QCAT

Queensland Civil and Administrative Tribunal

DECISION

Case number:	**OCR056-17**
Applicant:	**Legal Services Commissioner**
Respondent:	**William Hanron Redmond**
Before:	**Hon Peter Lyons QC, Judicial Member** Assisted by: Mr Scott Anderson Mr Keith Revell
Hearing Date:	**9 May 2018**
Proceeding Type:	**Tribunal Hearing**
Decision Date:	**17 July 2018**

IT IS THE DECISION OF THE TRIBUNAL THAT:

1. The application is dismissed.

2. Any party applying for an order for costs is to file and serve submissions in support of the application within seven days of the publication of these reasons; and the other party is to file and serve submissions in reply within a further period of seven days.

Signed

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

Hon Peter Lyons QC, Judicial Member
Queensland Civil and Administrative Tribunal

QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Redmond* [2018] QCAT
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **WILLIAM HANRON REDMOND** (respondent)
APPLICATION NO/S:	OCR056-17
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	17 July 2018
HEARING DATE:	9 May 2018
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member Assisted by: Mr Scott Anderson Mr Keith Revell
ORDERS:	**1. The application is dismissed.** **2. Any party applying for an order for costs is to file and serve submissions in support of the application within seven days of the publication of these reasons; and the other party is to file and serve submissions in reply within a further period of seven days.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – OTHER MATTERS – where respondent allegedly failed to meet financial obligations in regards to an employed solicitor – whether professional misconduct – whether conduct happened in connection with the practice of law – whether conduct fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner – whether conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence *Legal Profession Act* 2007 (Qld), s 5(1), s 28, s 418, s 419, s 452, s 656C,

Adamson v Queensland Law Society Inc (1990) 1 Qd R 498
Allinson v General Council of Medical Education and Registration [1894] 1 QB 750
Council of the Law Society of the ACT v Legal Practitioner N1 [2016] ACAT 36
Council of the Law Society of NSW v Adams [2010] NSWADT 177
Council of the Law Society of NSW v Andreone [2014] NSWCATOD 49
Council of the Law Society of New South Wales v Dalla [2011] NSW ADT 130
Council of the Law Society of NSW v Etherington [2016] NSWCATOD 31
Council of the Law Society of NSW v Kingston [2014] NSW CATOD 21
Kennedy v The Council of the Incorporated Law Institute of New South Wales (1939) ALJ 563
Law Society of NSW v Bouzanis [2006] NSWADT 55
Law Society of New South Wales v Delpopolo [2014] NSWCATOD 55
Law Society of New South Wales v Gillroy [2010] NSWADT 232
Law Society of New South Wales v Koffel [2010] NSWADT 149
Law Society of New South Wales v Vosnakis [2007] NSWADT 42
Legal Services Commissioner v Budgen [2011] QCAT 223
Legal Services Commissioner v Hope [2010] QCAT 184

APPEARANCES & REPRESENTATION:

Applicant:	D A Holliday of Counsel instructed by the Legal Services Commission
Respondent:	S Ford, Solicitor of Gilshenan & Luton

REASONS FOR DECISION

[1] The respondent failed (for a time) to meet financial obligations relating to an employed solicitor of various practices with which the respondent was associated. The applicant has contended that the respondent should as a result be found guilty of professional misconduct.

Respondent's relevant legal career

[2] The respondent was admitted to practice as a solicitor on 24 February 1986. It is common ground that he is an Australian lawyer pursuant to s 5(1) of the *Legal Profession Act* 2007 ('*LP Act*').

[3] Between 1 September 2001 and 1 November 2009, the respondent was a principal of the law practice known as Redmond van der Graaff. From 1 November 2009 to 8 April 2013 the respondent was the principal of a legal practice known as Redmond + Redmond (Trading Co Pty Ltd). Between 9 April 2013 and 18 March 2015, the respondent was the principal of the law practice known as Redmond (Red Lawyers Pty Ltd). He is now the managing director of Redmond + Redmond Lawyers.

Unmet obligations

[4] Between August 2006 and 18 March 2015, Mr Raymond Murphy was a solicitor employed by the practices just referred to. The respondent terminated Mr Murphy's employment at the end of that period.

[5] Between 1 July 2009 and 18 March 2015, superannuation contributions payable in respect of Mr Murphy totalling $13,570.75 were not paid. These amounts were payable under the *Superannuation Guarantee (Administration) Act* 1992 (Cth) ('*SGA Act*').

[6] Between 1 July 2007 and 18 March 2015, Mr Murphy was not paid the full amount due to him as wages, the shortfall being $6,060.45.

[7] On the termination of his employment, Mr Murphy became entitled to the sum of $37,846.14 representing 24 weeks of annual leave which he had not taken. By the same date, Mr Murphy had accrued 7.46 weeks of long service leave, with the consequence that, on termination, he became entitled to the sum of $11,763.82. These amounts were not paid at that time.

[8] Each of these unmet obligations provides the foundation for each of the four charges made in the discipline application brought against the respondent.

Respondent's explanation

[9] The respondent has provided an affidavit relating to the non-payment of these sums. He said that from 2007 onwards, he was personally involved in a multitude of litigious matters, resulting in his experiencing increased financial pressures. Mr Murphy was aware of these pressures, as he had the day to day conduct of a number of the respondent's personal litigation files.

[10] The respondent gave evidence that, when he changed firms in 2009, Mr Murphy came to his new firm on substantially the same terms as those for his employment with the previous firm, and was fully cognisant of the respondent's financial position and the pending litigation. Mr Murphy was, in the period 2009 to 2013, fully supportive of the respondent during his financial struggles, and in some weeks, offered to forego wages to allow the respondent to pay junior staff.

[11] After Mr Murphy filed his complaint with the applicant on 15 September 2015, it was necessary to clarify what was owing to Mr Murphy, which made it necessary to obtain expert evidence. The clarification has resulted in an amendment of the application (by the omission of an allegation that the respondent failed to pay Mr Murphy a further sum of $6,623.07 for annual leave loading).

[12] The respondent provided further information about his financial difficulties. He said that, in 2007, his net worth was of the order of $4 million. He had acquired

investment and lifestyle properties, but was heavily geared, and relied on his income to support interest payments.

[13] The respondent was also engaged in business ventures with respect to distressed mortgages. One led to proceedings against the respondent and one of his companies in the Supreme Court of this State. A freezing order was made against him, and there were a succession of applications in respect of his finances. With a wife and three children to support, he experienced significant stress and his marriage was at a breaking point. The global financial crisis significantly reduced the earnings of his practice, which was property-based.

[14] The civil proceedings settled, but the respondent's personal costs exceeded $2 million. To meet his liabilities, the respondent was forced to borrow money from his family, which he is still repaying. He was advised that he should enter into bankruptcy but chose not to. He and his wife almost lost the family home and he could not afford to pay school fees for their children.

[15] In this period, the other partner in his legal practice terminated the partnership, resulting in its dissolution, with the partner attempting to take the respondent's clients.

[16] In 2011, the respondent defaulted on his home loan, and also on his loans on two investment properties. About that time, he also defaulted on payments due under the settlement agreement. This was renegotiated. He again defaulted on this agreement in 2012. A creditor's petition was then filed against him, but in early 2013 he was able to pay the balance of the settlement, and the petition was dismissed.

[17] In 2013, Trading Co Pty Ltd was put into liquidation. The respondent was then in litigation with MIS Funding, the ANZ Bank, and the Australian Tax Office. With respect to the tax debt, there were appeals, ultimately to the High Court of Australia, which were unsuccessful. A further creditor's petition was then filed against respondent. At about this time he received sufficient fees from a client to enable him to pay the debt on which it was founded.

[18] In 2015, the mortgagee of one of the investment properties called in his debt, and then issued another creditor's petition. Again, fees received from a client enabled the respondent to pay this debt. In March 2015, he negotiated a settlement with the ANZ Bank, and to pay out the bank, he eventually obtained finance from a private lender.

[19] Between 2008 and 2015, the respondent was dealing with other unrelated proceedings by the applicant (referred to later) which had an adverse impact on his legal practice. The respondent believes that the subsequent reprimand also caused him to lose a lot of prospective clients.

[20] The respondent deposed that at all times during these difficulties, he was trying to make the payments owed to Mr Murphy but simply had no means of doing so. Eventually he was able to find a lender, from whom he borrowed moneys at 20% interest, to enable him to pay Mr Murphy. All of the amounts referred to in the discipline application have now been paid.

[21] While there might be grounds for scepticism about some of this evidence, the respondent was not cross-examined, there was no other challenge to his evidence,

and it has not been suggested that the evidence should not be accepted. Accordingly, this application should be determined on the basis of it.

Legislation relating to Tribunal proceedings

[22] Section 452 of the LP Act authorises the Commissioner to make an application, called a discipline application, to this Tribunal for an order against a Queensland solicitor in relation to a complaint. Section 453 requires the Tribunal to hear and decide each allegation made in the application. Section 456 confers on the Tribunal the power to make orders on the completion of a hearing, if it is satisfied that the respondent has engaged in unsatisfactory professional conduct or professional misconduct.

[23] Under s 656C of the LP Act, the Tribunal may act on an allegation if satisfied of it on the balance of probabilities, but the degree of satisfaction required will vary according to the consequences of the finding for the respondent.

[24] By s 28 of the QCAT Act, the Tribunal is required to act fairly and according to the substantial merits of the case. It must observe the rules of natural justice. However, it is not bound by the rules of evidence, and may inform itself in any way that it considers appropriate.

Tests for the assessment of the respondent's conduct

[25] The LP Act contains statutory definitions relevant to the allegations against the respondent. Thus s 418 of the Act provides:

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

[26] Section 419 of the same Act provides that:

> (1) ***Professional misconduct*** includes:
>
> (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence…

[27] Because these definitions are inclusive, and because these (or similar) expressions were in common use before the LP Act was enacted, common law tests for the assessment of such conduct remain relevant. In *Adamson v Queensland Law Society Inc,*[1] Thomas J said, with respect to professional misconduct:

> …the test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency.

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1 (1990) 1 Qd R 498, 507.

Such conduct has also been described as conduct that would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency (*Allinson* test).[2]

Characterisation of conduct

[28] For the contention that, in respect of each of the charges, the respondent's conduct should be characterised as professional misconduct, the applicant has relied upon the definition found in s 419(1) of the LP Act. For that contention to be accepted, it must be shown that the respondent's conduct happened in connection with the practice of law; and that it fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner. It must also be shown that the conduct involved a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence.

[29] Each of the non-payments alleged in the four charges happened in connection with the practice of law. A question which arises is whether that conduct fell short of the standard of competence and diligence which a member of the public is entitled to expect of a reasonably competent legal practitioner. That question will be first considered by reference to the ordinary meaning of the statutory language, read in context.

[30] It is necessary to note that the relevant competence is competence as a legal practitioner. The evidence shows that the respondent engaged in investments and ventures of some considerable risk, with disastrous financial consequences for him. That may throw into question his competence in respect of such investments and ventures, a question which may be complicated by the advent of the global financial crisis. However that is not the competence which the definition refers to.

[31] Often enough, non-payment of employed staff and the non-payment of statutory superannuation contributions will amount to conduct that falls short of the standard of competence and diligence to be expected of a reasonably competent legal practitioner. There may also be occasions where such conduct may be regarded as disgraceful or dishonourable (a test which Counsel for the applicant stated at the hearing, the applicant did not rely upon). However, there are particular features of the present case which warrant attention.

[32] This is not a case where the legal practitioner was unaware of obligations of which a competent practitioner would be cognisant. Nor is it a case where it has been shown that the practitioner conducted a legal practice incompetently, with the result that the practitioner could not, or did not, meet his or her financial obligations. Rather, it is a case where the only available evidence is to the effect that extreme adverse financial circumstances unrelated to the practice meant that the respondent was unable to meet in full his financial obligations to the complainant over an extended period of time. In the circumstances, the non-payments alleged in the application do not demonstrate that the respondent's conduct in connection the practice of law fell short of the standard of competence and diligence to be expected of a reasonably

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2 See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; and the discussion in Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017), [23.85].

competent legal practitioner, tested by reference to the ordinary meaning of the statutory language.

[33] It is convenient at this point to say something about Mr Murphy's attitude to the unmet obligations during the period of his employment. The evidence shows that he continued to work in the employment of the firms associated with the respondent, knowing the respondent's financial difficulties, and he demonstrated some willingness to accommodate them. That is consistent with the fact that, in the period between 2007 and 2015, wages totalling a little over $6,000 were unpaid. An available inference is that, until the termination of his employment, Mr Murphy was prepared to accept the extent to which Mr Redmond met his financial obligations in respect of Mr Murphy, having regard to the circumstances in which Mr Redmond found himself. The inference is more readily available in respect of wages than in respect of superannuation contributions, as the former would be directly paid to Mr Murphy. It is not relevant to the entitlement to payment for accrued annual leave, and the entitlement for long service leave, which only accrued on the termination of Mr Murphy's employment. This consideration is not necessary for the conclusion which has been reached on the basis of the statutory language; though it may well be relevant if a different view were taken of the reference to the expected standard of competence and diligence in the statutory definition. It would also be relevant if the applicant had relied on the *Allinson* test.

[34] Subsequent to the hearing, further submissions were sought from the parties on the question whether the respondent's conduct in respect of charges 1 and 2 involved a consistent failure to reach or keep a reasonable standard of competence and diligence. These charges were selected because, at the hearing, Counsel for the applicant appeared to accept that the obligations the subject of charges 3 and 4 arose at a time when the respondent did not have the means to meet them; and accordingly his failure to meet them did not relate to competence and diligence.

[35] The respondent's further submissions accepted that past cases revealed an established pattern of tribunals characterising the failure to meet such obligations as professional misconduct. That was consistent with the position taken in his earlier submissions, though he stated that the characterisation of the conduct is ultimately a matter for the Tribunal. The further submissions referred to *Law Society of New South Wales v Bouzanis*[3] and *Legal Services Commissioner v Budgen.*[4]

[36] The applicant's further submissions adopted, without addition, the respondent's further submissions. That is consistent with the position taken by the applicant in his submissions at the hearing. In the earlier submissions, the applicant contended that comparable cases, identified in the submissions and relating principally to a failure to comply with superannuation obligations, demonstrated that disciplinary bodies took a dim view of a practitioner's failure to pay employee entitlements; and it was submitted that this led to a finding that the present respondent was guilty of professional misconduct. It is therefore necessary to review the cases to which the parties have referred.

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3 [2006] NSWADT 55.
4 [2011] QCAT 223.

[37] Mr Bouzanis, a solicitor, had failed to make superannuation payments on behalf of an employee for a period of approximately four years. The Society contended that this failure constituted professional misconduct. The Tribunal in *Bouzanis* accepted the submission, finding the failure:

> ...to be a sufficiently serious abrogation of his fiscal responsibilities in the practise of law to warrant a finding... that the Solicitor is guilty of professional misconduct.[5]

[38] In *Bouzanis*, the Society appeared to rely upon a statutory definition of professional misconduct similar to that referred to earlier in these reasons, and the test based on *Allinson*. It might be noted that the Tribunal also referred to *Kennedy v The Council of the Incorporated Law Institute of New South Wales*,[6] where it was said that, for conduct to be misconduct, it:

> ...was enough that it amounted to grave impropriety affecting [the practitioner's] professional character and was indicative of a failure either to understand or to practise precepts of honesty or fair dealing in relation to the courts, his clients or the public.

The Tribunal did not identify the test which it relied upon for its conclusion that the solicitor was guilty of professional misconduct. It recorded, without comment, evidence of the solicitor's financial difficulties. It is not clear whether this related to the time of hearing, or extended back over the four year period during which the superannuation payments were not made. The case is not clear authority for the proposition that a failure to meet a financial obligation relating to an employee, due to financial incapacity, is professional misconduct.

[39] In *Budgen*, the solicitor had failed to pay superannuation contributions for an employee over a period of approximately eight years. The amount involved was $17,252. Mr Budgen's explanation was that the employee was employed by the Budgen Family Trust, of which Mr Budgen was not the trustee, and that the trustee formed an intention not to deal with the issue. The Tribunal was prepared to assume that this resulted in some financial benefit to Mr Budgen, and that he had been in a position to ensure that superannuation payments were properly made. The payments remained outstanding at the time of hearing. The Tribunal appeared to characterise Mr Budgen's conduct as '...a substantial contravention of the law, knowingly and deliberately, and for personal financial advancement.'[7] It was noted that the conduct extended for a longer period and involved a greater amount then the conduct in *Bouzanis*, where the practitioner's conduct had been found to be a serious abrogation of his fiscal responsibilities in the practice of the law. It was in those circumstances that the Tribunal found this solicitor to be guilty of professional misconduct. There are obviously significant differences from the present case, particularly in relation to the circumstances in which the solicitor failed to meet his obligations.

[40] The respondent's further submissions recorded that in *Budgen*, the Tribunal stated that a practitioner's failure meet important social fiscal responsibilities, like the

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5 *Law Society of NSW v Bouzanis* [2006] NSWADT 55, [18].
6 (1939) ALJ 563.
7 *Legal Services Commissioner v Budgen* [2011] QCAT 223, [21].

payment of tax, 'may constitute professional misconduct'.[8] However, the Tribunal went on to qualify that statement by saying that that is so if the conduct involves a substantial or consistent failure to reach or keep a reasonable standard of competence and diligence, or the misconduct violates or falls short, to a substantial degree, of the standard of professional conduct observed or approved by members of the profession of good repute and competency. Significantly, the qualification demonstrates that a failure to meet important social fiscal responsibilities does not automatically constitute professional misconduct. The decision is not supportive of the applicant's contention.

[41] The applicant's earlier submissions referred to *Legal Services Commissioner v Hope*.[9] There, the solicitor had failed, over a period of about 18 months, to pay superannuation contributions in respect of three employees, in a total amount of approximately $10,000. The Tribunal found this to be unsatisfactory professional conduct, a finding which the applicant sought to distinguish. The charges alleged that payment of the contributions was required by the SGA Act. In accepting a joint submission that the conduct should be characterised as unsatisfactory professional conduct, the Tribunal observed that the 'conduct may, in terms of s 420 of the *Legal Profession Act* 2007, constitute either unsatisfactory professional conduct, or professional misconduct,'[10] (later relying on s 419 for the conclusion that professional misconduct was the more serious of the two types). It noted that in each case, the definition in s 420 included conduct 'consisting of a contravention of relevant law'. Unfortunately, the Tribunal's attention was not directed to the precise terms of the section, which referred to 'a contravention of a relevant law' (emphasis added), a relevant law being defined to mean specified statutes, not including the SGA Act. The finding in *Hope* does not provide a proper basis for making a finding that the respondent's conduct amounted to professional misconduct or unsatisfactory professional conduct.

[42] It is convenient at this point to consider the schedule of cases provided by the applicant. In *Law Society of New South Wales v Vosnakis*,[11] the solicitor had failed to pay superannuation contributions for four employees for varying periods of up to 9 years. He was also guilty of other, arguably more serious, misconduct. He admitted the allegations made against him, and offered no explanation. The Tribunal concluded, without discussion, that his failure to pay moneys due for employee superannuation contributions, PAYG tax, and GST, constituted professional misconduct. This decision represents a finding of fact, and is of no real assistance in the present case.

[43] In *Law Society of New South Wales v Gillroy*,[12] two solicitors were the directors of a company that conducted a legal practice. The practice had failed to pay Group Tax (withheld PAYG tax), employee superannuation contributions, and GST. The total amount was $213,852.81, of which $34,101.81 was for superannuation contributions. They admitted they were guilty of professional misconduct. They gave evidence of the financial difficulties experienced by the practice, and their

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8 Ibid [20].
9 [2010] QCAT 184.
10 Ibid [8].
11 [2007] NSWADT 42.
12 [2010] NSWADT 232

attempts to address them. Nevertheless, the Tribunal considered that the conduct of each of them '...would reasonably be regarded as disgraceful or dishonourable by his or her professional brethren of good repute and constancy (*sic*)'.[13] This ground has not been relied upon in the present case, and there are some significant factual differences.

[44] The outcome recorded in the applicant's schedule for *Law Society of New South Wales v Koffel* is 'Professional Misconduct'.[14] Although the applicant in that case made such an assertion against the solicitor, the application was dismissed, notwithstanding that superannuation contributions totalling $123,998.97 were unpaid, relating to 33 employees, over a period of two years. The Tribunal observed:[15]

> ... in our opinion, the mere fact of a failure to pay superannuation guarantee contributions on time does not, of itself, constitute professional misconduct. It is the circumstances surrounding the failure, the consequences of the failure, and the actions subsequently taken by the solicitor, that determine whether the conduct constitutes professional misconduct.

[45] The passage from *Koffel* quoted above was referred to with apparent approval by the Court of Appeal of Western Australia in *Legal Profession Complaints Committee and O'Halloran*, and was expressly adopted by the Tribunal at first instance in that case.[16] Both decisions are referred to in the applicant's schedule. These cases demonstrate that it is not sufficient simply to have regard to the amounts unpaid, or the period over which liability accrued, in order to determine whether a practitioner is guilty of professional misconduct.

[46] The Tribunal decision in *The Council of the Law Society of NSW v Adams* may perhaps provide some support for the characterisation of the respondent's conduct for which the applicant contends.[17] The practitioner had not paid superannuation contributions for 5 employees over a period of year, the amount unpaid totalling $21,824.84. This was held to constitute professional misconduct. The basis for this finding was that the practitioner '...preferred his own financial and other interests over the interest of his employees', and accordingly the respondent was found to be '...not of good fame and character'.[18] Although the unpaid amount was considerably smaller, similar observations could be made about *Council of the Law Society of New South Wales v Dalla*,[19] (though the decision appears to be an application of the *Allinson* test).

[47] The hearing of the proceedings against Mr Andreone was conducted in two stages.[20] At the conclusion of the first stage, the respondent's failure to pay superannuation contributions of at least $200,000 over a period of a year was held to constitute professional misconduct.[21] It was found to be both a substantial failure to maintain a

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13 Ibid [45]-[46].
14 [2010] NSWADT 149.
15 Ibid [48].
16 [2011] WASAT 95, [20]-[21].
17 [2011] NSWADT 177.
18 Ibid [87].
19 [2011] NSW ADT 130, see especially [22]-[24].
20 *Council of the Law Society of NSW v Andreone* [2014] NSWCATOD 49; [2014] NSWCATOD 81.
21 [2013] WASCA 59, [22].

reasonable standard of competence and diligence, and to fall within the *Allinson* test.[22] There was no reference to any explanation from the practitioner for this failure. Nor was there any discussion which explained the finding relating to competence and diligence; though it might be noted that a similar finding was made in respect of a failure to remit PAYE deductions and GST totally $853,048.

[48] The complainant in *Law Society of New South Wales v Delpopolo* was employed as a secretary/paralegal by the practice conducted by the respondent through a company.[23] Superannuation contributions for the first period of employment (approximately six months) were not paid until about two months after the end of that period, and superannuation contributions for the balance of the employment (a little more than two years) were not paid in full, the total reaching $11,115, before a sum of $6,000 was paid about 10 months after the employment ended. It was accepted that the failure to pay arose from a lack of resources flowing from the poor financial performance of the legal practice.[24] Nevertheless it was found '[c]onsistently with the authorities referred to' that the failure was 'a sufficiently serious abrogation of (the practitioner's) financial responsibilities in the practise of law to warrant a finding by the Tribunal that she is guilty of professional misconduct'. There is no further explanation of the finding, and the test applied is not identified. A significant feature of the case is that the practitioner attempted to expand the practice and she employed other people at a time when she failed to meet the obligation to pay superannuation contributions for the complainant. It may be regarded as one of the stronger sources of support for the applicant's position.

[49] In *Council of the Law Society of NSW v Kingston*,[25] the practitioner had failed to pay superannuation entitlements and PAYG tax. The totals fluctuated; but the Deputy Commissioner of Taxation obtained judgement against the practitioner in a sum of $315,536.21, including $47,203.61 for superannuation contributions. Subsequently, the liability for unpaid superannuation entitlements increased to $103,350.01. At about the same time it appeared that the practitioner's assets exceeded his liabilities by about $1 million. Although he made some attempt to do so, he had not sold his home or either of his branch offices. The practitioner admitted that his conduct amounted to professional misconduct. The Tribunal so found. It accepted a submission that it could not be said that it had been shown that the practitioner did what he believed he could reasonably do in all the financial circumstances to meet his revenue responsibilities (when he became aware of the defaults).[26] It also concluded that the conduct would be 'reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency'.[27] These conclusions, and the facts otherwise, distinguish that case from the present case.

[50] In *Council of the Law Society of the ACT v Legal Practitioner N1*,[28] the practitioner had made superannuation payments for staff of $56,510.40, constituting only

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22 *Allinson v General Council for Medical Education and Registration* [1894] 1 AB 750; see [2014] NSWCATOD 49 [120]-[121].
23 [2014] NSWCATOD 55.
24 Ibid [47].
25 [2014] NSW CATOD 21.
26 Ibid [33].
27 Ibid [37].
28 [2016] ACAT 36.

approximately 35% of his statutory obligations.[29] It would seem to follow that he had not paid approximately $104,000 to meet such obligations when they fell due, though the obligations appear to have been later met. The failures occurred over a period of approximately three years. The Tribunal stated that a failure to pay superannuation contributions for employees could amount to professional misconduct at common law, with qualifications which bear some similarity to those stated in *Budgen.*[30] It quoted with approval the statement from *Koffel* set out earlier in these reasons.[31] The Tribunal found the practitioner to be guilty of professional misconduct, because he did not do all that he reasonably could have done to satisfy his statutory obligations.[32]

[51] In *Council of the Law Society of NSW v Etherington*,[33] the practitioner delayed making payments of $74,799.78 for superannuation contributions for employees. The Law Society submitted that this amounted to professional misconduct under the *Allinson* test. The Tribunal accepted the submission, finding the practitioner did not do all that he reasonably could to satisfy his statutory obligations.[34]

[52] The cases referred to by the parties do not, on balance, establish that a finding of professional misconduct will inevitably be made when a practitioner fails to meet statutory and other financial obligations relating to employees, in amounts and for periods similar to those involved in the present case. They do show that such a finding may be made, applying the *Allinson* test, in a number of cases when it is shown that the practitioner did not do all that the practitioner could reasonably have done to meet such obligations. That has not been established in the present case; and in any event, the applicant has not relied on this test. It is considered that the proposition from *Koffel*, quoted above, and referred to in *O'Halloran* and *N1,* correctly states the legal position. The same is true of the qualified approach stated in *Budgen*, and *N1*, which may be regarded as complementary. The applicant's approach is not consistent with these cases. The cases which have been discussed generally do not provide a satisfactory basis for not applying the natural meaning of the statutory definition; and the natural meaning of the definition does not lead to a finding of professional misconduct in the present case. Accordingly the respondent should not be found guilty of professional misconduct.

[53] The applicant did not submit that the respondent should, in the alternative, be found guilty of unsatisfactory professional conduct. The statutory definition would not support such a finding.

[54] It follows that the charges are not made out. Without a finding of professional misconduct or unsatisfactory professional conduct, the Tribunal does not have power to make the orders sought. The application should be dismissed. In the circumstances, it is appropriate to give the parties a fresh opportunity to make submissions about costs.

Orders

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29 Ibid [12].
30 Ibid [17].
31 Ibid [25].
32 Ibid [66], [68].
33 [2016] NSWCATOD 31.
34 Ibid [41].

[55] The following orders should be made:

(a) The application is dismissed;

(b) Any party applying for an order for costs is to file and serve submissions in support of the application within seven days of the publication of these reasons; and the other party is to file and serve submissions in reply within a further period of seven days.