JURISDICTION	**:**	STATE ADMINISTRATIVE TRIBUNAL
STREAM	**:**	VOCATIONAL REGULATION
ACT	**:**	LEGAL PRACTICE ACT 2003 (WA)
CITATION	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE and TROWELL [2009] WASAT 42
MEMBER	**:**	JUDGE J ECKERT (DEPUTY PRESIDENT) MR C EDMONDS SC (SENIOR SESSIONAL MEMBER) MS B HOLLAND (SESSIONAL MEMBER)
HEARD	**:**	15 - 19 SEPTEMBER 2008 FINAL WRITTEN SUBMISSIONS RECEIVED 18 NOVEMBER 2008
DELIVERED	**:**	13 MARCH 2009
FILE NO/S	**:**	VR 177 of 2007
BETWEEN	**:**	LEGAL PRACTITIONERS COMPLAINTS COMMITTEE Applicant AND MARK TERENCE TROWELL Respondent

Catchwords:

Legal practitioner - Disciplinary proceedings - Unprofessional conduct - Commonwealth Attorney General requesting a legal practitioner, being a Queen's Counsel, on a pro bono basis to assist Australian woman in prison in Bali - Practitioner issuing a press release and making other statements to the media about the matter - Practitioner and fellow barrister meeting with woman's

lawyers in Bali - Practitioner and fellow barrister meeting with woman in prison - Whether there was jurisdiction to find unprofessional conduct given the connection with the law and practice of Bali - Operation of the rules in ***Briginshaw v Briginshaw*** and ***Jones v Dunkel*** - The barrister and client relationship - Whether woman was a client or prospective client of the practitioner - Whether the statements to the media contained confidential information - Whether an obligation of confidence could attach to a statement made concerning an alleged bribery proposal - Whether the statements made to the media were without the informed consent of client - Whether client gave implied authorisation for the statements - Whether the practitioner believed the statements made were in the client's best interests - Whether the making of the statements in the circumstances constituted unprofessional conduct

Legislation:

Australia Act 1986 (Cth)
Constitution Act 1889 (WA)
Legal Practice Act 2003 (WA), s 164, Pt 12
State Administrative Tribunal Act 2004 (WA), s 32, Pt 4
Law Society of Western Australia Professional Conduct Rules 1983 (WA), r 4.5, r 6.3
Western Australia Bar Association Conduct Rules

Result:

The respondent is guilty of unprofessional conduct

Category: A

Representation:

Counsel:

Applicant	:	Mr SD Hall SC and Mr S Davies
Respondent	:	Mr MJ McCusker AO, QC and Ms A Plaisted

Solicitors:

Applicant	:	Legal Practitioners Complaints Committee
Respondent	:	Stables Scott

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

A v Haydn (1984) 156 CLR 532
Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1) (1981) 55 FLR 125
Apple v Wily [2002] NSWSC 855
Attorney General for the Northern Territory v Kearney [1985] 59 ALJR 749
Attorney-General v Guardian Newspapers (No. 2) [1988] UKHL 6; [1990] 1 AC 109
Briginshaw v Briginshaw (1938) 60 CLR 336
Browne v Dunn (1893) 6 R 67 (HL)
Castrol Australia Pty Ltd v Em Tech Association Pty Ltd (1980) 51 FLR 184
Corrs Pavey Whiting & Byrne v Collector of Customs (VIC) (1987) 14 FCR 434
Dimos v Hanos and Egan [2001] VSC 173
Gartside v Outram (1856) 26 LJ (NS) 113
Hawksford v Hawksford [2008] NSWSC 31
Initial Services Ltd v Putterill [1968] 1 QB 396
Jones v Dunkel (1959) 101 CLR 298
Kennedy v Wallace [2004] FCA 332; (2004) 208 ALR 424
Kennedy v Wallace [2004] FCAFC 337; (2004) 213 ALR 108
Kyle v Legal Practitioners' Complaints Committee (1999) 21 WAR 56
Law Society of New South Wales v Glenorcy Pty Ltd [2006] NSWCA 250; (2006) 67 NSWLR 169
Macpherson and Kelly v Kevin J Prunty and Associates [1983] 1 VR 573
Minter v Priest [1930] AC 558
Mobil Oil Australia Pty Ltd v Victoria [2002] HCA 27; (2002) 211 CLR 1
Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170
New South Wales Bar Association v Kalaf (unreported, Supreme Court of NSW, Court of Appeal, 12 October 1987; BC 8801429)
Pearce v Florenca [1976] HCA 26; (1976) 135 CLR 507
R v Cox and Railton (1884) 14 QBD 153
Rejfek v McElroy (1965) 112 CLR 517
Smith v Samuels (1976) 12 SASR 573
The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 9] [2008] WASC 239
Union Steamship Company of Australia Pty Ltd v King [1988] HCA 55; (1988) 166 CLR 1

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Summary of Tribunal's decision

1 Mr Trowell is a legal practitioner and Queen's Counsel practising criminal law in Perth. In March 2005, he was asked by the Commonwealth Attorney General whether he would assist in relation to the case of Ms Schapelle Corby. He agreed. During May and June 2005 the practitioner made a number of statements to the Australian media concerning Ms Corby.

2 The Legal Practitioners Complaints Committee brought a charge of unprofessional conduct against Mr Trowell on the basis that at the time he made the statements to the media, Ms Corby was his client or his prospective client, and in doing so he disclosed confidential information and made statements to the media without her informed consent.

3 Mr Trowell raised a jurisdictional argument based on the (alleged) lawyer client relationship with Ms Corby being formed in Bali. The Tribunal rejected this argument. Mr Trowell's substantive defences to the charge were, first, that Ms Corby was never his client nor his prospective client and he did not make the statements in that capacity. Alternatively, if Ms Corby was his client or prospective client, the statements made did not disclose information confidential to Ms Corby, or to the extent they did, he obtained her informed consent under a general authority he had from her to act in her best interests. In relation to one particular statement, Mr Trowell argued no obligation of confidence could attach to it, as it concerned a proposal by one of Ms Corby's Bali legal team to pay a bribe. Finally, Mr Trowell submitted that if otherwise established, the disclosures made did not constitute unprofessional conduct to the extent that he believed the government was and Ms Corby was not his client and that the disclosures were in her best interests and would assist her.

4 The Tribunal, having considered the evidence, found that at the time Mr Trowell visited Ms Corby in prison, Ms Corby retained and became the client of Mr Trowell.

5 The Tribunal considered the five relevant disclosures made by Mr Trowell and found that they comprised statements made by Mr Trowell, they disclosed information confidential to Ms Corby's matter and they were not revealed with Ms Corby's consent. The Tribunal rejected the submission that professional obligations of confidence did not attach to the statements disclosing a claim of bribery. The Tribunal accepted Mr Trowell's evidence that he believed that Ms Corby was not his client, but did not accept his evidence that in making the statements he

believed that the statements were in her best interests and would assist her.

6 Having regard to the content of the statements and the circumstances and motivation of their making the Tribunal found that Mr Trowell was guilty of unprofessional conduct. The Tribunal sought submissions as to penalty.

Outline

7 These reasons fall into three parts. Part 1 Preliminary covers jurisdictional matters, gives an outline of the facts and factual disputes, identifies the three principal issues, addresses the principal evidentiary arguments and makes some observations on credibility. Part II Client is directed at the first principal issue, whether Ms Corby was a client or prospect client of the practitioner. It addresses first the parties' contentions and legal concepts. Then in broadly chronological order it examines the approach from the Attorney General, the involvement of Messrs Percy and Davies and their visit to Bali, the practitioner's press release and visit to Bali, and events on his return to Perth. Part III Breach addresses the two remaining principal issues of confidentiality and making of statements to the media, and unprofessional conduct. It considers first the legal issues relating to these subjects. It then examines each of the relevant media statements. Finally, it examines whether in the circumstances the making of the statements constituted unprofessional conduct.

PART I - Preliminary

The reference to SAT

8 Pursuant to the provisions of Pt 12 of the *Legal Practice Act 2003* (WA) (LP Act), the Legal Practitioners Complaints Committee (LPCC) instituted professional disciplinary proceedings before this Tribunal against the respondent legal practitioner (the practitioner). There was no complaint made against the practitioner but, pursuant to its powers under s 164 of the LP Act, the LPCC inquired into certain conduct of the practitioner for the purpose of determining whether this constituted unsatisfactory conduct under the LP Act. Thereafter, by application dated 12 September 2007, the LPCC instituted these proceedings seeking orders that the Tribunal: (1) make a finding that the practitioner was guilty of such conduct; (2) impose a penalty; and (3) order the practitioner to pay the applicant's costs.

9 The Grounds of the application are that the practitioner was guilty of unsatisfactory conduct by unprofessional conduct between 1 May 2005 and 30 June 2005 (the relevant period) in: (1) disclosing material and or information confidential to his client or prospective client; and/or (2) making statements, including statements of his opinion, to the media about his client's or prospective client's matter; in each case without the client's or prospective client's informed consent.

10 This Tribunal has jurisdiction to hear and determine this application pursuant to the provisions of the LP Act and Pt 4 of the *State Administrative Tribunal Act 2004* (WA) (SAT Act).

Jurisdiction - extraterritoriality - Indonesian law

11 As is explained below, the threshold issue in this application is whether the LPCC has established that Ms Corby was the client or prospective client of the practitioner. To the extent such a relationship was formed, this took place in Indonesia, although the relevant conduct, the disclosure of confidential information and statements to the media, largely took place within Australia (one disclosure was made from Bali). In this context the practitioner has raised several jurisdictional arguments.

12 In his response (December 2007) the practitioner submitted that any obligation he owed to Ms Corby was governed by a foreign law, namely the 'proper law of Indonesia' (sic). At the hearing no oral submissions were made in support of this claim.

13 In his written closing submissions under the heading 'Jurisdiction Question', Mr McCusker QC for the practitioner put the argument (in summary and without the helpful authorities referred to) as follows:

1) The Western Australian Parliament is given broad legislative power to make laws for the peace order and good government of the (then) colony of Western Australia (s 2(1) *Constitution Act 1889* (WA));

2) There is a territorial limitation inherent in the grant of legislative power. Western Australia may only legislate for persons, events or things outside Australia, where the subject of the legislation is sufficiently connected to Western Australia. Although s 2(1) of the *Australia Act 1986* (Cth) declares that each State has power to make laws having an extraterritorial operation, such laws are

required to be laws for the 'peace order and good government of the State';

3) The practice in Western Australia of legal practitioners founds jurisdiction over the capacity of the regulator to regulate their practice. However, there must be limits to that;

4) If a Western Australian practitioner's conduct overseas constitutes unprofessional conduct overseas, there may be jurisdiction to deal with that;

[We accept those submissions.]

5) If a Western Australian practitioner's conduct overseas does not constitute unprofessional conduct overseas, even if it could constitute unprofessional conduct in Western Australia, 'it does not follow that the practitioner would be guilty of unprofessional conduct'; and

6) There is no evidence as to whether there would be a duty of confidence owed by the practitioner in the circumstances of this case under Indonesian/Balinese law.

14 The LPCC's outline of closing submissions on this subject was confined to the question raised in the practitioner's response; that is, whether the proper law of the contract was Indonesia. That is not, as we understand, the basis of the argument as put in the practitioner's written closing submissions and was, accordingly, of limited assistance.

15 There are difficulties with the practitioner's submissions. The first is that the conclusion ('it does not follow that the practitioner would be guilty of unprofessional conduct' in Western Australia) does not appear to follow logically from the premises identifying the constitutional powers (which may generally be accepted as correct). If, as the practitioner recognises, the regulator has or may have jurisdiction with respect to a practitioner's conduct an aspect of which takes place overseas, then of itself the status of the conduct overseas would not seem relevant. That is, it does not follow as a necessary inference that if the conduct was viewed overseas as being acceptable, the practitioner would not be guilty of unprofessional conduct in Western Australia. It does not seem open to suggest that some form of ethical relativism operates such that a local practitioner's conduct overseas might be judged only by the standards of that country. How the conduct of the Western Australian practitioner is

viewed here according to the standards of 'members of the profession of good repute and competence' remains the relevant enquiry. That is so even if the relationship of lawyer and client is created overseas.

16 The second difficulty with the submissions concerns the nature of the argument. That is, whether it is intended as a constitutional challenge to the power of the legislature to enact the LP Act to the extent it has extraterritorial operation with respect to conduct of a Western Australian legal practitioner overseas; or whether it goes to a question of construction of the LP Act, that is, whether in the circumstances it is intended to have such operation.

17 To the extent the argument goes to validity (that is, being a 'Jurisdiction Question'), the Tribunal's position may be put in general terms (as were the submissions) as follows. As the submissions record, the legislative authority of the Western Australia Parliament under the *Constitution Act 1889* is to make laws for the *peace, order and good government* of Western Australia. These words do not constitute words of limitation. Specifically, they do not confine the power to make laws which operate only to persons or events within the State. Again as the submissions note, that the State legislatures have power to make laws with extraterritorial operation is recognised in the *Australia Act 1986* (Cth). As to the extent of that power, the somewhat vague expression *peace order and good government* has been interpreted to mean that there must be a real connection between the subject matter of the legislation and the State. Whilst such a legislative power therefore requires a relevant territorial connection, and this requirement is perhaps also embedded in the federal structure of the government of Australia of which each State is a part, the test of relevance is to be applied liberally and even a remote or general connection will suffice. ***Pearce v Florenca*** [1976] HCA 26; (1976) 135 CLR 507; ***Union Steamship Company of Australia Pty Ltd v King*** [1988] HCA 55; (1988) 166 CLR 1; ***Mobil Oil Australia Pty Ltd v Victoria*** [2002] HCA 27; (2002) 211 CLR 1. For reasons given, there is here a direct and specific connection based upon the practitioner's admission and practice in Western Australia (and also in this case, the extent to which the conduct complained of took place here).

18 To the extent the argument is intended to operate as a matter of statutory interpretation, that is, to confining the operation of the general language to a subject matter under the effective control of the legislature (or perhaps as invoking the common law presumption against extraterritorial operation), it is clear, in our opinion, that the LP Act does so. The relevant provisions of the LP Act provide for the LPCC to inquire

into complaints and the conduct of a practitioner and refer the matter to the Tribunal, based upon her or his being admitted in Western Australia (as here) or being an interstate practitioner practising in Western Australia. That an aspect of the conduct was carried out overseas does not of itself deny jurisdiction as the submissions recognise. More specifically, there is nothing in the definition of unsatisfactory conduct in s 3 of the LP Act or Pt 12 generally which suggests it is limited to conduct exclusively undertaken in Western Australia. It would be easy to imagine circumstances where critical aspects of a practitioner's conduct (the use of a client's money) took place overseas. That could not deny the LPCC jurisdiction. ***Law Society of New South Wales v Glenorcy Pty Ltd*** [2006] NSWCA 250; (2006) 67 NSWLR 169, a case referred to by Mr McCusker.

19 But in any event, notwithstanding that (if proved) the relationship was formed overseas, the practitioner's unauthorised disclosure of the client's confidential information and statements to the media (if proved) took place (with one exception) in Western Australia and (so it is alleged) constituted unprofessional conduct. There could be no question that the LPCC and the Tribunal has jurisdiction in respect of that conduct. That being so, the question of where the relationship was formed, and according to what system of law, does not seem material and certainly not decisive. Further, to the extent relevant, we accept the LPCC's submissions that the proper law of the contract and of the professional obligation of confidence was Western Australia rather than Indonesia. That is, the contract and obligation had its closest and most substantial connection to Western Australian law. We note on this aspect in relation to a claim for privilege: ***Kennedy v Wallace*** [2004] FCA 332; (2004) 208 ALR 424 (***Kennedy***) at [51]-[52].

20 The final difficulty with the argument is the concluding part of the practitioner's submissions concerning the law (and practice) of Bali/Indonesia with respect to a lawyer's disclosure of confidential information. The general principles governing conflicts of laws include that:

1) the burden of proof lies on the party claiming that foreign law departs from the law of Western Australia; and

2) in the absence of proof to the contrary, foreign law is presumed to be the same as local law.

21 No reasons have been advanced why these principles ought not apply in the circumstances, even if the second rule might be said to be subject to some difficulties. That would suggest the presumption (or the 'default position') operates such that the law and practice of Bali/Indonesia proscribes the conduct to the extent that it is proscribed here.

22 We should say for completeness that we have read the judgments in ***Kennedy:*** on appeal ***Kennedy v Wallace*** [2004] FCAFC 337; (2004) 213 ALR 108. These decisions were cited by Mr McCusker in support of the argument that regard must be had to how the issue would be considered overseas. We understand the basis for referring to these decisions by way of analogy, but in the event do not find them to be of assistance. First, because the subject, legal professional privilege, is conceptually different. Practical issues would necessarily arise where the document was privileged in one country but not in another. Second, because the primary judge raised the issue but made no statements of principle and decided the matter on the facts. Third, because on appeal, the issue of the relevance of privilege under the foreign law was left largely undiscussed and expressly undecided - as a 'difficult question' (see on appeal at [204], [214], [62]).

23 To the extent the conclusion contended for may be said to reflect professional standards generally, we mention that it has been addressed by the Code of Conduct of the Bar of England and Wales. Barristers engaging in 'international work' are relieved from some of the requirements of the Code. Such work is defined relevantly as being work which:

1) relates to matters or proceedings essentially arising, taking place or contemplated outside England; and

2) is to be substantially performed outside England.

24 Here relevantly, the practitioner’s services were substantially to be performed within Australia.

25 For these reasons we reject the practitioner's submissions on the subject of jurisdiction.

Outline of facts and factual disputes

26 The practitioner is a Queen's Counsel specialising in criminal law. During 2005 he shared chambers in Perth with Mr Thomas Percy QC and Mr Jonathan Davies, both barristers also practising in the area of criminal law.

27 In March 2005, Ms Schapelle Corby, an Australian citizen from Queensland, was on trial in the District Court of Bali on a charge of importing a prohibited drug. Conviction for that offence carried severe penalties including the death sentence. Ms Corby was represented by solicitors in Queensland and a 'legal team' in Bali (the Bali legal team). She maintained throughout that she was innocent of the charge against her.

28 At this time the practitioner was approached by the Commonwealth Attorney General (Attorney General) on behalf of the Commonwealth government (the government) and asked whether on a 'pro bono' basis he would assist Ms Corby in relation to her trial (and subsequently in relation to her appeal). The practitioner agreed to do so. The nature of the brief from the government is disputed. What seems clear is that the arrangement was very informal. That is reflected in the practitioner shortly thereafter, without the express authority of the Attorney General, enlisting the assistance of Mr Percy (and subsequently another Perth barrister Mr Philip Laskaris) in this undertaking. Mr Percy in turn enlisted the support of Mr Davies.

29 The practitioner left messages with Ms Corby's Queensland lawyers that Mr Percy and he were available to assist. There was no response.

30 The plight of Ms Corby attracted intense media attention in Australia. From April 2005, the first of a series of newspaper articles reported on the involvement of the practitioner and Mr Percy in Ms Corby's trial and subsequent appeal. Such articles, television and radio interviews (media reports) relevantly continued through to the end of June 2005. The LPCC, in part, relies on the media reports as evidence that the practitioner had been retained by Ms Corby and as revealing the disclosure of confidential information and the making of statements to the media. For his part, the practitioner accepts that he made statements to the media to the extent they are directly quoted in the media reports. There is considerable disagreement between the parties as to the inferences to be drawn from these statements in relation to these issues. The practitioner says that:

1) the statements were not made by him as Ms Corby's lawyer because he was never retained by her;

2) the statements did not disclose matters confidential to her; and

3) to the extent Ms Corby was his client and he did disclose her confidential matters, she impliedly authorised the statements.

31 On 27 May 2005, Ms Corby was found guilty by the District Court in Bali and sentenced to 20 years imprisonment. It appears she then had seven days to give a notice of appeal and 14 days thereafter to file the appeal. At this time Ms Corby asked the Australian consul in Bali if she could see the practitioner or Mr Percy.

32 At the time of the verdict, Mr Percy and Mr Davies were in Bali on another matter. On 29 May 2005, at the request of Ms Corby's family, they met with Ms Corby's Bali legal team. Mr Davies prepared an extensive memorandum of this meeting. There is an issue as to the extent this reflected what was said at the meeting. There is also a dispute as to the extent to which Mr Percy and Mr Davies represented the practitioner at this meeting. Upon their return to Perth, Mr Davies sent a letter, for which approval was sought and apparently provided by the practitioner, to the Bali legal team, requesting copies of a transcript of the trial, in effect to enable the Perth team to assist in relation to the appeal.

33 The LPCC alleges that, in these circumstances, from 29 May 2005, the practitioner (together with Mr Percy and Mr Davies) was retained by Ms Corby or she then became a prospective client of the practitioner. The practitioner denies this.

34 On 31 May 2005, the practitioner, without any prior communication with Ms Corby or the Bali legal team, prepared and issued a press release which related to Ms Corby's situation and her appeal. This is the first of the alleged eight disclosures of Ms Corby's confidential information and/or making unauthorised statements to the media (we refer collectively to these as 'disclosures', or where the second aspect is separately considered, 'statements to the media').

35 On 1 June 2005, the practitioner spoke to a radio interviewer about Ms Corby's appeal. This is the second complaint of disclosure. Also, on that day, Ms Corby made a telephone call to Mr Davies. On the following day, Mr Rasiah, one of the Bali legal team (the 'case manager' rather than a lawyer), was reported in the newspapers as criticising the practitioner and Mr Percy because of the public comments they had made about the case. This is one of several instances where the practitioner and Mr Rasiah publicly criticised one another's contribution and involvement in the case.

36 Over the long weekend of 3 - 6 June 2005, the practitioner and Mr Laskaris, pursuant to Ms Corby's request, at their own cost, travelled to Bali to visit Ms Corby. The LPCC alleges Mr Laskaris made this visit in his capacity as the practitioner's junior. The practitioner maintains that Mr Laskaris, at this time his junior in a case in Perth, asked to accompany him and came merely out of personal interest. The practitioner asserted in his evidence that the sole purpose of his visit to Ms Corby was to reassure her that the government was doing all it could for her. Based on contemporaneous accounts of the matter, the LPCC challenges this position and argues that the purpose was to provide Ms Corby and her legal team with legal assistance in relation to her appeal.

37 On Friday, 3 June 2005 the Perth barristers met with Ms Corby's Bali legal team and discussed her case. The Bali legal team sought assistance from the Australian government in the form of it producing evidence relating to Ms Corby's appeal. The practitioner made certain proposals concerning the appointment of an appeal lawyer from Jakarta. The extent to which they discussed the appeal and whether the practitioner offered to assist is disputed. The LPCC alleges (alternatively) that the practitioner was retained by Ms Corby at this meeting or she then became a prospective client of the practitioner. Following the meeting, the practitioner spoke to a journalist about the meeting and Ms Corby's appeal. This is the third complaint of disclosure.

38 On Monday, 6 June 2005, the practitioner and Mr Laskaris met with Ms Corby in prison. A number of matters concerning her present situation and her appeal were discussed. The practitioner gives different accounts of this meeting (considered below). In his witness statement and by his oral evidence he says that he told Ms Corby that he was not there to give legal advice or assistance and could not act for her and that she understood this. The LPCC challenges this version of events. The LPCC alleges (in the further alternative) that the practitioner was retained by Ms Corby at this meeting or she then became a prospective client of the practitioner.

39 The practitioner says that on two occasions over this weekend, Mr Rasiah raised with him the suggestion that the government provide money in order to bribe the Bali judges hearing the appeal as being the only way this would be resolved. The practitioner says that he made clear to Mr Rasiah that this would never happen. Mr Rasiah subsequently denied this allegation against him. The practitioner says also that he learned during the visit that Mr Rasiah had made an attempt during the trial to bribe the judges and prosecutors. The practitioner says that at the

time of his departure Mr Rasiah gave him a draft letter for the Australian government, requesting funds for the appeal, including $500,000 for 'lobbying'. The practitioner believed this was code for money to bribe the judges. Mr Rasiah was not called at this hearing. We will assume in favour of the practitioner, without making any express finding on the point, that the practitioner believed that Mr Rasiah had made such attempt during the trial and that over the weekend Mr Rasiah had made suggestions concerning the government providing money for such purpose, including, as the practitioner believed, in his draft letter. Following his return to Perth, the practitioner emailed Mr Rasiah that the government would require an explanation for this item. He said this was for the purpose of 'flushing out' the suggestion of money for bribery.

40 Mr Rasiah flew to Perth on 10 June 2005. He met the practitioner and gave him a 'final' letter to the government which omitted any request for money for 'lobbying'. There is evidence that at the meeting Mr Rasiah eschewed any further suggestion of bribery, but some evidence that on a social occasion that evening he raised the subject with Mr Davies.

41 On the following day, 11 June 2005, the practitioner again spoke to two journalists about Ms Corby's appeal. These comprise the fourth and fifth complaints of disclosures. In the media articles published the following day, the practitioner is reported as complaining about the delay of the Bali legal team in providing draft grounds of appeal. They also report the practitioner saying that Mr Rasiah had first provided a draft letter containing a request for financial assistance in respect of a particular item, which item was omitted from the final form of this letter.

42 Again, on 13 June 2005, the practitioner spoke to two journalists about Ms Corby's appeal, it is alleged making similar and related comments, including that the services of Mr Percy and the practitioner had not been availed of in relation to the appeal. These comprise the sixth and seventh complaints of disclosure and statements to the media.

43 On 14 June 2005, the Bali legal team filed the appeal.

44 On 22 June 2005, the practitioner again spoke to a journalist about Ms Corby's appeal. This included express reference to Mr Rasiah seeking $500,000 from the Australian government for the purpose of bribing the Bali judges. This is the eighth complaint of disclosure. The practitioner said in evidence that in the course of this conversation the journalist disclosed that he knew of the bribery allegation and was going to print the story in any event. The practitioner said there were good reasons for

making the disclosure in the interests of himself, the government and Ms Corby. The LPCC challenges the need for the practitioner to disclose the bribery suggestion. Following the newspaper report of the practitioner's allegations, there was extensive publication of the story. On 24 June 2005 Ms Corby dismissed her Bali legal team, although the team, or members of it, were reinstated shortly thereafter.

45 Some days later the LPCC wrote to the practitioner raising its concerns about his conduct and specifically whether there had been a disclosure of Ms Corby's confidential information.

The principal issues

46 It is important to appreciate the nature of the LPCC's case against the practitioner. The unprofessional conduct complained of is the practitioner's disclosure of his client's or prospective client's confidential information and statements to the media, in each case without his client's or prospective client's consent. The LPCC has not put its case or an alternative case, on the basis of the disclosure of confidential information of a person (Ms Corby) to whom the practitioner in the circumstances owed a duty of confidence (as to which see r 95 of the *Conduct Rules of the Western Australia Bar Association*). Neither has the LPCC sought to define *client* in this context by reference to the relevant duties owed by a legal practitioner to a person who is the beneficiary of these duties. Rather, it has proceeded on the basis that the person to whom these duties were owed (Ms Corby) was a client of the practitioner in the sense of a person who actually retained the practitioner so as to create a lawyer client relationship; or alternatively was a prospective client in the sense that information was imparted to the practitioner with a view to his being actually retained by Ms Corby in a lawyer client relationship. It may be that there were reasons (not disclosed to us) why the LPCC so proceeded. Perhaps it was thought necessary to so proceed in order to rely on the 'statements to the media' professional conduct rule. In any event, it has resulted in much of the hearing and the parties' submissions being directed to the issue whether a lawyer client relationship or prospective lawyer client relationship was made.

47 There are in consequence three principal legal and factual issues which require resolution:

1. Was Ms Corby a client or prospective client of the practitioner?

48 The LPCC states in its statement of issues, facts and contentions (the LPCC statement) that the practitioner was retained by Ms Corby as at:

1) 29 May 2005 (the meeting between Messrs Percy and Davies and the Bali legal team);

2) 3 June 2005 (the meeting between the practitioner and the Bali legal team); and

3) 6 June 2005 (the meeting between the practitioner and Ms Corby).

49 The practitioner responds in his response and his statement of issues, facts and contentions (the practitioner's statement) that he was retained by the Australian government and that at no time was he retained by Ms Corby.

50 The LPCC alleges, in the alternative to the claim that Ms Corby retained the practitioner on the dates mentioned, that Ms Corby was a prospective client of the practitioner up to:

1) 4 June 2005;

2) 6 June 2005; or

3) 29 June 2005;

51 The LPCC's case in relation to these alternative dates appears to be that Ms Corby was a prospective client on whose behalf the practitioner received confidential information:

1) as at 4 June 2005 (this should probably refer to 3 June 2005), at which time, following the practitioner's meeting with the Bali legal team on that date, she became an 'actual' client;

2) alternatively as at 6 June 2005, at which time following the practitioner's meeting with Ms Corby on that date she became an actual client; and

3) up to 29 June 2005, on the basis that Ms Corby never became an actual client.

52 The practitioner maintains that at no time was Ms Corby his prospective client.

53 The issue for the Tribunal is whether Ms Corby was the client or prospective client of the practitioner in the sense we have indicated at the

times alleged. It will be apparent from the way that the LPCC has framed its case, that in the event our finding is that Ms Corby was not a client or prospective client, then the application must fail.

2. Did the practitioner disclose confidential information and were the disclosures and statements to the media made without consent?

54 The LPCC makes eight specific complaints of disclosure of confidential information (each disclosure containing a number of identified statements) or the making of statements to the media, in each case without the client's or prospective client's consent. The LPCC's case of unauthorised statements to the media does not depend on the statements containing confidential information.

55 The practitioner disputes the making of some of the statements and maintains generally with respect to the charges that:

1) the information was not given to him by or on behalf of Ms Corby;

2) the information was not given in confidence by or on behalf of Ms Corby; and

3) if there was disclosure of confidential information or statements to the media, he had Ms Corby's (informed) consent to make the disclosures and statements under a general authority given by her on 6 June 2005 to do whatever he thought best to protect her interests.

56 Further, with respect to the eighth complaint of disclosure (22 June 2005), the practitioner says that the material or information within the statements was a proposal by a third party, Mr Rasiah (meaning it was not on behalf of Ms Corby), to attempt to procure money from the Australian government to bribe the Balinese judiciary, such that no confidence could attach to that communication.

3. Did the disclosures and statements to the media constitute unsatisfactory conduct?

57 The LPCC claims that the disclosures and statements to the media constituted unprofessional conduct within the second limb of the essential notion of what ***Kyle v Legal Practitioners' Complaints Committee*** (1999) 21 WAR 56 constitutes unprofessional conduct adopted in at 71-72. That is, that the conduct in question was conduct that, to a substantial degree,

fell short of the standard of professional conduct observed or approved by members of the profession of good repute and competence.

58 For his part the practitioner denies that (if otherwise established) the disclosures and statements to the media constituted unprofessional conduct because he honestly believed that Ms Corby was not his client nor prospective client and that the statements to the media were in her best interests and would assist her.

The evidence - some legal issues

59 In the present case there was no evidence given by the (alleged) client Ms Corby. This was the subject of sustained criticism by Mr McCusker. The LPCC has largely constructed its case on the statements made by the practitioner to the media, some contemporaneous documents, his (near contemporaneous) response to the inquiry of the LPCC, the evidence of Mr Percy and Mr Davies and admissions of the practitioner. For the reasons expressed below, we have found that evidence of the two other barristers of limited assistance in the resolution of the issues. That has meant that the evidence of the practitioner in relation to his brief from the government, his meetings with Ms Corby and the Bali legal team and as to what he said to the media and generally is of critical importance to the outcome of this application. Because so much of the practitioner's testimony has been challenged, our assessment of the credibility of the practitioner's evidence is central to our determination.

The standard of proof - Briginshaw

60 In the first part of the practitioner's written closing submissions, Mr McCusker states that the finding of unprofessional conduct would be very serious 'particularly against a senior counsel who has practised for 26 years with no blot on his professional reputation'. In then addressing the standard of proof, Mr McCusker further contends that a finding of unprofessional conduct would have grave consequences, affecting as it would the reputation and earning capacity of the practitioner.

61 The closing submissions then make reference to the judgments in ***Briginshaw v Briginshaw*** (1938) 60 CLR 336 (***Briginshaw***). In considering a 'serious matter' Rich J said that the satisfaction of the tribunal 'cannot be produced by slender and exiguous proofs or circumstances pointing with a wavering finger to an affirmative conclusion.' Dixon J said that 'the seriousness of the allegation made' and 'the gravity of the consequences' were 'consequences which must affect the answer to the question whether the issue has been proved to the

reasonable satisfaction of the tribunal'. In such matters 'reasonable satisfaction should not be produced by inexact proofs, indirect testimony or indirect inferences' (the last phrase is underlined in the submissions). Further, weight is to be given 'to the presumption of innocence and exactness of proof is expected'.

62 Whilst we accept these submissions, in some respects they are both too broad and too narrow.

63 As to the first aspect, the submissions do not focus on the relevant standard as being the civil standard of proof, that is proof on the balance of probabilities. The expression used by Dixon J, 'reasonable satisfaction', has not been continued. In this respect the 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***). Relevantly here, it might be said that a senior counsel of many years standing would be unlikely to make disclosures of a client's confidential matter, or make statements to the media about the client's matter, without the client's informed consent. 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. In that respect it is also relevant to note that there is limited direct, as opposed to circumstantial, evidence contradicting the practitioner's written and oral evidence. Nevertheless, the decision in ***Rejfek v McElroy*** (1965) 112 CLR 517 at [11] makes clear that:

> the standard of proof to be applied in a case and the relationship between the degree of persuasion of the mind according to the balance of probabilities and the gravity or otherwise of the fact of whose existence the mind is to be persuaded are not to be confused. The difference between the criminal standard of proof is no mere matters of words: it is a matter of critical substance.

64 It is the case that the civil rather than the criminal standard applies, notwithstanding the onerous penalties which may be imposed. The purpose of professional disciplinary proceedings is the protection of the public rather than the punishment of the individual. This explains also why a practitioner facing a complaint is under a duty to co-operate in the investigation and ought take a less combative approach than he or she might in other proceedings. (Some of the limits of the latter notion are

examined in ***New South Wales Bar Association v Kalaf*** (unreported, Supreme Court of NSW, Court of Appeal, 12 October 1987; BC 8801429), (***Kalaf***, discussed below). Moreover, although we take into account the practitioner's seniority within the profession, the obligations expected of him by reason of his appointment as one of Her Majesty's Counsel and an officer of the Supreme Court and in consequence the extent to which his honesty and integrity may be relied on, that cannot of itself deter us from the task of scrutinising his evidence and examining his conduct.

65 We do not understand the operation of this aspect of ***Briginshaw*** to mean that every fact to be found requires evidence of this heightened strength. We think the principle operates in relation to such facts as are integral to the charge and, by reference to the whole of the evidence, to the ultimate inference that the conduct breached the requisite standard. That means in particular, in our view, and in favour of the practitioner, that we must test whether Ms Corby was a client of the practitioner by reference to the ***Briginshaw*** standard. There is of course no element of impropriety or anything unusual in the formation of a lawyer client relationship. But it would be unlikely and have serious consequences were a senior practitioner to disclose confidences and make statements to the media concerning a person except on the basis that such person was not the practitioner's client, as the practitioner here contends, or was otherwise not a person to whom the practitioner owed a duty of confidence. In this context, we are mindful that our assessment of the issue requires us to take into account circumstantial evidence and draw inferences and form conclusions in the absence of the evidence of the (alleged) client.

66 As to the second aspect, the practitioner's submissions omit reference to another important part of Dixon J's judgment in ***Briginshaw***. This is, that in making a finding of a fact the tribunal must feel 'an actual persuasion' of its occurrence or existence; it is not sufficient to make a finding as a result of a mere mechanical comparison of probabilities, independently of any belief in its reality. This subjective requirement on the part of the tribunal does not appear to have been directly affected by later decisions, including ***Neat Holdings***. Whether it has impliedly been rejected by the use of 'balance of probabilities' rather than 'reasonable satisfaction' is an open question. Given the grave and serious nature of these proceedings, we proceed in favour of the practitioner on the basis that an 'actual persuasion' on the part of the Tribunal is required.

LPCC's failure to call witnesses - Jones v Dunkel

67 Directly allied to his submissions concerning the standard of proof, Mr McCusker sought to draw inferences against aspects of the LPCC's case by reason of its failure to call several witnesses, particularly Ms Corby and the practitioner's alleged junior, Mr Laskaris. There was also some short reference made to the failure to call Ms Lubis and Mr Rasiah, members of the Bali legal team, specifically in relation to their meeting with the practitioner on 3 June 2005.

68 The principles governing the operation of the 'rule' in ***Jones v Dunkel*** (1959) 101 CLR 298 (***Jones v Dunkel***) are set out in *Cross on Evidence* (7th Aust Ed) [1215] and have recently been summarised by Justice Owen in ***The Bell Group Ltd (In Liq) v Westpac Banking Corporation [No 9]*** [2008] WASC 239 (***The Bell Group Ltd***) at [1004] - [1022].

69 We have taken into consideration and applied such of these principles as are relevant to the present circumstances, but with this qualification. It is to be borne in mind that this is not an ordinary civil action but rather it constitutes professional disciplinary proceedings brought by the governing body against a legal practitioner before a tribunal subject to its own statutory procedures. These include that it is not bound by the rules of evidence or the practices of courts but is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms (s 32 SAT Act). We have so proceeded and in this respect were prepared to accept explanations from both parties as to why Ms Corby's evidence might or might not have been available, without direct evidence in support.

70 We mention we have also had regard to the decision in ***Kalaf***, cited in another section of the practitioner's closing submissions. The majority in the circumstances of that case were not prepared to make a finding that the practitioner before them had lied about the matter, in the absence of the Association (being the governing body and regulator) calling an available witness who had knowledge of the matter. In their view, although this aspect of the case did not turn upon the issue of onus, it was the Association, as the party carrying the burden of proof on this issue, rather than the practitioner, who was required to call the witness if it sought such a serious finding. Samuels JA who alone addressed the rule in ***Jones v Dunkel*** held it was the practitioner who would be expected to call the witness and drew an adverse inference from his failure to do so.

Failure to call Ms Corby

71 A central issue in this case is whether Ms Corby was the client or prospective client of the practitioner. The LPCC did not call Ms Corby to give evidence. Her evidence may have been of assistance in particular as to what was said at the meeting with the practitioner and Mr Laskaris on 6 June 2005. More specifically she may have been able to corroborate the practitioner's evidence that at the meeting he told her in effect that he could not provide her with any legal advice or assistance and that she understood this.

72 In his oral opening submissions, Mr McCusker referred to the fact that Ms Corby was not being called 'as to fact or as to a complaint'.

73 As to the evidence regarding Ms Corby's availability, the practitioner initially defended his not obtaining Ms Corby's authority to his press release because of the considerable difficulty in speaking to her - one that, he suggested, also explained why the LPCC was not calling her. Somewhat later, the practitioner was asked by the Deputy President whether, since his meeting, he had had any contact with Ms Corby. The practitioner said that he had not. Asked whether he knew how difficult or easy it was to contact her in prison he said: 'No. I don't know. I think that's probably true of the applicant too, isn't it'. Notwithstanding, in re-examination in answer to some suggestive questions in that respect, the practitioner then said that he did not know of any particular difficulty in contacting Ms Corby; he was sure she could have been interviewed by the LPCC. We did not give that last evidence any weight. It was unsupported by reasons, was contradictory and was one instance of a particularly self-serving response.

74 In his oral closing submissions, Mr Hall SC, counsel for the LPCC, suggested that it would be unrealistic to suppose that Ms Corby would want to participate in a case involving criticism of the Indonesian legal system.

75 In his closing submissions, Mr McCusker argues that the fact that Ms Corby was in prison was in itself no explanation for not calling her. He submits that it is commonplace for prisoners to give evidence by video link and she might have provided a signed statement. He categorises the explanation given by Mr Hall as conjecture and as not sustainable on the facts, given she was not privy to the alleged bribe. He maintains that the unexplained failure to call Ms Corby raises a strong inference that her evidence would not help the LPCC's case, under the rule in ***Jones v Dunkel***. He says further that the onus of establishing unavailability is on

the LPCC as it bears the onus of establishing that Ms Corby was the practitioner's client: ***Smith v Samuels*** (1976) 12 SASR 573. This is not a case he submits, where the 'evidentiary onus' is on the practitioner to rebut any evidence that Ms Corby was his client.

76 The LPCC does not in its written closing submissions directly address the way this argument is put or the legal principles underlying it. Neither does it refer to Mr Hall's oral submissions on the matter. It submits, on the basis of the practitioner's response letter, that there was no need for it to consider calling Ms Corby. That is because in his response letter to the LPCC the practitioner explains that during the meeting with Ms Corby on 6 June 2005, Ms Corby told the practitioner that she understood that the practitioner could not act for her in Indonesia (the LPCC's underlining). It is said that this was not evidence that it needed to dispute because it was not inconsistent with its case, but supported it. It was not until the practitioner's witness statement was served on the first day of the hearing, that the practitioner asserted in effect that he had said he could not act for her at all. The LPCC submits that in these circumstances:

1) no adverse inference can be drawn against the failure of the LPCC to call Ms Corby; and

2) there was no reasonable opportunity to call her.

77 We do not accept the second of these reasons. It is a departure from the explanation given by Mr Hall at the end of the hearing. Further, there was no evidence that the LPCC made any effort to contact Ms Corby. The LPCC might have made use of the Tribunal's informal procedures to obtain evidence from Ms Corby.

78 The practitioner filed submissions in reply in forceful language disputing the LPCC's assertions.

79 We observe that, notwithstanding Mr McCusker's pre-emptive argument on the matter (or perhaps because of it), the LPCC does not suggest that the practitioner might have called Ms Corby, much less seek to draw an inference from his failure to do so.

Ms Corby; the circumstances - application of the principles

80 The question whether Ms Corby was a client of the practitioner is addressed in detail in Part II of our reasons.

81 As the LPCC points out, the practitioner's response letter gives an account of his conversation with Ms Corby on 6 June 2005 which includes: 'She knew they [Mr Laskaris and the practitioner] could not represent her in Indonesia. Mr Trowell told her that they would help in any way they could.' It was not until after the commencement of the hearing, on his filing his witness statement dated 17 September 2008, that the practitioner substantially adds to this. He there says they told her they were not there to give legal advice, that she did not ask for legal advice or assistance, that they told her that they could not act for her as her lawyers because they were not admitted in Indonesia, she did not give any legal instructions or request that they act for her as her lawyers, he took no instructions from her and he was not being retained to act on her behalf and he made that perfectly clear to her. He maintained this position in his oral evidence saying that he had never provided any legal assistance to Ms Corby nor the Bali legal team nor offered such.

82 In determining the LPCC's 'obligation' to call Ms Corby, it is important to appreciate that it is not specifically alleged against the practitioner, nor a necessary part of the LPCC's case, that the practitioner had lied in evidence about these conversations at their meeting, as opposed to a submission by the LPCC that it was 'open' to find that the practitioner was dishonest in his witness statement and evidence as to his new account of his relationship with the government and Ms Corby. The distinction is important as ***Kalaf*** makes clear. In this context, and in response to the submission from Mr McCusker on the point, a passage from the judgment of Mahoney JA is apt:

> An issue as to whether a conversation took place is not the same as an issue as to whether a witness lied about it. A court may decide, with the proper degree of satisfaction, that the conversation did not take place and, in doing so, it may refuse to accept the evidence which a witness gave. It does not follow that if the issue be whether the witness lied, it would be prepared formally to find that issue against him.

83 That leaves the question whether, in the circumstances, the inference against the LPCC ought to be drawn.

84 At the time of the hearing Ms Corby was in a prison in Bali serving a sentence (reduced on appeal) of 15 years. We think it safe to say by reference to media reports in evidence that the conditions of her prison were primitive by Australian standards, including in terms of standards of health, food, and over crowding. No doubt there are telephones. Whether there are international video conference links seems more doubtful. There

is no evidence as to whether the authorities would be prepared to allow her to give evidence in these proceedings using such facilities.

85 The associated question is whether at this time she would have any interest in assisting in the matter. Mr Hall's 'conjecture' that this seems unlikely has some (limited) validity.

86 If that difficulty were overcome, there is the question of whether Ms Corby would have any recollection of the specifics of her conversation with the practitioner. This took place in June 2005, shortly after her conviction and sentence of 20 years and at a time when we would assume, and it is confirmed in the practitioner's response letter, she was under very considerable stress. We think that both then and now Ms Corby would have rather more immediate and pressing issues on her mind than the details of her conversation with the practitioner.

87 In order for the rule in ***Jones v Dunkel*** to operate, the evidence of the missing witness must be such as would have elucidated a matter. It is not enough to conclude that a witness may have knowledge. It will be appreciated that the elucidation which would be required of Ms Corby (in this respect) falls within a very narrow compass; could she say that the conversation was to the effect the practitioner could not act for her in Indonesia, or was it that she understood, and he made clear he could not provide, legal advice or assistance of any sort. In the circumstances we have outlined, the prospect that she might have assisted on this point seems doubtful. We are unable to conclude, on the balance of probabilities, that Ms Corby would have, or probably have, that knowledge.

88 There is a stronger basis for our decision. Under the ***Jones v Dunkel*** rule, the significance to be attributed to the fact that a witness does not give evidence depends in the end upon whether, in the circumstances, it is to be inferred that the reason why the witness was not called was because the party expected to call the witness feared to do so. The party may not be sufficiently aware of what the witness will say to warrant that inference. The party may simply not know what the witness will say. In this respect we can say with much greater confidence that, to the extent that the LPCC may be regarded as the party expected to call Ms Corby, we do not believe, having regard to all of the circumstances, that it did not call Ms Corby because it feared to do so.

89 The rule in ***Jones v Dunkel*** can operate against a party who bears the burden of proof (the LPCC) or against a party who does not bear the onus

(the practitioner). Although the LPCC has not argued that the practitioner ought to have called Ms Corby, the practitioner has in his closing submissions sought to defend his decision not to do so. It is said that 'this is not a case where the "evidentiary onus" was on the respondent, to rebut any inference that Ms Corby was his client.'

90 To the extent it impacts on this issue, we are not convinced that submission is correct. We understand the reference to 'evidentiary onus' to mean in this context what is sometimes called the 'strategic onus'. That is, given a fixed legal onus on the LPCC to prove its case, there is nevertheless a shifting tactical burden on the practitioner in the sense that if he does not produce contradictory evidence on a particular matter the finding is likely to go against him. Given the terms of the practitioner's response letter concerning the conversation with Ms Corby recited above and also the evidence of his statements to the media on the subject (considered below), we would have thought there was a case to answer that the practitioner was engaged to assist her in various matters, including in the appeal, albeit in a limited role and from Australia. The practitioner's 2008 witness statement departed from the version put in his 2005 response letter in several critical respects. It was inevitable that he would be challenged on this. He ran the risk of his witness statement and oral evidence not being accepted. It was clearly open to him to have sought corroboration of his evidence from Ms Corby. She was equally available (if at all) to both parties. Unlike the LPCC, the practitioner had a pre-existing relationship with her, although perhaps one soured by his last (the eighth) media interview in which the practitioner accused her legal team in Bali of seeking money to bribe the appeal judges. For the reasons we have outlined she may not have been able or willing to assist the practitioner. But that is a different question.

91 For these reasons we do not draw an inference adverse to the case of the LPCC by reason of its failure to call Ms Corby.

Mr Laskaris

92 Mr Laskaris also attended the meeting on 6 June 2005 with the practitioner and Ms Corby. The practitioner has made similar submissions with respect to the LPCC's failure to call Mr Laskaris. There is no evidence or explanation to suggest he was not available to either party to give evidence. It appears he was interviewed by the LPCC and a transcript of the interview provided to the practitioner. Neither party sought to tender that document. He was also summonsed by the LPCC, but was not called upon.

93 In his closing oral closing submissions, Mr Hall put as the first reason for not calling Mr Laskaris that it had not previously been suggested that he ought be called. It might perhaps operate to strengthen the inference otherwise drawn against a party that at an early stage of the proceedings, that party is put on notice that it is expected to call a witness or provide a proper explanation for the failure to do so and that the inference will be sought if it does not. But we do not think that there is anything in the principles governing the ***Jones v Dunkel*** rule that a party must be put on such notice.

94 Mr Hall also said by way of explanation:

> 1) Mr Laskaris was equally available to the practitioner who had a longstanding professional relationship with him; and
>
> 2) the LPCC formed the view that for reasons unrelated to his integrity, Mr Laskaris was not a person who could provide an accurate account of events.

95 As regards the first of these reasons, it does not appear to be in dispute that the practitioner might have called Mr Laskaris. If called by the LPCC, it seems likely, given Mr Laskaris' relationship with the practitioner, that he would have given evidence, including in cross-examination, which tended to favour the practitioner (as we find did both Mr Percy and Mr Davies). It follows that as between the parties we regard the practitioner rather than the LPCC as the party that would more naturally call him. On the authorities, that would be a sufficient reason for not drawing an adverse inference against the LPCC.

96 We are mindful that in ***Kalaf*** dealing specifically with this type of issue as between the regulator and a practitioner, the majority took the view that the obligation was on the regulator. However, that majority decision was made where there was a serious accusation of dishonesty advanced by the regulator against the practitioner before the court. That is not the case before us.

97 We have been troubled by the second explanation given by Mr Hall (Mr Laskaris was not a person who could provide an accurate account of events) in the absence of any evidence or elaboration. However, we are not prepared to regard the LPCC's failure to call Mr Laskaris as attributed to its fear that it would not advance the LPCC's case. We rather think the inference to be drawn from the fact that neither party wished to call

Mr Laskaris or tender the transcript, is that his evidence was not entirely helpful to either.

98 In the circumstances we are not prepared to draw the inference sought from the LPCC's failure to call Mr Laskaris.

Mr Rasiah, Ms Lubis

99 The failure to call these witnesses was not strongly pressed by Mr McCusker. There would have been some practical difficulties in obtaining their evidence and again an issue arises whether they would have been interested in assisting. We would not be prepared to draw an adverse inference from the failure of the LPCC to call these witnesses or provide some statement from them, again because we are not prepared to find that the reason was a fear on the part of the LPCC as to what they would say.

The rule in Browne v Dunn

100 Mr McCusker identifies a number of occasions in both his closing submissions (being the practitioner's alleged dishonesty with respect to his conversation with Ms Corby on 6 June 2005) and submissions in reply (the alternative of the cynical misuse of the practitioner's position, the practitioner's disclosure on 11 June 2005, the softening of the evidence of Mr Percy and Mr Davies) where he says that submissions are made by the LPCC where there was no relevant cross-examination.

101 Mr McCusker has referred to the rule in ***Browne v Dunn*** (1893) 6 R 67 (HL). Justice Owen in ***The Bell Group Ltd*** at [1023] - [1041] also summarised the relevant principles underlying this rule. It is not necessary to recite them here.

102 We have dealt with the first instance cited by Mr McCusker in the previous section of these reasons. It was not a necessary part of the LPCC's case that the practitioner was dishonest in his evidence as to what was said at the meeting with Ms Corby. To the extent it was submitted by the LPCC that it was 'open' to the Tribunal to so find, we do not do so. Nor would we think it appropriate to do so in the absence of Ms Corby's evidence and the matter being put directly to the practitioner.

103 With respect to the LPCC's submission of the alternative of the practitioner's cynical misuse of his position, there was considerable cross-examination of the practitioner, albeit without using that exact expression, as to why the government would require someone of the practitioner's status to meet the government's alleged objectives, with a

view to showing that in fact the practitioner was requested to provide assistance to Ms Corby in relation to her appeal. We do not think any unfairness arises in relation to this submission.

104 With respect to the LPCC's submission concerning the practitioner's disclosure on 11 June 2005, there was again cross-examination on why the practitioner disclosed the draft letter and its variance with the final letter, to the media. It was not put, as it was in the LPCC's submissions, that this was to generate publicity for its own sake or to criticise the Bali legal team. But we think there were sufficient questions asked of the practitioner as to how he thought the disclosures made were in Ms Corby's interests to justify the submission.

105 As regards the position taken by Mr Percy and Mr Davies in relation to the practitioner, we accept that there was little in the way of cross-examination to the effect that their evidence was affected by their friendship with the practitioner. Neither were they cross-examined in relation to the contents of the affidavit of the Principal Legal Officer of the LPCC (mentioned below). However, that affidavit was filed in the proceedings and its purpose was plain. Moreover, given the close relationship between these barristers we would have thought the submission obvious and unexceptional. We do not think there is any unfairness in these circumstances.

106 In relation to these and other possible instances where there was no direct examination of the practitioner on a matter the subject of submissions or of our observations (some of which we have identified in Part II of these reasons), we make the following general observations. First, Mr Hall's cross-examination of the practitioner was in our view comprehensive, appropriate and fair. The substance of the LPCC's case was put to the practitioner. Second, it was apparent from the 'pleadings' (application and grounds, practitioner's response, parties' statements) that much of the practitioner's version of events was being challenged. Third, the practitioner's witness statement was filed late, not being provided until the commencement of the afternoon session of the first day of the hearing; that is, after Mr Hall's opening submissions. That necessarily affected the LPCC's preparation of its cross-examination. Fourth, this is again an area where by reason of the status of the Tribunal we do not think evidentiary rules should be applied in any formalistic way provided we are satisfied, as we are, that no unfairness has operated.

The status of the media reports

107 Much of the LPCC's case depends upon inferences to be drawn from the practitioner's conversations with journalists. The LPCC sought to prove the practitioner's statements by producing the published media reports and transcripts of interviews. These statements were directly relevant to the fact and content of the disclosures and statements to the media. The statements were also of significance to the issues of the nature of the government's request of the practitioner and his relationship with Ms Corby. They were evidence of the practitioner's then state of mind in relation to those matters.

108 The practitioner made these submissions in relations to the media reports:

1) to the extent that he was directly quoted in these reports he accepted that he had made the statement attributed to him;

2) not everything he may have said, perhaps including statements which qualified his reported statements, has necessarily been included in the reports; and

3) the context in which he made the statements may not have been fully and accurately reported.

109 The latter two submissions may generally be accepted. Each statement of each media report or transcript must be considered on its own merits. We accept (as did the practitioner) that where he is directly quoted this is likely to be a reasonably accurate record. We are also generally prepared to accept the accuracy of the report where the statement is indirect ('Mr Trowell said ...'). In this respect the evidence of one of the journalists, Ms Munro, was that the Tribunal might have confidence in the accuracy of these reported indirect statements, whilst appreciating they were not verbatim. In some instances it seems clear enough from the content of the material reported on and its relationship with the direct quotations that it is likely to have come from the practitioner. On other occasions, the statements apparently made by the practitioner are consistent with other admitted statements. But we also recognise that the reporters may have had other less reliable sources or may have picked up extracts from other media reports.

110 The practitioner's evidence when questioned about statements to the media stands in its own right.

Credibility - the practitioner

111 On some critical issues, this application depends on an assessment of the credibility of the practitioner. He was cross-examined at length on the issues in the case. We have carefully reviewed his evidence taking into account admitted facts, his contemporaneous statements, other contemporaneous documents, the evidence of the other barristers called and the probabilities of the matter. We have also had regard to the practitioner's demeanour in the witness box and the extent to which it appeared to us he was giving his evidence in an open and forthright manner. We do at once recognise the limitations in determining credibility on that basis.

112 The practitioner was admitted in Western Australia as a barrister and solicitor in December 1981. In 1989 he elected to practise solely as a barrister at the independent bar. In 2000 he was made Queen's Counsel. He has practised throughout this period, primarily in the area of criminal law and we accept, 'without a blot on his character'.

113 In several respects the practitioner was an impressive witness. On many topics he had a good recall of the details. It was seldom he took refuge in a lack of memory. He exhibited a comprehensive vocabulary and an ability to put his position very clearly. He was mostly confident in his responses, usually retained an appealing sense of humour and for the most part appeared positively to enjoy jousting with Mr Hall. As might be expected, he was well aware of the obligations of his cross examiner and regularly confined him to his task ('just ask a question'). He was also well aware of the evidentiary requirements. In his evidence on one subject, he pointed out that the question asked of him had not been put to a previous witness (Ms Munro).

114 In other respects however, the practitioner was not a satisfactory witness. We have identified these in discussing the various issues below. On many occasions he perversely denied what appeared to us the plain meaning of the documents put to him. There were some remarkable inconsistencies in his evidence, for example, what contribution Mr Percy made to assisting Ms Corby; what was discussed at his meeting with Ms Corby's family on 4 June 2005; and whether he had any part to play in assisting on the appeal or whether his role was as a mere go-between. On other occasions it appeared the practitioner was unsure as to where his best interests lay in his response, for example in his answers concerning his notes of the agreed statement to the media made during the meeting with Ms Corby on 6 June 2005. He often answered in a way which

showed he was anticipating where the line of questioning was leading, perhaps again an attribute of his profession. On the subject of the difficulty or otherwise in contacting Ms Corby (outlined above) his evidence was not merely inconsistent; it appeared to us to be entirely cynical. We do not think our concerns as to the practitioner's evidence can be satisfactorily explained by the 'effluxion of time (3 years) and the exigencies of giving evidence' as Mr McCusker expressed the matter. Overall, the impression the practitioner gave in the giving and the content of his evidence, reinforced by a careful reading of the transcript, was that he was more concerned with arguing his position than endeavouring to give a complete, candid and disinterested (so far as possible) account.

115 The unsatisfactory nature of the practitioner's evidence was particularly evident in his answers to questions concerning his statements to the media. As detailed below, many of his published statements reflect the position that the practitioner in his capacity as a Queen's Counsel specialising in criminal law had, at the request of the government, together with Mr Percy, offered on a pro bono basis to assist the Bali legal team in preparing Ms Corby's appeal. To the extent the practitioner disputed that this was the position, it was open to him to frankly admit that in the circumstances of the moment, caught in the media spotlight, he had, unfortunately, given that misleading impression. Rather than do so, the practitioner sought to avoid responsibility for these statements by disputing that he had made the statements or arguing that the reports did not reflect what he had actually said or that he did not know why he had said that or that the meaning attributed to the statements was different from that put to him. In the end, we formed the impression that his accounts to the media were a reasonably reliable reflection of his then state of mind and his endeavours in the witness box to avoid their clear implication was directed to advancing his defence.

116 In other respects we have found the practitioner's evidence to be inconsistent both with contemporaneous records and the probabilities of the matter. One example is the practitioner's evidence concerning his contact in the relevant period with Mr Percy and Mr Davies. The impression conveyed is that there was minimal communication between them and the practitioner, prior to the hearing, was unaware of much of what work they were doing; he was unaware that Mr Percy, assisted by Mr Davies, was independently assisting Ms Corby on his own initiative without reference to the practitioner and, according to the practitioner, so that the government might be seen to be doing something. We are aware that this position receives some support from the evidence of Mr Percy and Mr Davies. However, in the statements to the media of both the

practitioner and Mr Percy there is a consistent theme of their joint efforts in assisting on the appeal at the instigation of the government. Moreover, given the factors of their physical proximity in chambers, their mutual friendships, the extent to which they spoke to the media about their 'team' efforts, the likelihood that they would have discussed the media reports of their involvement, the extent to which Mr Davies sought approval from the practitioner of his communications with the Bali legal team, the content and tone of the few email communications produced between Mr Percy and the practitioner and the like, we find there was considerably more contact between the practitioner and Mr Percy and Mr Davies than the practitioner was prepared to admit.

117 Of more importance, as detailed below, in several critical respects the practitioner's witness statement and oral version of events was inconsistent with the details and tenor of his other documents arising from the LPCC's inquiry and application and in particular his first response letter to the LPCC. The last of the practitioner's disclosures and statements to the media took place on 22 June 2005. On 27 June 2005, the LPCC wrote to the practitioner advising that it was inquiring into his various statements to the media and requesting detailed particulars of the circumstances relating to the statements and as to his relationship with Ms Corby. The practitioner responded through his solicitors by letter dated 26 July 2005 (response letter). That was a comprehensive seven page letter written on his behalf by his solicitor, Mr Stephen Scott (now Judge Scott). We infer that this letter was reviewed by the senior practitioner then representing the practitioner, Mr Ron Davies QC.

118 The practitioner was cross-examined about inconsistencies between his response letter and his later witness statement. The practitioner at several points sought to distance himself from his response letter. At one point in his evidence it was suggested to the practitioner in relation to a specific matter, that his recollection in July 2005 would be better than at the time of his giving evidence, three years later. The practitioner answered that he 'assumed' that his solicitors would not have written something that he had not told them. He did not remember checking the letter, but he 'probably' did. On another occasion he said he was not the author of the letter. He then gave a qualified admission that it reflected his instructions:

> But things have changed since then in this sense: ... that was almost three years ago now, and what has happened is I have been able to see a whole range of documents that have been provided and obtained, and heard what other people have had to say about things, and my memory has been assisted by that.

119 That response seemed to us, as happened not infrequently, to be a 'lawyer's answer'. In other circumstances it might have provided an explanation for changes made from an earlier account. In the present case however, it is not clear to us what other documents or comments subsequently reviewed did or would have assisted the practitioner's recollection about the subjects dealt with in his response letter. With one principal exception, his recently being reminded by Senator Ellison of a telephone conversation on 4 June 2005, the practitioner did not support this explanation. His later evidence was to the contrary effect, as detailed below.

120 We have no difficulty inferring that the practitioner would have carefully reviewed the contents of his response letter. At one point when challenged about an omission in the letter, the practitioner responded:

> I thought what ... the committee got, was pretty darn good because I tried to recollect in that circumstance most of what I regard are the relevant things for the committee's consideration ... I set it out as honestly and as completely as I possibly could ... I went to a lot of trouble to try and give them [the LPCC] as much information as I could.

121 At another point in his evidence, when again challenged about an omission, he said:

> Well, you know, I thought the response that was given was pretty extensive; it was about what, a six to seven-page document. ... One of the reasons I suggested to Stephen Scott that it be a full account so that - it was part of my - part of getting the situation - I gave a full account to the committee so the committee could make a proper assessment of it ...

122 We refer also to the practitioner's solicitors' further letter to the LPCC dated 6 October 2005, in which the solicitors say:

> We set out in our letters to you of 26 and 28 July 2005, at length, all of the relevant factual material which related to (inter alia) the circumstances in which our client responded to the request made of him by the Commonwealth government to ascertain what assistance may be afforded to Ms Corby on behalf of the Commonwealth government with respect to Ms Corby's appeal.

123 The question of the reliability of the response letter was specifically raised in the context of the practitioner's meeting with Ms Corby on 6 June 2005. The practitioner said at one point 'I tried to include as complete an account as I could in the original letter in 2005 to the committee.' It was put that as the response letter was provided a few weeks after the event had occurred, it was more likely to be a correct

account of the meeting than the account in his witness statement. The practitioner responded: 'I would have thought so, of course.'

124 We think the position is as follows. In late June 2005, the practitioner was called on to explain the events of May and June 2005. No doubt he would have searched his memory and read the available records for that purpose. The comprehensive account given in the response letter attests to this fact. In the ordinary course it is more likely to be an accurate record of events and of the practitioner's state of mind at the time than the practitioner's evidence three years later; that is, in his witness statement of 17 September 2008 and in his oral evidence given on 18 September 2008 and 19 September 2008.

125 Far from assisting his recollection, the practitioner's more recent review of the relevant documents and evidence and the focus on his defence appear to have distorted his recall of the matter. At several points of his evidence the practitioner might be taken to have acknowledged as much. Asked about disclosing Mr Rasiah's request for $500,000 he said: 'I don't recall ever revealing the amount of the finances that were sought. I don't recall that. So much happened, and you look back and you look at all these documents, you start to imagine things happened when they don't [sic].' Asked about being requested to give advice to the Bali legal team he said: 'I don't know now. After three years I'm not sure now. I have seen so many reports and I can't say definitively what I meant at that time other than to say that I would have given advice in relation to evidence.' When we asked the practitioner about an aspect of his conversation with Mr Pennells, reported in his response letter, he said:

> That was my recollection at the time. This is the difficulty, of course after three years ... You understand completely how difficult it is for a witness to disentangle what you knew then and what you now know ... you're not sure what you knew then and what you now know ... you're not sure where the truth lies because it's very difficult.

126 Asked whether he was anxious to discuss the appeal with the Bali legal team, the practitioner initially said in evidence: 'Didn't matter to me, because they had it, I assumed, under control, and it wasn't part of my brief to prepare the appeal.' Anticipating the next question perhaps, he continued: 'Of course I was interested.' Taken to the passage in his response letter where he said he had been interested, he then said: 'Well, I'm - maybe I thought I was anxious in 2005. I'm not so sure of that now. I don't know.'

127 There are other reasons why weight is to be given to the practitioner's response letter and, to some extent, although they were much less comprehensive, to the solicitors' further letters dated 6 October 2005 and 24 April 2007. First, the degree of care which the practitioner's solicitors took in preparing the response letter is evident, in addition to the practitioner's evidence on the subject, from the detail of the letter and from the fact that two days after it was sent, the solicitors sent a second letter correcting a small error concerning the level of the court in Bali earlier referred to. Second, as the practitioner and his advisers would have been aware, he was under a professional obligation in his response to provide a full and accurate account of his conduct in relation to the matter the subject of the inquiry - *Professional Conduct Rules 1983* (WA) r 1.3(e). Third, at the time it was written the practitioner did not know specifically what charge might be brought against him nor what evidence would be available in support and specifically whether what he said might be contradicted by evidence from Ms Corby. That was not the position at the time he prepared his witness statement and gave his oral evidence by which time he knew that she was not being called. Consciously, or subconsciously perhaps, he could give evidence more favourable to his position in those circumstances. Fourth, within the requirement to provide a 'full and accurate account of his conduct' the practitioner would be expected to include in his response letter all of the circumstances favourable to his position in relation to his relationship with the government and Ms Corby, statements made to journalists and generally. We are therefore of the view that we are entitled to view with some reservations the practitioner's account of the matter three years later which include a substantial number of additional and invariably favourable circumstances based on the practitioner's subsequent recollection of the matter.

128 For these reasons, in particular where the practitioner's oral evidence appears inconsistent with other evidence or with the probabilities, we think that the response letter is available not merely to test the practitioner's oral evidence of certain matters but as constituting a more reliable record of those matters. In relation to issues such as the practitioner's understanding of what he undertook for the Commonwealth government and his relationship with Ms Corby, we think that the practitioner's version of events in his response letter read with the contemporaneous documents is the best evidence available.

129 We have dealt with this issue at some length because we are conscious that in preferring the version of events in the practitioner's response letter we are departing from the practitioner's own evidence of

events in his witness statements and under oath. Our reference to the practitioner's several candid admissions later in his evidence of the difficulty he was under in recalling events of three years ago and separating his then statements from his later reconstruction is intended to demonstrate also that there is no basis for a finding of dishonesty in relation to his evidence.

130 The significance we attach to the practitioner's contemporaneous records generally is also borne out by the practitioner's own evidence. On a number of occasions in his evidence, when asked about media reports, the practitioner, in our view entirely honestly, said that after a period of three years he had no recollection of why he said certain things which were reported.

131 We make some general observations on the reliability of the practitioner's evidence. The practitioner has had three years to reflect on the events. As a senior barrister closely involved in the preparation of his defence, as we infer, and the tactics of defending the application (some evidence of which was revealed in Mr Percy's interview with the LPCC's principal legal officer mentioned below), the practitioner knew precisely the 'critical path' of the LPCC's case as formulated and the points at which his evidence would be critical to its outcome. It is noticeable that the changes between his response letter and his later pleadings and witness statement are almost uniformly directed at diminishing the prospect of Ms Corby being his client rather than simply providing a fuller account of the events. There is support for our view, albeit subtle, in the difference in tone, as well as content, between the practitioner's response letter, which reflects a measure of concern as to his conduct, and his witness statement, being his revised version of events, which does not. Further, as the practitioner himself expressed, he ultimately felt aggrieved and galled at the outcome of his involvement in the Corby matter. We think that whilst initially the practitioner was flattered to be involved in this high profile case at the request of the Commonwealth government and, to an extent, sought out and enjoyed the media attention, the end result was he was trenchantly criticised by Ms Corby's family and in the media generally and faced an inquiry from the LPCC. This sense of being badly treated was reflected in a number of outbursts in his evidence, for example in answers in relation to his press release and as to the costs he bore himself in visiting Ms Corby in Bali. We think these considerations may well have, in a subtle way, affected his evidence.

132 The issue of the credibility of the practitioner extends to his evidence as to his intentions and state of mind. Those matters arise incidentally in

relation to the practitioner's understanding of his instructions from the government, the role of Mr Percy and Mr Davies, his purpose in going to see Ms Corby, his belief as to Ms Corby's understanding at the meeting and so on. They are specifically raised by the practitioner's defence in which he responds that he believed Ms Corby was not his client and that his disclosures were in her best interests and would assist her. To the extent these beliefs are challenged, we bear in mind the general principle that a witness's evidence of her or his intentions and state of mind are to be tested closely and on the basis that the best evidence is likely to be what the witness actually did at the time. This assumes significance in considering the practitioner's contemporaneous actions and statements.

133 We have closely considered this issue of credibility in the light of the whole of the evidence, having regard to the cogency of proof required by ***Briginshaw*** and bearing in mind the position of the practitioner as a long-serving barrister and senior counsel. This in part accounts for the length of these reasons. In the end we have come to the conclusion that the practitioner was not a consistently reliable witness. In certain critical aspects we have not been prepared to accept his current version of events. We do not find that the practitioner was deliberately dishonest in his evidence. Neither is such a necessary part of the LPCC's case. But we do think there has been a measure of reconstruction, as that term is understood in this context, as to what took place and that the practitioner has in some respects persuaded himself as to his current version of events and the extent to which they excuse his culpability.

Credibility - Mr Percy and Mr Davies

134 In considering the credibility of both Mr Percy and Mr Davies it is to be remembered that both were in the invidious position of being called to give evidence in support of the LPCC's case against the practitioner, who was not merely a fellow legal practitioner and the senior member of their chambers but a close friend (Mr Percy) and a good friend (Mr Davies). Moreover, the LPCC's case was in part that it was through the agency of these barristers that Ms Corby became a client of the practitioner. Both witnesses showed that they felt strongly that such was not the position. Furthermore, both were being asked to recall events of some three years earlier. Mr McCusker was critical of the fact that it has taken the LPCC three years to formulate its claim and reach a hearing. We think that fact regrettable, without of course attributing blame for that circumstance.

135 Our criticism of the barristers' evidence is to be understood in this light.

Credibility - Mr Percy

136 There is a refreshingly direct account of Mr Percy's understanding of his role in this matter in his early letter to the LPCC dated 26 September 2006:

> My involvement ... was simply an agreement to assist pro bono in a proposed appeal by Ms Corby against her sentence and/or conviction. ... I was never formally briefed but agreed to assist pro bono on the basis of a request that had been made ... to my colleague Mr Trowell QC by the Commonwealth government.

137 The principal legal officer of the LPCC, in an affidavit filed in these proceedings, said that on 24 July 2008, Mr Percy had advised her that: 'he was a close friend of the respondent and had been providing advice to the respondent in relation to tactics to this application and accordingly was not prepared to co-operate with the Committee.' Mr Percy does not appear to have responded to the statement attributed to him and he was not cross-examined on it. Nevertheless, we have no reason to doubt it. At one point of his evidence Mr Percy volunteered his opinion that Mr Trowell and he were 'never acting for Ms Corby.' On several subjects the evidence of Mr Percy and the practitioner was expressed in similar language. Both spoke of the government as the client and Ms Corby merely obtaining the indirect benefit of their services as the ultimate beneficiary. The practitioner referred to his acting for the family of Mr Rush 'very much like Mr Percy was acting for Nguyen's family'. Both sought to distinguish between providing advice in relation to her appeal, which to some extent they acknowledged, and acting for her, which they both denied.

138 On several occasions where his own previous statements were put to him, Mr Percy appeared to us to give evidence inconsistent with the plain meaning of those statements and with the probabilities of the matter. In other instances his apparent lack of recall on important issues was significant. He appeared to have made no effort to read the relevant material (eg the press release, the memorandum of meeting dated 31 May 2005, the draft and final letter from Mr Rasiah) in order to assist the Tribunal.

139 We think that his evidence as a whole and the manner of giving it showed he clearly favoured the position of the practitioner as against the LPCC. That said, there was nothing said during his evidence which we regard as dishonest as such.

Credibility - Mr Davies

140 The affidavit from the LPCC's principal legal officer also states that following an interview with the LPCC on 22 July 2008, Mr Davies prepared a draft witness statement but subsequently advised that he was uncomfortable with this, although Mr Davies did ultimately provide a witness statement. The legal officer deposed that during the interview Mr Davies declared he was a good friend of the practitioner. The evidence showed that Mr Davies shared chambers with the practitioner, although on a different floor. He said in evidence that he had known the practitioner professionally for many years although he had never worked on a case with him. At one point in his evidence Mr Percy said that Mr Davies usually did what Mr Percy told him. Our observation of Mr Davies in his evidence was that he was remarkably deferential to both his 'leaders', Mr Percy and the practitioner.

141 Mr Davies appeared to involve himself in the Corby matter with enthusiasm, sincerity and dedication. In early June 2005, Ms Corby rang him from prison. Apparently on his own initiative, on his own, at his own cost, he made a second trip to Bali over the long weekend of 3 June 2005 - 6 June 2005 and obtained draft witness statements, including one from Mercedes Corby. He said this was not specifically to pass to the Bali legal team. He formed some strongly held views as to Ms Corby's innocence. Given he was acting without payment and with seemingly little recognition, it is difficult not to admire his commitment.

142 As a witness however, Mr Davies was singularly unhelpful. Mr Davies' standard response to many of the questions, sometimes before the question was finished, was that he did not recall the matter. This was particularly so on matters that concerned the practitioner. We are not convinced the problem lay with his memory or with his expressed concern not to respond unless he was able to give a completely accurate account of events. This elusion was particularly evident when questioned as to his meeting with the Bali legal team on 29 May 2005 and the record which Mr Davies made of that meeting. It was also apparent when questioned about the letter he sent to the Bali legal team following his return (discussed below). He did not remember whether Ms Corby had called him in relation to his visits to Bali. In an email on 10 June 2005 to the practitioner, Mr Davies advised that 'Anna' had provided him with a copy of the Indonesian judgment. Anna was apparently Mr Percy's articled clerk. When asked who Anna was, Mr Davies said he did not remember. To give another instance, of less direct relevance to the issues, Mr Davies said that at the end of his visit on 3 June 2005 - 6 June 2005 he went to

see the practitioner and Mr Laskaris to warn them to leave Bali immediately. Incredibly, Mr Davies claimed in his evidence that he could not remember the reason for this urgent and dramatic intervention. He also said that, as he recalled, this was the only time during his visit that he saw the practitioner and Mr Laskaris. The practitioner said there were several occasions during the long weekend when he saw Mr Davies.

143 The inference we draw from Mr Davies constantly taking refuge in his allegedly weak memory, and from the content of his evidence and the manner of giving it, is that because of his relationship with the practitioner and a sense of loyalty toward him he was concerned not to provide answers which he believed might assist the case of the LPCC. Again, we make no findings which impugn his honesty as such.

PART II - Client

Was Ms Corby a client or prospective client of the practitioner?

144 The grounds of the application found the practitioner's alleged misconduct on Ms Corby being the practitioner's client or prospective client.

The parties' contentions

145 The LPCC argues in its statement that there was a retainer, express or implied, between the practitioner and Ms Corby arising as at certain alternative dates; alternatively Ms Corby was relevantly a prospective client at certain alternative dates. As regards its case of Ms Corby being a prospective client the submissions and supporting cases of the LPCC involve the passing of confidential information to a lawyer with a view to the lawyer being engaged, but where in the circumstances this does not result. For his part the practitioner denies that Ms Corby was ever either a client or a prospective client.

146 At the outset of the hearing, the Tribunal raised with Mr Hall whether the LPCC's case of breach of confidential information was limited to a duty owed to Ms Corby as a client or prospective client or whether it might be owed to her in some lesser relationship - for instance, as a person who stood in the position of a client (the latter suggestion is misattributed to Mr Hall in the transcript). Mr Hall responded that so much was encompassed by the idea of a prospective client. That is not really how the matter had been put in the LPCC's statement, which as indicated, argued that Ms Corby was a 'prospective' client; that is, a client in 'prospect'. In response, Mr McCusker submitted that the application

was confined to 'client' or 'prospective client'. It could not, he said, encompass 'some other amorphous relationship'. The Deputy President suggested the matter might be left to closing submissions.

147 In the practitioner's closing submissions the defence is confined to meeting a charge based on Ms Corby being a 'client' or 'prospective client'. Mr McCusker also submits the relationship of lawyer and client is based on proof of contract, express or implied. Where there is no retainer he acknowledges there might still be some limited circumstances where the duty of confidence arises but it would require something more than the lawyer identifying someone as a 'prospective client'. It would require a situation such as where a solicitor sends a barrister a brief which the barrister reads and returns without accepting it. This is because inherent in the notion of sending the brief is the obligation to the prospective client to keep it confidential.

148 By its closing submissions, the LPCC limits its case to the allegation that Ms Corby was a client or prospective client of the practitioner. The argument for an obligation of confidence arising under the circumstances, but not involving a lawyer client relationship or prospective lawyer client relationship, is not put by the LPCC. As regards the creation of this relationship, the LPCC submits that a retainer need not be contractual in the case of a barrister, the current state of the law being 'unsettled'. The submission is that where a barrister is engaged by a lay client or by instructing solicitors, the barrister owes an obligation of confidence in respect of information conveyed to the barrister either by or on behalf of the client. That obligation is an incident of the 'retainer', contractual or not, is an equitable obligation and is referred to in the Conduct Rules of the WA Bar Association and of the Law Society. The LPCC invokes r 4.5 (Advertising and Publicity) and r 6.3 (Confidentiality) of the Law Society's *Professional Conduct Rules*.

149 In his submissions in reply, Mr McCusker concedes that the law as to whether an alleged retainer is contractual or not is unsettled. As to the suggestion that the retainer constituting Ms Corby a client might arise without a contract, he submits 'that was never the case against the respondent'. With respect to this submission, we do not regard the LPCC's application read with the LPCC's statement as confined to the case of a retainer arising by contract between the practitioner and Ms Corby. Mr Hall made this clear in his oral closing submissions. In any event, given the extent and nature of the evidence on the issue of a retainer and on the relationship generally between the practitioner and Ms Corby, and the timing of the written submissions (the practitioner

having the last word), we do not think any unfairness arises from the LPCC clarifying its position in closing. What we think is not open to the LPCC, given the manner in which it has presented its case, is for it to move away from the need to establish a retainer creating the relationship of lawyer and client; or circumstances showing a prospective client - a person in prospect as a client.

The relationship of barrister and client - the legal principles

150 The issues arising from the submissions regarding the relationship of a barrister and client include the nature of a 'retainer', whether contractual or otherwise, and what is embraced by the notions of 'client' and 'prospective client'.

151 As a matter of ordinary usage, 'retain' means to engage the services of a barrister, often by payment of a preliminary fee.

152 In the past, the practice in Australia (and in England) was that barristers could only provide or undertake their services on behalf of a lay client on the instructions of a solicitor. The solicitor had a general authority to instruct and pay the barrister. The barrister looked to the solicitor rather than the lay client for the payment of fees. There was no contract either between barrister and lay client (by reason of the lack of direct relationship) or between barrister and solicitor (by reason of the nature of their relationship). It followed that the retainer of a barrister did not involve a contract. This position resulted as a matter of professional ethics rather than from principles of law.

153 However, the modern position in Australia (and in England), is that subject to any particular requirements of the relevant professional conduct rules, a lay client may have direct access to a barrister and there appears to be no reason, in principle, why a barrister might not contract with either or both the lay client and the solicitor. This is now the case in England, where the Bar Council provides standard form contractual terms, and has also been recognised in Australia, for example in ***Dimos v Hanos and Egan*** [2001] VSC 173 where the history, principles and statutory regime are discussed.

154 In the case of solicitors, where it is often said that a contract with the client must be shown for the relationship to exist, the better view would seem to us to be that the relationship is 'consensual' but not necessarily 'contractual': ***Macpherson and Kelly v Kevin J Prunty and Associates*** [1983] 1 VR 573 at 575. That would seem an equally apt description for the modern relationship of barrister and client.

155 In some cases, there may not be a contract between barrister and lay client for a number of reasons. These reasons include the intercession of a solicitor, who is in a position to make the necessary arrangements with the client and the barrister respectively, or because (as here) the barrister is providing services on a pro bono basis so that there is no consideration moving from the promisee client. In those circumstances, the inquiry whether there is a contract implied on the facts (in respect of which the LPCC has provided the relevant authorities) would seem unnecessary. Rather, the inquiry is whether the relationship of barrister and client is established in the circumstances. That may depend on the purpose of the inquiry. In our view, in the present context, so much might readily be accepted where a barrister acting in the course of the barrister's professional duties meets with and provides or offers to provide legal advice or assistance to a lay person (or other lawyer on behalf of the lay client) who seeks that advice or assistance. In those circumstances, and whether or not the barrister offers ongoing services, the barrister is retained by the client.

156 In these proceedings, the practitioner maintained in his evidence and submissions that he was retained by and acted for the government. That claim was made notwithstanding the practitioner's own evidence as to the degree of informality concerning this engagement. It is not suggested, nor could it have been, that this was a contractual relationship.

157 So far as concerns a 'prospective client', both the LPCC and the practitioner refer to the case of a person on whose behalf a lawyer receives and reads a brief with a view to the lawyer's engagement but where, for whatever reason, this does not result. The principle must extend to a person who meets with a lawyer and discusses matters in confidence with a view to retaining the lawyer. Where the relationship is established, a duty on the lawyer will attach to those conversations (of both the person and the lawyer) which, within 'a very wide and generous ambit of interpretation' are referable to that relationship: ***Minter v Priest*** [1930] AC 558 where the court held that communications from the prospective client to a solicitor at their meeting were privileged in circumstances where the solicitor ultimately declined to act. That expression of the extent of the duty must also apply, in our view, where the relationship is with a client.

158 That is not to say that for all purposes a person to whom a duty of confidence is owed by a lawyer is, without more, to be considered as the lawyer's 'client': ***Apple v Wily*** [2002] NSWSC 855 at [6-13], a case cited by the LPCC. This decision was followed in ***Hawksford v Hawksford***

[2008] NSWSC 31 at [17] - [19] where it was also held that there may be a relationship of lawyer and client, absent a contractual retainer, for the purposes of the client privilege rule.

The evidence as to the relationship between the practitioner and Ms Corby

159 As mentioned, in March 2005, Ms Corby was on trial in Bali on a charge of importing marijuana. Ms Corby was represented by a firm of solicitors, Hoolihans, in Queensland and by a law firm, Lily Sri Rahayu Lubis S H & Associates in Bali. Both Mr Rasiah, as a case co-ordinator not a lawyer, and Ms Lubis were part of that law firm.

The request from the Commonwealth government

160 The relationship between the government and the practitioner is of little significance in itself. However, it is important to the extent that it explains the circumstances in which the practitioner came to visit Ms Corby's Bali legal team and Ms Corby herself.

161 The nature and scope of the practitioner's engagement by the Attorney General on the practitioner's evidence on behalf of the government is one of the areas where there are significant differences between the practitioner's evidence and contemporaneous documents.

162 In his witness statement the practitioner says in summary as follows. In March 2005, at the Attorney General's invitation, they met to discuss Ms Corby's case. The then Attorney General, Mr Ruddock, asked him to reassure Ms Corby that the government was concerned about her welfare and was assisting her financially. The practitioner said that his understanding was that the government was concerned about three matters:

1) that it was not getting any recognition for providing financial assistance to her lawyers;

2) that it wanted to be seen to be doing something to assist her; and

3) it was having difficulty communicating with Ms Corby's lawyers about the various requests made by them for evidence and other matters.

163 For his part the practitioner says he agreed that he would, on an informal basis and without charge, assist the Australian government by trying to make sure that any requests from the Bali legal team for financial

assistance and evidence were passed on to the Australian government, and so act as a go-between. The practitioner says that it was never suggested that he provide legal assistance to Ms Corby.

164 Counsel for the LPCC cross-examined the practitioner as to why someone of his legal skill and experience would be needed to tell Ms Corby and the public that the government was providing financial assistance to the Bali legal team. The practitioner did not know Mr Ruddock's motives. He did not recall what it was that the government wanted to be seen to be doing. As regards communicating with the Bali legal team, he was being asked to act as a go-between. He did not ask why a Queen's Counsel was being asked to pass on messages between them. He was asked why he offered to assist the Australian government without charge. The practitioner said that he was not briefed formally; he was being asked to do something quite 'diplomatic'; it was a 'qausi-political' situation. When asked whether it was his intention to offer advice and experience to Ms Corby's lawyers in preparing the appeal, the practitioner responded: 'I was drawing upon my experience quite clearly, but I didn't propose to offer advice as such to anyone'.

165 The practitioner was questioned about the paragraph in his witness statement to the effect that there was no suggestion by the Attorney General that the practitioner provide legal assistance to Ms Corby. He was asked whether the reason he could not act for Ms Corby was that, as he said in his witness statement, he was not qualified to practice law in Indonesia and was not familiar with Indonesian law and procedures. The practitioner said this:

> Well, there are a number of reasons. First of all, she had lawyers - she had her own lawyers. Secondly, I was ill equipped to act on her behalf. I took the view that I wasn't being asked to do that by the government. In any event, if I had been asked to do that, I would have had to have responded that I was ill equipped to do that. I simply couldn't do that because I wasn't an Indonesian lawyer, or a lawyer qualified to practise in Indonesia.

166 At the practitioner's request, staff at the Attorney General's office spoke to Hoolihans, the solicitors in Queensland, to let them know of the engagement of the practitioner. Subsequently the practitioner left messages with the solicitors, but they did not return his calls. In his witness statement the practitioner says that the purpose of his calls was to find out, on behalf of the government, what was happening. In consequence of the lack of response, the practitioner said that it was not possible for him to advance the matter. When asked why he did not pursue his brief from the government irrespective of any response from

Hoolihans, the practitioner said in effect that he could not 'muscle in' when Ms Corby already had lawyers acting for her.

167 The impression given by this evidence is that the specific obligation the practitioner undertook was to facilitate communications between the Bali legal team and the government in relation to their requests for assistance with evidence. He was to be the go-between or messenger. In no respect was he being asked to provide legal advice or assistance to Ms Corby. Had he been asked to do so he would have declined on the basis that Ms Corby had her own lawyers and he was not qualified in Indonesian law nor licensed to practice there.

168 There are significant difficulties with this account, some of which are exposed by the cross-examination. There is no credible reason why the Attorney General of the Commonwealth of Australia would engage a Queen's Counsel from Perth, specialising in criminal law, merely to convey messages to and from the Bali legal team and to publicise the government's interest in the case. The government had at its disposal consular staff and public relations consultants who might better perform these tasks. Equally, there is no sensible reason why the practitioner should act for the government without fee in undertaking these matters. The reference to the practitioner acting without charge (witness statement) and his several earlier references to his acting pro bono, are much more readily explained in relation to the practitioner's services to Ms Corby. Further, on the practitioner's account, there is no apparent reason why, given the non-legal nature of the government instructions, the practitioner could not have pursued his role without the consent of Hoolihans. His desire to contact them is explicable on the basis that he regarded himself as offering legal assistance to Ms Corby or her lawyers and he therefore needed to advise those solicitors of his availability and the nature of his offer.

169 Moreover, these difficulties are largely resolved if regard is had to the explanation given in the practitioner's response letter to the LPCC, his statements to the media, and other contemporaneous documents including statements from the government indicating how it understood the practitioner's role.

170 The practitioner's response letter includes:

> ... [T]his is a most unusual situation involving a senior practitioner being requested by the Australian government, on a pro bono basis, to lend what assistance he could to an Australian citizen overseas who was represented (as she must be) by solicitors of that country. The matters pertaining to

Ms Corby involve not only legal but political issues and the very real prospect that media coverage and speculation might affect the way in which Ms Corby might be treated.

…

In March 2005 Mr Trowell was approached by the Federal Attorney General Phillip Ruddock and asked whether he would be prepared, on a pro bono basis, to ascertain whether the Commonwealth was able to provide any assistance to Ms Corby who was then standing trial in the District Court in Bali.

Mr Trowell was then aware, from press coverage, that Ms Corby was represented by a Queensland law firm ... and a substantial legal team in Bali.

Mr Trowell told the Attorney-General that he would be happy to provide assistance if he could and as a matter of protocol contact ought to be made with the Queensland solicitors. Mr Trowell then spoke with Tom Percy QC who agreed to lend his assistance. Attempts made to make contact with the Queensland solicitors were unsuccessful.

Two months later, in May 2005, staff from Foreign Minister Alexander Downer's office contacted Mr Trowell and enquired of him as to whether the offer to assist by him and Mr Percy was still open and Mr Trowell confirmed that it was. Subsequently Mr Downer's office confirmed that Ms Corby had expressed a wish to the Australian Consul at Bali to see Mr Trowell or Mr Percy.

…

Together with Phillip Laskaris as his junior Mr Trowell travelled to Bali on the long weekend of 3-6 June 2005.

Mr Vasu Rasiah contacted Mr Trowell the day before his departure.

…

Mr Rasiah endeavoured to persuade Mr Trowell not to visit Bali. The indication to Mr Trowell was that Mr Rasiah was desperate to prevent Mr Percy or Mr Trowell from giving any advice concerning Ms Corby’s appeal because he saw them as a threat to his control over Ms Corby.

...

At a meeting at a restaurant in Bali on 3 June 2005 Mr Trowell was anxious to discuss the appeal with a view to coming to terms with the extent to which any assistance might be provided.

…

> Finally, Mr Trowell told Mr Rasiah that if Ms Corby's legal team had any requests of the Australian government for evidence that they may think helpful to Ms Corby's case then they ought to be detailed in writing and he offered to refer them to Christopher Ellison, the Australian Minister for Justice.
>
> …
>
> It must be remembered that Mr Trowell was in Bali at the request of the Australian government to ascertain whether Ms Corby had needs with which he could provide some assistance.

171 These paragraphs from the practitioner's response letter make clear the nature of the government's request and the practitioner's role in mid-2005 as he understood it. The practitioner was requested in effect:

1) to make known the government's existing financial assistance to Ms Corby in the form of the payment of her legal fees;

2) to offer Ms Corby further assistance from the government and specifically in relation to what evidence the government could provide; and

3) this further assistance included, at the government's request, the practitioner's legal services on a pro bono basis (including following her conviction in relation to the appeal) to the extent that those services could appropriately be provided given Ms Corby's own Queensland and Indonesian lawyers.

172 It was the practitioner ('he') who was directly providing assistance to Ms Corby. He was not merely conveying to her that the government offered 'its' assistance. This was the position when the practitioner was initially approached and in late May 2005 when he was asked by the government whether his offer of assistance was still open because Ms Corby had requested to see Mr Percy or him. It seems likely that it was the third task (providing legal advice and assistance to Ms Corby) which explains the government's selection of a Queen's Counsel specialising in criminal law.

173 Moreover, this understanding of the practitioner's role accords closely with contemporaneous accounts, including in statements made by the practitioner.

174 An article in the *Courier Mail* on 20 April 2005 refers to the practitioner's involvement as being part of a 'Federal government sponsored attempt to assist Corby'. It reports:

> Mr Trowell, a WA-based lawyer boasting excellent contacts with the Indonesian legal system, was approached by the Attorney-General … and asked if he would be willing to aid or guide the Corby team.
>
> Mr Trowell … agreed to help, but only if the Attorney General's office contacted Corby's lawyers first to make clear the two silks [the practitioner and Mr Percy] had the backing of the government.
>
> Mr Trowell said the Attorney-General wanted Corby to get the best help available, but was keen to ensure it did not appear the Australian government was meddling with the Indonesian legal system.

175 The article earlier quotes the practitioner as saying, in relation to his calls to Ms Corby's Queensland lawyers:

> I was very surprised there was no response. We were offering ourselves at no cost, we were not trying to muscle-in because we had a thirst for publicity, but simply because she was an Australian national in a foreign country needing assistance.

176 It was put to the practitioner that in saying 'we were offering ourselves at no cost' he meant in context 'offering ourselves to the Queensland lawyers'. The practitioner denied this meaning and that he intended that meaning in any way. He said that what was being offered was his acting as a go-between. When pressed as to why in this context cost was relevant, the practitioner said he did not know. It may have been a comment made to rebuke the Queensland lawyers for not responding.

177 We do not find any of this convincing. We mention that although the practitioner at this section of his evidence persevered in describing his go-between role, confronted with his later media statements, he later conceded that he was more than merely a 'milkman' or 'courier' - that his services as a lawyer 'of some profile' were being employed. In addition, there is nothing in Mr Percy's 2006 letter to the LPCC (recited in Part I of these reasons) and very little in his evidence which supports this understanding of his or the practitioner's role. The government would be unlikely to have a concern about 'meddling with the Indonesian legal system' nor would it be facilitating provision of 'the best help available', if the practitioner's role was merely to liaise with the Bali legal team. He, or some government representative, could have accomplished that task from Perth.

178 The practitioner does not accept that he said to the journalist that he was asked to 'guide or aid' the Corby team or that in fact he was so asked to do so. However, it seems probable that the source of the journalist's information, including about 'guiding or aiding the Corby team' was the practitioner, he being directly quoted elsewhere in the article and there being no other source quoted or indicated for the comment. This description is also consistent with the practitioner's later media statements.

179 The article concludes: 'Mr Trowell said he left detailed messages on two occasions outlining how he and Mr Percy could help but he received no response.' The practitioner disputes that he said this or that he offered help. This is an indirect quote of what the practitioner said and it seems most unlikely that it would not have reflected the substance of what the practitioner told the journalist at the time. Having regard to all the evidence, we reject the practitioner's evidence on both counts.

180 A further article appeared in *The West Australian* newspaper on 23 April 2005. This quoted the practitioner saying: '[Mr Ruddock] was seeking some pro-bono assistance advice that could be given to her legal team.' Counsel for the LPCC asked the practitioner why he had said that to the journalist. The response was significant. The practitioner said: 'I have no idea now, looking back over three years, but it was clearly within the terms of what he'd asked me to do.' Challenged as to what appeared to be a concession, the practitioner reverted to his role as a go-between: 'If that involved advice as to what the government would accept or reject, or what was available, then I would have given it'. It was put to the practitioner that his statement to the journalist refers clearly to advice to Ms Corby's Bali legal team, not the government, but that in evidence the practitioner denied giving any such advice and said he had never been asked to. The practitioner, his initial explanation exposed as untenable, then responded that he was not giving advice to the Bali legal team in a direct sense, but he supposed: 'I would have given my two pennies worth in terms of any questions of evidence that they wanted'. Consistently with much of what he said in his response letter and other statements to the media, the practitioner here (initially at least) admitted that the Attorney General requested of him that on a pro bono basis he provide assistance and advice to Ms Corby's Bali legal team (and necessarily therefore to her). In our view, this reflects the true position. On the evidence also, we do not think the advice offered was limited to advice on evidence in the manner the practitioner suggests in his second explanation.

181 The practitioner was also questioned about some email correspondence he had in early May 2005 with an Indonesian academic. This was in relation to Mr Rush, one of a group of nine Australians also facing drug charges in Indonesia. In this correspondence, the practitioner introduced himself as having been invited to provide informal advice to the family of Mr Rush. There are two references to Mr Rush as 'my client'. There is also a passing reference to the Attorney General approaching the practitioner in relation to Ms Corby to 'assist her Australian lawyers'. The practitioner claims in the email that those lawyers had made 'a bit of a hash of things' by trying to use the Australian media to advance her cause. We think this somewhat ironic, given the practitioner's own use of the media and the outcome of that. Questioned by Mr Hall about the term 'client', the practitioner first said that this (Mr Rush and his family) was a different situation - he was acting for 'the family'. That is difficult to accept. The email at one point refers to 'my client's father'. He then said that the reference to 'his client' was merely a convenient expression. Again, we do not find that evidence persuasive. We think it more likely that insofar as Mr Rush was the beneficiary of his services, provided at the instance of his parents, the practitioner regarded Mr Rush as his client. Under later questioning by the Tribunal, the practitioner was prepared to accept at least an argument to this effect. In this context, we also do not accept the practitioner's position in relation to Mr Rush that this was a 'different situation', because the interests of the family and Mr Rush were aligned whereas the interests of the government and Ms Corby were not. Even accepting the latter proposition for the sake of the argument, we do not think this a material distinction.

182 As concerns the government's subsequent request of the practitioner as to whether he was still prepared to assist, the practitioner in a conversation with a journalist on about 28 May 2005, uses similar language as appears in the reports of 20 April 2005 and 23 April 2005. He is quoted saying:

> Chris Ellison ... suggested to Mr Ruddock that he approach me to ask if we could offer assistance to Schapelle Corby's legal team. ... I was contacted by [the] Foreign Minister[s] ... chief-of-staff this week. He said "You were quite happy to assist in March. Is the offer still open?" Tom [Percy] and I said we would be happy to help.

183 Expressly, and consistently with other reports, this is assistance to Ms Corby, directly or by way of her legal team, not to the government.

184 Mr Ellison, the Minister for Justice, was interviewed on 6 June 2005 at the time of the practitioner's visit to Ms Corby. We include parts of that interview below.

185 Mr Ruddock was not called by either party. In a letter to the practitioner of 7 June 2005 (immediately after the practitioner's visit to Ms Corby), the Attorney General thanked the practitioner 'for the assistance you have been giving to Ms Corby and her family.' The Attorney also passed on to the practitioner the name of a contact who had information which the contact believed would be 'useful in the preparation of Ms Corby's appeal.'

186 A few days later (10 June 2005), in a further letter sent to the President of the Western Australian Bar Association, the Attorney General expresses his appreciation for 'the pro bono assistance offered to Ms Schapelle Corby by Mark Trowell QC, Tom Percy QC and their juniors Phillip Laskaris and Jonathan Davies'. Shown the letter and asked if he agreed with it, the practitioner answered first that these were the writer's words, not his. Pressed, he said that of course they had provided pro bono assistance to Ms Corby:

> She wasn't the direct beneficiary of our service, let's say, she was an indirect beneficiary. ... the situation is that the government wanted to assist Schapelle Corby, but it wanted to get recognition for that fact, and it thought the best way to do it was to have a go-between in an informal way, in which that information could be conveyed to it.

187 The difficulty with that answer is that there is nothing in these letters which suggests that the role of the practitioner was anything in the nature of a 'go-between'. The Attorney General directly approached the practitioner and he might be expected to know whether his instructions involved (as the letters state) the provision of assistance on a pro bono basis by the practitioner as Queen's Counsel and his junior, to Ms Corby. That necessarily meant the provision of legal assistance.

188 Moreover, the practitioner states in his witness statement and in evidence that the government was concerned to be seen to be doing something to assist Ms Corby. It seems to us unlikely in those circumstances that it would request a Queen's Counsel from Perth, specialising in criminal law, to visit Ms Corby (following her request to see a Queen's Counsel being Mr Percy or the practitioner) on terms that excluded the practitioner providing her any legal advice or assistance in relation to her appeal or generally. There is no reason why it should have done so.

189 We are mindful of the practitioner's assertions in his evidence that he had not been requested by the government to provide any legal assistance to Ms Corby and would have declined if asked (set out above). We cannot accept the evidence given by the practitioner in that respect. On the evidence and probabilities, we do not think there is anything in the informal brief from the Attorney General which precluded the practitioner acting for Ms Corby by way of providing assistance to her Bali legal team and to her, subject to the constraints inherent in her having her own lawyers. That is in effect how the practitioner described the request in his response letter. That is consistent with the correspondence from the Attorney General set out above and with the statements made by the Minister for Justice (mentioned below). Furthermore, we think that during the relevant period the practitioner regarded himself as under a request to do so. That is how he consistently presented the position in statements to the media.

190 On this subject, having regard to the whole of the evidence, we find relevantly that there was an informal arrangement reached between the practitioner and the government. This included, so far as the practitioner understood, that the practitioner in his capacity as a Queen's Counsel specialising in criminal law would, at the government's request, on a pro bono basis, offer legal advice and assistance to Ms Corby directly or by her Bali legal team, including (after her conviction) in relation to her appeal. It was understood that the services would include facilitating the provision of evidence that might be requested of the government.

Involvement of Mr Percy and Mr Davies

191 The involvement of these barristers has again only an indirect bearing on the issues in the case. Their involvement is important however to the extent the LPCC submits that the relationship of lawyer and client between the practitioner and Ms Corby was created through the agency of Mr Percy and Mr Davies (or in relation to the claim Ms Corby was a prospective client, was in part created through their involvement). It is important to record the other Perth barristers' involvement to the extent it sheds light on the issue of the practitioner's relationship with Ms Corby and with the government.

192 The practitioner says in his witness statement that shortly after he was contacted by the Attorney General, on his own initiative, he spoke to Mr Percy to see if he would be interested in joining him to 'assist the Australian government'. It seemed to the practitioner that Mr Percy's involvement would reinforce the message of support that the practitioner

was to convey. He says Mr Percy agreed to assist if he could. The practitioner said in his evidence that Mr Percy 'did not need much encouragement to come on board'. And later, that Mr Percy 'enjoyed the media situation'. The practitioner says they had very little discussion on the matter. He did not relay the details of his conversation with Mr Ruddock or the Justice Minister. Mr Percy and Mr Davies did not know what the practitioner had been asked to do by the Attorney General. He did not confide in them.

193 Counsel for the LPCC asked the practitioner why, on his version, when Mr Percy was approached to reinforce the message that the practitioner was to deliver, the practitioner did not tell Mr Percy what that message was. The practitioner said there were some politics involved - that he did not think that he was approached because of his abilities as a lawyer, but because of his history in the Liberal Party and that some discretion was expected.

194 Later in his evidence, the practitioner asserts that he had been asked by the government to intervene, in his capacity as a lawyer. Elsewhere in his evidence, the practitioner says that he told Mr Percy in general terms about the three objectives as recorded in his witness statement. We have mentioned the terms of Mr Percy's 2006 letter to the LPCC. Consistent with this, in his mid-2005 media statements and (in more qualified terms) in his oral evidence, Mr Percy said in effect that the government requested that he and the practitioner endeavour to assist Ms Corby in relation to her trial and (later) appeal. None of this is consistent with the practitioner's evidence of Mr Percy's role.

195 Counsel also questioned the practitioner as to why, on his version, he would need another QC to act as a go-between in the very narrow role that he says he was retained for, namely to communicate with the Bali legal team as to what evidence was sought and available. The practitioner’s response was that it was not the aspect of conveying information that Mr Percy was required for, but from the perspective of the government, being seen to be doing something to assist Ms Corby. In effect, Mr Percy was (without being critical or unkind) ‘window dressing’. This was a further instance where the questions asked were telling and the answers given unconvincing. The practitioner said in his solicitors' letter of 24 April 2007 to the LPCC that the role of Mr Percy and the practitioner was to act on behalf of the government and to provide assistance to Ms Corby's legal team, particularly concerning funding and access to evidence. He was not cross-examined on this.

196 In relation to Mr Davies, the practitioner says in his witness statement that he did not initiate the involvement of Mr Davies. He became involved at Mr Percy's invitation and is said to have done things on his own account by communicating with the Corby family and preparing draft witness statements in relation to the appeal. The practitioner said Mr Percy and Mr Davies had a great sense of justice and they took hold of the case and were 'off and running'. He does not recall the occasion when, according to Mr Davies, the practitioner expressed some disapproval at Mr Davies interviewing witnesses. On the evidence, this may have occurred when Mr Davies was in Bali on this task at the time of the practitioner's visit over the weekend of 3 June 2005 - 6 June 2005. The practitioner says in his solicitors' letter of 24 April 2007 to the LPCC that during this visit he saw Mr Davies 'on a few occasions'. Beyond this, and although the practitioner believed they were acting beyond his brief, he did not speak to them about their doing so.

Mr Percy and Mr Davies' visit to Bali on 27 May 2005

197 The LPCC's case is that the practitioner was retained on 29 May 2005 by reason of the conduct of Mr Percy and Mr Davies in effect agreeing on his behalf that he be retained by Ms Corby to assist on the appeal.

198 On about 27 May 2005, Mr Percy, Mr Davies and Mr Voon (an Australian solicitor who speaks and reads Indonesian), went to Bali. Mr Davies went on private business. Mr Percy went at the invitation of the Queensland solicitors representing Mr Nguyen, one of the 'Bali 9', to give advice as to the representation Mr Nguyen was receiving from a Bali law firm and on the matter generally. In the course of their visit, they met with Ms Lubis and Mr Rasiah. They discussed a number of matters concerning Ms Corby's trial and appeal.

199 Mr Percy's account of the meeting is that in the course of his conference with the solicitors for Mr Nyugen, he was told that the sentencing of Ms Corby was taking place. As a matter of interest he attended at the court although he did not stay until the end of the sentencing. Mr Percy says that later that day he received a call from Mercedes Corby, the sister of Ms Corby. She said in effect that she knew that Mr Percy had offered his help in the past and the family would like to take it up. Mr Percy later received a call from Mr Rasiah. This led to the meeting on the following day between Mr Percy, Mr Davies, Mr Voon, Ms Lubis and Mr Rasiah. It lasted for an hour, maybe a little longer. Mr Percy says at the meeting they talked generally about the trial, the

evidence against Ms Corby, her solicitor's impressions of the verdict and the sentence, and what might be proposed in terms of an appeal. He thinks Mr Davies took some notes which would provide a more detailed account than he could recall, in the witness box.

200 Mr Davies prepared a memorandum of the meeting which appears to set out in considerable detail the various matters discussed. The headings include 'Decision and Appeal Process', 'Statute and Criminal Liability', 'Funding', 'Our assistance', 'AFP & Customs', 'Evidence and Trial Aspects'. Under 'Our assistance' there are bullet points: 'We have offered whatever assistance we may with the grounds of appeal', 'Discussion of any role for us and how we may be of assistance. We offered input and cooperation and they please[d] if we can assist.'

201 Mr Percy was questioned about the memorandum. He thought it may have comprised skeleton notes which may have been improved on after the meeting. He said that he thought they had discussed the decision and appeal process and the nature of the offence, but he could not recall whether the other subjects were discussed. Concerning the appeal, his evidence was that Mr Davies and he had said that if they were provided with a transcript of the trial including the final addresses they would have a look at it. He said that Mr Davies and he, sometimes with Mr Voon's help, had worked on a number of pro bono cases over the past decade. Asked whether their assistance was in identifying grounds of appeal he answered: 'If I could see any ... given the completely non-existent state of my knowledge of Indonesian law, but just at a general natural justice level or something like that. If anything leapt off the page at me, I'd be happy to give my two bob's worth.' In his later evidence, Mr Percy puts a rather higher value on the practitioner's and his contribution.

202 In his witness statement, Mr Davies says of the meeting on 29 May 2005 that he did not offer his services to, or receive any offer of engagement from, the Bali legal team, although he was ready to volunteer assistance if he could. He said in evidence he could not recall much about the meeting including whether Mr Voon was present or how long it took. He did recall that a copy of the reasons for decision was requested so that they could understand the reasoning of the judges 'to assist in any way we reasonably could'. At another point in his evidence Mr Davies was asked whether, as reported, the Bali legal team had agreed to send them a copy of the transcript. He said he could not remember what was proposed to happen when they got the transcript or what his role was to be.

203 Taken through the items in the memorandum, Mr Davies' repeated response was that he does not recall or he could not remember. The memorandum did not refresh his memory including as to his own contribution to the meeting. It appeared Mr Davies had not troubled to read his memorandum to refresh his memory in order better to assist the Tribunal. Mr Davies' evidence was that the memorandum was a 'composite' document as he put it, and by reason of its 'casual nature' and his inability to verify it from his independent recollection, he could not describe it as a 'comprehensive or accurate' record of what was discussed. It was composite he said because of its date and it was 'not really his kind of style'. He could not suggest who else might have contributed to it.

204 It seems clear enough to the Tribunal, and we find, that the memorandum constitutes a reasonably comprehensive and accurate record of what was discussed at the meeting. It might have been prepared from handwritten notes and details included after the meeting, until the time it was printed out and dated 31 May 2005 (the date it bears in handwriting). Its terms are consistent with Mr Davies' letter of 30 May 2005 (below). In our view it was clearly intended as a record of what had been discussed and we find that the subjects mentioned were in fact discussed. Our conclusion on the outcome of the meeting as regards the practitioner is set out below.

205 Both Mr Percy and Mr Davies were asked whether they had contact with the practitioner during their visit. Neither could recall. The practitioner did not recall any contact either. Mr Percy and Mr Davies were also asked whether on their return to Perth they discussed their visit with the practitioner. Both said they could not recall or (Mr Percy) that he could not say for sure. For his part the practitioner said he spoke to Mr Percy in a 'general sense' and that he was told what had taken place. We think the likelihood was that Mr Percy and the practitioner discussed the matter following their return to Perth. The practitioner had received the request from the government and would naturally want to be kept informed of what Mr Percy and Mr Davies were doing. He was, in an informal sense, the person responsible to the government for meeting its request that he assist Ms Corby.

206 Notwithstanding their lack of recall of any contact between them, it appears that Mr Percy in fact spoke to the practitioner from Bali. The practitioner was interviewed by a newsreader for a radio station on 30 May 2005. He was asked whether Ms Corby's supporters knew of the

government's offer of legal assistance, in the form of the practitioner and Mr Percy, during her trial. His response, being an excerpt, was: 'That's my understanding, yes. Tom Percy's in Bali and he's confirmed to me that the legal team - that's the Indonesian legal team - weren't aware of it as well.' This indicates not only that Mr Percy had spoken to the practitioner from Bali, but, as would be expected, he had conveyed the substance of what had taken place at the meeting. That explains how the practitioner knew that the Bali legal team were unaware of the government's offer of legal assistance.

207 Mr Percy also spoke to a journalist from the ABC on 30 May 2005. The report includes: 'Tom Percy says he and his colleague Mark Trowell will look at copies of the judgment and other rulings and then advise on how they think Corby's appeal will go.' Mr Percy is then quoted about his meeting with the Bali legal team: 'They've made a couple of things known to me about how they were unhappy with the way the trial ran which would furnish possible grounds of appeal.' When questioned about this first comment, Mr Percy said he may have said something along these lines. He said he was not sure if he mentioned Mr Trowell's name. We think it almost certain that he did, given the reference to Mr Trowell was an indirect quotation and given the other statements made by Mr Percy at the time.

208 An hour or so after the practitioner's radio interview on 30 May 2005, Mr Percy was also interviewed on a South Australian radio station. The interviewer's first question was "Can you confirm at this point in time that both yourself and Mark Trowell will be assisting in the appeal of Schapelle Corby?' Mr Percy answered "Yes, I can". When cross-examined about this, Mr Percy acknowledged that he did say that, but then volunteered that he had not said that they ever 'acted' for her. The practitioner also sought to make this distinction between 'assisting on the appeal,' which he sometimes conceded, and 'acting for Ms Corby', which he denied. Mr Percy said he may have made his comments to the interviewer even if he had not first spoken to the practitioner about giving such assistance. He said given the practitioner had previously expressed an 'interest' in the matter, he thought that he was entitled to make the comment.

209 In the interview, Mr Percy then described his meeting with the Bali legal team and gave an explanation as to the appeal procedures in Indonesia. He explained that the practitioner was well connected in the region. Mr Percy had a background in criminal appeals and 'we've decided that I'll look at the papers once they formulate them in the next week or

two.' Asked about priorities, Mr Percy said that counsel for Ms Corby (we assume Ms Lubis) did not purport to be a top criminal lawyer and:

> … I want to take it to another level and I want to, together with my colleague Mark Trowell QC and our team, evaluate exactly what might have gone wrong, if anything, and what can be done better, if anything?

210 Questioned by Mr Hall about this comment, Mr Percy said he hoped that the practitioner would cast his eye over the transcript. He thought he was not committing him.

211 Asked next by the interviewer as to whether he would meet Ms Corby, Mr Percy said: 'I don’t usually meet with appellant clients of mine' and later: 'I don’t usually form a view about clients.' In this case he thought he could do what was necessary from Australia. He might meet Ms Corby on a later return visit but he did not think the appeal would warrant that. They would look at issues of the onus and standard of proof and if there was some impropriety found, their position was there should be a complete discharge. When cross-examined about whether he viewed Ms Corby as a client, Mr Percy said that he did not, and that what he meant was ‘even if she had been a client’. Pressed on the point, Mr Percy's evidence was if he was a lawyer for anyone, then it was for the Australian government, to see if there was anything meaningful that the practitioner and he could do to assist. The difficulty with that answer was immediately exposed. Mr Percy conceded that he had not spoken to anyone from the Australian government himself, nor received a letter briefing him, nor had he ever provided pro bono assistance to the government. In his evidence he comments: 'they usually can afford their own lawyers'. We think a fair reading of what Mr Percy told the journalist was that to the extent he was assisting in her appeal, he regarded Ms Corby as his client who he might, but would not necessarily, meet on his next visit. Whether she was in fact his client (as the LPCC asserts) it is not necessary to finally determine.

212 When cross-examined as to Mr Percy's interview and specifically whether Mr Percy had committed the practitioner to assist in the way he appeared to, the practitioner said:

> ... we were like trains on parallel lines ... He thought that his contribution was best made by in some way contributing towards her appeal. ... I've seen documents where Tom has said a lot of things which I don't agree with, and certainly don't accept, in some cases, his description. I had no intention whatsoever of assisting in the appeal. It just wasn't something that I intended to do, nor did I believe I was equipped to do so, because I wasn't an Indonesian lawyer.

213 The practitioner's constant reference to his not being able to assist because he was not an Indonesian lawyer nor expert in Indonesian law is not convincing. On a number of occasions (reports on 30 May and 14 June 2005) when Mr Percy was asked by journalists about what he could do to assist from Australia, Mr Percy gave a convincing explanation as to how a senior Australian criminal lawyer might contribute to the appeal proceedings in Bali. We have no doubt that Mr Percy genuinely believed that this was the position and that the practitioner and he were in a position to make that sort of contribution in relation to Ms Corby's appeal. As noted, the practitioner had been engaged to assist his 'client' Mr Rush, in relation to his proceedings in Bali, so clearly the practitioner believed he was in a position to make a contribution to proceedings there.

214 The involvement of the practitioner in the Australian 'team' assisting on the appeal is further evidenced in the request for, and the practitioner approving, an email letter by Mr Davies to the Bali legal team following Mr Percy and his return to Perth. The letter dated 30 May 2005 reads in part:

> You know we will do all we can to help you in any way you think is useful or relevant.
>
> You will recall that I will be the contact point for our team here in Perth. Please make available to us as soon as conveniently possible a copy of the reasons for decisions and your closing address.

215 The evidence shows that a draft of this proposed letter was emailed by Mr Davies to Mr Percy who responded for Mr Davies to 'run it by Mark first'. Some moments later it was forwarded to the practitioner. An hour later it was sent to 'Lily and Vasu'. In his witness statement, Mr Davies says he did not get the practitioner’s approval. Under cross-examination, Mr Davies said he thought it was sent without approval, because he 'speculated' that the practitioner was not there. In fact, the practitioner was prepared to concede that he probably did see the letter before it was sent. Asked as to his understanding of the practitioner's role, Mr Davies said that he understood the practitioner was representing a government Minister. Asked why if this was so Mr Davies would seek the practitioner's approval to the letter, Mr Davies said the practitioner was 'a leader in chambers, so he's concerned in aspects of the matter, and I'd been instructed to do that by Tom Percy.' Asked about the reference to 'the team' he said he meant himself, Mr Percy and Mr Voon. He said it did not include the practitioner. Mr Percy when asked said the 'team' referred to was Mr Davies, Mr Voon, himself, and 'possibly the practitioner'.

216 We have little doubt in these circumstances that in fact the practitioner did read the letter and signify some form of approval and we so find. We think Mr Davies' explanation that the practitioner was involved in its preparation or sending based only on his being 'a leader in chambers' is not credible. Given the request that the practitioner approve the letter and the related evidence we cannot accept the practitioner's claim that Mr Davies was not part of any team the practitioner was involved in. The practitioner was asked to approve the letter because, we find, he was in the sense described, responsible for the work of the barristers involved. We also find, on the balance of probabilities, that Mr Davies' reference to a team was intended to include the practitioner. It seems to us more likely, and we therefore find, that the practitioner, as the person whom the government had first approached in the matter to assist Ms Corby, would have been part of the 'team' offering this assistance.

217 On the following day, 31 May 2005, there is a further message from Mr Davies to Mr Percy. This conveyed the substance of Mr Davies' conversation with a Mr Wilson about the Corby family's concerns as to the Bali legal team signing up Ms Corby for the appeal. Mr Davies raised the question of their 'engagement'. Showing some prescience in the matter he asked: 'Do we act for the girl [Ms Corby] or the family?' It appears that email, which the practitioner acknowledges he saw, led to the practitioner also speaking to Mr Wilson, because the practitioner sent an email later that evening to Mr Percy saying they 'must talk' about what was said between Mr Wilson and the practitioner. On the practitioner's evidence, Mr Wilson's expressed concern was that Ms Corby was 'surrounded by a bunch of crooks'. Mr Percy does not recall whether the practitioner and he had in fact spoken about this conversation with Mr Wilson. As he recalls also, Mr Percy did not respond to Mr Davies' query.

218 Questioned about his email to Mr Percy, the practitioner accepted that he probably spoke to Mr Percy about the matter. The content of this email and its imperative language is, we think, a clear indication of the level of communication which took place between the practitioner and Mr Percy. There is no obvious reason why he would need to speak to Mr Percy about his follow-up conversation (Mr Davies had already spoken to Mr Wilson), with a member of Ms Corby's family, unless the practitioner and Mr Percy were working closely together in their contribution to the appeal. The practitioner's explanation in evidence that he felt Mr Percy needed to know who he was dealing with supports rather than diminishes the strength of this inference. In fact, at this point in his evidence, the practitioner conceded that in the press he probably

continued to present himself with Mr Percy as a team, meaning, in relation to the appeal.

219 The evidence shows that at this time the practitioner also spoke to another member of the Corby family, Ms Younger. The practitioner's evidence was that she expressed similar concerns to Mr Wilson's.

220 All of this evidence, and the evidence of what followed, is quite inconsistent with the practitioner's claims in evidence as to:

1) his role being limited to a go-between in relation to the Bali legal team's requests for evidence; and

2) Mr Percy being 'window dressing' so the government might appear to be doing something.

Press release - events of early June 2005

221 Also on 31 May 2005, the practitioner prepared and issued a press release including:

> In fact at this difficult time they [Ms Corby's supporters] should not be speaking to the media at all.
>
> I am referring to the non-lawyer members of her 'team'.
>
> [This case] is about the tragic conviction and imprisonment of a young woman that we are desperately trying to save.
>
> It [adverse reaction to the verdict] makes the task of defending Schapelle Corby more difficult.
>
> It jeopardises her appeal.
>
> It is the Australian government that has obtained my services (and that of Tom Percy QC) and offered them to Schapelle Corby who for some unknown reason was not informed of that offer made months ago by the Attorney General to her Queensland lawyers.
>
> This young woman deserves the best chance we can give her.

222 The practitioner signed off the release as 'Mark Trowell QC'. He emailed this to Mr Percy the following day.

223 The release (and several emails between the barristers in Perth) was not produced to the LPCC by the practitioner in accordance with the LPCC's summons to produce relevant documents. It was a remarkable omission. However, we accept that it was an oversight. Notwithstanding

the LPCC's submissions on the matter, we are not prepared to draw any adverse inference from this.

224 Questioned about his press release, the practitioner said he did not speak to anyone before issuing it to 'a few media outlets'. His authority to do so was the general authority he had from the government. That he had not stated in the release that he spoke on behalf of the government was a matter of discretion; his acting for the government was 'not something to go trumpeting around'. He accepted that his issuing it and identifying himself in it as a Queen's Counsel would give weight to the comments. The practitioner's evidence was that the reference to 'we' was a reference 'hopefully to all Australians'. He did not accept that the reference to the government obtaining his services and that of Mr Percy QC and offering them to Ms Corby necessarily meant as lawyers. The reference to his services 'meant what he had been asked to do by the government'. The practitioner's assertion at this point in his evidence, that as Ms Corby was not his client he could make whatever comments he liked without consulting her, is considered in Part III of these reasons.

225 Several of these answers were again evasive and not at all convincing. In fact, the practitioner repeatedly 'trumpeted around' to the media, including in this press release, that he had been approached by the Commonwealth government to offer his services to Ms Corby. Indeed, the inference fairly to be drawn from the language used: 'It is the Australian government which has obtained my services (and that of Tom Percy QC)' and the timing of the press release, being immediately following Mr Percy's contact with the Bali legal team and Mr Percy's media interviews, is that the practitioner was here deliberately asserting his role in the Corby proceedings. The reference to 'we' more naturally refers to the lawyers representing her, including the author of the release 'Mark Trowell QC'. The reference to the government making the services of Tom Percy QC and the practitioner available to Ms Corby clearly means legal services. In the practitioner's closing submissions on the press release, it is suggested that the statements were merely comments and opinions not made by the practitioner as Ms Corby's lawyer, but those which any member of the profession might make. On the contrary, on a fair reading of this document, we think the practitioner is in substance asserting by this press release that as one of the 'legal' members of Ms Corby's 'team' he was in a position to speak to the media, whereas non-legal supporters were not.

226 We mention that this press release is the first of the eight disclosures the subject of the application. For reasons explained, it does not fall to be considered in that context.

227 On the following day, 1 June 2005, shortly before his trip to Bali, the practitioner spoke to members of Ms Corby's family, we assume to advise them of his visit. Also on this day it appears that Ms Corby spoke by telephone to Mr Davies. He could not recall whether this was in relation to his visits to Bali. The practitioner says he was not aware of this call. Mr Percy was.

228 Parts of the press release were quoted in the media. In a media report on 1 June 2005, Mr Rasiah is quoted as saying that he and Lily Lubis had meet with Mr Percy but would not be giving up control of the case: 'We will consult them, but no orders sorry.' The practitioner is quoted as responding that Mr Percy and he had never intended to represent Ms Corby at her appeal nor to "issue orders". Further, 'Mr Trowell … says 'the barristers' [Mr Percy's and the practitioner's] expertise, advice and contacts would be of value to the appeal.' There is then a direct quote: 'We have been promised various materials relating to the conduct of the trial, but as yet have received nothing.' The practitioner challenged the former statement as not being a direct quote. He was not sure he said it in those terms. It is an indirect quote followed by a direct quote bearing on the same subject. Therefore, in the context of the article and given similar statements by the practitioner regarding his role in contributing to the appeal, we find that the practitioner made a statement to this effect.

229 Also on 1 June 2005, the practitioner spoke by telephone to a radio interviewer. Comments made in this interview are the second of the eight media disclosures complained of in this application. We find that statements to this effect were made, as the practitioner admitted in evidence. However, for reasons explained below, they do not fall to be considered in that context. Asked about various matters, the practitioner answered:

> ... it was the Australian government, the Federal Attorney-General who approached me and Tom Percy to offer assistance to Schapelle Corby [and] the Attorney-General's office which has provided the funding for the Indonesian lawyers.

230 And later:

> When the Attorney-General approached me, he said, "Look, I'm concerned about her welfare. Would you be prepared to help?" So I got Tom Percy on board and we're both in, not a problem. She's an Australian national in trouble in a foreign country, more than happy to help.

231 The practitioner also used the opportunity again to dispute that he was 'issuing orders'. He was asked by the journalist whether he had spoken to Ms Corby's so that 'you are now with your colleague from Perth, acting on her behalf'. The practitioner responded:

> ... But on the one hand we have reports saying, "Well, we are happy to accept the advice of Percy and Trowell, but they are not going to give us orders and we are not going to just do what they want us to do." Now, I made it perfectly clear, this wasn't a case of giving orders. I also made it clear it is not about the lawyers, it is about Schapelle Corby. We don't want to get dragged into a situation where there is a competition between her legal representatives as to what should or shouldn't be done.

232 And a little later:

> We have been promised a whole range of materials about what happened at the trial. So far, we haven't got them. They say, "Trowell and Percy, yes they can be part of a group of people we take advice from." Well okay, we're big boys, we can take that, it is not about our egos.

233 Towards the end of the interview the practitioner added the provocative statement that the spokesman for the Bali legal team, Mr Rasiah, was not a lawyer and that the practitioner thought only the lawyers, himself included, had something to contribute. This appears to have led to Mr Rasiah's outburst on 2 June 2005 (below).

234 Cross-examined about these statements, the practitioner maintained that whilst they reflected the position that Ms Corby was the ultimate beneficiary of his support that did not mean that 'he was acting for her'. It was put that these statements reflected the position that Mr Percy's and the practitioner's services were part of what was being offered by the government. The practitioner denied that: 'what was being offered was a chance for her team to have a direct line of communication to the government to improve Corby's position.' Asked whether the 'competition between her legal representatives' was a reference to competition between the Bali legal team, and Mr Percy and the practitioner, the practitioner seemed to acknowledge this, but said this was a telephone conversation made at a time he was preparing for court and it reflected a poor choice of words: 'I was never her legal representative'. Mr Hall asked the practitioner why, when directly asked whether he was now acting for Ms Corby, he did not simply say 'no'. There was no satisfactory answer.

The practitioner denied he was implying that Mr Percy and he were acting for Ms Corby. We think it fair to acknowledge that at no point in these media statements did the practitioner refer to Ms Corby as his client; although neither did he refer to the government as his client.

235 When cross-examined about the 'range of materials' he had referred to, the practitioner explained that this was the transcript of the trial and the decisions of the judges. He said this was something that Mr Percy and Mr Davies had an interest in and if he could 'help that along' he would. The government's purpose in involving him was ultimately to benefit Ms Corby. Asked about the reference to 'the group we take advice from' he denied this conveyed that they were prepared to give advice to the Bali legal team. He denied also that in requesting the material, he was giving the impression it was to assist Ms Corby.

236 We think the practitioner's evidence quite unconvincing. It appears reasonably clear to us that the role the practitioner and Mr Percy assumed was to offer their assistance as senior criminal barristers in the preparation or finalisation of the appeals, including facilitating any requests for evidence. The practitioner appears to have taken the view that this assistance did not constitute acting for Ms Corby such as to attract any duties owed by him as a lawyer. We think that distinction is misconceived.

237 There was a report in the Western Australian on 2 June 2005, the day before the practitioner left for Bali, apparently following the interviews with the practitioner and Mr Percy. There is a reference to the Bali legal team making a 'scathing attack' on Mr Percy and the practitioner. It quoted Mr Rasiah saying the Bali legal team was considering rejecting the help of the practitioner and Mr Percy because of public comments they had made about the case: 'All we wanted was for them to help us'. And: 'What is the point of attacking local lawyers? Attacking me?' The article also includes a response from Mr Percy:

> Percy … said he was not aware of criticism from Corby's Bali legal team. "They expressed not the slightest reluctance to us," he said. "... The last time we heard from her lawyers, they were very enthusiastic". He and Mr Trowell had spoken to Corby's sister, Mercedes, and had a line of communication with Corby. The pair were waiting on a transcript of the judgment last Friday and were prepared to advise her Bali lawyers on tactics, evidence and presentation of the case. "We're only here to help," [Mr Percy] said.

238 Questioned about this, Mr Percy said he believed the 'line of communication' was a reference to Mr Davies' telephone conversation

with Ms Corby on 1 June 2005. The reference to 'tactics, evidence and presentation' was the practitioner's and his response to journalists suggesting they knew nothing about Indonesian law and therefore had nothing to contribute.

239 This newspaper report led Mr Davies to suggest to Mr Percy and the practitioner on 2 June 2005, both a letter to the Bali legal team regarding what 'we' were endeavouring to do, and arranging for Ms Corby to direct the Bali legal team to cease public comments. In response to this proposal, the practitioner 'absolutely agree[d]'. Questioned as to his 'agreement', the practitioner suggested this was entirely a matter for Mr Davies. Further, he denied that the 'we' referred to Mr Percy, Mr Davies and him. However, it seems perfectly obvious to us on this and the related evidence that the practitioner was equally involved in the assistance offered and in fact the reference in the email to 'we' did refer to those three Perth barristers.

240 We mention some further media statements of Mr Percy relevant to the role of the Perth barristers. In a radio interview on 14 June 2005, Mr Percy was asked what he and the practitioner could 'bring to the table' despite neither being experts in Indonesian law. He replied:

> Experience of about 50 years, experience in difficult appeals, knowing what grounds are likely to get up, which are completely fatuous, ones which we have our own understanding of as how to run them, how to phrase them, the way in which tactically you can run the appeal. There's a number of things which are somewhat intangible sometimes but sometimes quite palpable.

241 It was suggested this was in Australian law. He responded:

> I think these things transcend boundaries. We might not know the case law over there ... I've worked with international lawyers at a number of levels and everyone can bring their own respective wisdoms to bear in relation to appeals. It's not like we are saying we know the ins and outs and the technicalities and loopholes, it's just bringing an appeal in relation to fresh evidence and in relation to the onus and standard of proof, to see whether they got it right over there. There's some suggestion that they didn't.

242 Mr Percy supported this position under cross-examination. As mentioned earlier, this seemed to us a reasonably persuasive explanation as to what contribution the Perth barristers, including the practitioner, understood they might make to the appeal and what contribution they might in fact have made. We infer from some of the practitioner's comments to the media, for example, reference to the barristers' expertise

and experience and the practitioner's acceptance of a brief to act for Mr Rush, that the practitioner also shared this view as to the nature and value of that contribution. Mr Percy said those contributing to the 50 years experience were the practitioner, himself and Mr Davies. Mr Percy suggested at this point they were not advising Ms Corby, although she would receive the indirect benefit of their advice. He referred to Mr Nguyen as the 'ultimate beneficiary' of his advice although he was never acting for him, then volunteered: 'Trowell and myself were never acting for Corby'. For his part, the practitioner said that he did not know Mr Percy had said this to the journalist. Mr Percy could not speak for him. He had a different role from Mr Percy. The problem with this evidence is that there is nothing in any of the contemporaneous accounts which supports it and a great deal in which the practitioner represents himself as proposing to work with Mr Percy on the appeal.

243 We mention finally in this context that Mr Davies was described in an ABC media story on 30 May 2005 as being 'a junior barrister to the two QCs', being the practitioner and Mr Percy. Mr Davies later so described himself in an email on 10 June 2005. This was apparently to a witness he was proofing in the matter. He said he could not send on the further information she provided 'except to my two leaders Tom Percy QC and Mark Trowell QC.' Mr Davies at first accepted that this meant Mr Trowell was his leader in relation to the Corby matter. Asked to repeat his answer, Mr Davies then said he meant his two leaders in chambers. We reject this suggestion. Shortly thereafter he said he had sent it to the practitioner to keep him informed of what he was doing as he had been asked by Mr Percy to keep the practitioner informed of emails he was sending on the Corby matter.

Conclusion - did Ms Corby become a client of the practitioner on 29 May 2005?

244 There are several observations we would make about the evidence concerning the involvement of Mr Percy and Mr Davies and their communications with the practitioner. First, we accept that there was a degree of informality about the practitioner's retainer by the government. This is seen in the practitioner's involvement of Mr Percy and Mr Davies without reference to his 'client', the government. Second, we accept that this informality is reflected also in the extent to which the practitioner and Mr Percy (and Mr Davies) regarded themselves as acting with a measure of independence in their joint endeavour to assist Ms Corby. Third, however, we do not accept the evidence as to the limited communications between Mr Percy and the practitioner. We think it most unlikely given

their physical proximity, mutual friendship, the degree of publicity the case was generating including in relation to the Perth barristers' involvement, and their common objective in responding to the government's request and assisting Ms Corby, that these lawyers did not have considerably more contact with each other than their evidence suggests. We think it very likely, and we therefore find, that the 'team' that each of the barristers talked about included the practitioner. We think the practitioner tried to distance himself from the work and public statements of Mr Percy in order to avoid the implications of what Mr Percy told the media about 'their' assistance in the appeal. Similarly, we think the practitioner sought to distance himself from the work and email communications of Mr Davies to diminish the implications arising from these as to the practitioner's involvement in the appeal. We have set out the evidence on these matters in some detail because we are conscious that in this respect we are making findings contrary to the evidence of the practitioner and to some extent Mr Percy and Mr Davies.

245 The issue remains whether the statements and conduct of Mr Percy and Mr Davies in their meeting with the Bali legal team on 29 May 2005 operated to create a relationship of lawyer and client as between the practitioner and Ms Corby.

246 In relation to this issue we mention the following. First, the evidence shows that the Perth barristers did not plan to meet the Bali legal team during their visit to Bali. They were contacted by Mercedes Corby, we assume on behalf of Ms Corby, in relation to Mr Percy's offer to assist, and asked to discuss the matter with the Bali legal team. They then met. Second, we think in those circumstances the Bali legal team had implied authority to retain the Perth barristers, including the practitioner, to assist on the appeal. This was to be at no cost to Ms Corby. Third, we think Mr Davies' email letter to the Bali legal team following their visit and its reference to the 'team' was intended to include the practitioner and that the practitioner by some means approved that letter. Fourth, there was no evidence to suggest that prior to his visit Mr Percy had some form of formal authority to bind the practitioner to a relationship with Ms Corby. Fifth, however, the fact that the relationship of barrister and client may be created informally, without the need to show a contract, means also we think that it might be created by someone such as a solicitor (or as in this instance, another barrister) on behalf of a barrister, without showing that such person had formal legal authority to contract on behalf of the barrister. So for instance, the evidence of both the practitioner and Mr Percy reflect the position that through the agency of the practitioner, they regarded Mr Percy as engaged by the government.

247 However, the relationship between lawyer and client must still be capable of being regarded as 'consensual'. The issue is whether the circumstances of the meeting between Mr Percy and Mr Davies and the Bali legal team, taken together with Mr Davies' follow-up letter approved by the practitioner, may be said to have constituted an agreement or understanding on the part of the participants that the practitioner was to be engaged, necessarily, in the circumstances, with Mr Percy and Mr Davies, on behalf of Ms Corby to provide legal services with respect to her appeal. There is indirect evidence that the Bali legal team at the meeting did agree to accept the barristers' offer of assistance: see Mr Davies' memorandum and email letter dated 30 May 2005 and Mr Percy's statement on 2 June 2005 that the Bali legal team were 'very enthusiastic'. The real difficulty lies in the lack of direct evidence from either Mr Percy and Mr Davies, or from the Bali legal team, that there was any intention to include the practitioner in the offer of assistance.

248 On this state of the evidence we are not prepared to find, on a balance of probabilities and having regard to the requirements of ***Briginshaw***, that the practitioner's engagement by Ms Corby was effected by Messrs Percy and Davies at the meeting on 29 May 2005. We do not understand that their involvement at this meeting could add to the case of Ms Corby being a prospective client in these circumstances; that is, we think the cumulative evidence to this point is also insufficient to establish that relationship.

The practitioner's visit to Bali on 3 June 2005 - 6 June 2005

249 The LPCC's alternative case is that Ms Corby retained the practitioner either during the practitioner's meeting with her Bali legal team on 3 June 2005 or during the practitioner's meeting with Ms Corby on 6 June 2005. It is again necessary in these circumstances to have regard to the practitioner's evidence tested against the accepted facts, the contemporaneous documents, the practitioner's response letter and the probabilities.

250 On about 27 May 2005, a member of staff of the Department of Foreign Affairs asked the practitioner whether he was still prepared to assist. The practitioner indicated that he was. The officer advised that Ms Corby had asked to see Mr Percy or the practitioner. This is the sequence as the practitioner describes it in his evidence. At this time also, DFAT referred to the practitioner an offer of assistance from Mr Hutapea, a senior lawyer from Jakarta. Mr Hutapea had offered to assist the Corby legal defence efforts on a pro bono basis through the Australian

government, he having heard that it 'had made available 2 QC's to assist with the ongoing defence of the case': see email dated 31 May 2005 to the Australian Embassy Officer forwarded to the practitioner. In evidence, the practitioner disputed this characterisation of what the government had offered but said he nevertheless put Mr Hutapea's name forward without correcting this (apparent) misconception.

251 The practitioner then made arrangements to visit Ms Corby in jail in Bali. In the practitioner's witness statement he said his sole purpose for agreeing to see her was to reassure her that the government had not abandoned her and to re-assure her that it was interested in her fate.

252 We describe the practitioner's visit to Bali and the events immediately following his return by reference to the sub-headings from the practitioner's witness statement.

Practitioner's meetings with Bali legal team on 3 June 2005

253 In his witness statement the practitioner says that another barrister, Mr Laskaris, then working as his junior on a case in Perth, asked to accompany the practitioner to Bali. The practitioner says in his witness statement he was happy for the company, but Mr Laskaris 'was not essential to the trip nor was he in a position to offer legal assistance because like me he was not admitted in Indonesia or familiar with the law in that jurisdiction'. The implication from the way this is expressed, confirmed in the practitioner's oral evidence, is that Mr Laskaris was not accompanying him to Bali as his junior in relation to the Corby matter.

254 This account of Mr Laskaris' involvement appears unexceptional. In our view however, it cannot stand when regard is had to what the practitioner stated about Mr Laskaris' status at the time and the probabilities of the matter. In the practitioner's response letter his solicitors say: 'Together with Philip Laskaris as his junior, Mr Trowell traveled to Bali on the long weekend of 3-6 June 2005'. It is difficult to read this as other than Mr Laskaris went as his junior in relation to Ms Corby. So much was admitted in the practitioner's response. Asked why, if this account was wrong, he did not correct this version in his response letter, the practitioner said in effect that it did not appear to him to be important. That answer again does not provide a satisfactory explanation. In his later solicitors' letter dated 24 April 2007 to the LPCC the solicitors say 'Mr Laskaris agreed to assist our client in the matter' (he was not cross-examined on this).

255 It appears Mr Laskaris accompanied the practitioner on all his professional engagements in Bali over the long weekend. In both his response letter and his witness statement, in the practitioner's description of their meeting with Ms Corby and what was said to her, the practitioner constantly refers to 'we', meaning Mr Laskaris and himself. He specifically says that Ms Corby told Mr Laskaris and him that she knew that 'they' could not represent her in Indonesia. The practitioner would be unlikely to have so described matters if Mr Laskaris was with him at the prison merely as a travelling companion. Mr Laskaris was interviewed immediately after the visit and spoke about 'their' visit and working with the practitioner.

256 Moreover, in the practitioner's letter of 21 June 2005 to Mr Hutapea, the practitioner says '[Mr Rasiah] raised that issue with my junior Mr Laskaris and me when we visited Bali a few weeks ago.' We mention also, although it carries limited weight, that the letter from the Attorney General of 10 June 2005 commends the practitioner 'and his junior Mr Laskaris'.

257 Mr McCusker in his closing submissions said of Mr Laskaris: 'He's been described as a junior in the sense he was a junior because he was junior, not only in years and in terms of practice, but also he often did act as his junior in trials, I understand.' That explanation does nothing to allay our concerns.

258 Having regard to the evidence, we think it probable and find that the practitioner held out and regarded Mr Laskaris as his junior with respect to his dealings with Ms Corby and the Bali legal team over the long weekend of 3-6 June 2005.

259 It seems to us improbable that if the practitioner was seeing Ms Corby merely as the government's messenger, in effect to pass on the government's message of support, that he would 'arrange for' (per his statement) Mr Laskaris to accompany him or that Mr Laskaris would, at his cost, have agreed to travel to Bali in the role of a messenger's companion.

260 In his witness statement, the practitioner says that on the morning of his departure, he spoke on the telephone to Mr Rasiah who said he did not want the practitioner to come to Bali. The practitioner says he responded that he had been asked by Ms Corby to meet him and it was his intention to do so. The practitioner says he does not recall who initiated the call. It seems likely that the practitioner did so. It is not apparent otherwise how

Mr Rasiah would know that the practitioner and Mr Laskaris were coming to Bali to see Ms Corby. That call would also explain how Mr Rasiah knew the time of the practitioner's arrival in Bali and was there to meet him.

261 This conversation with Mr Rasiah is put this way in the practitioner's response letter: 'Mr Rasiah endeavoured to persuade Mr Trowell not to visit Bali. The indication to Mr Trowell was that Mr Rasiah was desperate to prevent Mr Percy or Mr Trowell from giving advice concerning Ms Corby's appeal because he saw them as a threat to his control over Ms Corby'. This statement implies as the purpose of the practitioner's visit his giving advice to Ms Corby in relation to her appeal. This paragraph is not included in the practitioner's witness statement. This omission, taken with the other changes we identify from his response letter and the evidence generally, is because, we infer, faced with the charge that Ms Corby was his client the practitioner sought to diminish his role as an adviser on the appeal.

262 On the evening of their arrival (Friday, 3 June 2005) the practitioner and Mr Laskaris were met at the airport by Ms Lubis and Mr Rasiah and invited to dinner. The practitioner says that it had not been his intention to meet them in Bali. This seems a little odd, given the practitioner's repeated claims in evidence that his primary role was to facilitate requests for evidence from the Bali legal team. Moreover, he was carrying the proposal from Mr Hutapea, forwarded by DFAT, that Mr Hutapea be involved in the appeal. In a radio interview after their return to Perth, Mr Laskaris described their purpose as persuading the Bali legal team to bring in a senior appellate lawyer from Jakarta.

263 In his witness statement, the practitioner says that at the dinner, when he raised the subject of an appeal, Mr Rasiah said the appeal would only be resolved by the payment of money to lawyers and judges and that the government would need to use its political influence. The practitioner says he informed Mr Rasiah that the Australian government would never pay bribes nor use its political influence to interfere with the legal process. The practitioner also raised the subject of assistance from a senior advocate from Jakarta, mentioning the name of Mr Hutapea. He invited Mr Rasiah to detail any requests for assistance and he would convey them to the Justice Minister. When Mr Rasiah said he did not want the barristers to visit Ms Corby in prison in his absence, the practitioner says he explained that they were not visiting her as lawyers to discuss her case or give any legal advice, but simply on behalf of the Australian government to see what it could do for her.

264 The account of the discussions concerning the appeal at the meeting in the practitioner's response letter is quite different, the differences being significant. It is there said: 'Mr Trowell was anxious to discuss the appeal with a view to coming to terms with the extent to which any assistance might be provided.' The practitioner's evidence on this aspect of the meeting was confusing. He was asked first whether he had been anxious to discuss the appeal. He responded: 'Didn't matter to me, because they had it, I assumed under control, and it wasn't part of my brief to prepare the appeal.' This was inconsistent not only with his response letter but his earlier media statements in which he had complained of delays in receiving the transcript from the Bali legal team. The practitioner then continued: 'Of course I was interested.' When the relevant passage in the response letter was put to him, the practitioner said: 'Well … maybe I thought I was anxious in 2005. I'm not so sure of that now.' Questioned later by the Tribunal, the practitioner confirmed the effect of his statement in his response letter. In a later conversation with a journalist on 22 June 2005, the practitioner said in relation to this meeting: 'I kept pushing them to tell me what they saw as the best grounds of appeal.' In the practitioner's solicitors' letter to the LPCC dated 24 April 2007, the practitioner says: 'Mr Rasiah said to the practitioner he would welcome any help and would send through [to the practitioner] the appeal papers.' For reasons earlier expressed, we think the practitioner's account of the matter in his response letter a much more reliable record of events and of his state of mind than his evidence three years later.

265 Questioned by the Tribunal, the practitioner said that at the meeting he had not asked for the transcript of the trial because he was aware at that time that Mr Percy had requested this. Contrary to this, Mr Percy's evidence was that although he did not recall what the practitioner told him following the practitioner's visit, he added: 'It's just that we were going to get the transcript hopefully.'

266 The other matters mentioned in the witness statement concerning the meeting are addressed in the response letter, except, significantly, there is no mention of the practitioner explaining to Mr Rasiah the limited purpose of their visit to Ms Corby ('not as lawyers'). This seemingly self-serving evidence appears at odds with his evidence of his 'animated' conversation with Mr Rasiah on the previous day, when he told Mr Rasiah that he was visiting Ms Corby, at her request, whatever Mr Rasiah's objections. There is nothing in the practitioner's subsequent media reports, including the report immediately following their meeting, which suggests he was 'not visiting her as a lawyer to discuss her case or give any legal advice'. With reservations, we are prepared to accept the practitioner's evidence that the

statement was made, but only to answer Mr Rasiah's objection. Having regard to the other evidence, we do not think it reflected the practitioner's state of mind.

267 On Saturday 4 June 2005 the practitioner spoke to a journalist with The Sunday Times. This included a report on the practitioner's meeting on the Friday:

> Mr Trowell told the Sunday Times last night, "Her legal team has given us a shopping list that they want me to present to the Australian government. It is a list of evidentiary matters that they want to explore. Mr Trowell said he had frank discussions with the legal team. "Issues that may have divided us have been ironed out."

268 We mention that statements alleged in this conversation with the journalist (not here quoted), published on the following day, constitute the third of the disclosures the subject of the application. These statements, admitted, were as to the request for evidence, that the performance of the Australian police and customs had been first rate, that once the appeal was lodged it could not be changed, that the practitioner had arranged an advocate from Jakarta to assist Ms Corby and that Ms Corby faced the possibility of losing her life. For reasons explained below this disclosure does not fall to be considered in that context.

269 The practitioner was questioned about this report. He said that he regarded the problems as having been 'ironed out', notwithstanding his evidence as to the request for bribe money, because he thought that he had got the message across that the government would not be party to that purpose. He did not recall what specific 'problem' it was he was referring to. He did recall: 'There had been unpleasantness in the media, mostly from Vasu Rasiah, who resented any intrusion into the case which he controlled'. We believe, having regard to the evidence of the dispute in the media on the subject immediately preceding the practitioner's visit, that 'the problem' was the role of the Perth barristers in assisting on the appeal. The practitioner said that the request for a 'shopping list' of items of evidence was made orally at the meeting on Friday 3 June 2005. Asked what authority he had to disclose that request from Ms Corby's lawyers to the media, the practitioner said that Ms Corby was not his client, he was not part of her legal team and further, the fact that requests for evidence had been made was already in the public domain.

270 The practitioner also spoke to the ABC on Sunday 5 June 2005. The report includes: 'Mark Trowell says he is happy to offer assistance to the legal team drafting an appeal against her [Ms Corby's] 20 year sentence

for drug smuggling.' The practitioner denied making the statement which he said was not a direct quote. Given the extent to which he is quoted in the report, the relationship of this statement with these quotations and the fact that the statement is an indirect quote that is consistent with other comments to the media by the practitioner, we think it probably was made. He was taken to a statement which was a direct quote: 'I want to listen to what she has to say. I want to reassure her that her team that includes both the Queensland lawyers, that includes the Indonesian lawyers, that we're all trying to help her.' The practitioner denied that the reference to 'we're' included him as part of her team. We think this again strains the ordinary meaning of the passage.

271 The practitioner says in his witness statement that, on the following day, he rang Senator Ellison, the Minister for Justice, and informed him of the meeting and Mr Rasiah's suggestion of the government providing the money for bribes and its use of political influence. The practitioner says he was told to reject the proposal in the strongest terms. They agreed it was in the interests of Ms Corby and the Australian government to publicly express confidence in the integrity of the Indonesian justice system. This conversation is not referred to in the practitioner's response letter. The practitioner said he had recently been reminded of the call by Senator Ellison.

272 Asked about the matter by the Deputy President, the practitioner said that he cannot recall whether he passed on the oral request for evidence to Senator Ellison. Asked why he did not do so when he later conveyed the substance of the draft letter to the government, or some time thereafter, the practitioner said that: 'the priority was the attempt to shake [the government] down for money.' On the evidence this appears to have been the practitioner's focus rather than that of the government which appears to have done nothing about Mr Rasiah's suggestion. In fact the only reference to the practitioner doing anything in the nature of assisting in the provision of evidence from the government appears in his letter to Mr Hutapea of 21 June 2005, after the appeal had been lodged. This evidence suggests, as does the response letter, that the practitioner's role as a 'go-between' assumed much greater significance in his evidence than existed in fact.

273 Senator Ellison was interviewed on 6 June 2005. We are prepared to accept the transcript of the interview at face value although there is some doubt as to its exact provenance. It is some evidence of how a Minister of the government, speaking on its behalf, saw the government's position and the role of the practitioner. The interviewer asks:

> [O]ne of the two QCs now working on [the] defence, Mark Trowell, a close friend of yours, told us here at Sky News today that he's asked you for various pieces of information to help with her appeals, what information is he seeking and will you be helping?

274 Senator Ellison answers:

> Well, I understand Mark Trowell's in Bali at the moment and has not yet returned to Australia. I spoke to him before he left and indicated that the government stood ready to assist in whatever way it could within the confines of the law, and he indicated that he would talk to me on his return. Both he and Tom Percy are eminent criminal QC's, I know them both well ... and we're very happy to see that they're now providing legal advice to the Corby team.

275 Shortly thereafter, he continues:

> Well that's a legal question you'd have to address to Mark Trowell and Tom Percy who are handling the appeal … the government doesn't involve itself in the running of the appeal.

276 The practitioner was asked about the first statement and whether he had said anything to Senator Ellison that would lead him to believe that the practitioner was providing legal advice to the Corby team. The practitioner answered: 'I wouldn't have thought so, because I never believed that I was.' As to the second matter, the practitioner said he had never said anything which would suggest to the Senator that the practitioner was handling the appeal.

277 Standing alone, this evidence of Senator Ellison's comments would not count for much on the issue of whether the practitioner's role was to provide legal advice to Ms Corby. It carries more weight however because it is consistent with other contemporaneous accounts, including from the practitioner.

Conclusion - did Ms Corby become a client of the practitioner on 3 June 2005?

278 We find that at the meeting of 3 June 2005 the practitioner in effect offered to provide legal assistance to the Bali legal team. He also suggested to the Bali legal team that it might wish to consider employing a senior advocate for the appeal and suggested Mr Hutapea. Further, the subjects discussed included the merits of the appeal, the evidence the Bali legal team sought from the Australian government and the financial assistance it sought. There were strong grounds to contend that, in the circumstances, these were matters which the practitioner was under a duty

to keep confidential. The issue on the application however, is whether this duty arose because what was said at the meeting constituted Ms Corby the client or prospective client of the practitioner.

279 The practitioner's evidence is that the sole purpose of his visit was merely to convey the government's message of support. After careful consideration, we do not accept that evidence because it is inconsistent with so much of the other evidence to which we have referred and to the probabilities of the matter which we have outlined. We think that he went because of Ms Corby's request to see a Queen's Counsel and pursuant to the government's request to offer her legal advice and assistance. However, the practitioner's evidence as to what Mr Rasiah said during the telephone call on 2 June 2005 and at the meeting on 3 June 2005, to the effect that he did not want the practitioner meeting Ms Corby, is not consistent with the Bali legal team dealing with the practitioner on the basis that Ms Corby was his client or prospective client.

280 On the state of the evidence we are again unable to conclude with the sufficient degree of conviction on the balance of probabilities, that the outcome of the meeting between the practitioner and Mr Rasiah and Ms Lubis was that there was some agreement or understanding that the practitioner was engaged on behalf of Ms Corby to assist in the appeal. On the practitioner's account of what was said there is not sufficient evidence to conclude that such was the intention, objectively determined, of those present at the meeting.

281 The remaining question in this context is whether the circumstances up to 4 June 2005 were such as to constitute Ms Corby a prospective client of the practitioner. There is much support for the LPCC's contention in this respect. The difficulty is the limited evidence of Ms Corby's attitude beyond her request to see the practitioner. In the end, we do not feel an 'actual persuasion', something firmer than a 'wavering finger', that Ms Corby was a prospective client at this point. We mention that this specific finding affects the third disclosure made on 4 June 2005.

Meeting with AFP, media and consular officials on 4 June

282 In his witness statement the practitioner says that on 4 June 2005 he met with the AFP Liaison Officer, the Australian Consul and media representatives.

283 The practitioner also refers to a meeting with a journalist who told him that she had a conversation with one of the District Court judges in Ms Corby's trial. The judge had told the journalist that he was aware of,

and upset about, Mr Rasiah's attempt to bribe the judges and prosecutors in the case. A similar statement is made in the practitioner's response letter.

284 In the course of being questioned about this conversation, the practitioner revealed that on the Saturday Mr Laskaris and he had invited the media in Bali for drinks at the house where they were staying, as he said, to find out what was happening concerning Ms Corby's case. Although the practitioner disputed that he was here seeking media attention, we think this fact is further evidence supporting our finding that the practitioner in fact sought out and encouraged media attention. In answer to a question from the Deputy President the practitioner said later that part of the purpose of his trip was to see and 'be seen with' Ms Corby.

Meeting with Michael and Mercedes Corby on 4 June

285 The practitioner says in his witness statement that Mr Laskaris and he also met with Mercedes Corby and her father Michael Corby on the evening of Saturday 4 June 2005. They spoke about the case and the problems the family were having with the Bali legal team. The practitioner says there was at this meeting no request made, nor did he offer, to provide legal assistance to Ms Corby or the Bali legal team. He said that the purpose was only to give some reassurance that the Australian government would do what it could to assist her.

286 The practitioner said under cross-examination:

> They wanted to ask me things ... about the appeal and I couldn't answer that because I just didn't know, and never did, and I told them that the Australian government had funded the Bali lawyers.

287 The practitioner was taken to a news report on 24 June 2005 in which the reporter states that: 'Mark Trowell has given an undertaking to Schappelle's family that he'll assist in any way possible. He believes he can maintain a working relationship with her Bali lawyers.' There is then a reference to the practitioner and an attributed statement: 'If you bear in mind that you're working for Schapelle Corby you can work with anyone. She's the focus of our attention.' Examined on this, the practitioner said he did not recall giving such undertaking. In his solicitor's letter to the LPCC dated 24 April 2007, the practitioner said their discussions concerned the circumstances of her arrest and departure from Australia. In re-examination the practitioner said, for the first time, that he did not tell the family that he was going to act for her or provide legal assistance. We reject that evidence. It is inconsistent even with his witness

statement. To the extent relevant, we think on this evidence that it is probable that he did tell the family that he would assist Ms Corby in any way possible and that he meant in his capacity as a lawyer. So much is consistent with what he said in his response letter about telling Ms Corby they 'would help in any way they could'.

288 In his solicitors' letter dated 24 April 2007 to the LPCC, the practitioner suggests this meeting on 4 June 2005 was concerned with the possible grounds of appeal. The conversations 'for the most part concerned the circumstances surrounding Ms Corby's arrest at Denpassar Airport and her departure from Australia'. That is not consistent with the practitioner's evidence that his purpose in visiting Bali was related to giving some assurance to Ms Corby on the part of the government.

Conversation with Mr Rasiah on 5 June

289 In his witness statement, the practitioner recounts that Mr Rasiah invited Mr Laskaris and the practitioner to his house for a barbecue dinner on the Sunday night. He said in evidence he had no difficulty with dining with him, given the presence of other guests. Mr Rasiah collected them and drove them to his place and during the trip raised again the question of money for bribery. The practitioner says he told Mr Rasiah this approach was extremely dangerous and harmful. In his evidence, the practitioner said that during this conversation Mr Rasiah also confirmed the journalist's account, that he had sought to bribe a trial judge.

Meeting with Ms Corby at prison on 6 June

290 The practitioner says in his witness statement that the Australian Vice-Consul, Mr Laskaris and he met with Ms Corby in the Superintendent's office. The practitioner says he explained to Ms Corby that he was there not to give legal advice but that he was there at the request of the Australian government, which was concerned about her position. He told her it had been paying her legal expenses to her Indonesian lawyers. There was a discussion about several topics which the practitioner sets out. These included:

1) she wanted to change her Bali lawyers;

2) she did not ask for legal advice or assistance and they told her they could not act for her as her lawyers because they were not admitted in Indonesia;

3) she asked that they should do anything which they thought might protect her interests and to protect her from some of her Bali legal team;

4) their advice as to obtaining the services of a senior advocate from Jakarta; and

5) anti-Indonesian activities that had made it difficult for her in prison.

291 There follows the statement that: 'At no time did Ms Corby give me any legal instructions or request that we act as her lawyers. I certainly took no legal instructions from her nor was I being retained to act on her behalf. I made that perfectly clear when speaking about what we could do.'

292 In the space of three paragraphs in the witness statement, there are several claims made in effect that the practitioner told Ms Corby he could not advise or assist or act for her. This is in marked contrast to his response letter and his contemporaneous accounts.

293 In the practitioner's response letter, there is reference to Ms Corby's concerns about the demands of her Bali legal team in relation to signing over media rights and her being fearful of Mr Rasiah. As to representation:

> She told them that she knew they could not represent her in Indonesia. Mr Trowell told her that they would help in any way they could. Ms Corby asked Mr Trowell to do anything which in his judgment would protect her interests. ...
>
> It must be remembered that Mr Trowell was in Bali at the request of the Australian government to ascertain whether Ms Corby had needs with which he could provide some assistance.
>
> Together they decided that Mr Trowell should deliver a message to her supporters to calm things down. After some discussion they settled on a form of words which Ms Corby wanted Mr Trowell to relay through the gathered media.

294 It is of significance that in his response letter the practitioner had not claimed that anything was said concerning Ms Corby not seeking legal advice and assistance nor his not giving legal advice or assistance. The reference in his response letter is to Ms Corby saying she knew 'they could not represent her in Indonesia'. This statement allows for the practitioner to provide legal advice and assistance including in relation to

her appeal ('helping in any way they could'), falling short of representation in court. In relation to the appeal, this would allow for the type of assistance which the practitioner and Mr Percy explained to the media several times. Moreover, given the extent to which Ms Corby in fact sought and the practitioner provided legal advice and assistance as revealed both in his response letter and his witness statement, the practitioner's assertions as to what was said about not doing so are difficult to accept. They appear to us to have been directed at meeting the LPCC's case rather than being based on an actual recall of events.

295 There follows in the response letter a summary of what the practitioner told the media waiting outside the prison. This includes

> She was reassured that all her legal team were working hard on her appeal.
>
> She was aware that Mr Trowell and Mr Laskaris had met with her family the day before and was reassured by their visit.
>
> Ms Corby was very grateful for their support and that of the Australian government.

296 There is a similar reference in the practitioner's witness statement to their discussion about a message to her supporters. He there said that he 'made some notes of what I should say'. The summary of what was said to the media largely reflects that in the response letter but with some significant changes:

> She was reassured that all her *Indonesian* legal team were working hard on her appeal.
>
> She was aware that we had met with her family the day before and was reassured by our visit.
>
> Schapelle was very grateful for [omitted – '*their support and*'] the support of the Australian government.

297 The practitioner was cross-examined at some length concerning his visit to Ms Corby. He explained that the Australian Vice-Consul had collected Mr Laskaris and him and taken them to the prison. The Vice-Consul 'discreetly' waited outside. The practitioner in evidence recounted his conversation with Ms Corby in the terms used in his witness statements:

> But essentially she misunderstood what our role was. She thought that we were taking over her case and she was relieved at that. I had to dissuade her from that notion and tell her that we weren't to be her lawyers; we couldn't be her lawyers because we weren't admitted in Indonesia to

> practise law; couldn't appear. She wanted to sack the existing lawyers that she had. I told her I didn't think that was a great idea because, you know, who else knew about the case? There was no transcript, as far as I knew. ... But I made it perfectly clear to her that we just could not act as her lawyers, and that we weren't there in that capacity.

298 Asked whether she was not delighted that they were assisting her, the practitioner said:

> I can't remember the exact words, but I suppose - I mean, we were assisting her. We were assisting in terms of communication between her lawyers and the Australian government, but she was never under the illusion - she may have been to start with, but she was never under the illusion that we were acting as her lawyers, because we couldn't, and I told her that. And the reason I remember it is because I had to impress upon her that we weren't taking over the case. We weren't there to act as her lawyers. I had to make that perfectly clear to her, because she assumed - this was such a relief to her that she had the opportunity to get rid of her lawyers, because she knew they were a bunch of crooks.

299 The practitioner said in evidence that 'up front' they disabused her of the role that she thought they would play. Asked then whether it was correct to say that at the end of the meeting she was 'reassured' by the practitioner playing a role in the appeal, the practitioner was evidently wrong-footed:

> Well, I can't - look, as I said - you're obviously looking at the letter from my solicitors to the tribunal. I think I said there that I can't remember the sequence in which the conversation took place. I said that in Judge Scott's letter to the committee. It was made perfectly clear that I couldn't remember the sequence but, "These were the topics that were discussed", but I do recall her raising this question. It was a relief on her part that at last Australian lawyers were taking over her case, because she was surrounded by these crooks.

300 That answer appears to suggest that Ms Corby was 'reassured' up to the point where the practitioner 'disabused' her that he would be acting for her. What exposes the weakness in that purported explanation is that Ms Corby wished her expression of reassurance about her legal team to be conveyed after the meeting. Thus the sequence of the conversation could not provide any answer to the question. The practitioner was then asked whether Ms Corby had said that she had hoped that he was taking some part in the decision making. The practitioner then admitted: 'I can't remember what words were used.' He was taken to the media report on 14 June 2005 where on his account:

> It just seemed to me when I spoke to Schapelle Corby she was delighted we were assisting, reassured by that fact, and hoped that we would be at least participating in some of the decision making, albeit on the periphery of her case.
>
> We haven't been included. That's fine because at least we offered.

301 The practitioner said that this was merely her hope and expectation, not something that he had agreed to do. However, in our view this was merely a lawyer's answer. It is not credible to believe that Ms Corby would so express delight and reassurance and find hope if the circumstances were as the practitioner claimed in his evidence. That is, that at her express request, having come from Australia to visit her in prison, this Queen's Counsel and his junior had then told her not merely that the practitioner was not taking over the conduct of her appeal in Indonesia, but that he was not prepared to provide any legal advice and assistance whatsoever. If this delight, reassurance and hope existed only to the point where she was disabused, we cannot accept that the practitioner would relay her 'initial' reaction a week later in a statement to the press.

302 The practitioner was then asked about the reference in the report of 14 June 2005 as to what it was they had offered Ms Corby:

> To liaise with her legal team, to obtain the evidence which they claimed existed in Australia and which would prove her innocence; not that she had to do that, but that's the way they thought it had to work, and they weren't - you've got to - can I say this, your Honour? They never really worked on the appeal; it was quite obvious.

303 The practitioner's appeal to the Deputy President and the following attempt to discredit the accuracy of the report, including by what else he might have said to the journalist, merely serves to highlight the difficulty he had in maintaining the defence that, contrary to so much of what he said at the time, he offered Ms Corby no legal advice or assistance and specifically he did not offer any advice or assistance in relation to her appeal.

304 It was then put to the practitioner that what he had said to Ms Corby at their meeting was in accordance with his response letter: he could not represent her in Indonesia. The practitioner said it was 'more' that he could not represent her 'at all'. The practitioner then said that helping her was not inconsistent with his instructions from the government. But immediately afterwards that: 'There was nothing I could have done to act on her behalf. I was simply a go-between, conveying information from

her legal team to the Australian government.' Asked about the authority he received from Ms Corby to do anything which in his judgment would protect her interests, the practitioner said that whilst he could not help as a lawyer and he did not think he was in a legal relationship with Ms Corby, he had a very wide discretion as to what he could do to assist. That was not inconsistent with his instructions from the government. We think this rather confusing account of his role is the direct consequence of the practitioner endeavouring to manage the contradictions between his account in mid 2005, whereby he offered, in his capacity as a barrister accompanied by his junior, to help in any way he could, and the position he took at the hearing in 2008, that he told her he would not provide legal advice or assistance of any kind such that she was not therefore his client.

305 The practitioner was asked about checking with Ms Corby before making subsequent media statements. The practitioner said it was not easy to do this and because he was not in a legal relationship he did not need to do this. Asked about a statement in his response letter the practitioner mentioned the notes referred to in his response letter as to what they agreed he should tell the media when he left the prison. He said 'I actually have the notes.' He was asked whether he still had those. The practitioner then said he was not sure. He would have a look. Mr Hall observed that these had not been produced to the LPCC and we have not since received them. The practitioner did accept that what he said in his response letter as to the statements to the media was more likely to be correct than his account in his witness statement. He was then asked why there had been a change made from his response letter. He referred there to 'her legal team', however, in his witness statement he said that she was reassured that all 'her Indonesian legal team' were working hard on her appeal. He could not explain why he had introduced the word 'Indonesian' into the sentence. He said it was what he must have meant. We think the answer is that he introduced the qualifying word 'Indonesian' in his witness statement in an attempt to exclude his involvement with the 'team'. Asked how this statement that they were working hard was consistent with Ms Corby wanting to sack her Bali legal team, the practitioner said this was a question of keeping up appearances. There was no point in 'bagging' her legal team publicly. He said that if the Bali legal team abandoned her, given there was no transcript of proceedings, there would effectively be no appeal. It is impossible to reconcile this evidence with the practitioner's later attempt in his evidence to justify his conduct over the following weeks, during which he constantly 'bagged' the Bali legal team. It was put that Ms Corby was reassured because she understood the practitioner was involved in the appeal decision-making.

The practitioner did not accept that. We think that is a reasonable inference based on the response letter and statements to the media.

306 Some further questions were asked by the Tribunal concerning the meeting with Ms Corby on 6 June 2005.

307 The Deputy President asked the practitioner further questions about the notes he had made. The practitioner appeared first to suggest that he could not find them. The Deputy President then asked whether they were on his solicitors' file. The practitioner responded, ingenuously, that they might be, he had not asked them. He then said, unconvincingly, that there was no reason to keep them. Anticipating perhaps a concern as to why there was a discrepancy between his witness statement and his response letter in relation to the statements to the media, he then volunteered: 'I'm not sure why there is a difference. Maybe having looked at the Stables Scott letter I was just more particular, because I met the Indonesian team, because I was never part of their team.' Our observation of the witness and subsequent examination of the relevant section of the transcript shows this was an occasion on which the practitioner appeared to lose his way. The episode is not without significance. The practitioner's first reference to the notes suggested he did have them. He then backed away from this position. The level of detail in the 'summary' and the reference to passages of direct speech strongly suggest that the notes were available to the practitioner at the time of his response letter. His first answers admit this. If that were so then:

1) they were likely to be a more accurate version of the summary than a reconstruction three years later; and

2) there was every reason to keep and produce them.

308 We again prefer the version of events given in the response letter as a more reliable account in this respect.

309 The Tribunal asked whether, as had been reported, the visit took from two to two and half hours. The practitioner had 'no idea'; it took time to get in and out. The Vice-Consul excused himself from the room and waited outside during the conference. The practitioner said he was not asked to do so. The practitioner had suggested to Ms Corby that she engage counsel from Jakarta. He could not recall whether he told her of the requested shopping list of evidence. He did not believe he spoke to her about his role in vetting that evidence for the government. He advised her against sacking her Bali legal team. He told her he would assist in whatever way he could. He did not remember whether the form of telling

her this was that he had been asked by the government to do so on a pro bono basis or whether it was that he was there to provide assistance: 'I remember telling her that I could not act for her as her lawyer, because that was her expectation. I told her that in the clearest of terms. … I made it perfectly clear to her that I was there for the government. … I wasn't there to give legal advice on her appeal. I wasn't there to do any other legal work. … it was clearly her belief or expectation that I would take up her case … I had to dissuade her from that notion.' And a little later: 'I was their [the government] lawyer; I wasn't her lawyer.' He was referred to the report in which he said that she was relieved they would be at least participating at the periphery of the case and asked: 'You told her that you could not represent her in Indonesia?' The practitioner said 'Yes'. The practitioner said his role was to vet the requests for evidence made by her Bali legal team, to make some assessment whether it was relevant to the appeal from the government's point of view. He accepted that this proposed evidence, to the extent it may have been produced by the government, was for the benefit of Ms Corby in her appeal. But he was not crafting the grounds of appeal or assessing their validity.

Practitioner's discussions with media outside Kerobokan prison

310 The practitioner says that immediately after the meeting he held an impromptu meeting with the media outside Kerobokan prison and made a statement in terms of the agreed message. This led to an article published in The West Australian on 7 June 2005. This includes: 'Mr Trowell met Corby in her jail cell this morning and discussed the legal options she has for an appeal.' It was put to the practitioner that the press would have understood he was speaking to them as Ms Corby's lawyer. The practitioner said if that was their view they misunderstood.

311 Mr Laskaris was also interviewed immediately after he came out of the prison. His comments were largely directed at Ms Corby's physical and emotional state. They had talked for 'a couple of hours' and held a conversation for the whole duration. Asked about canvassing with her 'your plan of attack for the appeal' he said he worked with the practitioner who was requested by the Australian government to undertake a 'co-ordination role'. He thought the Bali legal team had agreed to their proposal that it bring in a senior appeal advocate from Jakarta. He believed from the Bali legal team there were good grounds for appeal but they would not be given to the practitioner and him 'to settle or check or proof or tick off'. That was not their role. They had told Ms Corby that the appeal decision would not be available for two to three months. In a second interview, on his return, Mr Laskaris again said they spoke to

Ms Corby for a couple of hours. He said their job was to talk to the Bali legal team and try and convince them to appoint a senior appellate advocate from Jakarta. These accounts of Mr Laskaris' understanding of their role would have carried more weight had Mr Laskaris been called as a witness and explained the basis for this understanding.

Departure from Bali on 6 June

312 On the evening of 6 June 2005, Mr Laskaris and the practitioner went to the airport for their flight back to Australia. The practitioner's evidence was that Mr Rasiah met them there and gave the practitioner an envelope saying it contained requests for assistance from the Australian government. Mr Rasiah also said he intended to come to Perth at the end of the week to hold a press conference to announce he had handed over a request to the Australian government to provide evidence in support of the appeal. The practitioner did not open the envelope until the flight was underway. When he did so there was a document which was not on a letterhead, was marked ‘Draft’, was not dated and was not signed. This set out a number of requests for 'evidence' to assist in the appeal. Under the heading ‘Financials’ there was an item ‘Lobbying, approximate A$500,000'. The practitioner formed the view that this was a reference to the bribe money which Mr Rasiah had earlier spoken about.

313 Having spoken to Senator Ellison's staff on the following day, it was agreed that the practitioner would not pass on the draft letter but rather write to Mr Rasiah seeking an explanation, in particular for the item for lobbying. This the practitioner did. In his email letter to Mr Rasiah, the practitioner suggested that a formal letter be sent, to be signed by Mr Rasiah, giving further details of this and various items. He also advised against Mr Rasiah coming to Perth to make media statements, indicating that this would be counter-productive. There is no evidence of a response.

314 Asked why it was necessary to request a clarification if the practitioner was convinced that the request for money for lobbying was for a bribe, the practitioner said that he was trying 'to flush him out to make sure [his] assumption was correct'. As to why the request should be kept confidential, the practitioner said that this was to avoid the requests for financial assistance being played out in the media. The practitioner did not believe the request for money for 'lobbying' might have related to a public relations exercise given what Mr Rasiah had told him and what he had learnt about Mr Rasiah's previous attempt to bribe the trial judges.

315 As the LPCC points out in its closing submissions, it is not apparent why the government would have any interest in 'flushing out' the request for bribe money. Whether the amount of $500,000 was intended for bribes as the practitioner believed or was actually for 'lobbying', there was no prospect that the government would provide it. The obvious thing to have done was to have said so. There is force in the LPCC's submissions that the reason the practitioner sought to flush out the request was to provide evidence damaging to the Bali legal team and specifically Mr Rasiah. That would explain why in his letter to Mr Rasiah the practitioner asked that the formal letter be signed by Mr Rasiah and urgently faxed to the practitioner. That submission becomes relevant to our determination of the practitioner's motives in later disclosing the bribery claim to the media. It explains also why the practitioner did not pass to the government the requests for evidence but then complained of the delay in receiving them.

Meeting with Mr Rasiah on 10 June

316 On the morning of 10 June 2005, Mr Davies sent an email to the practitioner advising that Mr Rasiah was in Perth and proposing to meet with them at one o'clock that afternoon. Further, that Mr Davies had obtained the Indonesian judgment and that Mr Voon would collect and translate this. Questioned about his motivation for sending this email to the practitioner, Mr Davies said first he did not remember and then that it was to keep Mr Trowell informed of what he was doing. He felt an obligation to do so but did not remember why he felt that. For his part, the practitioner said he had 'no idea' why Mr Davies might have advised him. Asked about the copy of the judgment, he said he never saw it and did not know what happened to it. However, in his solicitors' letter dated 24 April 2007 to the LPCC, the practitioner says the practitioner was 'given one booklet in Indonesian' at the June meeting. That suggests he at least saw the document containing the trial judge's reasons. He was not cross-examined on this. There was no evidence as to what became of the transcript of the reasons.

317 We have little doubt that the reason that Mr Davies informed the practitioner is that together with Mr Percy, it was intended they would contribute what they could to the grounds of appeal. That was why, at the request of Mr Percy and the practitioner, Mr Rasiah delivered the judgment to them. That was their role as the practitioner repeatedly told the media and he sometimes acknowledged in various terms before us.

318 There followed a meeting between Mr Rasiah, Mr Bakir (a Corby supporter), Mr Percy, Mr Davies, Mr Voon and the practitioner. Mr Rasiah handed the practitioner a letter dated 10 June 2005. This was the final form of his draft letter with the requests for assistance from the Australian government. The item for 'lobbying' was omitted. The practitioner says he arranged to fax the letter to the Minister for Justice. The practitioner had a limited recollection of the meeting. They agreed to cease making media comments. They were however met outside by the media. The practitioner believed that Mr Rasiah had set this up so he could publicly claim he had delivered a demand on the government for assistance.

319 Mr Davies' recollection of the meeting was that it was acrimonious. That was not the recollection of either the practitioner or Mr Percy. Mr Percy's evidence was that at the meeting there was a discussion about the draft letter and how totally inappropriate it would be to seek money from the government for bribes. He said: 'Rasiah was at pains to say that had been removed in the final letter.' He quoted Mr Rasiah saying: 'No, no, no. That's all out now. We've taken that all out.' The practitioner does not recall a discussion when the letter was handed over.

320 Mr Davies says in his witness statement that later that day he took Mr Rasiah and others for a drink. He said that Mr Rasiah approached him and wondered whether the government would produce the cash for the Bali court. Mr Davies, shocked, made a note of the conversation on his mobile telephone. He mentioned it to Mr Percy but did not tell anyone else. He did not see the practitioner at the time to tell him. In his oral evidence Mr Davies confirmed he told Mr Percy but did not speak to the practitioner until some considerable time later and after the subject of bribery had become the subject of controversy in the press, including the report published on 23 June 2005. His best recollection of this was weeks or a month or so later. As to this, Mr Percy says he recalled Mr Davies talking to him about having a drink with Mr Rasiah and that the request for money for lobbying was 'going nowhere'. Questioned by the Tribunal, Mr Percy said his understanding was that there was no further claim for a corrupt payment. However, in cross-examination in answer to some leading questions, he said Mr Davies may have told him something along the lines that at the drinks Mr Rasiah had raised the subject of bribing the judges. We do not have much confidence in this last response. In some unusually tentative evidence on this subject, the practitioner, 'having thought about this very carefully', said he believed Mr Davies told him about this conversation with Mr Rasiah. In answer to some questions from the Deputy President, he said this was some time before his

conversation with Mr Pennells on 22 June 2005. However, in his letter to the LPCC dated 24 April 2007, being the first mention of the matter, the practitioner said he learnt of the conversation with Mr Rasiah from Davies in about late June 2005. On this state of the evidence we do not think that Mr Davies did convey the substance of his conversation with Mr Rasiah to the practitioner until after the press reports on the subject starting on 23 June 2005.

Practitioner's subsequent media statements and documents concerning his meeting with Ms Corby and his role in the appeal

321 In Part III of these reasons we set out the evidence in relation to the practitioner's media statements after 6 June 2005, disclosure of which is the subject of the application. Some of these statements include reference to the practitioner's meeting with Ms Corby and his position in relation to advising her on her appeal. We mention the following statements in the present context.

322 In an article on 12 June 2005 (the fourth disclosure of the application, to Ms Munro) the following passages appear:

> Tensions between the Bali-based lawyers and the Perth-based barristers Mark Trowell, QC, and Tom Percy, QC emerged about the appeal yesterday.
>
> "We had a frank exchange of views about the progress of the appeal. As yet neither Percy nor myself have seen any draft grounds of appeal; we haven't seen the transcript of the reasons of the judgement or a transcript of the trial," Mr Trowell said.
>
> Mr Trowell was concerned that the government received the documents at the end of the last working day before the appeal was due to be filed.

323 Ms Munro emailed the article to the practitioner. The practitioner was prepared to accept in his evidence that, as reported, at the meeting on 10 June 2005 (described above), the parties had had a 'frank exchange of views about the progress of the appeal'. Although he had no direct recollection, he may well have said at the meeting he was concerned that the Bali legal team was not prosecuting the appeal. Asked about his interest in seeing the draft grounds of appeal, the practitioner said 'Of course I would have read them. I was interested to see what they were but I wasn't interested in participating in a process of drafting the appeal grounds. One of the reasons I wanted to see it was to see whether they were actually doing anything.' A little later he said that it was never his intention to assist in drafting the grounds of appeal or giving advice in

relation to them. When it was put to the practitioner that Mr Rasiah had in fact provided the judges' reasons, the practitioner said he did not know that – he did not see them. We reject the practitioner's evidence on this last matter, given Mr Davies' email and the meeting with Mr Rasiah on 10 June 2005.

324 The appeal was filed on 14 June 2005. As regards an article on 14 June 2005 (the sixth disclosure of the application, to Ms Nott) the following appears:

> Australian lawyers called in to assist the appeal of convicted drug smuggler Schapelle Corby have not been briefed on the grounds of the appeal lodged in Bali today, Perth QC Mark Trowell says.
>
> Mr Trowell said he and fellow Perth QC Tom Percy had no idea what was in the 21-page document lodged with the Bali High Court, and they felt they had let Corby down through no fault of their own.
>
> Mr Trowell, enlisted with Mr Percy by the federal government to assist Corby's appeal against her conviction and sentence, said the Gold Coast woman's Indonesian lawyers had not made the best use of the experience and skills they offered.
>
> "I am not saying that we're in any way miffed or disappointed by not having been involved," Mr Trowell said.
>
> "It just seemed to me when I spoke to Schapelle Corby she was delighted we were assisting, reassured by that fact, and hoped that we would be at least participating in some of the decision making, albeit on the periphery of her case.
>
> "We haven't been included. That's fine because at least we offered.
>
> "But if they want to say that we are part of this thing then they really need, for Schapelle Corby's sake, to make use of the resources that are being offered."

325 The practitioner could not recall whether he made the second statement. Given the context, we find he said something to this effect. As he explained in evidence, he said that had Ms Corby been assisted by 'better quality people' on the Bali legal team 'we might have been able to get some evidence from the government that might have really helped them in the appeal ...'. He felt he had let her down to that extent; but 'we'd done what we could' but it was 'beyond our control'. The 'we' refers to Mr Percy and the practitioner.

326 The practitioner appeared to accept the third statement (at least from 'said'). It was put that this reference was not to using his experience and

skills as a conduit or messenger. The practitioner said: 'It wasn't as if I was a courier ... that drops stuff around the town ... Obviously I thought it was important also that I could interpret what was being asked for and see whether it had any relevance and discuss it with the government and to use my experience and skill in that regard.' And then: 'They weren't asking a milkman to go about this task. They were asking someone who understood the legal process and someone hopefully that could act as an intelligent, experienced go-between.'

327 As regards a second article on 14 June 2005 (the seventh disclosure of the application, to Mr Pennells) the following appears:

> A Perth QC enlisted by the Australian government to help Schapelle Corby has launched a stinging attack on her legal team, saying it was unprepared for her appeal and had treated him like "window dressing".
>
> Mark Trowell said yesterday that he had not spoken to the head of Corby's defence team, Vasu Rasiah, since the Bali-based lawyer's flying visit to Perth on Friday.
>
> Asked if he had been frozen out, he said: "I don't think we were ever brought in."…
>
> But Mr Trowell, who was enlisted to help in its preparation, said yesterday that he had still not seen a draft of the appeal grounds or been given any indication what arguments might be presented.
>
> "They've never really given us any part to play in their appeal other than being a conduit to the government," he said. "I'm disappointed for Schapelle Corby.
>
> "There is an expectation in the Australian community that Australian lawyers would have some part to play. And that was the government's expectation as well. That's obviously why they approached us." Mr Trowell and fellow Perth QC Tom Percy had offered to work on Corby's case pro bono after being asked to lend their expertise on the appeal.
>
> Mr Trowell said yesterday that the pair had not played much of a role so far and questioned what more they could do when they were not being included in the legal discussions. ...
>
> "But at no time have we seen any draft appeal grounds. More importantly, we haven't seen any transcript of proceedings, in English or Indonesian."
>
> Mr Trowell criticised the legal team's handling of its request last Friday for information from the Australian government to help the case, saying it was made at the last minute and was a rehash of a former request which Corby's lawyers knew the government could not deliver.

> "My criticism is of not being prepared," he said. "They should be spending more time preparing the appeal than holding press conferences in Jakarta with soapie starlets."

328 Given the practitioner's evidence on the subject, there is considerable irony in his complaints here as to his being treated as 'window dressing' and being merely 'a conduit to the government'.

329 Questioned about the opening statement and why he would give an opinion about the legal team's state of preparation, the practitioner said he did so because it was clear the Bali legal team were intending to lay the blame for the failure of the appeal on the Australian government. Asked whether he thought these statements helped Ms Corby he said:

> 'I was not acting for Ms Corby. I was acting for the Australian government. If she was ultimately a beneficiary of their efforts or my efforts on their behalf, then so be it, and I did the best I could consistent with the instructions that I'd been given by the Australian government but I wasn't acting as her lawyer so therefore saw no inconsistency with what I said in terms of what my role was.'

330 Asked about his role as referred to in this statement, the practitioner said that as he had no understanding of Indonesian law and never practised there he could not possibly advise or assist them in relation to the appeal. He then said his role was as the government defined it - that is, to assist the Bali legal team in obtaining information which they could use to mount the appeal. Asked about the expectation Mr Percy and he would have some role to play in the appeal itself, the practitioner said this referred to assisting in obtaining the evidence. In re-examination, the practitioner said his disappointment was in not being involved in discussions on the evidence. This explanation again does not bear analysis. The practitioner's complaint and disappointment is directly tied to his claim of not having seen any draft appeal papers or having been given any indication of the arguments contained in the appeal; meaning he had not had an opportunity to comment on the appeal grounds before the final papers were filed. That was the government's 'expectation'; that is why it had 'approached' him; in order that he had some part to play in the appeal.

331 The practitioner wrote to Mr Hutapea, the counsel from Jakarta, on 21 June 2005. The substantive part opens ‘Both Tom Percy QC and myself stand ready to assist you in any way you think may help you to argue this appeal’. The greater part of the letter is concerned with denigrating Mr Rasiah and criticising his performance. This includes: 'He had done nothing to advance [Ms Corby's] interests by refusing to involve

Tom Percy and myself other than to attempt to use us to extract money from the Australian government.' Referring to finding a potential witness he said: 'Mr Rasiah has just never released any of this type of documentation [to enable the selection of a witness] for [Tom Percy and my] analysis and consideration. Mr Rasiah never wanted our assistance in this case and I suspect that he feared losing control of the case.' He concludes by indicating he has been negotiating with an investigator to analyse the evidence and asks whether he should bring the company on board.

332 Questioned about the opening sentence of the letter, the practitioner said it referred to assistance in the provision of any relevant evidence. The practitioner denied that he was going to analyse documentation and said that his comment that ‘Mr Rasiah has just never released any of this type of documentation for our analysis and consideration’ (referring to documentation from which witnesses could be identified), was a reference to a role of ‘filtering’ the requests for evidence and distinguishing those which were irrelevant and unrealistic from those which were realistic. The government approached him not as a 'milkman' but as a lawyer 'with some profile' capable of doing this work, so the government would get the credit for his intervening. The response from Mr Hutapea was confined to the evidentiary matters.

333 In the aftermath of the practitioner's disclosure on 22 June 2005 of what he described as an attempt by Mr Rasiah to secure money for bribery (the eighth disclosure of the application), the practitioner was interviewed on 24 June 2005. It was reported that he was proposing to travel to Bali and might meet the Bali legal team:

> I’d prefer to see case documents, I'd prefer, rather than sitting around having dinner and discussing things, I'd prefer them to give us the materials [so] that we can get together with Tom Percy, who’s going to also be in Bali and we’d like to say, right, we think you should go this way or we can help you, we can analyse the evidence in some other way, that might assist the case.

334 Counsel for the LPCC put to the practitioner that he wanted the material so that he could analyse this to assist the case. The practitioner said that it was all about the evidence, and trying to understand the case so he could have a meaningful dialogue with the government and provide relevant material for the appeal. The practitioner says the reason he commented about the failure of the Indonesian legal team to provide the material was because it was indicative to him of the fact that they had no

intention of putting together a proper appeal and that it was all about money.

335 There was a later interview on 24 June 2005. The transcript includes:

> We [Mr Percy and the practitioner] were never formally accepted by the Indonesia legal team. We've offered help. We haven't been provided with any materials in which we could use our expertise to help Schapelle Corby. ...
>
> Percy and I gave an undertaking to Schapelle Corby and her family that we would assist her in any way that we could. All we need is a bit of cooperation from her legal team. To date we haven't really had that.

336 Questioned about the first paragraph, the practitioner said that he was referring to his expertise as a lawyer: 'I wasn't being asked as a milkman to go and see Schapelle Corby or assist. I was being asked because I had legal expertise; legal expertise that would enable me to fulfil the request made of me by the Australian government.' Questioned about the second paragraph, the practitioner was uncertain about an undertaking to the family but 'he certainly told Schapelle Corby that I would assist her in any way that I could.' Asked about his relations with Ms Corby's family, the practitioner responded: 'They are private discussions.' The practitioner in evidence was not prepared to admit he said this. We do not think it necessary to make any specific findings in relation to this report.

337 An article in the Sydney Morning Herald on 27 June 2005 claims that Mr Hutapea warned the practitioner in advance that his bribery allegation would be extremely damaging to Ms Corby's case. The practitioner is quoted as responding 'There are reasons for it.' The practitioner denied that Mr Hutapea warned him in this respect. He disputed his response, although this is in direct quotes. Also, in an ABC interview of Mr Hutapea on 27 June 2005, the advocate said that the practitioner's disclosure of the alleged bribery claims had been very damaging: 'I couldn't understand because he's part of the team, whatever happened he cannot disclose it to the public because there is a lawyer client privileged relationship'. It is not clear whether he is speaking of the professional practice in Bali/Indonesia or Australia or both.

338 We make some brief observations about this section of the evidence. First, the practitioner spoke about the common interest of Mr Percy and himself in relation to assisting with the grounds of appeal. There is not the slightest suggestion here of any discrete division of responsibilities as he suggested in his earlier evidence. Second, the practitioner's attempt to characterise the legal assistance he offered in relation to the appeal as

confined to advice given to the government, again inconsistent with earlier evidence that he was offering advice to no one, appears increasingly strained. Third, the practitioner's attempt to characterise his role as merely that of a 'go-between' also loses credibility. There is no reference to this role in his statements to the media which are directed at his assisting in the appeal. In the end he acknowledged at least that he was approached to assist, and to visit Ms Corby, because of his legal expertise.

339 We should mention in this context that we have been astute to observe the distinction between the practitioner's statements to the media and his actual relationship with the government and Ms Corby. Although the practitioner at no time suggested as much, either in his evidence or his submissions, we have considered the possibility that for personal reasons he may have overstated his actual role in the appeal process. That is, he may have represented that he had offered to do more in relation to the appeal than in fact he had. On the whole of the evidence however, we think that the position rather was that he had been approached by the government, and had agreed to provide assistance to Ms Corby and the Bali legal team in relation to her appeal, in terms of what he told the media throughout the period from late May to late June 2005. It is the oral evidence which he gave to us which must, in all the circumstances, give way.

Conclusion - did Ms Corby become a client of the practitioner on 6 June 2005?

340 As is apparent, there is a considerable conflict on the subject of the practitioner's relationship with Ms Corby between the practitioner's late 2008 witness statement and evidence and the practitioner's mid-2005 response letter and media and other statements. In order to resolve this conflict and make the appropriate findings we have taken into account not merely those parts of the response letter, witness statement and oral evidence focused on the meeting with Ms Corby, but the context in which those accounts were given. That includes evidence of the events and of the practitioner's media and other statements, shortly before and after their meeting.

341 As regards the practitioner's direct evidence of the meeting on 6 June 2005, there are some difficulties in his account of the matter.

342 First, there is no reference in his response letter to any difficulty in assisting Ms Corby because of his instructions from, or the fact that he was acting for, the Attorney General. We think the practitioner implied at

least in evidence, although the proposition was disputed in his closing submissions, that this retainer precluded his being retained by Ms Corby. In fact in our view his acting for the Australian government in no sense intruded on his assisting Ms Corby in whatever way he could in relation to her appeal. Not only was there no impediment to his so assisting her by reason of his instructions from the government, so much was, on our finding, in accordance with the request made of him by the government.

343 Second, we do not accept that the sole purpose of his visit to Ms Corby was to pass on the government's messages of support. These messages, capable of being conveyed by the Australian Consul, would have been rather empty if the practitioner declared that in his capacity as a Queen's Counsel, he was not prepared to advise or assist her in relation to her appeal or generally. Moreover, in his later evidence, the practitioner made clear that he had been asked to see Ms Corby not as a mere messenger but because of his legal expertise.

344 Third, the practitioner repeatedly said in evidence that his role was to offer Ms Corby the government's assistance and specifically to facilitate requests for evidence from the Bali legal team to the Australian government. Yet on his account he 'believed' he did not discuss this subject with Ms Corby. That does not accord with the rest of the practitioner's evidence including what he said in evidence was the nature of the assistance he was providing (see above). We think it likely that the subject was discussed with her.

345 Fourth, the practitioner was clear in his response letter and in his evidence that at the meeting Ms Corby requested of him that the practitioner do anything which in his judgment would protect her interests. This instruction formed the basis for the practitioner's defence that he had Ms Corby's implied consent to the disclosures he made. We have no doubt that this request was made of the practitioner in his capacity as a Queen's Counsel. It is difficult to understand how Ms Corby's request could have been made, or accepted by the practitioner, or what work it could do, if the practitioner had nevertheless told Ms Corby that he was unable to provide her any legal advice or assistance.

346 We accept that Mr Laskaris and the practitioner may have explained to Ms Corby at some point in the conference that they could not represent her in Indonesia and that she accepted that. It seems likely that she would have readily understood that legal practitioners from Perth could not take over the conduct of her appeal in an Indonesian court conducted in the

Indonesian language (as we infer was the position). In his response letter, the practitioner does not refer to such explanation - only that Ms Corby 'knew' they could not represent her in Indonesia. The effect of that explanation and her acceptance was that the barristers were not to be regarded as representing her in that sense. We accept also that the practitioner may well have explained to Ms Corby that the primary responsibility for drafting the appeal lay with the Bali legal team and that the barristers' assistance would be at the 'periphery'.

347 To the extent the practitioner maintains otherwise, we reject the proposition that the practitioner told her that in his capacity as a lawyer, he could provide no legal advice or assistance to her. First, there is no obvious reason he would have said this to a young woman in a jail in a foreign country facing a severe sentence. She had asked for his assistance in his capacity as a Queen's Counsel. He had travelled from Perth to visit her at her request. It seems likely from the extensive publicity and we infer from that publicity and her request of the Australian Consul to see the practitioner or Mr Percy, that she would have known that the practitioner had been requested to assist her by the Attorney General on behalf of the Australian government. In his capacity as a Queen's Counsel she had, on his evidence, requested he take over the conduct of her appeal. No doubt the practitioner disclosed that he had met with the Bali legal team on the Friday to discuss her appeal ('all her legal team was working hard on her appeal').

348 Second, such a statement (that he could not assist) was not a necessary part of telling her that he could not represent her in an Indonesian court. His not representing her and not preparing the appeal grounds did not preclude his advising and assisting in relation to the appeal. In some of the media statements the practitioner draws the distinction between not representing her on her appeal but, in relation to it, offering assistance. This advice and assistance is variously expressed in his statements to the media and (reluctantly) in his evidence: as his offering to 'aid or guide' the Bali legal team, giving his 'two pennies' worth' of advice to them on questions of evidence, offering 'expertise, advice and contacts' in relation to the appeal, offering to 'help [the appeal] along if he could', 'offering legal assistance to the legal team drafting [the] appeal', 'participating in some of the decision making [of the appeal] albeit on the periphery', making available his 'experience and skills', expressing his disappointment at 'not being included in legal discussions', offering advice that on the appeal the Bali legal team 'should go this way' and he could 'analyse the evidence in some other way that might assist the case',

offering 'expertise to help Schapelle Corby', his being chosen to see her because of his 'legal expertise' and so on.

349 Third, that statement is inconsistent with much of the evidence in this case including the request from the government as we have found it and the practitioner's statements to the media and in correspondence (regarding Mr Rush, to Mr Hutapea) as to his having offered assistance in relation to the appeal.

350 Fourth, that statement is irreconcilable with what the practitioner says was in fact discussed at the meeting. In his capacity as a barrister he advised Ms Corby in substance as to retaining her Bali legal team, engaging counsel from Jakarta, his receiving requests for evidence from the Bali legal team which would assist her appeal, the harm to her prospects on the appeal from anti-Indonesian sentiments and the terms of an appropriate public message to her supporters, and offering to do 'anything [further] which we thought might protect her interests'. Within the permissible 'very wide and generous ambit of interpretation' those subjects were fairly referable to their relationship.

351 Finally, such a statement would hardly lead Ms Corby, in her desperate position, immediately thereafter to express re-assurance that 'all her legal team were working hard' and her considerable gratitude for the support of Mr Laskaris and the practitioner.

352 To the extent that the practitioner suggested that he did not see her as a lawyer or that the advice given by him was in some capacity other than as a lawyer, that is as a government representative or mere 'go-between', we reject that suggestion. He visited her as a Queen's Counsel and in company with his junior. The Australian Consul excused himself. The subject matters discussed are clearly legal in content. The meeting lasted several hours.

353 As concerns the practitioner's meeting with Ms Corby on 6 June 2005, having regard to the whole of the evidence, we make the following findings:

1) Ms Corby requested to see the practitioner or Mr Percy in their capacity as Queen's Counsel;

2) the practitioner and Mr Laskaris attended in their capacity as Queen's Counsel and junior at Ms Corby's specific request, and pursuant also to a request from the Attorney General for the practitioner to offer whatever

legal assistance to Ms Corby he could including in relation to her appeal;

3) given the presence of the Australian barristers and their 'client', the Australian Vice-Consul deemed it appropriate to and did wait outside during the conference;

4) the meeting took a substantial time, in the order of two hours;

5) the practitioner advised Ms Corby that he and Mr Laskaris had met with the Bali legal team on the Friday to discuss her appeal and with her family on the Saturday and had conveyed to the family the practitioner's offer to assist Ms Corby;

6) there was a discussion and an acknowledgment that the practitioner could not represent her in an Indonesian court in relation to her appeal - that is, in Indonesia;

7) the practitioner in effect agreed to provide his legal services on a pro bono basis generally to the extent he was able to assist in relation to the grounds of appeal and specifically with respect to requests from the Bali legal team as to evidence that the Australian government might provide;

8) the practitioner discussed the various anti-Indonesian incidents which had taken place in Australia and the potential for this to damage her prospects on appeal;

9) the practitioner provided specific advice in relation to her appeal in respect of not dismissing her Bali legal team, engaging counsel from Jakarta and as to an appropriate public message to her supporters;

10) Ms Corby discussed with the practitioner that she felt pressured and under duress by the Bali legal team in signing media rights in relation to her story;

11) The practitioner otherwise agreed in effect to provide his legal services generally on a pro bono basis to do anything which he thought might protect and advance her interests; and

12) the practitioner made no statement to the effect that he could not offer legal advice or assistance.

354 On that basis we find on the balance of probabilities, having regard to ***Briginshaw***, that in the course of the meeting on 6 June 2005 there came into existence between the practitioner and Ms Corby the relationship of barrister and client. In that respect, Ms Corby retained the practitioner both in respect of the advice and assistance he gave at the meeting and in respect of the ongoing advice he offered generally and in relation to her appeal.

355 The absence of Ms Corby's testimony does not, we think, preclude this finding, based as it is upon the practitioner's own account of the meeting in his response letter, media and other statements and admissions in evidence. Ms Corby's intention, objectively determined, to enter into this relationship, may be inferred from her request to see the practitioner as a Queen's Counsel, her seeing the practitioner and his junior in prison and the findings we have made as to what was discussed and agreed at the meeting.

356 If contrary to our finding the practitioner did make a statement to the effect that he could not offer legal advice or assistance to Ms Corby, we think there are good arguments for the view that contrary to that expressed intention, the practitioner in fact did so in the manner we have found, so that the relationship of barrister and client nonetheless arose.

PART III - Breach

357 As outlined above, the LPCC's case is that on eight occasions the practitioner, in each case without his client's or prospective client's informed consent:

1) disclosed information confidential to his client or prospective client; and/or

2) made statements to the media about his client's or prospective client's matter.

358 On our findings, Ms Corby first became an actual client on 6 June 2005. It follows that only statements made to the media after that date (the fourth to the eighth disclosures) are under the application, the subject of a breach of the 'confidence rule' and the 'statements to the media' rule.

Confidentiality - the competing contentions

359 The LPCC submits that insofar as Ms Corby was the client of the practitioner he owed a professional duty of confidence. This duty is reflected in r 6.3 of the Law Society's *Professional Conduct Rules 1983* (WA) which, at the time of the alleged conduct, provides as follows:

> A practitioner shall not without the consent of his client directly or indirectly reveal that client's confidence or use it in any way detrimental to the interests of that client or lend or reveal the contents of the papers in any brief or instructions to any person except to the extent:
>
> a. required by law, rule of court or court order provided that where there are reasonable grounds for questioning the validity of the law, rule or order he shall first take all reasonable steps to test the validity of the same; or
>
> b. necessary for replying to or defending any charge or complaint of criminal or unprofessional conduct or professional misconduct brought against him or his partners, associates or employees or to respond to a requirement under paragraphs (e) and (j) or Rule 1.4 [concerning a response to a complaint or inquiry].

360 In our view, the reference to 'confidence' first appearing means or includes 'confidential communication', that being part of the definition of the word in *The Macquarie Dictionary* (4th Ed, 2005).

361 The LPCC's statement includes the propositions, without reference to authority, adopted in its closing submissions, that in the circumstances the following information was confidential:

1) information in relation to the matter that the practitioner received in connection with the professional relationship. It does not matter that some of the information might be information that is by some means 'in the public domain'. It is not for the practitioner to make disclosures that confirm or otherwise clothe with legitimacy material that is publicised by others. The fact that the client or the client's agents or potential witnesses have informed the practitioner of a fact is itself confidential; and

2) the views that the practitioner formed in relation to the matter as the issues were considered. If a legal practitioner forms views in relation to a client's matter, those views are confidential to the client. It is not open to

the practitioner, absent consent, to disclose the views the practitioner has formed.

362 The practitioner's closing submissions accept that a barrister owes a duty of confidence to the client, but contend that the relevant 'confidence' or 'confidential information' must have the necessary 'quality of confidence'. This excludes that which is public property or in the public domain. It is submitted that in order for the rule to apply:

1) the information must be confidential in quality;

2) the information must be imparted so as to import an obligation of confidence; and

3) there must be an unauthorised use of that information to the detriment of the party communicating it.

363 Reference is made to statements to this effect in cases dealing with the equitable doctrine of confidence.

364 The practitioner also contends, at least in his statement, that none of the information of which complaint is made was given to him by or on behalf of Ms Corby so as to come within the rule.

Professional duty of confidentiality

365 We do not think the professional duty of confidence is conditioned in the manner which the practitioner contends. It may be that the lawyer's professional duty of confidence overlaps with or has features in common with the equitable obligation of confidence arising in certain relationships and circumstances. It may also derive its character and support from the doctrine of legal professional privilege. It may also be that in the circumstances the lawyer has contractual and equitable and fiduciary obligations of confidence which must also be met. But in relation to the professional obligations of confidence, those contractual, equitable and fiduciary obligations and their respective remedies serve different purposes and are informed by different considerations. As regards the equitable duty for instance, protection of the interest by an action for breach of confidence founded upon an obligation of conscience seems of limited relevance in the present context. The scope of legal professional privilege is in some respects more restrictive than the professional obligation of confidence and rests upon a different principle (public interest). We do not think there is any warrant for reading down the

independent professional obligation of confidentiality reflected in the conduct rule by reference to those other doctrines.

366 Once the relationship of lawyer and client is established, then we think the lawyer's obligation of confidence arises and operates within strict limits. As a general rule, information about a client's matter communicated to a legal practitioner in a professional capacity, will be presumed to be confidential. The practitioner will be required to keep communications secret except to the extent that, expressly or impliedly, the practitioner is authorised by the client to disclose them, at which point they will or may cease to be confidential, or the exceptions under the rule apply.

367 This is the position reflected by r 6.3 of the *Professional Conduct Rules 1983* (WA). There is a prohibition against disclosure of confidential information and, separately, against use detrimental to the interests of the client.

368 In general terms we accept that the duty of confidence extends in the manner which the LPCC submits.

369 First, we think the duty extends to the information about Ms Corby's case that the practitioner learned in his professional relationship with Ms Corby. This would include the information which he would not have had but for this relationship. Clearly, it would cover information he learned directly from her on 6 June 2005 as well as information he subsequently learned from the Bali legal team.

370 Second (further to the LPCC's submissions), we think that once the relationship of lawyer and client is established the duty extends to information of a confidential nature acquired by the practitioner prior to that. That would include for instance, information which the practitioner had previously acquired from the Bali legal team, leaving aside a separate duty arising and owed at the time the information was received.

371 Third, we accept that the prohibition on disclosing Ms Corby's 'confidential' information would generally extend to matters in the public domain, depending perhaps on the extent of the publicity and the authority of the source. In its submissions concerning statements to the media, the LPCC contends that it does not mitigate a communication to the media by a legal practitioner that the information is already in the public arena or is believed to be so. Repetition or confirmation of information by a legal practitioner may give that information a credible status that it might not otherwise have: ***Camp v Legal Practitioners Complaints***

Committee (2007) WASC 309 at [70] which supports the proposition contended for. We think this is equally applicable to an alleged disclosure of confidential information.

372 Fourth, we think the obligation extends to opinions formed by the practitioner about his client's affairs. The practitioner does not appear to challenge this proposition generally, or by reference to the grounds of the application limiting this extension to statements to the media. We do not think there is any basis to do so.

373 We do not think it necessary for the LPCC's case that Ms Corby gave evidence that she regarded the relevant statements as confidential. So much will be presumed once the relationship of lawyer and client is established.

374 That leaves the question whether in the particular circumstances the disclosure might be said to constitute unprofessional conduct.

No confidence in iniquity

375 As concerns the eighth disclosure the subject of the application, the practitioner submits that the duty of confidence could not attach to the disclosure of Mr Rasiah's attempt to procure money from the Australian government to bribe the Balinese judiciary.

376 It is not possible to do justice to this argument without understanding the facts. Mr Rasiah, although not a lawyer, was part of the Bali legal team. According to the practitioner's witness statement and evidence, over the weekend of 3 - 6 June 2005, Mr Rasiah on two separate occasions made the suggestion that the government should provide the funds which he said were necessary to bribe the appeal judges. This suggestion was first made at their dinner meeting on the Friday night (3 June 2005) and was repeated during a car trip to Mr Rasiah's house on the Sunday night (5 June 2005). On both occasions the practitioner responded in effect that the government would never consider such a suggestion. The practitioner informed Senator Ellison of the suggestion made on the Friday night, on the following day. The practitioner believed from his discussion with Ms Corby on 6 June 2005, although it was not said that the suggestion was discussed, that she knew nothing about it. The practitioner also believed the suggestion was contained in Mr Rasiah's draft letter seeking $500,000 for 'lobbying'. The practitioner conveyed the substance of the draft letter to the Minister's office and it was agreed that the practitioner should not deliver the letter but seek details of the item from Mr Rasiah. This the practitioner did. When the

final letter was delivered, the item was omitted. This letter was passed to the government. The practitioner did not expressly disclose the suggestion to the media until about two weeks later. When then questioned by a journalist (in the circumstances described below) the practitioner gave a detailed account of Mr Rasiah's suggestion at their dinner and in the draft letter. Mr Rasiah denied to the journalist that he had made the suggestion.

377 In summary, a non-legal member of the Bali legal team but acting on its behalf and in the presence of its lawyer, Ms Lubis (at least on the Friday night), on two occasions made an informal suggestion to the practitioner that the government provide money for bribing the appeal judges. It may readily be inferred that the suggestions were made in confidence and to the practitioner (and Mr Laskaris) in his professional capacity as a lawyer assisting with the appeal. It may be assumed that the practitioner was authorised to convey the suggestion to the government. It may also be accepted for present purposes that, as the practitioner believed, Ms Corby did not know about the suggestion. On our findings, on 6 June 2005, the practitioner was engaged by Ms Corby to provide advice including in relation to the appeal. Information which the practitioner then held, including in relation to the appeal, became the subject of his duty of confidence. In the normal course that would include Mr Rasiah's suggestion. In considering the 'inequity rule', we treat the rule as potentially available as a defence notwithstanding that the relevant communication was made before, but published after, the retainer was established.

378 In the practitioner's closing submissions, the proposition that no confidence could attach to Mr Rasiah's suggestion such that the practitioner was entitled to publish this to the media, is based on the 'rule' that there is no confidence as to the disclosure of an iniquity. This proposition was originally formulated in ***Gartside v Outram*** (1856) 26 LJ (NS) 113 at 114:

> The true doctrine is that there is no confidence as to the disclosure of an iniquity. You cannot make me the confident of a crime or fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part.

379 This passage has been developed in England as an independent 'public interest' defence to justify publication of an otherwise confidential publication. Moreover, the English doctrine has in certain circumstances allowed for the possibility of disclosure to the media. In ***Initial Services Ltd v Putterill*** [1968] 1 QB 396 it was held at 405-6:

> The disclosure must, I should think, be to one who has a proper interest to receive the information. Thus, it will be proper to disclose a crime to the police; or a breach of the Restrictive Trade Practices Act to the Registrar. There may be cases where the misdeed is of such a character that public interest may demand, or at least excuse, publication on a broader field, even to the press.

380 To similar effect is ***Attorney-General v Guardian Newspapers (No. 2)*** [1988] UKHL 6; [1990] 1 AC 109 at 269.

381 However, the doctrine has received limited theoretical recognition in Australia. Gummow J in ***Corrs Pavey Whiting & Byrne v Collector of Customs (VIC)*** (1987) 14 FCR 434 at 456 says:

> Finally, if there be some other principle of general application inspired by Gartside v. Outram, it is in my view of narrower application than the "public interest defence" expressed in the English cases. ... That principle, in my view, is no wider than one that information will lack the necessary attribute of confidence if the subject matter is the existence or real likelihood of the existence of an iniquity in the sense of a crime, civil wrong or serious misdeed of public importance, and the confidence is relied upon to prevent disclosure to a third party with a real and direct interest in redressing such crime, wrong or misdeed.

382 There is a similarly restrictive view of the principle in ***Castrol Australia Pty Ltd v Em Tech Association Pty Ltd*** (1980) 51 FLR 184, a case cited by Mr McCusker.

383 The practitioner also cites ***R v Cox and Railton*** (1884) 14 QBD 153 in support of the submission. This concerned a claim for legal professional privilege where a solicitor was called on to answer a question concerning his client's affairs. It was held the privilege did not attach in the case of a communication, criminal in itself or intended to further any criminal purpose. This was because that communication could not be regarded as within the rationale for the privilege, because it is not in furtherance of the interests of justice. Further, it was not within the express terms of the privilege rule, because it is not within the ordinary scope of the lawyer's professional employment. There have been a number of Australian authorities which have followed this decision - see in particular ***Attorney General for the Northern Territory v Kearney*** [1985] 59 ALJR 749 and generally *Cross on Evidence* 7th Ed para [25285]-[25290]. The principle extends to cases where the iniquity was that of a third party rather than the client, but the communication is held by the lawyer on behalf of the client.

384 It may be that appropriate disclosure of a serious proposal to bribe the judiciary is to be regarded as required by law for the purposes of r 6.3. In any event we would accept that appropriate disclosure of such a proposal would likely avoid any finding of unprofessional conduct. However, in our opinion, disclosure by a lawyer of such confidential information could only be justified if made to the appropriate authority or otherwise in accordance with the exceptions to r 6.3. It is difficult to see how it could ever justify publication to the press. The exceptions to the rule indicate how confined are the circumstances where disclosure is permitted and the appropriate authorities to whom disclosure may be made.

385 The parties have not referred to any directly relevant Australian cases or texts dealing with public disclosure by a lawyer. The matter is discussed by Boon and Levin *The Ethics and Conduct of Lawyers in England and Wales* (2nd Ed 2008) at p 231-233 including:

> Normally such confidences can be revealed only to those having a legitimate interest in receiving the information, which would include the police or other relevant enforcement authority and also the intended victim. Gossiping in the pub about it or informing a tabloid newspaper would not be disclosure in the public interest.

386 We have been troubled by the consideration that the practitioner's argument might be put that Mr Rasiah's suggestion to the practitioner (accepting for these purposes the practitioner's account of it) was of such nature as 'not to fall within the ordinary scope of the practitioner's professional employment' within the rule in ***R v Cox and Railton***, such that no duty attached to the communication, then or later. Whatever justification there is for treating a disclosure of a communication made to further an illegal purpose as outside the specific terms in which the legal professional privilege rule has been expressed (rather than merely an exception to it), we do not think the principle for which the case stands can operate to excuse a lawyer publishing confidential information learned about his client's matter to the media. It does not seem to us that preventing disclosure in this manner could be described as inimical to the interests of justice or of the public interest. The concern in the present context is not with a client's privilege but with a lawyer's obligation. Put another way, we think the correct approach to this issue is to regard the professional obligation of confidence as independent of other doctrines including that of legal professional privilege. We are of the view that the communication made by Ms Corby's Bali lawyers to the practitioner in his capacity as a barrister assisting in the appeal was confidential and that it therefore attracted the duty of confidence. From this time (or, under the

application, 6 June 2005), the practitioner was required to keep that information confidential, except to the extent he was authorised to disclose it to the government or as provided by the rule.

387 The practitioner's closing submissions cite a number of additional cases in support of the submission. As to these, the High Court in ***A v Haydn*** (1984) 156 CLR 532 held the court would not enforce a contractual obligation of confidence where to do so would obstruct the administration of the criminal law because such was contrary to public policy. The matter in issue in ***Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1)*** (1981) 55 FLR 125 and ***Castrol Australia Pty Ltd v Em Tech Association Pty Ltd*** (1980) 51 FLR 184 was whether a possible breach of the *Trade Practices Act 1974* (Cth) overrode an obligation of confidence. For reasons earlier expressed concerning the independent professional obligation of confidence, we do not think these assist in the present inquiry.

388 For these reasons we do not think the iniquity 'rule' can be invoked to defend the practitioner's disclosure to the media of Mr Rasiah's suggestion of money to be provided by the government for use in bribing the appeal judges.

Statements to the media

389 Rule 4.5 of the *Professional Conduct Rule*s (in operation at the relevant time) provides in effect that a practitioner may make statements to the media provided that where the subject matter concerns a matter in which the practitioner is or has been professionally engaged:

> 1) ….
>
> 2) the practitioner shall not participate unless the practitioner has the informed consent of the practitioner's client to do so and it is not contrary to the interests of the practitioner's client for the practitioner to do so.

390 It follows that to the extent we find that, in breach of the confidence rule, the practitioner made the statements complained of to the media without Ms Corby's consent, there will necessarily be a breach of this second rule. There will also be a breach of this rule in those circumstances where the relevant communication was not confidential. Whether any such breach constitutes unprofessional conduct remains to be decided.

391 Mr McCusker points out in his closing submissions that the rule does not by its terms apply to the case of a prospective client, although he accepts that in certain circumstances a duty of confidence to a prospective client may still arise, having regard to the analogous case of legal professional privilege arising in those circumstances. On our findings it is not necessary to explore this issue because we have found that Ms Corby became an actual client on 6 June 2005.

392 As against this, the practitioner's submissions and authorities in relation to 'no confidence in iniquity' is directed at the alleged breach of the duty of confidence rule rather than the breach of the statements to the media rule. That would allow for a breach of the media rule even concerning a statement containing a proposal to commit a crime. Perhaps it was intended to be implicit in the submissions that the defence covered both rules. On our findings it is not necessary to say more about this.

Ms Corby's informed consent

393 The LPCC's case is that Ms Corby did not give her informed consent to disclosure of any of the identified statements for the purposes either of the confidence rule or the statements to the media rule.

394 We do not understand the parties to contend that there is a material difference between the nature of the client's informed consent required for the disclosure of confidential information and in relation to statements to the media. Neither do we understand the practitioner to challenge that the consent required under both rules is 'informed consent'. We note in passing that whereas the statements to the media rule specifies 'informed consent', the confidence rule does not. However, in our view the professional duty of confidence will generally require that the client's consent be an informed consent as the LPCC contends. That does not preclude the possibility of an implied authorisation by the client, for instance, in relation to the Bali legal team discussing the grounds of appeal with the Perth barristers or the Perth barristers discussing the appeal between themselves.

395 The practitioner submits that each of the statements complained of was made with Ms Corby's implied consent. This is on the basis that at their meeting on 6 June 2005, Ms Corby requested of the practitioner that he do whatever he judged to be in her best interests, and in particular anything which he thought might prevent her from being prejudiced by the actions of, in particular, Mr Rasiah. Specifically, the practitioner says he disclosed certain information because he thought it was in her best interests that he do so:

1) his criticism of delays in her appeal was made with the object of these being more expeditiously prosecuted and to make clear that the delay was not her fault, and

2) to publicly distance Ms Corby from the bribery allegation.

396 Although it is not stated, this defence could only operate with respect to statements made on and after 6 June 2005.

397 It is not obvious that Ms Corby's instruction to the practitioner authorised in advance statements to the media about her appeal. Statements to the public at large are not generally regarded as the appropriate way of protecting a person's interests. In any event, the notion of informed consent requires or suggests that the client know in advance the content of the proposed disclosure. Here that was not the case.

398 In considering this issue, it is to be remembered that on his evidence the practitioner, in error, on our finding, did not regard Ms Corby as his client. We think his motivation generally in making the statements to the media was the interests of the government and (regrettably) publicising his own personal role and conducting his dispute with Mr Rasiah. At one point the practitioner was asked in cross-examination whether before making a media comment he had made any attempt to contact Ms Corby or her Queensland solicitors. The response was 'She wasn't my client ... I was entitled to make any comments I chose. There was no reason to consult her.' At a later point in his evidence, when questioned by the Tribunal about this statement in his evidence, the practitioner said in effect that in the event of a conflict between what he regarded as the interests of the government and of Ms Corby's interests, the government's interests had to prevail.

399 We bear this evidence in mind in our approach to the issue whether the practitioner, in making the disclosures, believed he was acting in Ms Corby's interests.

Approach to the issue

400 On our finding, the relationship of barrister and client was not formed until 6 June 2005. In the way the LPCC has framed its case, the practitioner could only be guilty of unprofessional conduct with respect to statements made to the media from that date. These are in relation to the statements in the fourth disclosure published on 12 June 2005, the fifth disclosure also published on 12 June 2005, the sixth disclosure published

on 14 June 2005, the seventh disclosure also published on 14 June 2005 and the eighth disclosure published on 23 June 2005. These will be considered in turn.

401 We consider each of the statements the subject of these disclosures. We address in turn:

1) whether the practitioner made the statement or the substance of the statement to the media;

2) whether the statement was otherwise in the public domain (relevant only to the gravity of the disclosure);

3) whether the statement comprised information confidential to Ms Corby; and

4) whether the statement was made with Ms Corby's informed consent (as being in her best interests).

Fourth disclosure: statements published on 12 June 2005 - journalist Catherine Munro

402 In the meeting between the Perth barristers, Mr Voon and Mr Rasiah on 10 June 2005 (discussed in Part II of these reasons) it was agreed that the lawyers would impose a media 'ban', as the practitioner said, 'to quieten things down'. It was short-lived.

403 On the following day, the practitioner spoke to a journalist, Ms Munro. An article appeared in the Sun-Herald on 12 June 2005. The statements the LPCC claims were made and published and of which it complains are:

1) neither he [the practitioner] nor Mr Percy had seen any draft grounds of appeal, the transcript of the reasons of the judgment of the Indonesian Court or a transcript of the trial;

2) he had received an incomplete document from Mr Rasiah in Bali which requested assistance from the Australian government;

3) he was concerned that the request had been made by Ms Corby’s Indonesian lawyers at a very late stage;

4) the requests made included asking the government to account for the 4.1kg of marijuana that Ms Corby was convicted of taking into Bali, to produce the person who put the marijuana into the bag, the owner of the drugs, closed circuit TV film from customs, Qantas and the airports and the baggage weights of Ms Corby’s bags; and

5) he had received a formal document from Mr Rasiah which omitted a request for financial assistance which had been included in the informal document.

404 The first issue is whether these statements were made by the practitioner. In his witness statement the practitioner says he has no recollection of speaking to Ms Munro.

405 The Tribunal received a witness statement and heard evidence from Ms Munro who co-wrote the article. Ms Munro said that for the purposes of writing the article she spoke to the practitioner and all statements within quotation marks in the article that are attributed to the practitioner were said by him during their conversation. Ms Munro also said in effect that to the extent the introduction to a relevant passage commenced 'Mr Trowell said' or similar but which was not followed by words in quotation marks, she was confident that she had been given the substance of those words but the statement so attributed was not given verbatim.

406 Cross-examined on the article, the practitioner accepted that it referred to the letters from Mr Rasiah. As concerns the requests for assistance, he said he had made a distinction between the two letters (draft and final). As concerns the final letter, the practitioner said that he felt free to disclose the letter. He disputed, however, that it was necessarily his statement to the journalist which had disclosed the final letter. He said he wanted to make it clear that the government had never received the earlier draft letter. Ultimately he appeared to accept that he had made the statement concerning the 'incomplete document' (the draft letter). Given its contents, he wanted it on record that the government was not in possession of the document. He proactively sought this. It was suggested to the practitioner that the reference to the disparity between the letters would likely lead to inquiry as to the nature of the first letter. The practitioner conceded that this was a risk. He thought that journalists as this stage may already have had knowledge of the request for $500,000 from Mr Rasiah. He was asked whether the practitioner's view of Mr Rasiah influenced his decision of what to say to Ms Munro. The practitioner thought the real danger was that although Mr Rasiah had been told he would not get the money, he was not going to be 'put off'. He might have 'teed up' the bribes for the judges and then sought money from the government to meet this at the risk of Ms Corby being 'finished' if the government did not produce the money. Asked whether the disclosure might reflect adversely on Ms Corby, the practitioner said he had not said enough to show he was talking about bribery.

407 If, as the practitioner said in his response letter, he could not recall ever speaking to Ms Munro, it is difficult to understand the basis upon which in his evidence he said he was concerned in this conversation to make clear that the government had not received the draft letter and distinguished between the two letters. That suggests, as the LPCC claims, and as appears from his inconsistent evidence regarding his intentions, that the practitioner's evidence as to this conversation was a reconstruction of why he made these disclosures at this time.

408 We think the probabilities are that the practitioner made each of the statements, with the possible exception of the statement as to the contents of the final letter (the fourth paragraph above). The first paragraph is in direct quotes and the practitioner elsewhere stated this to the media. He also acknowledged making this statement in re-examination. Regarding the second and fifth paragraphs (the letters) he acknowledged he mentioned the first letter and said that he wanted to put in the public arena that there were two letters. Moreover, the passage referring to the letters includes an indirect quotation ('Mr Trowell said'). Ms Munro said that he had made this statement. As to the third paragraph (delay in the request for evidence) the practitioner said in evidence that he was concerned and wanted to make it known that the Bali legal team was late in delivering the request.

409 However, there is some uncertainty as to whether the practitioner was the source of the statement contained in the fourth paragraph. In favour of this, the practitioner said in evidence he did not regard himself as bound to keep the contents of the letter confidential. Ms Munro said in evidence she did not recall talking to anyone else about the article. She sent the practitioner a copy of the article and thanked him for his assistance. He might have disclosed the contents of the letter off the record. As against the practitioner being the source of the statement however, the report in relation to the content of the letter is not tied into the parts of the article where the practitioner is quoted. There is a reference in this context to 'sources' and to Senator Ellison. The practitioner said in his solicitors' letter dated 24 April 2007 to the LPCC that he suspected the government leaked some of the information about Mr Rasiah's requests for assistance. It is conceivable that the source was Mr Rasiah, who the practitioner also believed was speaking to journalists, although had Mr Rasiah been the source it seems likely he would have been quoted and unlikely that the letter would have been described as 'signed by case co-ordinator Vasu Rasiah.' In his conversation on the same day with Mr Taylor (the fifth disclosure) the practitioner declined to reveal the contents of the letter. It was not directly put to him in

cross-examination that he disclosed the contents of the letter. On this state of the evidence we are not prepared to find he made the fourth statement Hereafter, where we make reference to the disclosures and statements made to the media we exclude reference to this specific statement.

410 There is no evidence that any of the matters the subject of these statements was in the public domain. Had they been from a source other than the practitioner, he might have been expected to produce and tender the report. The LPCC apparently made available to the practitioner a file of all the media articles it held on the Corby matters.

411 We regard each of these statements as being confidential to Ms Corby.

412 We do not think any of the disclosures were made in Ms Corby's best interests. Exposing delays on the part of the Bali legal team in getting out the appeal grounds could not assist her. Publishing statements criticising the performance of the Bali legal team was more likely to have distracted them from their task and provided encouragement to the prosecution defending her appeal. In his evidence concerning expressions of support for Ms Corby's legal team made immediately after his visit on 6 June 2005, the practitioner admitted as much. In explaining that no one else was in a position to conduct her appeal, he said there was therefore a need to 'keep up appearances'. To the extent the practitioner was concerned at the Bali legal team's delay, the appropriate course was to write privately to them about this. Conducting an argument with, or as he said 'putting pressure on', the Bali legal team through the medium of the press appeared to us ineffectual (given the previous public dispute between Mr Rasiah and the practitioner it was unlikely to be productive), inappropriate and improper. It is nonsense to suggest it helped Ms Corby by distancing her from the work of her Bali lawyers. Nor do we see any advantage to Ms Corby in the practitioner publishing the existence and content of the draft and final letters. These requests for finance and assistance with the evidence were matters for private consideration by the Bali legal team, the Perth lawyers assisting them and the government. Further, in his letter to Mr Rasiah dated 8 June 2005, the practitioner stated that the question of obtaining funding was extremely sensitive and was required to be handled quietly and in confidence. It ought not, he believed, be played out in public. Yet the practitioner was here publishing the existence of letters requesting financial assistance. As was put to the practitioner in cross-examination, the reference to the draft letter including a request for financial assistance which was subsequently

omitted, was likely to arouse the suspicion of the media. The draft letter had been received by the practitioner and an explanation sought of its contents before the figures were to be put forward to the government. It was treated by the practitioner, as he explained in evidence, as a draft, unsigned and undated letter. The final letter, signed and dated, did not pursue the request for an amount for lobbying. That is where the matter might have rested. At this point, there was no evidence, beyond the practitioner's faint suggestion, that the journalists at the time were aware of Mr Rasiah's request for bribe money. Neither was there any credible evidence that Mr Rasiah was continuing to pursue a claim for bribe moneys from the government. The practitioner's stated concerns about Mr Rasiah 'teeing up' bribes with the High Court judges had not been mentioned in his response letter nor his witness statement and appeared speculative. This supports the inference we make that there was a measure of reconstruction in the practitioner's evidence concerning his conversation with Ms Munro.

413 To the extent the practitioner claims he believed that these disclosures were in Ms Corby's best interests or were not detrimental to her interests, we reject that evidence. When asked whether the practitioner considered the effect on Ms Corby of his disclosing the draft letter and the suggestion from Mr Rasiah, the practitioner answered by reference to the consequences if it had been disclosed that bribes had been paid or that Mr Rasiah had approached the High Court with that in mind. The practitioner then said he had 'never mentioned the bribe' as such. The difficulty with this evidence is that there was never a prospect of the government paying money for bribes nor any evidence of Mr Rasiah 'teeing up the judges'. For all these reasons we find that the practitioner never turned his mind to the consequences for Ms Corby. We think it was detrimental to Ms Corby's interests to reveal these matters at all and particularly to hint at a suggestion of impropriety in relation to a request for financial assistance by a member of her Bali team.

414 We find that this disclosure and the statements to the media were made by the practitioner without Ms Corby's informed consent.

Fifth disclosure: statements published on 12 June 2005 - journalist Nick Taylor

415 Also on 11 June 2005, the practitioner spoke to journalist Nick Taylor of The Sunday Times. An article appeared in that newspaper on the following day (12 June 2005). The statements made of which the LPCC complains are as follows:

1) Ms Corby's Indonesian legal team had made a list of requests for the Australian government;

2) the Indonesian legal team had previously only given an unsigned draft of the requests and the practitioner had advised that was not appropriate and that a formal document of request and expenditure detail was needed;

3) He [the practitioner] had expressed concerns about the late delivery of the request by the Indonesian team; and

4) Neither he nor Mr Percy had seen the grounds of appeal or a transcript of the Court proceedings;

416 The practitioner accepts that he made the statements, except for the second. He says that what he told Mr Taylor was that:

> The Indonesian legal team had only given an informal draft of the requests, and the practitioner had said that that was not appropriate, and that a formal request and detail of proposed expenditure was needed.

417 We accept the practitioner's version of this part of the conversation.

418 There was virtually no cross-examination on this article although during some limited re-examination the practitioner explained he had made the statements to 'protect the government'. We make similar findings as for the previous disclosure. There is no evidence that any of the matters the subject of these statements was (except through the practitioner) in the public domain. We regard each of these statements as comprising matters confidential to Ms Corby. We do not think any of the disclosures were made in Ms Corby's best interests or that the practitioner believed they were. Neither do we accept, as the practitioner claimed in re-examination that, as he believed, they were not detrimental to her interests. The reference to the draft letter being 'not appropriate' could only continue to arouse suspicion. We do not think the practitioner turned his mind to whether these disclosures affected Ms Corby's interests.

419 We find that this disclosure and the statements to the media were made by the practitioner without Ms Corby's informed consent.

Sixth disclosure: statements published on 14 June 2005 - journalist Holly Nott

420 The LPCC complains that on about 13 June 2005 the practitioner made statements to the journalist Holly Nott which appeared in a press article on the following day:

1) He [the practitioner] and Mr Percy had not been briefed on the grounds of appeal lodged by Ms Corby's Indonesian legal team;

2) The only material he and Mr Percy had received from the Indonesian legal team was an untranslated copy of the trial judge's findings;

3) The Indonesian lawyers had not made the best use of the experience and skills they were offered;

4) The Indonesia legal team had left it to the last minute to organise the material they needed for the appeal; and

5) Just one cause for concern was the last minute request and application for finance.

421 The practitioner had no recollection of speaking to Ms Nott. The practitioner in his response denies each of these statements. In evidence, the practitioner was critical of what he regarded as assumptions made in the article. He appeared to accept he may have said some of the things otherwise reported concerning his feeling that he had let Ms Corby down, and that the Indonesian legal team had not made the best use of his and Mr Percy's experience and skills, had left things to the last and were overly dependent on the Australian government.

422 The first paragraph is an indirect quote and is consistent with matters in which the practitioner is directly quoted. It is also consistent with other statements made by the practitioner at the time. We find that it, or a statement substantially to that effect, was likely to have been made. Similar comments apply to the second paragraph. We think it probable that the statement was made. The third paragraph is closely tied into the quotation from the practitioner which follows it and he did not dispute that he may have said it. We find that it was made. Finally, the fourth and fifth statements are again directly linked to statements on which the practitioner is quoted and are consistent with the practitioner's other statements and his position that he was 'protecting the government'. We find each of these statements was made.

423 As before, our findings are that there is no evidence that any of the matters referred to in these statements was in the public domain, other than through the practitioner. We regard each of these statements as being confidential to Ms Corby. We reject the practitioner's assertion that these statements were in Ms Corby's interests or were not detrimental to her. We think they were detrimental to her interests. We do not think the practitioner turned his mind to whether these disclosures affected

Ms Corby's interests. We think the inference to be drawn from the fact that the practitioner was making the same or similar statements to the press on a near daily basis was that, to some extent at least, as the LPCC contended, he courted media attention for its own sake.

424 Having regard to the content of the statements and generally we again do not think this disclosure and statements to the media were relevantly made with Ms Corby's informed consent.

Seventh disclosure: statements published on 14 June 2005 - journalist Steve Pennells

425 The complaint is that on about 13 June 2005 the practitioner made the following statements to journalist Steve Pennells which were published on 14 June 2005:

1) The Indonesian legal team were unprepared for the appeal;

2) They [Mr Percy and the practitioner] still had not seen a draft of the appeal grounds or been given any indication of what arguments might be presented;

3) He had not been provided with a transcript of the proceedings;

[He had not seen a transcript of the proceedings.]

4) The Indonesian legal team request for information from the Australian government was made at the last moment and was a rehash of a former request which the Indonesian lawyers knew the government could not deliver; and

5) The Indonesian lawyers should have spent more time preparing the appeal and had wasted time holding press conferences.

426 The practitioner admits making the statement in square brackets in paragraph 3 and the statement in paragraph 5, but otherwise does not admit the statements. The practitioner explained in re-examination that the last statement concerned Mr Hutapea holding a press conference with a 'soapie starlet.' This was apparently a television exercise with a view to encouraging public support for Ms Corby's case in Indonesia.

427 Mr Pennell's provided a witness statement. Mr Pennells says he does not have any independent recollection of this conversation but based on his usual practice he believes that all of the quotes within the article that are attributed to the practitioner are the words the practitioner used during the conversation. The other references to what the practitioner said which

are not in quotation marks are a paraphrase of words used by the practitioner.

428 The first statement is, at the second place it appears, in direct quotes. The second statement is an indirect quote. The third statement is admitted in its amended form. The fourth statement is in indirect quotes. The fifth statement is admitted. When questioned about the article, the practitioner did not dispute any particular statement. We find that each of the statements was made.

429 As before, our findings are that there is no evidence that any of the matters referred to in these statements was in the public domain, other than through the practitioner. We regard each of these statements as being confidential to Ms Corby and their disclosure detrimental to her interests. We do not think the practitioner turned his mind to whether these disclosures were in Ms Corby's best interests. The view concerning how the Bali legal team had wasted time seems to us unconstructive and provocative.

430 We find this disclosure and the statements to the media were made by the practitioner without Ms Corby's informed consent.

Eighth disclosure: statements published on 23 June 2005 - journalist Steve Pennells

431 On 22 June 2005, the practitioner had a further conversation with journalist Steve Pennells. The following statements were reported in an article on 23 June 2005:

1) the practitioner believed that Ms Corby's Indonesian legal team had given consideration to using bribery to attempt to secure success in Ms Corby's appeal;

[Mr Rasiah had given consideration to using bribery and Ms Corby had no knowledge of that, or of any request for money for a bribe, or any proposal to attempt to bribe];

2) Mr Rasiah had provided a draft letter for the Australian government which included a request for an amount of $500,000 for lobbying;

[Mr Rasiah had produced a draft letter which included a request for the Australian government to provide $500,000];

3) the practitioner was of the view that the request in the draft letter for $500,000 was for bribes for judges; and

4) when Mr Rasiah passed the final version of the request to the practitioner for on-forwarding to the Australian government the request for $500,000 had been removed.

432 The statements are admitted except, with respect to the first two paragraphs, that they were in the form in brackets. We accept the practitioner's evidence in this respect.

433 The allegation of the possible use of bribery in the Corby proceedings caused something of a sensation in the Australian media and, as there reported, in Indonesia. Over the following week the story with various follow-up comments was published in various media outlets in Australia. These included reports in which Mr Rasiah denied that the request for $500,000 was for bribery, Mr Hutapea said that he had warned the practitioner against making the allegation and (separately) the allegation might result in an increase in Ms Corby's punishment, Ms Corby had 'sacked' her Bali legal team although subsequently reinstating part of the team and Ms Corby's mother said that rather than helping her daughter, the practitioner was making things worse.

434 In his witness statement and response letter, the practitioner states that on the same day but prior to his conversation with Mr Pennells, he had spoken to another journalist Nick Butterly. Mr Butterly had telephoned to advise that he had written a story to appear in his newspaper based on a conversation with Mr Rasiah, in which Mr Rasiah had admitted asking for $500,000 for lobbying but denied that it was to bribe judges. The practitioner says he made no response. It was however clear to him that Mr Butterly was aware of the contents of the draft letter. It followed that, in the practitioner's view, other members of the media might also be aware of the draft letter.

435 The practitioner says his views were confirmed when Mr Pennells spoke to him later in the evening of 22 June 2005. As described in his response letter the practitioner says that Mr Pennells told him that Mr Rasiah had asserted that he had never made any request of the Australian government through the practitioner for money to bribe judges. Mr Pennells asked the practitioner to confirm whether Mr Rasiah's explanation was true. The practitioner said that he was not prepared to be untruthful about the matter and to be involved in any cover-up in respect of what he believed to be a criminal enterprise to bribe judges of the High Court of Bali. The practitioner told Mr Pennells that Mr Rasiah's assertion was untrue and relayed briefly the substance of his conversations with Mr Rasiah. He also told Mr Pennells that these activities of Mr Rasiah were not undertaken with the knowledge of Ms Corby, nor

were they countenanced by Ms Corby's legal team. In his response letter the practitioner acknowledged that the substance of his comments to Mr Pennells were reflected in the article.

436 Mr Pennells' witness statement on the subject is difficult to follow. He gives a generalised account of his conversation with the practitioner (at [15]) followed by a more detailed and rather different version (at [18] - [24]). The explanation for the variance is no doubt because, as he acknowledges, after this length of time his recollection of events surrounding the story was not good. He says he cannot recall how much information he had before the phone call to the practitioner and how much he got from the practitioner, but if the practitioner did not provide the information then he at least confirmed it. He is confident however that the words in the article he put in quotations were those of the practitioner, with the possible exception of the word 'lobbying'. Mr Pennells says that he rang the practitioner once or possibly twice on the evening. Adopting his generalised account, his evidence was that he had some knowledge involving Mr Percy and the practitioner to the effect that the Indonesian lawyers, 'especially Vasu Rasiah' asked for money from the Australian government for bribes. He put to the practitioner something along the lines that he understood there was a bribe or two made, he understood the practitioner was party to it or a conduit to it and was that correct. Mr Pennells says that the practitioner 'confirmed it' and he quoted ‘pretty much what [the practitioner] said’ in the article. He ‘used pretty much every quote he gave me’. Mr Pennells says he also spoke to Mr Rasiah and put the allegation to him and that 'he denied it flatly and said the money was requested for a public relations campaign'.

437 There was tendered also a transcript of the LPCC interview of Mr Pennells. This is broadly consistent with his witness statement. What emerges additionally from this document is that prior to his conversation, Mr Pennells was aware of a request for $500,000 and that there was a suspicion that this was for bribes. He believed he had learned from Mr Rasiah of Mr Rasiah's request for $500,000. He had learnt from the practitioner that there was a draft letter. He told the practitioner they were running the story anyway that the government had been approached for money, and he could confirm or deny this. When he put the allegation to Mr Rasiah he had denied this and said the amount sought was for public relations or something like that. He may have rung the practitioner back after that. He believed from his conversation with the practitioner he had now got 'hard evidence' of a request for bribe money as opposed to rumour.

438 The practitioner was cross-examined at some length about the statements he made to Mr Pennells. His evidence was unsatisfactory in part because he answered by reference to what Mr Pennells had told the LPCC. The practitioner also framed his rather fuller account of the matter in his witness statement in part by reference to Mr Pennells' witness statement. He acknowledged that in fact no request for bribe money had been made to the Australian government by way of the draft letter because he had not passed on the draft letter. He was asked why he did not tell that to Mr Pennells or why he did not do as Senator Ellison had done and confirm that the government had not received a request for lobbying or for other purposes and would have rejected such a request. The practitioner quarrelled with the question and did not answer it. As regards the Minister, what the Minister said was literally true but he was aware of the request (because the practitioner had orally advised his staff of it) and he could not speak for him. He emphasised that Mr Pennells had said he was going to run the story with or without the practitioner's version. The practitioner disclosed what he did in order to protect his own position, the government's position and Ms Corby's position. He could not be 'untruthful' and needed to make the disclosure to protect the integrity of the government, himself and Ms Corby who knew nothing about it. He was asked by the Tribunal whether the effect of what he said was to convert a possible rumour of a bribe attempt into the fact of that. The practitioner said he believed that Mr Pennells had sufficient material to run with the story of a bribe attempt. It was put by Mr Hall that what he had told Mr Pennells became the story. The practitioner thought the journalist may have bluffed him but he had a fair idea what the situation was. He said he had made it a pre-condition to agreeing to talk to Mr Pennells that he report that Ms Corby was not involved in the attempt. As the LPCC points out, that evidence of a condition was not part of either his response letter nor his witness statement, both of which deal specifically with the subject of Ms Corby's lack of knowledge. He referred to Mr Davies' account of his conversation with Mr Rasiah at the bar on 10 June 2005 and his fear that Mr Rasiah would approach the judges and 'tee them up' for the bribes and then ask the government for the money. We think that evidence of both these matters is unsatisfactory for reasons given. Then, 'that would have been fatal to her because the money would not have been forthcoming'. This is a curious suggestion given the practitioner's assertion that the Bali judges were not open to corruption. He said Mr Pennells had put to him that the bribe had taken place and that the practitioner was party to it. He regarded himself as in an enormous dilemma and that he had to think quickly about how he was

going to respond. He was not going to be untruthful about it because that would have been a disaster for everybody.

439 When asked about a subsequent report disclosing that Ms Corby had sacked her Bali legal team, the practitioner said in evidence he welcomed the news that she had got rid of the 'crooks and charlatans' that surrounded her. Asked whether he saw this as a potential benefit of his statements to Mr Pennells, the practitioner said: 'I don't know now. I just don't know.' He then said he did not think he made his decision because of an objective to damage Mr Rasiah or to attack the Bali legal team. It was clear from his answers that the practitioner could not say with any conviction that this was not his motive at the time. When asked by the Deputy President whether the disclosure was an escalation of his disagreement with Mr Rasiah, the practitioner answered by reference to the informal conversation between Mr Davies and Mr Rasiah on 10 June 2005. We consider this issue of motive below.

440 We accept that the practitioner felt himself under some pressure when confronted by the journalists about whether there had been a bribe attempt. We also note that the practitioner, questioned by the Deputy President, acknowledged that he did not know whether he made the right decision or not in making the disclosure to Mr Pennells. We are conscious also of Mr McCusker's caution that, with the benefit of hindsight, we categorise as unprofessional conduct that which may have been an understandable error of judgment.

441 Our sympathies are limited however. First, we think much of the practitioner's dilemma as to how to answer was of his own making. He had generally made himself available to the media to discuss the Corby matter. More directly, he had put out that there was an inappropriate draft letter from Mr Rasiah which had made a claim for an item of money which was subsequently omitted. Second, by this date the appeal had been lodged. Any further assistance the practitioner could give was, it appears, in relation to assisting in obtaining additional evidence. The government had apparently decided not to take Mr Rasiah's suggestion of a bribe any further. There seems to us no obvious reason why the practitioner needed to contribute to the subject. Third, a related point, we think that in the circumstances there was no imperative to provide a detailed account to Mr Pennells of Mr Rasiah's suggestion of payment of bribe money. To the extent he was pressed on the matter he could simply have declined to comment as he did with Mr Butterly or answered briefly as the Minister subsequently did (ABC interview on 23 June 2005). At another point in his evidence the practitioner claimed he was 'no stranger'

to dealing with the media. Whatever rumours were circulating amongst journalists would have remained just that, particularly given Mr Rasiah's emphatic denial of any claim by him for money for bribery. Mr Pennells' evidence suggests that it was the practitioner's detailed account refuting the denials of Mr Rasiah's which made the matter newsworthy. This supports the LPCC's submission that the better characterisation of the matter was the practitioner exposing the story rather than, as the practitioner claimed in evidence, having to defend the charge of being involved in a cover-up of it. Fourth, having reviewed the whole of the evidence it is apparent that the practitioner had formed an extremely hostile attitude toward Mr Rasiah. The manner in which the practitioner spoke about Mr Rasiah both at the time (for instance in his letter to Mr Hutapea) and before us (we have mentioned some only of these references) suggests he felt an intense personal animosity which coloured his decisions. The basis for that hostility as indicated by the practitioner's own statements was not just the suggestion of the government paying money for bribes but was Mr Rasiah keeping control of the case and excluding the Perth 'team'. See again his letter to Mr Huapea and his statements to the media to this effect. We have formed the view that the practitioner's decision progressively to disclose the bribery claim was motivated, at least in part, because of his intense dislike of Mr Rasiah. That explains why the revelation about the bribery claim went into such detail - covering the initial request, the draft letter, his refusal to convey the draft letter to the government and the subsequent omission of the request from the final letter. It also explains why instead of setting out his concerns in private correspondence with Mr Rasiah or Ms Lubis, or advising the government to take the matter up with the Indonesian authorities, the practitioner made his revelations through the press where it would have maximum impact. Finally, the practitioner had earlier been extremely critical of a Corby supporter (Mr Bakir) for his making bribery allegations. He said these might generate anti-Indonesian sentiment which could affect the mind of an Indonesian judge. The practitioner sought to distinguish those circumstances, they being false allegations, but at the least he must have known that the consequences of his disclosure would cause significant problems for the Bali legal team which could not assist Ms Corby awaiting the completion and outcome of her appeal.

442 We reject the practitioner's evidence that when questioned by Mr Pennells, the only options open to the practitioner were to tell him what had happened or to deceive him. We reject also his evidence that his disclosures were necessary to protect his interests, the interests of the government and Ms Corby. The practitioner might have declined to

comment in relation to the matter. It is not as if he or the government had anything to hide. The practitioner had rejected the suggestion of money for bribery from the outset and acting on his belief of the real nature of the claim for lobbying and the status of the draft letter had refrained from passing it on. There is no evidence that Ms Corby knew of the suggestion. No-one, not the Bali legal team nor the government, had any interest in revealing Mr Rasiah's suggestion, but had the issue somehow opened up or been investigated, those facts would have emerged. As regards the written records, the facts were that the practitioner had received a draft letter making a request for funds including an amount for lobbying. This had not been passed on to the government pending clarification. When the final letter was received it had omitted the request for an amount for lobbying. To the extent it was necessary to mention any of this (and we do not think it was) the practitioner might have confined himself to that. There could be no criticism of his conduct or that of the government or Ms Corby in these circumstances. We think that position would have best served Ms Corby's interests.

443 We reject also the assertion that the practitioner was under a professional duty to 'tell the truth' concerning the bribe allegations. To the extent the government or the practitioner had thought it necessary to reveal Mr Rasiah's suggestion, there were appropriate ways the practitioner might have gone about this. Publication to the press was not one of them.

444 The only redeeming feature of the incident is that the practitioner did at least endeavour to protect Ms Corby and her family by stating that they were unaware of the bribery allegations.

445 We find that these statements were not in the public domain. We find further that they did comprise matters confidential to Ms Corby and that disclosure was contrary to her interests. That she may not have known about Mr Rasiah's suggestion that the government provide money for bribing the judges is not to the point. Lawyers for a client will often discuss matters and tactics relating to the case without the client's express knowledge or involvement, acknowledging that these strategies will rarely involve that under consideration. However misconceived the bribery proposal may have been, it was one on its face made to the knowledge of the Bali legal team and pursued by Mr Rasiah on behalf of and in the interests of Ms Corby. We reject the practitioner's suggestion at one point in his evidence that the suggestion was made for Mr Rasiah's own purposes; that is the money would not have been used for Ms Corby's benefit. There was no evidence to support that suggestion and, given the

source of the funds, it seems inherently unlikely. We find the statements were not made in Ms Corby's best interests and neither was this the practitioner's motivation in making the disclosure.

446 We find that the practitioner made this disclosure and the statements to the media without Ms Corby's informed consent.

Unprofessional conduct

447 The remaining issue is whether the making of the statements in the circumstances constituted unprofessional conduct. That is, whether the practitioner's conduct, as found, to a substantial degree fell short of the standard of professional conduct observed or approved by members of the legal profession of good repute and competence.

448 The findings we have made concerning the making of the statements and the circumstances of and motivation for their making, leads irresistibly to our finding that the practitioner was guilty of unprofessional conduct in relation both to the disclosure of confidential information and in making statements to the media. Whilst it may have been the case that the making of an individual statement might not have constituted unprofessional conduct, when the statements are taken as a whole and the circumstances of their making is considered it is clear that the practitioner was guilty of a serious breach of professional conduct.

449 The circumstances relevant to this finding in summary are as follows:

1) Ms Corby was from 6 June 2005 the client of the practitioner. He ought to have appreciated this fact given the circumstances of their meeting as we have found. To the extent he did not, he should at the least have considered this possibility and refrained from making statements to the media or sought her informed consent to do so if satisfied they were otherwise in her best interests;

2) in their meeting of 6 June 2005, the practitioner and Ms Corby agreed a form of words for release to the media of matters which were of direct and immediate concern to Ms Corby and which, because they were of a general nature and intended for the Australian public, were justifiably made through the media. The practitioner ought to have sought her agreement before proposing to make further statements to the media. To the extent there

were practical difficulties in directly doing so, he might have sought her approval through her Bali legal team or through her family who were in constant touch with her. It is of interest that in his letter dated 21 June 2005 to Mr Hutapea, the practitioner in effect sought his permission to the practitioner making a further media statement relating to the appeal (that only Mr Hutapea and Mr Siregar handle the appeal);

3) the statements made fall into two main groups. The first group comprise criticism of the Bali legal team for:

a) delays in providing a transcript of the trial and reasons, the draft grounds of appeal and requests for (inappropriate) evidence;

b) not making the best use of the experience and skills offered; and

c) spending insufficient time on the appeal.

The appropriate course for a responsible barrister in the practitioner's position believing there were these problems which were capable of redress was to have written to the Bali legal team and made known these concerns. If there were difficulties in doing so because the criticism was directed at the Bali legal team, he might have sought to raise them with Ms Corby or her family. To publish these statements to the media was detrimental to Ms Corby because it appeared to demonstrate a failure on the part of her Bali lawyers and a weakness in their preparation of her appeal. As the practitioner said in effect in his evidence, there was little point in criticising the Bali legal team because no-one else was in a position to take over and prepare the appeal. These statements may have provided comfort to the prosecutors defending the appeal. It was likely to distract the Bali legal team from their task and make it less likely they would include the Perth team in assisting with the grounds of appeal. It is far from clear that the statements promoted the government's interests, although the practitioner claimed they did by anticipating the Bali legal team's attack on the government. We think the motivation for these public

statements was in part the pursuit of the practitioner's dispute with the Bali legal team and in particular Mr Rasiah, and the practitioner's interest in promoting himself in the media as an expert, approached by the government, whose pro bono services were not being availed of;

4) the second group of statements either foreshadowed or constituted the bribery claim. For reasons given above, we reject the practitioner's claim that this was disclosure made in Ms Corby's interests. We do not think there was any credible evidence that after 10 June 2005 (the delivery of the final letter to the government) Mr Rasiah was seriously pursuing money for bribery from the government. We do not think the journalists' possible story of a bribery claim, rejected by Mr Rasiah, would have had any or sufficient foundation but for the practitioner's progressive revelation of the details of Mr Rasiah's suggestion. Again, we have doubts whether they promoted the government's interests, although the practitioner claimed they did by anticipating a suggestion that the government was the recipient of a request for money for bribery. We again think the motivation for these public statements was in part the pursuit of the practitioner's dispute with Mr Rasiah; and

5) in the space of about 11 days the practitioner made five disclosures to the media of statements which directly concerned Ms Corby's appeal. They were statements as we find which were not merely of no benefit but were detrimental to the interests of a person who was in an extraordinarily vulnerable situation, and where there was no obvious benefit to the government.

450 The practitioner argued that he did not breach the requisite professional standard to the extent he believed Ms Corby was not his client and further that he made the statements believing them to be in her interests. We have dealt with the second argument. We do not accept it. As to the first, we accept the practitioner's evidence that he did not regard Ms Corby as his client. The basis for the practitioner's position appears from his evidence to have been based in part, on the fact that the government was his client and its interests may have conflicted with Ms Corby's. He was so certain Ms Corby was not his client he felt no

need to analyse or discuss or seek advice on whether that belief was sound.

451 The starting point in considering this issue must be the situation of Ms Corby, suffering both physical deprivation and the prospect of life in an Indonesian jail and dependent, for some possible relief, upon the success of her appeal. We think that a responsible barrister would have been acutely aware of these facts and conducted themself accordingly. That would require that the barrister pay very careful attention to whether they owed Ms Corby duties of confidentiality. Given that possibility existed, the practitioner ought to have erred on the side of caution and exercised great restraint in making any disclosures or, where necessary, saying anything to the media. He might have made efforts to clear any statements with Ms Corby in the manner suggested, if they were otherwise not detrimental to her position. We think the practitioner manifestly failed to exercise that level of care and restraint. Rather, he sought out media attention and disclosed confidential matters and expressed his personal opinions about her appeal with no or little regard to the consequences for Ms Corby. Worse, he conducted his personal dispute with Mr Rasiah through the press in a manner that was highly prejudicial to Ms Corby's interests. In these circumstances, we do not think the practitioner's belief that Ms Corby was not his client excuses his conduct.

452 Neither do we think that the disclosures and statements were justified to the extent the practitioner believed they were in the government's interest or served a political purpose for which he had been retained and were not inimical to Ms Corby's interests. We leave to one side the propriety of the practitioner, in the circumstances, undertaking what he called a semi-political role. In our judgment the practitioner was under an obligation to Ms Corby as his client to protect her confidences, ensure any disclosures were in her interests, and obtain her authority to make statements to the press. Put another way, whatever political or other service the practitioner regarded himself as rendering to the government, from Ms Corby's point of view we think she was entitled to expect that a senior counsel advising and assisting her in relation to her appeal against a life sentence would scrupulously comply with his professional obligations to protect matters confidential to her appeal and obtain her informed consent to statements made to the media.

Conclusion

453 For these reasons we find that the charge of unprofessional conduct in respect of both the disclosure of confidential information and statements to the media without the informed consent of Ms Corby as the practitioner's client have been made out.

Orders

1. The practitioner is guilty of unprofessional conduct.
2. The Tribunal will hear submissions as to penalty and costs on a date to be fixed.

I certify that this and the preceding [453] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

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JUDGE J ECKERT, DEPUTY PRESIDENT