

TRANSCRIPT OF PROCEEDINGS

MAGISTRATES COURT

W J SMITH, Magistrate

MAG-00013065/12(8)

LEGAL SERVICES COMMISSION

Complainant

and

HENRY AUGUST MCKEE

Defendant

BUNDABERG

..DATE 11/12/2012

CONTINUED FROM 16/10/2012

..DAY 2

DECISION

I, JOANNE BUGDEN, Director of Reporting, Finance and Community Engagement, Reform and Support Services, and the officer in charge of the State Reporting Bureau transcripts, do hereby certify that the abovementioned transcript, pages 1 to 29, is a transcript held in the official records of the State Reporting Bureau.

Dated this 7th day of January 2013



Joanne Bugden
Director
Reporting, Finance and Community Engagement
Reform and Support Services

WARNING: The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

BENCH: A plea of not guilty is made to each of two complaints. The offences alleged are against section 24(1) of the Legal Profession Act 2007 and section 25(1) of the Legal Profession Act 2007 which commenced on 1st of July 2007.

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Section 24(1) provides, under the heading, "Prohibition on engaging in legal practice when not entitled:

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(1) a person must not engage in legal practice in this jurisdiction unless the person is an Australian legal practitioner. The maximum penalty, 300 penalty units or two years' imprisonment."

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Section 25(1) provides, under the heading, "Prohibition on representing or advertising entitlement to engage in legal practice when not entitled:

(1) a person must not represent or advertise that the person is entitled to engage in legal practice unless the person is an Australian legal practitioner. Maximum penalty, 300 penalty units or two years' imprisonment."

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Australian legal practitioner is defined in section 6 of the Legal Profession Act 2007. Subsection 1 provides: "An Australian legal practitioner is an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate."

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Section 5(1) of the Legal Profession Act 2007 provides: "An Australian lawyer is a person who is admitted to the legal profession under this Act or a corresponding law." The term,

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"engage in legal practice", is not defined in the Act.

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The complainant has the onus to prove each material element of each alleged offence beyond reasonable doubt. Witnesses called in an endeavour to discharge that onus were: Darielle Glenna, surname Campbell, principal legal officer, of the Legal Services Commission of Queensland; David Coull, who is now retired, but was liability claims manager for Wesfarmers Limited, a parent company of Bi-Lo Proprietary Limited; and Otto Karl Hundert. The accused person, Henry McKee, gave evidence in defence of each offence alleged to have been committed by him.

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THE BACKGROUND

Mr Otto Karl Hundert and Mr Henry August McKee met in New Guinea in the 1970s. On 19th of June 2009 Mr Hundert had a fall in the Bi-Lo supermarket in Bundaberg and he was injured as a result of that fall. Mr Hundert was desirous of making a claim against Wesfarmers in relation to that injury he suffered. Mr McKee was at the home of Mr Hundert and offered to do the claim for Mr Hundert. Mr Hundert testified of having difficulty with the English language. No fee was discussed between Mr McKee and Mr Hundert, however, Mr Hundert stated that he offered Mr McKee 10 per cent of whatever outcome. Mr Hundert prepared no documents in relation to his claim. They were prepared by Mr McKee.

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In 2010, Mr Hundert was advised by Mr McKee that he was required to submit a notice of claim to Wesfarmers Limited.

That notice was prepared by Mr McKee and is Exhibit 6 in these proceedings. Offer of settlement of the claim was made by Wesfarmers Limited on 13th of April 2011. Exhibit 8 refers. The offer of \$30,000 in full and final settlement of the claim by Mr Hundert was accepted.

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A letter from Mackee Pacific, under the hand of Henry McKee, dated 18th of April 2011, confirmed that acceptance of the offer. Mr Hundert acknowledged that he knew Mr McKee was not a solicitor and Mr McKee informed Mr Hundert that if there was a need to undertake proceedings in a Court, he could not act for Mr Hundert.

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In the matter of Legal Services Commissioner against David John Walter [2011] QSC 139, the Legal Services Commissioner applied, pursuant to section 703 of the Legal Profession Act 2007 (Queensland), for an injunction to restrain David John Walter from engaging in certain conduct, namely, engaging in legal practice in the State of Queensland when not an Australian legal practitioner.

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His Honour, Justice Daubney stated in his judgment of 27th of May 2011, from clause 4: "The applicant's case is that I should be satisfied, on the material before me, that the respondent has engaged in conduct that constituted an offence against a relevant law. The term, 'relevant law', includes the Legal Profession Act. It is contended the respondent contravened section 24(1) of the LPA, which provides:

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(1) A person must not engage in legal practice in this

jurisdiction unless the person is an Australian legal practitioner. Maximum penalty, 300 penalty units, or two years' imprisonment;

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(5) Before referring to the evidence on which the applicant relies in support of the allegations of contravention, it is necessary to say something about the interpretation of section 24(1);

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(6) Under the LPA, an Australian legal practitioner is an Australian lawyer who holds a current local, that is Queensland, practising certificate, or a current interstate practising certificate. By section 5(1), An Australian lawyer is a person who is admitted to the legal profession under the LPA or a corresponding law, which in general terms is a reference to the corresponding laws relating to the legal profession in other Australian jurisdictions;

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(7) Section 24 falls within part 2.2 of the LPA. The main purposes of part 2.2 are stated in section 22 to be:

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'(a) to protect the public interest in the proper administration of justice, by ensuring that legal work is carried out only by those who are properly qualified to do so;

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(b) to protect consumers by ensuring the persons carrying out legal work are entitled to do so.';

(8) There are a number of categories of persons excluded from the operation of section 24. For example, section 23 provides that part 2.2 does not apply to a person authorised to engage in legal practice under a law of the commonwealth, or a government legal officer in engaged in government work;

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(9) Section 24 itself contains provisions which exclude the

application of section 24(1) to certain specific practices,
lawyers, and other persons;

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(10) There is nothing in the evidence to suggest that the
respondent falls within any of the categories or classes of
person to whom section 24(1) does not apply. The evidence
also reveals that the respondent is not, and did not at the
time of the impugned conduct, hold a practising certificate in
Queensland or interstate. He was not, and is not, an
Australian legal practitioner within the meaning of that term
in the LPA;

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(11) In order to prove the contravention of section 24(1)
therefore, the applicant must satisfy me that the respondent
engaged in legal practice. There is no general definition of
the term, 'legal practice', in the LPA, only a specific
definition for the purpose of part 2.5, relating to
suitability reports. See section 85. Schedule 2 to the LPA
relevantly provides that: 'engage in legal practice', includes
practice law;

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(12) The noun 'practice', and the verb 'practise', are in my
view, terms of art when used in context of the professions.
The Macquarie dictionary relevantly defines, 'practice', as,
(6), 'the exercise of a profession or occupation, especially
law or medicine; and, 'practise', as, (7), to pursue a
profession, especially law or medicine;

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(13) In *Felman v. Law Institute of Victoria* [1998] 4 Victorian
Reports 324, the Victorian Court of Appeal considered the
term, 'engage in legal practice', in the Legal Practice Act
1996 of Victoria. Kenny JA, said at 352, 'In my opinion, the
expression, "to engage in legal practice", in section 314, and

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elsewhere, signifies to carry on or exercise the profession of law. Reference to the definitions of 'engage' and 'practice' in the Oxford English dictionary supports the view that this is the ordinary and natural meaning of the expression. The carrying on of the profession of law is done by none other than a legal practitioner. Accordingly, in my view, the expression, 'engage in legal practice', means engage in legal practice as a legal practitioner. The italicised words being implicit in the notion of legal practice.

(14) This relatively broad approach to construing the term, 'engage in legal practice', is consistent with traditional notions of legal practice, that is, those which were in place prior to the introduction of the LPA, and similar legislation in other jurisdictions. In *Downey v. O'Connell* [1951] Victorian Law Reports 117, Gavan Duffy and O'Bryan, Justices, said at 122: 'The common conception of a practising barrister or solicitor is that of a legally qualified barrister and solicitor who holds himself out to the public in general as willing to act as a direct and responsible personal confidential legal advisor, and to do and be directly responsible for the legal work generally, and who has clients for whom he does legal work in that way.'

(15) More recently, in *Cornall v. Nagle* [1995] 2 Victoria Reports 188, J D Phillips, Justice, in construing the Legal Profession Practice Act 1958 (Victoria), identified that a person who is neither admitted to practice law nor enrolled as a barrister and solicitor may be regarded as acting or practising as a solicitor in one of three ways:

(i) by doing something which, though not required to be

done exclusively by a solicitor, is usually done by a solicitor, and by doing it in such a way as to justify the reasonable inference that the person doing it is a solicitor;

(ii) by doing something that is positively proscribed by legislation or rules of Court, unless done by a duly qualified legal practitioner;

(iii) by doing something which in order that the public may be adequately protected, is required to be done only by those who have the necessary training and expertise in the law.

(16) In the case before him, J D Phillips, Justice, considered it unnecessary to go beyond an example of the giving of legal advice as part of a course of conduct and for reward as an example of the third category of conduct, but said, at 208:

'In my opinion, the giving of legal advice, at least as part of a course of conduct and for reward, can properly be said to lie at or near the very centre of the practice of law, and hence, the notion of acting or practising as a solicitor. If the public is to be adequately protected from those lacking relevant qualifications, then in the context of a regulated legal profession, the giving of legal advice professionally is, I think, to be regarded as exclusively the province of those properly trained in the law and having the necessary expertise. It is thus something required to be undertaken only by the legally qualified and not by those not properly qualified. Nor, if the protection of the public is to be adequate, can that protection be left to depend, as does the Sanderson test, upon whether the unqualified one declares that

he has no legal training. By prohibiting any unqualified person acting or practising as a solicitor, section 90 should be taken to encompass the giving of legal advice, at least in circumstances where there is a course of conduct involving the giving of that advice for reward. I go no further than that, only because it is unnecessary to do so in this particular case.

(17) In *Legal Services Commissioner v. Bradshaw* [2009] LPT 21, Fryberg J expressed the view that the expressions, 'engage in legal practice' and 'practise law' under section 24 of the LPA are the professional equivalent of the expression, 'carry on business', which is used in relation to activities other than professional activities, and that practising law is an activity which has the characteristics of carrying on the business of being a lawyer. His Honour explained, 'One would look for evidence of continuity of repeated acts. One would look for evidence of payment for those acts. One would look for evidence of seeking business from members of the public, or at least from other lawyers. One would look for evidence of a business system. One would look for evidence of maintaining books and records consistent with the existence of a practice. One would look for evidence of a multiplicity of clients. None of those things is in evidence before me.'

(18) For my part, I would respectfully disagree with the equation of practising law with the carrying of a business. I prefer the formulation of Kenny JA, and would hold that the terms, 'engage in legal practice' and 'practise law', in the LPA invoke the notion of carrying on or exercising the profession of law, not the business of law.

(19) There is a palpable difference between carrying on or exercising the profession of law, on the one hand, and carrying on the business of a lawyer, on the other. At least one of the hallmarks of a profession, apart from special skill and learning, is that the profession has public service as it's principal goal. The distinction between a trade, business or occupation and a profession was described by Street CJ in re Foster [1950] SR New South Wales 149 at 151: 'A trade or business is an occupational calling in which the primary object is the pursuit of pecuniary gain. Honesty and honourable dealing are of course expected from every man, whether he be engaged in professional practice or in any other gainful occupation. But in a profession, pecuniary success is not the only goal. Service is the ideal, and the earning of a remuneration must always be subservient to this main purpose.

(20) The factors listed by Fryberg J are, it seems to me, indicia of a person carrying on a professional business. Some or all of those indicia, if present in a particular case, will be relevant in determining whether the person, by carrying on that business, has carried on or exercised the profession of law. But those indicia are not, in my view, determinative. The fact that a person carries out legal work, to use the phraseology of the purposes of part 2.2, as expressed in section 22, for reward, is indicative of a person engaging in legal practice, but is not a necessary precondition to a finding that a person has engaged in legal practice.

(21) In short, the fact that a person is engaged in the business of providing legal services is indicative of that person practising law, but a person may be practising law

without being in business. It is clear, for example, that an Australian legal practitioner can exercise the profession of law for clients without any entitlement to or expectation of reward or remuneration from those clients. But an Australian legal practitioner who habitually acts pro bono for needy client can hardly be said to be not engaged in legal practice because he or she provides professional legal services without reward from those clients.

(22) In my view, therefore, the proper approach to section 24 requires a consideration of the impugned conduct to ascertain whether it amounts to the person carrying on or exercising the profession of law and has thereby practised law."

In the matter of Legal Services Commissioner v. Douglas McLeod Beames [2012] QSC 327, an application was also brought pursuant to section 703 of the Legal Profession Act 2007 for a declaration and injunctive order.

Her Honour Justice Philippides stated from paragraph 11 of her judgment, "The applicant argued that in identifying himself as a lawyer when witnessing the form 29, the respondent represented that he was entitled to engage in legal practice in breach of section 25 of the LPA. Section 25 of the LPA relevantly provides as follows: "25, prohibition on representing or advertising entitlement to engage in legal practice when not entitled, (1), a person must not represent or advertise that the person is entitled to engage in legal practice unless the person is an Australian legal practitioner, maximum penalty 300 penalty units or two years' imprisonment."

(12) "It was contended that section 25 was breached not only by the respondent's use of the word "lawyer" as his witnessing qualification, but additionally by the act of witnessing the document, thereby representing an entitlement to engage in legal practice."

Reference was made by the applicant to Legal Services Commissioner v Walter [2011] QSC 132, where Daubney J considered the meaning of engage in legal practice for the purposes of an application pursuant to section 703 of the LPA in similar terms to the present case but dealing with a breach of section 24, rather than section 25. His Honour applied the decision of Cornall v Nagle [1995] 2 Victorian Reports 188 at 5 and 6.

More recently, in Cornall v Nagle, Phillips J, in construing

the Legal Profession Act 1958 Victoria, identified that a person who was neither admitted to practice law nor enrolled as a barrister and solicitor may regard it as acting or practising as a solicitor in the three ways as were outlined by his Honour Justice Daubney.

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(13)"The applicant thus submitted that by including the word "lawyer" next to his purported witnessing qualification, the respondent was doing something, although that thing is not required to be done exclusively by a solicitor in such a way as to justify the reasonable inference that the person doing it was a solicitor; moreover, the respondent had, by witnessing the form 29 as a lawyer, plainly represented that he was entitled to engage in legal practice when he was not an Australian legal practitioner.". In my view, those submissions are correct and should be accepted.

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I wholly agree with the learned opinion expressed by his Honour Justice Daubney in paragraph 18 of his judgment in Walter, that the terms "engage in legal practice" and "practice law", in the Legal Profession Act 2007 Queensland, invoked the notion of carrying on or exercising the profession of law, not the business of law.

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On the whole of the evidence adduced before me, I am satisfied beyond reasonable doubt that the complainant has proven that Henry August McKee has never been admitted to practice as a solicitor or barrister at law of the Supreme Court of Queensland or any other Australian jurisdiction, and does not

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hold a current practising certificate as either solicitor or barrister to engage in legal practice in Queensland or any other Australian jurisdiction. Mr McKee is not a person who is admitted to the legal profession under the Legal Profession Act 2007 Queensland, or a corresponding law.

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By letter dated 15th of March 2010, that is Exhibit 1, folio 8, Mr Henry McKee wrote to Wesfarmers Limited on behalf of Mr Otto Hundert. Mr McKee details his educational and professional qualifications in his letterhead, including LLB. He has, in the introductory paragraph, the words, I quote, "instructed by our client, Mr Otto Hundert". A reference, I quote, "HM/JDM", is detailed on the correspondence. The contention of Mr McKee that he was acting only in a mentoring role for Mr Hundert is not accepted as honest and not accepted as reliable.

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If correspondence was prepared for Mr Hundert as a friend, there existed no need to detail qualifications of Mr McKee, nor make reference to, I quote, "instructions by our client". If the correspondence was prepared for Mr Hundert as a friend, there existed no need to have a reference, I quote, "HM/JDM", as any correspondence from Wesfarmers for Mr Hundert could not be confused with any other claim.

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Wesfarmers Limited responded under the hand of Mr David Coull, and made reference, in line with correspondence from Mr McKee, to Mr McKee's reference of HM/JDM, and also referred to, I quote, "your client", Exhibit 1, as was indicated by Mr McKee.

Mr Coull was asked by Mr McMillan for the complainant, "What impression did you have as to Mr McKee's involvement in Mr Hundert's claim?". He responded, "I believed that he was a solicitor acting on behalf of Mr Hundert."

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Mr Coull also testified that the correspondence directed under the title "Henry McKee" gave the impression that it was a letter from a solicitor who was probably a sole practitioner. Mr Coull also noted the listed qualifications that he observed on correspondence for Mr McKee, including LLB.

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Evidence of Mr Coull is that Mr McKee never wrote to him, nor informed him orally that Mr McKee was a solicitor. Mr Coull confirmed that it was rare in his experience for a notice of claim to be completed by a member the of the public. The notices of claim that he encountered were more frequently completed by solicitors.

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There exists no doubt that Mr McKee completed the notice of claim form for Mr Hundert, Exhibit 6, and engaged in a course of correspondence with Mr Coull, the representative of Wesfarmers Limited.

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In the notice of claim, Exhibit 6, at question 4, it is stated, I quote, "Has the injured person instructed a law practice to act on the person's behalf in seeking damages for the personal injury?". A box for "No" has a cross applied in it; however, further words are expressed on the notice of

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claim form. I quote, "If yes, provide date instructions were given". No date was inserted, but where the name of lawyer and firm and address is detailed, the following words are inserted, I quote: "I am represented by a friend of mine, Henry McKee, DLit, LLB, of Henry McKee International Consultants, 60 Sims Road, Bundaberg, Queensland, 4670. Phone, fax 617 415 35648".

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It is found that the notice required nothing more to be inserted in section 4 after "No" was indicated by Mr McKee. I'm satisfied beyond reasonable doubt that Mr McKee, by completion of the unnecessary words with qualifications DLit and LLB with his name, deliberately set out to give an impression of him being someone in the practice of law, representing Mr Hundert. The notice of claim was dated 14th of October 2010.

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Further clarification was sought from Wesfarmers Limited in relation to question 4 on the notice of claim. Mr McKee responded to Wesfarmers by letter dated 23rd of September 2010, Exhibit 7, and provided information pertaining to question 4. It states, I quote, "Since the end of June 2009, Mr Otto Hundert searched for a solicitor to represent him on a no-win, no-fee basis. Due to his mature age, his endeavour ended without any favourable outcome. When this was obvious, I commenced to represent him from the 15th of March 2010. Of the accident, I was informed around the 27th of June 2009."

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It is pertinent to note that the date sought by Wesfarmers

Limited in question 4 related to a date instructions were given to a law practice. Mr McKee's carefully chosen words failed to express he was not an Australian legal practitioner. Those words used by him in the correspondence, Exhibit 7, are capable of conveying and representing that Mr Hundert failed to obtain a solicitor to represent him on a no-win, no-fee basis, thus Mr McKee commenced to represent him from 15th of March 2010. It is relevant to note the use of the words "represent him", no details related to Wesfarmers Limited by Mr McKee that he was helping Mr Hundert as a friend and mentor.

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In various items of correspondence to Wesfarmers Limited - for example, Exhibit 5, a correspondence of 7th of April 2011; Exhibit 9, correspondence of 18th of April 2011; Exhibit 4, 10th of May 2011; Exhibit 1, a folio 93, a letter of January the 10th 2011, and 19th of January 2011 being Exhibit 1, folio 94, reference was made to Mackee, M-A-C-K-E-E, Pacific, Australian Business Number 74963986644, and private attorneys, commercial consultants, centre for injury and compensation claims.

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Correspondence to Dr Abdul Chaudhry, C-H-A-U-D-H-R-Y, orthopaedic surgeon, Exhibit 1, folio 99, from Dr Henry McKee, DLit, made reference to "our client's injury", and Mackee Pacific, Australian Business Number 74963986644. The words, "Private attorneys, commercial consultants, centre for injury compensation claims" were also printed on that correspondence.

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A letter dated 17th of February 2011, Exhibit 1, folio 100, to Dr Chaudhry had the same references to Mackee Pacific and private attorneys, commercial consultants, centre for injury compensation claims.

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A letter dated 18th of February 2011, Exhibit 1, folio 101, to Mr Otto K Hundert was under the hand of Dr Henry McKee, DLit, requesting an up-to-date medical report. The letter bore reference to Mackee Pacific, private attorneys, commercial consultants, centre for injury compensation claims.

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Letters dated 25th of February 2011 to ID van der Walt Medical Proprietary Limited, Exhibit 1, folio 104, and Exhibit 1, folio 107, communication of 11th of March 2011 to Dr David van der Walt also have reference to Mackee Pacific and the private attorneys, commercial consultants, centre for injury compensation claims.

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The contention of Mr McKee that the correspondence was at the direction of Mr Hundert and was purely administrative is not accepted by the Court as accurate. The evidence of Mr McKee in this regard is not considered honest and not considered reliable. It is farcical to suggest that a letter directed to Mr Hundert himself was at the direction of Mr Hundert.

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I'm satisfied beyond reasonable doubt that Mr McKee engaged in a course of conduct which was calculated to have others believe he was engaged in legal practice. Mr Hundert [sic] was not one of those persons admitted to the legal profession

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under the Legal Profession Act 2007 Queensland or at
corresponding law.

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Evidence satisfies the Court that Mr McKee engaged in a course
of correspondence which had the result of a settlement of Mr
Hundert's claim for \$30,000. On 18th of April 2011, Mr McKee
wrote to Wesfarmers Limited, advising, I quote, "Our client is
prepared to accept your offer of \$30,000 in full and final
settlement of this action.". On 10th of May 2011, Mr McKee
wrote to Wesfarmers Limited, I quote, "Please issue your
cheque in favour of Mackee", M-A-C-K-E-E, "Pacific Clients
account.". Mr Coull testified that he made an error, and the
settlement cheque was in fact drawn in the name of Mackee
Pacific Trust Account.

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Evidence reveals that in May 2011, when the settlement cheque
was received by Mr McKee, he, of necessity, established a
banking account, Henry August Kurt McKee trading as Mackee
Pacific Statutory Trust Account, to allow the cheque to be
negotiated, and importantly for him, to give Mr McKee ability
to distribute the settlement moneys.

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Mr McKee's evidence of him carrying out assistance to Mr
Hundert as a professional mentor and his evidence that he was
carrying out assistance in proceeding with Mr Hundert's claim
on an agreement of sharing any payment on a 50-50 basis were
unconvincing, when all the circumstances revealed are
considered by the Court. Mr McKee's own actions relating to
the claim contradict his expressed contentions before the

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Court.

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A document was completed titled "Notice of judgment or settlement for Medicare Australia". In the details of injured person section of that notice, that is Exhibit 1, folios 121, 122 and 123, under solicitors, item 16, the solicitors reference is noted as "OH/PL25220", and the name of firm, "Henry McKee" is noted. There exists no doubt that such document was prepared by Henry McKee.

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On 27th of May 2011, Mr McKee issued a statement of account to Mr Hundert which reduced a deduction of \$10,000 from the settlement moneys. That deduction referred to, I quote, "professional fees and costs, see memo".

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The memorandum attached to the letter of 27th of May 2011, also dated 27th of May 2011, Exhibit 1, folio 129, under the notation of Mackee Pacific and private attorneys, commercial consultants, centre for injury compensation claims, states, I quote, "Commensurate with your instructions, I acted on your behalf in matters under references stated above; attempted to claim procedure in accordance with the Personal Injuries Proceedings Act 2002, including relevant negotiations, correspondences, medical referrals, hospital and medical financial settlements and associated matters; negotiated final compensation payment. The payment was in compensation of the particular physical injuries as per medico-legal report from Dr David van der Walt, dated 29th of March 2011. No claim has been lodged or payment received for loss of earnings, income

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or the like, nor for out-of-pocket expenses incurred.".

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"Under part 3.14 of the Social Security Act 1991, Wesfarmers submitted to Medicare Australia \$3,000. Under section 23A, we applied on your behalf under section 23A with statement and statutory declaration for the refund of the \$3,000. When payment is to hand, it will be forwarded to you without delay. Thanking you for your instructions, always with pleasure at your service, yours faithfully, Henry McKee.".

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There exists no doubt that the style, form, and content of correspondence under the hand of Mr McKee in relation to Mr Hundert's claim were intended to suggest that Mr McKee was Mr Hundert's legal representative. The notice prepared for Medicare directly and unequivocally detailed Mr McKee was Mr Hundert's solicitor, and Mr McKee prepared that document.

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Evidence proves beyond reasonable doubt that in the period relevant to each alleged offence, Henry McKee did engage in legal practice. He undertook actions of preparing documents. He corresponded with Wesfarmers Limited and medical practitioners. He prepared documents for Medicare Australia. He disbursed moneys paid to a banking account in settlement of a claim, and prepared a memorandum of fees for his professional services.

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Even those activities, they are not required to be done exclusively by a solicitor, are usually done by a solicitor, and Mr McKee engaged in those activities in such a way as to

justify the reasonable inference that he was doing it as a solicitor.

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In adopting the proper approach to section 24 of the Legal Profession Act 2007, as stated by his Honour Justice Daubney, in paragraph 22 of his judgment, on consideration of the impugned conduct by Henry McKee, I find that it does amount to him carrying on or exercising the profession of law, and he is thereby engaged in legal practice.

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I am satisfied beyond reasonable doubt that diverse dates between the 14th of March 2010 and 30th of May 2011, at Bundaberg in the State of Queensland, Henry McKee did, contrary to section 24(1) of the Legal Profession Act 2007 engage in legal practice when he was not an Australian legal practitioner.

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I am also satisfied beyond reasonable doubt that on diverse dates between 14th of March 2010 and 30th of May 2011, at Bundaberg in the State of Queensland, Henry McKee did, contrary to section 25(1) of the Legal Profession Act 2007 represent that he was entitled to engage in legal practice when he was not an Australian legal practitioner. I find Henry McKee guilty of each offence alleged in the complaints before this Court.

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I'll both parties on the matter of penalty. Mr McMillan, are you able to hear me?

MR MCMILLAN: Yes, I am, thank you, your Honour. Your Honour, I made detailed submissions on sentence at the conclusion of the hearing.

BENCH: Yes, that's correct. Did you wish to add to those?

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MR MCMILLAN: Not at this stage, thank you, your Honour.

BENCH: Thank you, Mr McMillan. Mr Ebert.

MR EBERT: Thank you. Just by way of some antecedents, your Honour, your Honour, my client as you've heard is 78 years of age. He is a long and illustrious business career. He has engaged during his career as a consulting commercial consultant, business financial adviser, commercial consultant and mentor. He's worked in numerous countries through the Asia Pacific and Africa in conducting various business arrangements, administration, finance, accounting, marketing, public relations and the like.

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He has won numerous awards and qualifications over the course of his career. He has no history of a like nature. He has no history whatsoever in relation to any offence in any country

in relation to being before the Courts. He's on my instructions never been declared bankrupt. He's never been in a position of a company that has failed and placed in receivership or liquidation, never been the subject of any disciplinary proceedings except for the matter which we are before the Court today.

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Your Honour, certainly while I've heard the detailed reasons you've given today in relation to the issues of guilt, obviously the matter started off between Hundert and my client on a certain basis between them. As the factual context of the fee, that's a matter that's of determination but in relation to how the matter began, it certainly began as a matter of friends. What seems to have happened, your Honour, is that my client has engaged in a overt degree of formality with respect to a qualification that he holds, an LLB, which has then caused other persons such as Wesfarmers to form the view that he was a solicitor or a lawyer engaging in practice in the state.

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The background obviously is in relation to penalty. The matters in my respectful submission fall within the - certainly the ranges of penalties where - which have been given were in relation to the matter of the - more serious matter of Seymour, there was a \$5,000 penalty imposed in relation to that matter. That was where a person acted for some 29 persons conducting legal work including the preparation of a Court documentation through informal Court pleadings. That was certainly on the high end of the scale in my respectful submission in relation to these matters.

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The other matter where the practitioner - sorry, the accused had used the word "solicitor", there was an - the penalty imposed was at the lesser end of the scale and in the range of \$600. It's my respectful submission that the penalty, taking into account my client's impeccable history, his age, his health, he's not in good health, and that he's also in receipt of a pension at this stage of his life, he's not a self refunded retiree as such, he is in receipt of some government benefits, that the penalty range would be in the range of 600 to a thousand dollars in relation to the comparative penalties which have been - have come before the Courts in recent times.

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That's essentially my - the outline in relation to a penalty.

BENCH: Thank you, Mr Ebert. Mr McMillan, are any professional costs being sought by the complainant?

MR MCMILLAN: Your Honour, I thought I had simply submitted for costs in accordance with Justices Act scale.

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BENCH: Yes.

MR MCMILLAN: I don't seek any costs beyond the scale.

BENCH: Thank you. Are you seeking the filing fee of \$78 as well?

MR MCMILLAN: Yes, thank you, your Honour.

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BENCH: Thank you.

MR MCMILLAN: Your Honour, I'm sorry, on the question for costs, for completeness and so that there's some certainly your Honour's orders, it may be of assistance if your Honour makes an order for costs in a specified amount.

BENCH: Yes.

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MR MCMILLAN: My calculation looking at the schedule in the Justices regulation, would be I think about - there had been two mentions at a hearing so I would be satisfied if your Honour made an order for a fixed amount of costs in the amount of \$1,250.

BENCH: Thank you.

MR MCMILLAN: And there is of course, your Honour, the question of restitution as well. I don't know whether your Honour is yet to get to that, I just didn't want to-----

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BENCH: No, I certainly was going to give you and Mr Ebert an opportunity to be heard in relation to the compensation.

MR MCMILLAN: Thank you, your Honour.

BENCH: I'll hear from you first, Mr McMillan.

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MR MCMILLAN: Thank you. Your Honour, I made submissions at the conclusion of the hearing that upon - in the event that Mr McKee was convicted of the offences, that your Honour will make an order for restitution in the amount of \$10,000.

BENCH: Yes.

MR MCMILLAN: That is the full amount of the fee retained by the defendant from the settlement that was owed to Mr Hundert. Mr McKee gave evidence during his defence that the entire amount of that \$10,000 remained in a trust account.

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BENCH: Yes.

MR MCMILLAN: In my submission there is no reason that your Honour ought not make an order for restitution requiring that amount to be paid to Mr Hundert within a relatively brief period of time.

BENCH: Thank you. Mr Ebert, do you want to be heard in relation to the compensation in the matter of costs?

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MR EBERT: The submission I make would be brief, your Honour, in this sense that I'm concerned on the issue of restitution the only thing that Mr Hundert ends up in the position of some unjust enrichment in this sense that Mr McKee on his behalf entered into correspondence, incurred outlays in particular of correspondence, other general expenses that would otherwise

have been - Mr Hundert would otherwise have had to incur had he acted on his own behalf. In some limited way that may - your Honour may want to take that into account. It's very difficult for me to particularise to a precise figure.

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BENCH: At this-----

MR EBERT: But that's the only issue that I could raise.

BENCH: At this stage, because of the unlawful actions, and particularly where each offence has been established before the Court, the full \$10,000 should properly be paid to the proper officer of the Court on behalf of Mr Hundert.

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MR EBERT: I can't take it any higher than that. Thank you, your Honour.

BENCH: Thank you.

MR MCMILLAN: Your Honour, I didn't quite hear your Honour's observations a moment ago.

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BENCH: Yes. Mr McMillan, I just said, because of the unlawful actions of Mr McKee and his offending against the statute, it having been proved he should properly pay the total amount of \$10,000 to the proper officer on behalf of Mr Hundert.

MR MCMILLAN: Thank you, your Honour. I omitted to alert your Honour to the fact that the Act actually provides that a person may not charge any fee-----

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BENCH: Yes.

MR MCMILLAN: -----for an offence - for work done in contravention of the Act.

BENCH: I accept that. The principle's been enunciated in other matters before the high Courts as well.

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MR MCMILLAN: Yes, thank you, your Honour. Your Honour, just for your assistance, that provision is section 24(4)-----

BENCH: Thank you.

MR MCMILLAN: -----which reads, "A person is not entitled to recover any amount in relation to anything the person in did in contravention of subsection 1."

BENCH: Thank you, Mr McMillan. Mr McKee.

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DEFENDANT: Yes, your Honour.

BENCH: Upon the finding of guilty, you are formally convicted of each offence. Each conviction is formally recorded. In determining penalty I take into account the maximum penalties provided under section 24 and section 25 of the Legal Profession Act of 2007. I take into account the provisions of section 9 of the Penalties and Sentences Act of 1992.

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I also take into account those comments made by his Honour Judge Butler, Chief Magistrate in the matter of Legal Services Commission and Seymour, and the penalties imposed in that case.

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I also take into account the comments made and the penalty imposed in the matter of Bruce Graham De Costa and Police, a matter before her Honour Magistrate Cull in Brisbane on 4th of November 2009.

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I take into account also your personal particular, that you're 78 years of age and have had an illustrious business career. I take into account what is sought to be remedied by the legislation. And his Honour Judge Butler referred to those matters that persons are properly protected if actions are taken on their behalf by properly qualified legal practitioners with the appropriate protection, if they act in error that there are remedies are available.

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Where I consider all matters, the appropriate fine is for complaint number 1, a fine of \$1,000. I order that you pay Court costs of \$78.00 and professional costs of \$1,250. In

default of payment of that fine, the Court costs and professional costs, I order that levy be made by execution against goods and chattels that you own.

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I make a further order that you pay to the proper officer of the Court a sum of \$10,000 as compensation on behalf of Otto Karol Hundert within 14 days from today and in default of payment levy is to be made by execution against goods and chattels that you own.

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In relation to the second matter upon the finding of guilt, as indicated, you are formally convicted. The conviction is recorded. You are fined the sum of \$400, and in default of payment levy is to be made by execution against goods and chattels that you own.

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I make a formal order that particulars of each fine, each order for payment of costs and compensation be provided by the proper officer of the Court to the State Penalties Enforcement Registry forthwith for registration. What will happen is, each amount will register with the State Penalties Enforcement Registry. You will have to make arrangements in relation to payment of the fines, costs, and professional costs, and if the compensation is not paid within 14 days, appropriate levy can be made by the Registrar of the State Penalties Enforcement Registry.

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Is there anything that you don't understand?

DEFENDANT: I do understand.

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BENCH: Thank you. In relation to the fines, you can if you wish apply to do unpaid community service by way of a fine option order. If you want to bring that application, you'll have to bring in an earlier time on an approved application form that you can lodge with the registrar of the State Penalties Enforcement Registry. I'm sure Mr Ebert will assist you in that regard.

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MR EBERT: Yes, thank you, your Honour.

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BENCH: Mr Ebert, Mr McMillan, thank you both for your assistance.

MR MCMILLAN: Thank you, your Honour.

BENCH: Everything's clear for both parties?

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MR MCMILLAN: Yes, thank you, your Honour. Does Mr Hundert then make application to the proper officer for the return of the monies?

BENCH: I'm sorry? They will be forwarded to him directly. My clerk will provide an address for Mr Hundert. As soon as it's paid to SPER, it'll be paid to Mr Hundert.

MR MCMILLAN: Thank you, your Honour.

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BENCH: Thank you. Thanks, Mr Ebert.

MR EBERT: Thank you, your Honour.

BENCH: Court is adjourned.

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