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REGULATING THE LEGAL PROFESSION IN QUEENSLAND, AUSTRALIA



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1. The Legal Profession Act 2007 (Qld) (LPA)

The main purpose of the LPA is¹:

'to provide for the regulation of legal practice in this jurisdiction in the interests of the administration of justice and for the protection of consumers of the services of the legal profession and the public generally'.

The main purposes of the system for dealing with complaints are²:

- (a) To provide for the discipline of the legal profession
- (b) To promote and enforce the professional standards, competence and honesty of the legal profession
- (c) To provide a means of redress for complaints about lawyers; and
- (d) To otherwise protect members of the public from unlawful operators.

The LPA continued the existence of the Legal Services Commissioner (**Commissioner**)³ as the person with responsibility for:

- investigating conduct of Australian legal practitioners and law practice employees
- initiating disciplinary action against Australian legal practitioners and law practice employees
- prosecuting a person as an unlawful operator
- seeking injunctive relief for breaches of the LPA; and
- the Legal Services Commission (**Commission**) as the office supporting the Commissioner.

The Commissioner achieves the purposes of the LPA by:

- investigating complaints which involve a disciplinary issue
- initiating 'own motion' investigations
- conducting compliance audits of incorporated legal practices
- commencing disciplinary or other enforcement action; and
- engaging with stakeholders.

The Commissioner's strategy is to ensure that the Commission provides a high quality and professional service to consumers of legal services, complainants and lawyers equally.

The delivery of services by the Commission commences with responding to enquiries from the general public. These enquiries predominantly involve explaining the client/lawyer relationship and the Commission's complaints handling process.

HOW INVESTIGATIONS ARE CONDUCTED

The LPA⁴ requires complaints which involve an issue of unsatisfactory professional conduct⁵ or professional misconduct⁶ to be investigated, where the complaint is made within three (3) years⁷ after the relevant conduct occurred. The LPA provides six (6) grounds for the summary dismissal of

¹ Section 3 of the LPA

² Section 416 of the LPA

³ A position established in 2004 by the *Legal Profession Act 2004* (now repealed)

⁴ Section 435 of the LPA

⁵ Defined at s 418 of the LPA

⁶ Defined at s 419 of the LPA

⁷ See s 430 of the LPA

complaints⁸, including where the Commissioner forms the view that the complaint requires no further investigation.

The LPA allows the Commission to:

- conduct investigations into alleged conduct by a legal practitioner, law practice employee and unlawful operators⁹; and
- refer a complaint concerning a legal practitioner or a law practice employee to the Queensland Law Society (**QLS**) or the Bar Association of Queensland (**BAQ**) for investigation¹⁰.

Since September 2015 the Commission, by agreement with the QLS, does not refer matters to the QLS for investigation unless a conflict of interest arises at the Commission.

When conducting investigations referred by the Commission, the role of the QLS and the BAQ is limited to recommending what further action, if any, the Commissioner should take on those complaints¹¹. The decision to commence disciplinary action or take no further action rests solely with the Commissioner¹².

Where a complaint about a legal practitioner is made by the practitioner's client, the duty of confidentiality that applies between legal practitioner and client is expressly excluded as a reason for the legal practitioner not supplying information to the Commission about the complaint¹³. The Commission has the power to:

- require a complainant to supply information to the Commission concerning their complaint¹⁴; and
- serve notices upon the respondent legal practitioner requiring them to produce documents, provide information or otherwise help in the investigation¹⁵.

Failure by a legal practitioner to co-operate with the Commission in relation to its investigation by, for example, failing to supply a written statement to the Commission when required to do so, may be conduct that, of itself, amounts to professional misconduct.¹⁶

The Commission's ability to obtain information about a complaint concerning the conduct of a legal practitioner made by a non-client is limited by the duty of confidentiality and legal professional privilege which a legal practitioner must maintain. Of course a legal practitioner who is the subject of a complaint has the right to refuse to disclose information to the Commission on the grounds that it might tend to incriminate the practitioner¹⁷, regardless of whether the complainant is a former client or a third party.

The Commission has published on its website¹⁸ a series of plain English fact sheets which describe, amongst other information, how the Commission deals with complaints, how to make a complaint and how lawyers may respond to a complaint.

⁸ Section 432 of the LPA

⁹ Section 436 of the LPA

¹⁰ Section 435 of the LPA

¹¹ Section 439(1) of the LPA

¹² Section 452 of the LPA

¹³ Section 491(1) of the LPA

¹⁴ Section 431 of the LPA

¹⁵ Section 543 and 443(1) of the LPA

¹⁶ See s 443 of the LPA

¹⁷ Section 492(5) of the LPA

¹⁸ Available at <http://www.lsc.qld.gov.au/information-for-consumers/fact-sheets>

Having investigated a complaint or having received and considered the recommendation from the QLS or the BAQ concerning a complaint, the Commissioner has only two (2) options:

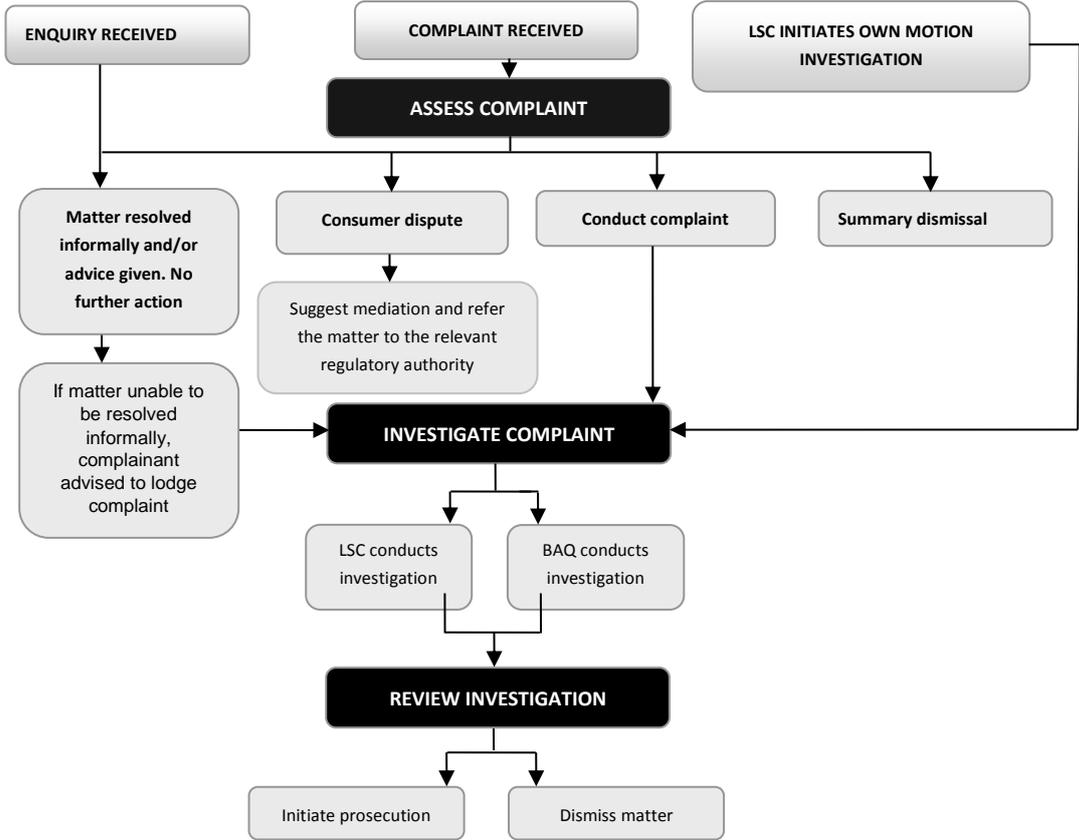
- to dismiss the complaint¹⁹; or
- if the Commissioner decides there is a reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct and that it is in the public interest to do so, to initiate a disciplinary proceeding²⁰.

There are various reasons why the Commissioner might decide there is no public interest in initiating a disciplinary proceeding notwithstanding an investigation finds evidence of unsatisfactory professional conduct or professional misconduct.

Examples include that:

- the conduct is of a minor kind only
- the lawyer has acknowledged his or her error
- there is no need to send a message to the profession about the issue; and
- the lawyer has corrected that error with the complainant and indeed may well have provided some appropriate redress such as a refund or/and apology²¹.

In the year ended 30 June 2017 the Commission dealt with 1332 formal written complaints. The procedural manner in which the Commission deals with complaints can be expressed diagrammatically:



¹⁹ Section 448 of the LPA

²⁰ Section 447 of the LPA

²¹ See further at page 7 of this paper concerning Consumer Redress

PROACTIVE REGULATION CONCERNING 'OWN MOTION' INVESTIGATIONS

The LPA²² authorises the Commissioner to commence an investigation into the conduct of a lawyer, law practice employee or unlawful operator without having received a complaint. These investigation matters are referred to by the Commission as 'own motion' investigations.

The Commission's Own Motion Investigations Policy²³ sets out the factors the Commissioner takes into account in deciding whether to commence an own motion investigation. The test to be satisfied is '*if the Commissioner believes an investigation about a matter should be started*' and the Commissioner has come to that belief '*on grounds that are reasonable in the circumstances*'.

An own motion investigation may be started as a result of information received from:

- a compliance audit of an incorporated legal practice
- a trust investigation
- a report from a court or tribunal about a lawyer's conduct in the course of proceedings
- a report about a lawyer's conduct from the Director of Public Prosecutions, Queensland Police Service, the Office of Fair Trading and other like agencies
- a report in the media about a lawyer or other person over whom we have jurisdiction
- a review of advertisements of law firms and law firm websites for compliance with the restrictions of the advertising of personal injury services; and
- on some occasions, anonymous sources.

Similarly the LPA²⁴ authorises the Commissioner to start an investigation into the conduct of a lawyer or for that matter anyone else the Commissioner reasonably suspects may have contravened restrictions on the advertising of personal injury services set out in the *Personal Injuries Proceedings Act 2002 (PIPA)* by touting at the scene of an accident or advertising personal injury services contrary to the restrictions set out in chapter 3, part 1 of the PIPA.

The power to commence an own motion investigation is therefore an important one. It enables the Commissioner to investigate conduct that has not attracted a complaint and in those circumstances it is an important consumer protection power which meets a number of the regulatory objectives. For the year ended 30 June 2017 the Commission commenced 95 own motion investigations.

2. Undertaking fair and consistent disciplinary and enforcement activities

The LPA gives the Commissioner sole authority to decide what action, if any, to take on a conduct complaint or own motion investigation after the matter has been investigated and a wide discretion in the exercise of that authority.

The LPA authorises the Commissioner to dismiss or take no further action on a complaint or own motion investigation if '*there is no reasonable likelihood of a finding by a disciplinary body of unsatisfactory professional conduct or professional misconduct [or] it is in the public interest to do so*',

²² Section 435(1)(c)(i) of the LPA

²³ Available online at <http://www.lsc.qld.gov.au/home/policies>

²⁴ Section 435(1)(c)(ii) of the LPA

or alternatively to make a discipline application to a disciplinary body 'as the Commissioner considers appropriate'.

Discipline Application Guidelines²⁵ have been published on the Commission's website which describe the factors the Commissioner takes into account in exercising those discretions. The Commissioner files discipline applications in the Queensland Civil and Administrative Tribunal (**QCAT**) in relation to more serious matters and in the Legal Practice Committee (**LPC**) in relation to less serious unsatisfactory professional conduct matters.

Similarly the Commissioner is the prosecuting authority for criminal offences concerning the legal profession in Queensland including:

- unlawful operator offences under the LPA:
 - engaging in legal practice when not entitled²⁶
 - representing or advertising an entitlement to engage in legal practice, when not entitled²⁷; and
- offences under the PIPA including, for example, touting at the scene of an accident.

The Commissioner is not confined to a prosecutorial role to deter criminal offending. The LPA²⁸ authorises the Commissioner to apply to the Supreme Court of Queensland to obtain an injunction restraining a person from contravening the LPA, or aiding, abetting, inducing or attempting to induce a person to contravene the LPA or relevant regulatory legislation.

In circumstances where the Commission was successful in obtaining Injunctions against lay persons see **Legal Services Commissioner v Walter** [2011] QSC 132 and **Legal Services Commissioner v Beames** [2012] QSC 327. In both cases injunctions were granted restraining those persons from either representing their entitlement to engage in legal practice or engaging in legal practice.

Further, the Commissioner is free to initiate civil litigation in the public interest including, for example, by applying to the Supreme Court for a declaration which may clarify the proper meaning of a term or terms in the LPA. See for example **Legal Services Commissioner v Dempsey** [2007] QSC 270.

ASSESSING AND REVIEWING OUR PERFORMANCE

The Commission assesses the performance of our prosecutorial and other enforcement functions having regard primarily to the findings of the disciplinary bodies and the courts and in particular to the number and proportion of matters in which a prosecution or injunction is obtained.

The Commissioner offers complainants and respondent legal practitioners the right of internal review of final decisions made by the Commissioner, including decisions to take no further action in relation to complaints and decisions to commence disciplinary action. The Commission regularly receives submissions from respondents to disciplinary applications and criminal prosecutions requesting the Commissioner to take into account further information. Those submissions are reviewed and the Commissioner reconsiders the decision to continue the proceeding.

In the past year as part of our continual improvement process and our focus on being fair and consistent in our approach to disciplinary or enforcement activities we reviewed various matters that

²⁵ See <https://www.lsc.qld.gov.au/home/policies> for the Discipline Application Guidelines

²⁶ Section 24 of the LPA

²⁷ Section 25 of the LPA

²⁸ Section 703 of the LPA

progressed through our internal prosecutorial matter stages. We entered into meaningful discussions with potential respondents or their lawyers to those intended applications.

For the year ended 30 June 2017, after further due consideration, the Commissioner decided that there was no public interest in further pursuing 20 of these matters.

In the Commissioner's view, being an effective regulator depends in part on how well we use our disciplinary and enforcement powers. This strategy focuses on ensuring that when disciplinary or enforcement action is needed the Commission's actions are fair, proportionate and consistent.

RIGHTS OF EXTERNAL REVIEW CONCERNING DECISIONS MADE BY THE COMMISSIONER

Disciplinary action commenced by the Commissioner is ultimately determined by two (2) disciplinary tribunals – the LPC and the QCAT. An appeal to the Court of Appeal of the Supreme Court of Queensland by way of rehearing is available in relation to all disciplinary decisions made by the QCAT²⁹. Decisions of the LPC may be reviewed by the QCAT³⁰.

Criminal proceedings commenced by the Commissioner as the complainant are determined in the Magistrates Court of Queensland.

A right of appeal against conviction exists and those appeals are determined by the District Court of Queensland by way of rehearing on the evidence given in the proceeding before the magistrate. New evidence can be adduced by leave.³¹ There is a limited right of further appeal to the Court of Appeal of the Supreme Court of Queensland where that Court grants leave to appeal³².

ADMINISTRATIVE REVIEW OF THE COMMISSIONER'S DECISIONS

Complainants and affected legal practitioners may request the Queensland Ombudsman³³ to review any decision made by the Commissioner to identify an administrative error, regardless of any other right of review.

Before proceeding to request the Ombudsman to review the Commissioner's decision, the complainant must request the Commissioner to reconsider the decision made, which involves identifying the administrative error that the complainant believes the Commissioner has made.

JUDICIAL REVIEW OF THE COMMISSIONER'S DECISIONS

A statutory order of review exists in relation to a decision made by the Commissioner to commence disciplinary action against a legal practitioner or law practice employee, but there is no requirement that the Commissioner supply a written statement of reasons in relation to the decision³⁴.

²⁹ See s 468 of the LPA

³⁰ See s 469 of the LPA and the *Queensland Civil and Administrative Tribunal Act 2009*

³¹ See s 222 of the *Justices Act 1886*

³² See s 118(3) of the *District Court Act 1867*

³³ See the *Ombudsman Act 2001*

³⁴ See s 31 and Schedule 2, item 2 to the *Judicial Review Act 1991*

A decision made by the Commissioner to commence a criminal prosecution of an unlawful operator is not amenable to judicial review³⁵ and there is no requirement to supply a statement of reasons in relation to that decision³⁶.

In the past three (3) years the Supreme Court of Queensland has published three (3) decisions which clarify that certain decisions made by the Commissioner to take no further action in relation to certain complaints are not amenable to judicial review by way of a statutory order of review:

- to take no further action in relation to a complaint concerning a legal practitioner³⁷
- to no longer deal with a complaint that a person acted as an unlawful operator³⁸
- to refuse to deal with a complaint made more than three (3) years after the conduct occurred³⁹; and
- to take no further action in relation to a complaint of misconduct as an employee of a law practice⁴⁰.

The Supreme Court determined that those nominated decisions made by the Commissioner are not 'decisions' within the meaning of *the Judicial Review Act 1991* because they do not affect legal rights and obligations in the relevant way. In other words:

- there are no legal rights or duties that owe their existence, in an immediate sense, to the four (4) decisions listed above made by the Commissioner; and
- no legal rights or duties depend upon the presence of the Commissioner's decision for their enforcement.

3. Consumer Redress and Access to Compensation under the LPA

The LPA provides complainants with access to statutory compensation in the form of:

- the Fidelity Fund⁴¹, which is maintained by the QLS to compensate for loss of trust money or trust property; and
- compensation orders made by disciplinary tribunals.

COMPENSATION ORDERS UNDER THE LPA

As the Commissioner performs an independent investigative function and determines whether to commence and continue proceedings, the Commissioner and the staff of the Commission do not advocate for or provide legal advice to the complainant or the respondent legal practitioner.

³⁵ See *Barton v The Queen* (1980) 147 CLR 75 and the discussion of this issue at [45] in *Murphy v Legal Services Commissioner* [2016] QSC 174

³⁶ See s 31 and Schedule 2 item 1 to the *Judicial Review Act 1991*

³⁷ *Murphy v Legal Services Commissioner* [2016] QSC 174

³⁸ *Leadpoint Pty Ltd v Legal Services Commissioner* [2015] QSC 254

³⁹ *Goodchild v Legal Services Commissioner* [2017] QSC 117

⁴⁰ *Goodchild supra*

⁴¹ Section 364 of the LPA sets out expenditure that may be made from the fidelity fund. Section 374 states that a person who suffers pecuniary loss because of a 'default' may make a claim against the fidelity fund. Section 356 defines 'default' as (a) a failure of the practice to pay or deliver trust money or trust property that was received by the practice in the course of legal practice by the practice, if the failure arises from an act or omission of an associate that involves dishonesty; and (b) a fraudulent dealing with trust property that was received by the law practice in the course of legal practice by the practice, if the fraudulent dealing arises from or is constituted by an act or omission of an associate that involves dishonesty

Where disciplinary action has been commenced against a legal practitioner, the Commission's procedure is to inform the complainant of their right to apply to the disciplinary tribunal to seek a compensation order against a law practice – which may be a different entity to the legal practitioner against whom disciplinary action has been commenced.

The Commission may provide the complainant with copies of their client file and other material obtained during the investigative process. The Commission does not otherwise assist the complainant to complete the application for a compensation order or to adduce the evidence the complainant needs to file in the disciplinary tribunal to prove their entitlement to a compensation order. The Commission may refer a complainant to the range of community legal centres in Queensland which provide free legal advice. The complainant can engage a lawyer but a disciplinary body is not empowered to include the lawyer's legal costs in preparing the compensation application as pecuniary loss under a compensation order.

The right of a complainant to seek compensation from a law practice is dependent firstly upon a finding by the disciplinary tribunal that the legal practitioner has engaged in conduct which amounts to either unsatisfactory professional conduct or professional misconduct⁴². Secondly the loss must flow directly from the conduct of the legal practitioner which the disciplinary tribunal found has occurred and amounted to either unsatisfactory professional conduct or professional misconduct.

If the complainant has obtained compensation from a court or from the fidelity fund for the loss, that loss cannot be recovered again by way of a compensation order made by the disciplinary tribunal⁴³.

The recovery of an amount awarded by a compensation order under the LPA does not affect any other remedy available to a complainant, but an amount so awarded must be taken into account in another proceeding by or for the complainant in relation to the same loss.⁴⁴

As will be seen from reviewing the decisions below, the compensation scheme available under the LPA is a limited form of compensation. The system of compensation available under the LPA is in no way a substitute for the right of a complainant to recover damages for negligence and breach of contract, amongst other remedies. It does however provide complainants with an opportunity to recover some form of compensation for pecuniary loss without the complainant having to prove that the legal practitioner has engaged in unsatisfactory professional conduct or professional misconduct.

LPA COMPENSATION DECISIONS

In Queensland, disciplinary tribunals have the power to make an order that a law practice compensate a complainant:

- for 'pecuniary loss' suffered because of conduct that has been found to be unsatisfactory professional conduct or professional misconduct⁴⁵ **and**
- where it is in the interests of justice to award such compensation.

The LPA limits compensation for pecuniary loss to \$7,500, unless the law practice and the complainant otherwise agree to a higher amount.

⁴² See s 456 of the LPA

⁴³ See s 465(2) of the LPA

⁴⁴ See s 467 of the LPA

⁴⁵ See s 465 of the LPA

In addition to compensation for any pecuniary loss, the disciplinary tribunal may order as compensation⁴⁶ in favour of a complainant:

- that a law practice cannot recover or must repay the whole or a stated amount that the law practice charged a complainant for stated legal services
- the discharge of a lien possessed by a law practice in relation to a stated document or class of documents; and
- that a law practice carry out stated work for a stated person without a fee or for a stated fee.

Where a law practice or legal practitioner has not agreed to pay compensation for pecuniary loss to a complainant, the current practice of the QCAT is to determine any application for compensation as a discrete hearing separately to the QCAT making its determination as to whether the conduct of a legal practitioner amounts to unsatisfactory professional conduct or professional misconduct.

In ***Legal Services Commissioner v Budgen (No 3)*** [2016] QCAT 485 the QCAT ordered the respondent, who was the executor of an estate, to repay \$28,727.01 to the complainant being an amount overcharged by the law practice with respect to legal services. A report prepared by an officer of the QLS which explained the amount which the respondent was overpaid and to which he had no entitlement formed the evidentiary basis relied upon by the complainant for the QCAT's determination.

The approach of the QCAT to the assessment of compensation for pecuniary loss has tightened over the past seven (7) years, requiring clear evidence that the complainant's pecuniary loss was:

- directly suffered because of the conduct of the respondent which the disciplinary tribunal found to amount to unsatisfactory professional conduct or professional misconduct; and
- an unavoidable consequence of the respondent's conduct.

It can be an onerous requirement for a non-lawyer to prepare evidence in a formal acceptable to the disciplinary tribunal to prove pecuniary loss.

In ***Legal Services Commissioner v Given (No 2)*** [2015] QCAT 479 the QCAT refused to make an order for compensation being a refund of fees paid to the respondent solicitor who prepared a will and enduring power of attorney for a person without preparing adequate notes and conducting an interview alone with the person to ascertain capacity. The QCAT found that the respondent's conduct did not unreasonably increase the legal fees charged by the respondent, nor did the conduct mean that the services rendered were of no value. This is despite the fact that the will and enduring power of attorney were set aside by separate orders made by the QCAT and the Supreme Court of Queensland prior to the QCAT determining the claim for compensation. The QCAT found at [22] that losses suffered as a result of an assertion that the will and enduring power of attorney should never have been created were not in the nature of pecuniary loss suffered because of the respondent's conduct.

In ***Legal Services Commissioner v Penny (No 2)*** [2015] QCAT 478 the QCAT found the respondent practitioner had failed to review an enduring power of attorney with the donor, failed to follow the capacity guidelines, failed to prepare detailed attendance records and notes of a conference and failed to maintain a client file. The QCAT refused to order pecuniary compensation being legal fees incurred as a result of applying to QCAT for orders in relation to guardianship of the donor and loss of income from the lost opportunity to be nominated as a beneficiary in the will of the donor.

⁴⁶ See s464 of the LPA

In ***Legal Services Commissioner v Nguyen*** [2016] QCAT 1 a claim for compensation was refused because the loss (reimbursement of fees paid, reimbursement of further legal costs incurred as a result of alleged negligence of the barrister) was not seen to be sufficiently connected to the conduct of the barrister being a failure to comply with the direct briefing rule, by informing the complainant of nominated matters and obtaining a written acknowledgment from the client.

In ***Legal Services Commissioner v Fyfe*** [2016] QCAT 3 the QCAT awarded compensation for pecuniary loss fixed at \$7,500 for the respondent's failure to prosecute the complainant's claim for criminal injuries compensation, which failure amounted to professional misconduct. The delay resulted in the complainant losing his right to pursue compensation under nominated legislation.

In ***Legal Services Commissioner v Fyfe*** [2016] QCAT 2 the QCAT refused to make an order for compensation in favour of a complainant in circumstances where the QCAT found that the respondent practitioner had engaged in legal practice without holding a practising certificate for 3 months during which she acted for the complainant. While the respondent solicitor had charged the complainant fees during that three (3) month period, the QCAT refused to make an order for compensation because the charge did not contain any allegation that the respondent practitioner lacked competence, nor was any issue raised in relation to the costs charged by the respondent.

In ***Legal Services Commissioner v Reeve (No 3)*** [2016] QCAT 487 the respondent, who acted for the purchaser of property in a conveyance, was charged with incorrectly disbursing trust moneys and misleading the complainant (who was the seller of the property) as to the basis he was receiving funds into trust. There had been a dispute as to who was required to pay for the costs of rendering works completed on the property. The respondent's client had suggested that the complainant had agreed to pay half the cost (being \$2,337.50). The complainant denied he had made any such agreement. The complainant's claim for compensation for pecuniary loss was dismissed because the complainant did not place before the QCAT evidence to prove that the complainant was entitled to the \$2,337.50 placed into the respondent's trust account.

Similarly in ***Legal Services Commissioner v Mugford (No 3)*** [2016] QCAT 417 the QCAT refused to make an order to compensate the complainant for alleged loss due to the respondent's failure to settle the sale of her house on the settlement day because the QCAT determined there was an option available to the complainant – namely to enable both contracts of sale to terminate, with fresh contracts of sale to be renegotiated, which would have resulted in the complainant suffering no cost. The QCAT noted that whether allowing both contracts of sale to terminate would have involved an ultimate loss was a matter of conjecture and was not quantifiable at that point in time (because that option was not selected).

Interestingly in ***Legal Services Commissioner v Scott*** [2016] QCAT 99 the QCAT made an order that the respondent compensate the complainant for pecuniary loss limited to \$7,500, even though the respondent did not hold a practising certificate and therefore was not a law practice but an unlawful operator at the time the respondent engaged in professional misconduct.

REMEDIES AVAILABLE TO COMPLAINANTS BEYOND A COMPENSATION ORDER UNDER THE LPA

In addition to compensation, the complaint process can result in a number of other remedies for redress for the legal practitioner's conduct. The tables below set out compensation voluntarily provided or awarded by the disciplinary bodies. Note that it is possible to have multiple remedies arising from one complaint. The number of remedies may be greater than the number of matters within each of the following categories.

Whilst a final analysis is yet to be undertaken for the Commission's yet to be published 2017 Annual Report, our monitoring of internal statistics revealed for the 2017 financial year disciplinary bodies have struck off three (3) lawyers, suspended two (2) lawyers, imposed financial penalties totalling \$21,501.00 on a total of 14 lawyers, reprimanded 15 lawyers, ordered seven (7) lawyers to undertake further training or be supervised and made 3 compensation orders totalling \$106,477.00.

However perhaps more importantly given our approach to regulation and without recourse to disciplinary action, we secured apologies from lawyers in response to 42 enquiries / complaints, secured financial redress totally \$242,809 in response to 35 enquiries / complaints, secured 23 undertakings from lawyers to improve their management systems, 11 to be supervised or mentored or to undertake further training and 32 undertakings from law firm principals to amend their advertising to conform to the PIPA. Thus as we stated previously, with this success there is no public interest in initiating disciplinary action notwithstanding that conduct issues have been identified. Compare these results with the previous three (3) years as set out in the tables below.

Enquiries

	15-16	\$	14-15	\$	13-14	\$
apology	-	-	1	-	4	-
financial redress/compensation	1	1,000	47	214,162	94	181,838
redress - improved communications	-	-	61	-	68	-
redress – other-	-	-	23	-	29	-
management system improvements	-	-	4	-	4	-
made advertisement PIPA compliant	4	-	3	-	2	-
total	5	1,000	139	214,162	201	181,838

Complaints

	15-16	\$	14-15	\$	13-14	\$
apology	42	-	45	-	67	-
financial redress/compensation	37	102,557	35	164,234	65	438,465
redress - improved communications	5	-	12	-	8	-
redress - other	12	-	27	-	23	-
management system improvements	31	-	51	-	46	-
training/mentoring/ supervision	4	-	18	-	15	-
made advertisement PIPA compliant	20	-	54	-	39	-
total	151	102,557	242	164,234	263	438,465

Prosecution Outcomes

	15-16	\$	14-15	\$	13-14	\$
employee not to be employed	-	-	-	-	-	-
fined (disciplinary body – USP / PMC)	11	38,250	7	26,000	6	26,000
fined (Magistrates Court – LPA offence)	-	-	1	1,083	-	-
ordered to apologise	--	-	-	-	-	-
ordered to pay compensation	1	7,000	-	-	1	7,500
ordered to make other redress	-	-	-	-	-	-
ordered to undertake training -or be supervised	4	-	-	-	1	-
reprimanded	11	-	9	-	6	-
struck off	6	-	1	-	4	-
suspended	-	-	-	-	-	-
withdrawn/reconsidered – apology	2	-	4	-	12	-
withdrawn/reconsidered – financial redress	-	-	1	9,656	6	19,998
withdrawn/reconsidered – apology	-	-	2	-	-	-
total	35	45,250	25	36,739	36	53,498

DIFFERENT COMPENSATION SCHEMES AVAILABLE WITHIN THE LEGAL PROFESSION IN AUSTRALIA

Different systems of compensation are available to complainants within the various states and territories in Australia.

In all jurisdictions, the complainant must be the applicant for a statutory compensation order. Compensation orders under all statutory schemes include orders for:

- recovery of pecuniary loss
- the repayment or recovery of fees (whether already paid and whether those fees have been ordered to be paid by another court or tribunal); and
- the discharge of a lien.

In all jurisdictions other than Queensland, orders for compensation are made against the legal practitioner who is found to have engaged in the conduct. In New South Wales and Victoria, which have enacted the *Legal Profession Uniform Law*, compensation orders may be made against the law practice as well as the legal practitioner⁴⁷.

⁴⁷ See 306 of the *Legal Profession Uniform Law*

Queensland's scheme for compensation for loss is the most restrictive, only compensating for pecuniary loss suffered because of conduct that has been found to be unsatisfactory professional conduct or professional misconduct.

In the Northern Territory compensation is limited to "*loss because of conduct that is the subject of a complaint*"⁴⁸.

In New South Wales and Victoria, the 'designated local regulatory authority' may make orders for "*loss suffered because of the conduct the subject of the complaint*" to a maximum of \$25,000, unless the parties agree to a higher amount. The loss is not limited to the complainant's loss – it may be the loss of another person who is the client of the respondent lawyer⁴⁹.

In the Australian Capital Territory, compensation may include financial compensation for loss suffered because of conduct that is the subject of a complaint⁵⁰ to a maximum of \$10,000 unless agreed.

In Western Australia, a compensation order can be made where the relevant decision maker is satisfied that:

- the complainant has suffered loss because of conduct that is the subject of a complaint by that person or is investigated by the Complaints Committee of its own initiative; and
- it is in the interests of justice that a compensation order be made⁵¹.

The monetary limit for compensation (absent agreement) is:

- \$7,500 in Queensland
- \$10,000 in Tasmania, Western Australia (for the Complaints Committee only), Northern Territory and the Australian Capital Territory; and
- \$25,000 in Western Australia (Tribunal) and New South Wales and Victoria.

The concepts of "*loss*" in the Legal Profession Uniform Law and "*monetary compensation*" and "*financial compensation*" in Western Australia and the Territories are wider than "*pecuniary loss*" recoverable by way of a compensation order in Queensland and Tasmania.

Queensland is the only jurisdiction where a disciplinary tribunal may order that a law practice carry out stated work for a stated person without a fee or for a stated fee. To date, no disciplinary tribunal has made such an order for compensation.

DETERMINATION POWERS OF THE COMMISSIONER

While the LPA does not empower the Commissioner to make findings of fact, the *Legal Profession Uniform Law* which operates in New South Wales and Victoria allows the Commissioner to make determinations in relation to consumer matters,⁵² costs disputes where the dispute over legal costs is less than \$10,000⁵³ and determinations that a lawyer or law practice associate has engaged in unsatisfactory professional conduct. These powers are in addition to the power of the 'designated local regulatory authority' in each state to make orders for "*loss suffered because of the conduct the subject of the complaint*".

⁴⁸ See s 534(1) of the *Legal Profession Act 2006* (NT)

⁴⁹ See s 307(2) of the *Legal Profession Uniform Law*

⁵⁰ See s 442(1) of the *Legal Profession Act 2006* (ACT)

⁵¹ See ss 448(1) and 449 of the *Legal Profession Act 2008* (WA)

⁵² Section 290 of the *Legal Profession Uniform Law*

⁵³ Section 292 of the *Legal Profession Uniform Law*

As at the time of writing this paper and subject to the publication of the 2017 Annual Report the Victorian Legal Services Commissioner⁵⁴ had made three (3) determinations in relation to consumer matters, 11 concerning allegations of overcharging, eight (8) concerning allegations of failure to comply with costs disclosure requirements and six (6) concerning fair and reasonable costs.

4. Incorporated Legal Practices and the provision of legal services

The LPA allows lawyers⁵⁵ to practice:

- as sole practitioners
- in partnerships with other lawyers
- since 1 July 2007 under a company structure as incorporated legal practices (**ILPs**); and
- in partnership with members of other professions described as multi-disciplinary partnerships (**MDPs**).

The LPA requires the Commission to regulate the provision of legal services by ILPs and MDPs in the same way we regulate the provision of legal services by any other law firm by:

- responding to complaints; and
- initiating own motion investigations, if we suspect all is not as it should be.

Notably, the LPA⁵⁶ requires ILPs to have at least one legal practitioner director and imposes obligations on each legal practitioner director over and above their usual professional obligations as lawyers. Crucially it requires each legal practitioner director to:

- keep and implement the appropriate management system to enable the provision of legal services by the practice under the professional obligations of Australian legal practitioners
- take all reasonable action to ensure that lawyers who work for the firm comply with their professional obligations; and
- take appropriate remedial action should lawyers who work for the firm fail to comply with their professional obligations.

Therefore legal practitioner directors of ILPs are responsible for ensuring that the ILP has the ethical infrastructure necessary to provide competent and ethical legal services, governance and supervisory arrangements, the policies, work practices and workplace culture more generally.

COMPLIANCE MECHANISMS FOR ILPs

The LPA⁵⁷ empowers the Commissioner to conduct an audit (**a compliance audit**) of an ILP concerning:

⁵⁴ See the Victorian Legal Service Commissioner's website at http://lsbc.vic.gov.au/?page_id=5046 for copies of these determinations.

⁵⁵ Section 220 of the LPA enables the Barristers Rules to prohibit a barrister from engaging in legal practice otherwise than as a sole practitioner. Rule 16 of the *Barrister's Conduct Rules* (Qld) requires a barrister to be a sole practitioner and must not practise in partnership, as the employee of any person, be a legal practitioner director of an ILP

⁵⁶ Section 117 of the LPA

⁵⁷ Section 130 of the LPA

- Compliance by the ILP and by its officers and employees with the requirements of the LPA or regulation, the Legal Profession Rules or the administration rules so far as they apply to the ILPs; and
- The management of the provision of legal services by the ILP, including the supervision of the officers and employees providing the services.

Compliance audits are one of several regulatory tools available to the Commission.

The Commissioner has, by agreement with the QLS, accepted primary responsibility for auditing ILPs. The responsibility to audit a law practice's trust account continues to be the responsibility of the QLS.

The Commission may require a corporation that notifies the QLS of its intention to commence practice as a corporation to undertake a 'self-assessment' audit of its management systems soon after giving such notice and to report those findings to the Commission. The Commission may thereafter:

- undertake periodic 'maintenance audits'
- at any time conduct interval 'spot' audits to test the accuracy of self-assessment statements and the standard of compliance generally of any ILP.

Formal arrangements have been entered into with the QLS to assist co-operatively in the operational aspects of this arrangement.

THE COMMISSIONER'S APPROACH TO COMPLIANCE AUDITS

The Commission's approach is governed by six (6) fundamental criteria. These are that compliance audits should:

- Be credible and robust
- Be proportionate
- Add value and to engage with legal practitioner directors with problem solving as to how they might best develop and continually improve their management systems, processes and workplace cultures to establish ethical infrastructure
- Be consistent with the Commission's 'education towards compliance' approach to regulation which is aimed at promoting higher standards (compared to the traditional regulatory approach which is geared to enforcing minimum standards)
- Not add any regulatory burden to incorporated legal practices unless there is some demonstrable risk-related reason that justifies a more intrusive approach
- Allow for the fact that the Commission will inevitably have limited resources

Which ILP is audited and when they are audited is determined by a number of factors including:

- When a law practice commences as an ILP
- The time since our last interaction with an ILP
- Analysing information based on a range of evidence including a firm's complaints history, the firm's previous self-assessment audit if applicable and the kinds of practice areas and aspects of practice that are most at risk.

REFINING OUR APPROACH TO AUDITS OF ILPS

Up until early 2015 the Commission had taken a largely educative approach to ILP compliance by purportedly educating practitioners about their obligations under the LPA.

Prior to 2015 the Commission conducted self-assessment audits and onsite reviews of ILPs upon notification of their intention to commence practice. It is the Commissioner's belief that compliance audits cover a full spectrum from supporting and educating ILPs to comply with the LPA to practice audits using our extensive coercive powers on those who we have identified to be at the greater risk of non-compliance.

In 2014 in an article published in the November edition of the Proctor magazine published by the QLS I advocated that as a regulator, we needed to refine and refresh our approach to regulation. It had been seven (7) years into the regulation of corporations before the Commission took the time to re-assess our approach to supervision.

Subsequent to that article and at my request the Commission's compliance team undertook an analysis of the Commission's functions and approaches to the ILP audit process which ultimately led to the way we now deal with ILP audits.

The Commission no longer require ILPs to undertake an initial self-assessment audit upon commencement. Upon notification of commencement, the Commission sends an initial letter to all ILP Directors to remind them of:

- the Commission's jurisdiction
- the obligations imposed upon ILP Directors
- recommendations for regular self-assessment reviews
- the scope of any future audit the Commission may undertake; and
- suggest that the ILP Directors review their systems regularly.

The letter is in essence a warning to legal practitioner directors of ILPs. If the practitioner has failed to take corrective action in response to the letter then upon any subsequent complaints or investigation all may not bode well for the legal practitioner directors should there have been any failure to comply.

The complaints history and enquiry data that we collect monthly is closely monitored to determine whether more proactive action should be taken. To date there has not been any increase in complaints concerning ILP's since the Commission introduced this new approach.

Suffice to say that the Commission's website states that the Commission uses compliance audits for a number of reasons including preventing, detecting or deterring conduct which may amount to unsatisfactory professional conduct or professional misconduct.

Fortney and Gordon⁵⁸ who assessed the impact of self-assessment in the New South Wales legal profession, identified that self-assessment has a positive impact upon regulation:

- On average, the complaint rate for each incorporated legal practice after self-assessment was one third the complaint rate of the same practices before self-assessment, and also about one third the complaint rates of firms that were not incorporated and thus never required to self-assess
- A vast majority of firms reported that they revised firm policies or procedures relating to the delivery of legal services and many reported that they adopted new procedures

⁵⁸ See Article "Adopting Law Firm Management System to Survive and Thrive: A Study of the Australian Approach to Management-Based Regulation" Forney S & Gordon T, 2012 University of St Thomas Law Journal, 2012 Volume 10 Issue 1

- A majority of firms reported that the self-assessment process was a learning exercise that helped them improve client service.

I do not believe that self-assessment alone is effective. Clearly, some of the positives to the self-assessment are:

- It is a positive initial interaction with the ILP
- The feedback from some firms is that it helps them on set up or as a way to test their existing systems; and
- It shows a proactive approach to regulation with efforts to minimise complaints and to support firms in creating an “ethical infrastructure”.

The Commission’s compliance team (as it then was) conducted internal research and analysis of ILP responses which revealed the following negatives:

- The audits are done at point of time. These type of audits can only ever be shown to be effective by maintaining an “ongoing” self-assessment process. There is simply no feasible way to undertake regular follow up self-assessment audits. Is it the job of the regulator to do what the law practice should be doing anyway? If firms do not undertake regular self-review then that should be a factor in any disciplinary proceedings. In fact, at no point during an investigation do we ever ask that question.
- Self-assessment audits on all law practices are not very effective given that most are start-ups or would not otherwise come to our attention. Large numbers have no complaint history.
- Self-assessment of all law practices goes against our stated position of not increasing regulatory burden unless there is a risk based assessment to do so.
- Our internal research identified a continuum of how firms approach completion of self-assessment ranging from “tick and flick” to some who identify improvements to those who fully engage in the process. Is it the role of regulators to “force” firms to take steps to help themselves? Or should we simply provide the tools for firms to help themselves unless there is a basis to intervene otherwise?
- Self-assessment is not useful in detecting misconduct.
- A large number of ILPs are sole practitioners who find the process to be time consuming and for them of little value.
- Self-assessment takes up an inordinate amount of the Commission officer’s time following up people to provide reports which are then of little or no use – as information is incomplete, questionable or rushed.
- The self-assessment form itself has not been updated for some years – one must question its use as an “educative tool”.

The upshot of that analysis is that, as highlighted above, the Commission now places the onus on ILP Directors to comply with the LPA and no longer automatically require an ILP to undertake self-assessment audits upon notification of the creation of the ILP. The Commission’s resources can be better directed at achieving the Commission’s strategic objectives by working where they are needed most and where the best “*bang for regulatory buck*” can be achieved (and shown).

In passing might I say that the bigger picture so far as an audit process is concerned is really that if sufficient resources were allocated and we had the power to do so that any effective audit process is not simply something for ILPs but should be used for all firms where there is a belief that such prevention would be effective. This approach should be seen as a non-adversarial collaboration between regulators and the solicitors to help firms develop and maintain “appropriate management systems” or supervision practices.

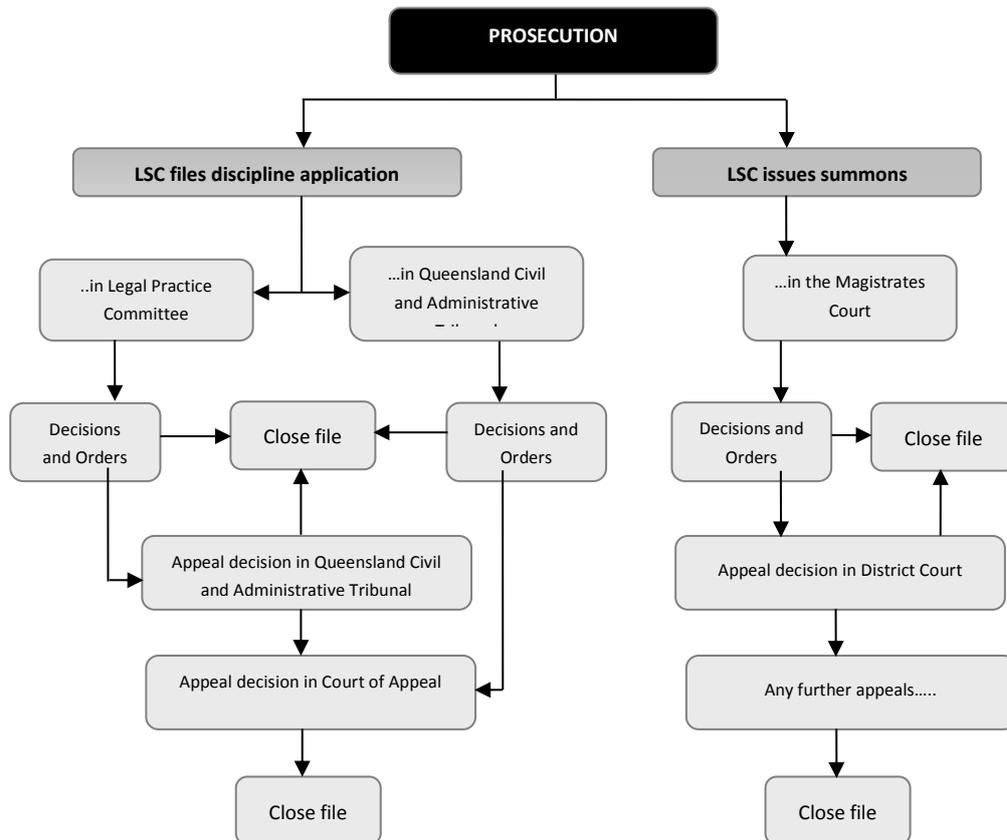
In the year ending 30 June 2017 there were 1025 registered ILP's representing 49.81% of all law firms (2058) and 17 MDP's representing 0.83% in Queensland. The Commission simply does not have the resources to undertake an audit or review of all of these practices.

5. Prosecutions commenced by the Commissioner

The Commissioner conducts two (2) types of prosecutions:

- Disciplinary action against legal practitioners and law practice employees; and
- Criminal prosecutions against unlawful operators.

Prosecution flowchart



DISCIPLINARY APPLICATIONS

The Legal Practice Committee may determine disciplinary applications commenced against legal practitioners for unsatisfactory professional conduct and law practice employees for misconduct. The Committee's powers in relation to a legal practitioner are limited to:

- an order publicly reprimanding the practitioner or, if there are special circumstances, privately reprimanding the practitioner
- an order that the practitioner pay a penalty of a stated amount, not more than \$10,000
- a compensation order
- an order that the practitioner do or refrain from doing something in connection with the practitioner engaging in legal practice
- an order that engaging in legal practice by the practitioner is to be managed for a stated period in a stated way or subject to stated conditions
- an order that engaging in legal practice by the practitioner is to be subject to periodic inspection by a person nominated by the relevant regulatory authority for a stated period

- an order that the practitioner seek advice from a person nominated by the relevant regulatory authority in relation to the practitioner's management of engaging in legal practice.

For a person who is or was a law practice employee, the committee may order that the law practice concerned and all other law practices in this jurisdiction must not, for a period stated in the order of not more than 5 years—

- continue to employ or employ the employee in a law practice in this jurisdiction; or
- employ or continue to employ the employee in this jurisdiction unless the conditions of employment are subject to conditions stated in the order.

THE PROSECUTION OF UNLAWFUL OPERATORS

Sections 24 and 25 of the LPA prohibit a person from:

- engaging in legal practice in Queensland unless the person is an Australian legal practitioner; and
- representing or advertising that the person is entitled to engage in legal practice unless the person is an Australian legal practitioner.

A prosecution for offences under ss 24 and 25 of the LPA must be established to the criminal standard – beyond reasonable doubt. Generally speaking, to establish an offence under s 24 of the LPA, evidence from a person who has been the client of an unlawful operator is required to prove the nature of the service provided, or promised to be provided.

Complaints received by the Commission concerning unlawful operators are of two types:

- persons who are admitted to practice in Queensland or elsewhere, who allegedly are engaging in legal practice in Queensland without possessing the appropriate practising certificate issued by the QLS or BAQ; and
- persons who are not admitted to practice in Queensland or elsewhere who are allegedly engaging in legal practice or holding themselves out as engaging in legal practice.

The District Court of Queensland in **Reichman v Legal Services Commissioner** [2017] QDC 158⁵⁹ confirmed that the test to determine whether a person was 'engaging in legal practice' was as described in **Legal Services Commissioner v Walter** [2011] QSC 132 and involved considering the impugned conduct to ascertain whether it amounts to the person carrying on or exercising the profession of law, and has thereby practised law. Shanahan DCJ found at [93] that the three (3) tests set out in **Cornall v Nagle** [1995] 2 VR 188 assisted in considering whether or not the accused carried on or exercised the profession of law.

For the year ended 30 June 2017 two (2) unlawful operators were sentenced to terms of imprisonment for engaging in legal practice without being an Australian legal practitioner.

In **Legal Services Commissioner v Jesse Adam Bond**⁶⁰ Mr Bond pleaded guilty before the District Court of Queensland to one (1) charge under s 24 of the LPA, one (1) charge under s 25 of the LPA and two (2) state fraud offences. Mr Bond held himself out as a solicitor employed by a fictitious law firm. He employed a young lawyer in his firm, who ultimately became suspicious of Mr Bond and contacted relevant authorities. Using aliases and claiming to be the illegitimate son of a judge, he operated his firm from a serviced office in the Brisbane CBD. A client lent him \$30,000 towards the

⁵⁹ <http://www.sclqld.org.au/caselaw/QDC/2017/158>

⁶⁰ Sentencing Remarks of Smith DCJ, 23 November 2016

start-up costs of his law firm, as well as other moneys. Mr Bond was convicted and sentenced to a period of four (4) months on each charge, to be served concurrently with each other.

*In Legal Services Commissioner v Nicholas Martin Braid*⁶¹ Mr Braid pleaded guilty before the Magistrates Court of Queensland to one (1) charge under s 24 of the LPA and one (1) charge under s 25 of the LPA by holding himself out as a solicitor to a person who required assistance in an industrial matter and accepting \$2,500 upfront for his “legal services”. Mr Braid had completed his legal studies but was never admitted to practice and therefore never held a practising certificate. Mr Braid launched a website for his law practice. On each charge Mr Braid was sentenced to three (3) months imprisonment, to be served concurrently with each other sentences he was already serving for other state offences.

There is a limited window within which criminal prosecutions for unlawful operator offences must be commenced, namely within⁶²:

- one (1) year after the commission of the offence; or
- six (6) months after the offence comes to the complainant’s knowledge, but within two (2) years after the commission of the offence.

Persons admitted to practice in Queensland, who engage in legal practice without possessing the appropriate practising certificate may of course be the subject of disciplinary action for contravening ss 24 or 25 of the LPA⁶³.

THE DISCIPLINE REGISTER

The LPA requires the Commissioner to keep a discipline register on the Commission’s website of disciplinary action taken under the LPA⁶⁴. The LPA requires that the register includes the names of the practitioners against whom discipline action was taken, the names of their law firms and the particulars of the disciplinary action. The LPA defines disciplinary action to mean ‘findings of a disciplinary body or a court of professional misconduct’.

The Commission has also created a Disciplinary and other relevant regulatory decisions page on our website⁶⁵ which includes links to all decisions of the disciplinary bodies and the courts including:

- findings of unsatisfactory professional conduct but not of professional misconduct
- decisions where no finding of unsatisfactory professional conduct or professional misconduct is made;
- decisions concerning costs of the disciplinary proceedings;
- decisions in civil litigation matters, including judicial review; and
- sentencing remarks concerning unlawful operators.

⁶¹ Sentencing Remarks of Magistrate Shearer, 7 February 2017

⁶² See s 709 of the LPA

⁶³ See s 27 of the LPA

⁶⁴ The Discipline Register can be accessed at <https://www.lsc.qld.gov.au/discipline/the-queensland-discipline-register>

⁶⁵ <https://www.lsc.qld.gov.au/discipline/disciplinary-and-other-relevant-regulatory-decisions>