

**IN THE LEGAL PRACTITIONERS  
DISCIPLINARY TRIBUNAL**

**ACTION NOS. 12 of 2014**

**IN THE MATTER OF**

**KENNETH KEUNG**

**and**

**LEGAL PROFESSION CONDUCT  
COMMISSIONER**

**DECISION OF THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL**

**THE ISSUE**

1. The preliminary issue that has to be determined by this Tribunal is whether it has jurisdiction to entertain the "Appeal" filed with this Tribunal on 18 December 2014 (the **Appeal**) by the Complainant Mr Keung (the **jurisdictional issue**).

**BACKGROUND**

2. The background which gives rise to the jurisdictional issue is set out in the determination of the Legal Profession Conduct Commissioner (the **Commissioner**) dated 20 November 2014 (the **determination**).<sup>1</sup>
3. The Appeal stated that the Complainant:

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<sup>1</sup> See the book supplementing the Commissioner's submissions.

"HEREBY APPEALS the decision of the Legal Profession Conduct Commissioner made on 20 November 2014.

The appeal is based on – The Complaint of Overcharging was made on 11 January 2014.

There are seven arms in the complainant of overcharging as listed below.

1. Duplication of jobs.
2. Invention of jobs without real existence.
3. Multiple billing of documents.
4. Lack of estimations.
5. Charging for letters of engagement.
6. Correction of job nature made in the Schedule of Costs for adjudication.
7. Overcharging through deception and misleading conduct.

The Determination dated 20 November 2014 was made on non-existing evidence as exemplified in my letters (Attached) sent to the Conduct Commissioner, Mr May, after its issuance.

Charging \$4275 for letters of engagement and multiple billing of \$2,000.00 were proven to be wrong-doings in the Supreme Court during adjudication by His Honour Judge Lunn on 14 August 2012 but the Conduct Commissioner said this was not misconduct as the figures did not reach the evidentiary threshold and the lawyers complained of believed that they could be charged.

4. The letters referred to as being ("Attached") to the Appeal appear to refer to a document headed "Conclusion" dated 7 March 2013 sent by the Complainant to the Commissioner, and letters sent by the Complainant to the Commissioner dated 26 November 2014 and 1 December 2014. These letters were filed with the Tribunal. The first document is dated before the Commissioner's determination made on 20 November 2014 and the last two letters are dated post this date.
5. The following pertinent facts distilled from the Commissioner's determination puts the Complainant's Appeal in context.
6. The Complainant first complained to the Legal Practitioners Conduct Board (the **Conduct Board**) on 24 June 2010 about a legal practitioner, (the **Practitioner**), another legal practitioner who was a senior associate in the Practitioner's firm, and a senior and a junior counsel from the South Australian Bar (the **First Complaint**). The complaint arose out of proceedings that the Practitioner's firm had been engaged to handle on behalf of a company of which the Complainant was then a director and shareholder.
7. As the Practitioner was the Presiding Member of the Conduct Board, the Board engaged an Adelaide legal firm, Cosoff Cudmore Knox (**CCK**) to investigate the complaints against all of the practitioners including the Practitioner and to provide a report to the Board in respect of its investigations noting recommendations to the Board on whether it should be satisfied that there had been unsatisfactory or unprofessional conduct on the part of any one or more of the practitioners. The Board accepted that

the ultimate function of determining whether it should be so satisfied was for it to determine.

8. The Conduct Board resolved on 14 December 2011 and 7 March 2012 that it was not satisfied that there was unsatisfactory or unprofessional conduct on the part of any of the practitioners, except it adjourned its investigation of what it called Complaint 17 against the Practitioner pending the outcome of certain Supreme Court proceedings relating to the subject matter of this complaint.
9. At its meetings on 9 October 2013 and 16 April 2014, the Conduct Board stated that it was of the preliminary view, that the Practitioner's conduct the subject of Complaint 17 was unsatisfactory conduct within the meaning of the *Legal Practitioners Act 1981* (the **Act**) (prior to the Act being amended by the *Legal Practitioners (Miscellaneous) Amendment Act 2013* (the **Amending Act**)) and that it would seek submissions from the Practitioner regarding its preliminary view, and also ask the Practitioner whether he would consent (if it became necessary) to the disposition of this matter as "relatively minor misconduct" pursuant to s 77AB(1)(c) of the Act by way of a reprimand.
10. Both the Practitioner and the Complainant took issue with the Conduct Board's preliminary view and both made detailed submissions in support of their views. In the absence of the Practitioner's consent, to the cause of action proposed by the Conduct Board, the Board was unable to deal with the matter under s 77AB of the Act in any event.
11. The Complainant filed a fresh complaint in a series of emails and documents dated between 7 March 2013 to 4 March 2014 (the **Second Complaint**), with the Conduct Board alleging overcharging by the Practitioner firm and listing what he called "seven arms" or grounds against them. The seven grounds are replicated in the Appeal. The investigation of the complaints were not completed by the Conduct Board before 1 July 2014.
12. The Complainant sought access under the *Freedom of Information Act 1991* (the **FOI Act**) from the Conduct Board to the CCK report and any documents upon which the Board relied on to form its preliminary view referred to in [9] above and any minutes of any Board meetings regarding the formation of this view. This request for access was refused by the Conduct Board.

13. In August of 2013, the Complainant applied to the South Australian Ombudsman for access to the CCK report and the related documents under the FOI Act.
14. On 8 May 2014, the Ombudsman made a provisional determination that the CCK report and some other documents that had been requested should be released to the Complainant. The covering letter to the provisional determination stated that the Ombudsman would finalise his determination upon a consideration of submissions from all parties concerned.
15. On 12 December 2014, Acting Deputy SA Ombudsman issued a statement of reasons in which he stated that as the Commissioner was an exempt agency under the FOI Act, he did not have jurisdiction to conduct a review of this agency's decision refusing access to the information the subject of the FOI application. By virtue of the transitional provisions of the Amending Act, the Commissioner had assumed conduct of the Complainant's complaints and had physical possession of the information, the subject of the FOI application relating to the complaints.
16. The Complainant has also asked this Tribunal to issue various summonses to aid the hearing of his Appeal against various persons, namely, Mr James Cosoff of CCK and the Commissioner, essentially calling for the production of the CCK report and related documents.
17. This Tribunal has indicated that it will first determine whether it has jurisdiction to entertain the Appeal, and if it does not, then the Tribunal is without jurisdiction to hear the Appeal and all matters associated with it, including the request for the issue of summonses to produce documents to aid the hearing of the said Appeal.
18. The Appeal when read with the written submissions of the Complainant dated 23 February 2015 and 25 May 2015 filed with the Tribunal and as further explained in his oral submissions appears to challenge the whole of the Commissioner's determination. The Appeal requests that the Tribunal "review or make inquiries into them" [all his complaints] thus challenging the Commissioner's determination as it relates to all of the complaints of the Complainant dealt with in the determination. The "grounds" of Appeal appear to mount a broad attack on the determination alleging "abuse of public office", "breach of legislated duties" etc.

## RELEVANT LEGISLATIVE SCHEME

19. As Complaint 17 in the First Complaint, and the Second Complaint had not been finalised by the Conduct Board prior to 1 July 2014, the Commissioner assumed conduct of the complaints by virtue of the transitional provisions in the Amending Act, Part 4 s 13, as if the complaints had been received by the Commissioner.
20. The Amending Act made substantial amendments including replacing the Conduct Board with the Commissioner with increased powers. As well as taking over the powers and duties of the Conduct Board, the Commissioner has new powers to make binding decisions imposing sanctions without the consent of parties in some cases, and to impose a wide range of disciplinary sanctions with the consent of the practitioner in question.
21. The term "unsatisfactory professional conduct" is defined by reference to the new s68 inserted by the Amending Act. Section 68 provides a definition of "unsatisfactory professional conduct" as including "conduct of a legal practitioner occurring in connection with the practice of law that falls short of the level of competence and diligence that a member of the public is entitled to expect of a reasonably competent legal practitioner."
22. "[P]rofessional misconduct" is defined by s69 as including "unsatisfactory professional conduct of a legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and conduct of a legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to practice the profession of the law." Section 70 provides examples of conduct capable of constituting "unsatisfactory professional conduct" or "professional misconduct."
23. Section 72 sets out the functions of the Commissioner which are to:
  - investigate suspected unsatisfactory conduct or professional misconduct,
  - take action against a practitioner following an investigation or to lay charges before the Tribunal,

- receive and deal with complaints of overcharging,
  - arrange for the conciliation of complaints,
  - commence disciplinary proceedings against legal practitioners in the Supreme Court on the recommendation of the Tribunal etc, and
  - carry out functions assigned to the Commission under the Act.
24. Section 78B deals with the Commissioner's powers to conduct an investigation into the conduct of a current or former legal practitioner
25. Section 77C sets out the circumstances in which the Commissioner may close the whole or part of a complaint without further investigation or further consideration of its merits, including where the Commissioner is satisfied that closure of the complaint is otherwise in the public interest.
26. Section 77J sets out the powers of the Commissioner to deal with certain conduct in the event he is satisfied there is evidence of unsatisfactory professional conduct, and that conduct can adequately be dealt with under s 77J(1).
27. Section 77J(2) relates to investigations into professional misconduct. Section 77N deals with complaints and investigations into allegations of overcharging against practitioners.
28. To the extent that the present complaints made allegations of unsatisfactory professional conduct, or professional misconduct, s 77B applied and to the extent that the subject matter of the complaints alleged overcharging, s 77N applied.
29. As the conduct complained of occurred prior to 1 Jul 2014 (prior to the Amending Act coming into effect), they had to be considered by the Commissioner by reference to the definitions of "unsatisfactory conduct" and "unprofessional conduct" as contained in s 5 of the Act prior to it being amended by the Amending Act, by virtue of the transitional provisions of the Amending Act, Part 4 s 14.
30. The Commissioner was satisfied that there was no "unsatisfactory conduct" or "unprofessional conduct" within the meaning of the Act on the part of the Practitioner in relation to Complaint 17, or the Second Complaint, and there was no basis upon which he could make a finding that the Practitioner or his firm had overcharged in the manner

alleged by the Complainant. Insofar as the Complainant may have re-agitated any complaints that had already been considered by the Conduct Board, the Commissioner closed them without further consideration of their merits in accordance with s 77C(1)(c) for the reason that they had already been considered by the Board.

31. Sections 77K and 77J have to be read together in order to ascertain whether the Complainant has a statutory right of appeal in the present case. Section 77K relevantly states:

**77K—Appeal against determination of Commissioner**

- (1) Subject to subsection (3), an appeal to the Tribunal against a determination of the Commissioner under section 77J(1)(a) or (3)(a)(i) may be instituted by—  
 (a) the legal practitioner or former legal practitioner in relation to whom the determination was made; or  
 (b) the complainant.
- (2) Subject to subsection (3), an appeal to the Tribunal against a determination of the Commissioner under section 77J(1)(b), (2) or (3)(a)(ii) or (b) after conducting an investigation into the conduct of a legal practitioner or former legal practitioner following receipt of a complaint may be instituted by the person who made the complaint.<sup>2</sup>

32. Section 77J which sets out the powers of the Commissioner to deal with certain unsatisfactory professional conduct or professional misconduct relevantly states:

**77J—Powers of Commissioner to deal with certain unsatisfactory professional conduct or professional misconduct**

- (1) If, after conducting an investigation into conduct by a legal practitioner under this Division, the Commissioner is satisfied that there is evidence of unsatisfactory professional conduct and that the conduct in question can be adequately dealt with under this subsection—
- (a) the Commissioner may determine not to lay a charge before the Tribunal and may instead exercise any 1 or more of the following powers:
- (i) the Commissioner may reprimand the legal practitioner;
  - (ii) the Commissioner may order the legal practitioner to apologise to any person affected by the practitioner's conduct;
  - (iii) the Commissioner may order the legal practitioner—
    - (A) to redo the work that is the subject of the investigation at no cost or to waive or reduce the fees for the work; or
    - (B) to pay the costs of having the work that is the subject of the investigation redone;
  - (iv) the Commissioner may order the legal practitioner to undertake training, education or counselling or be supervised;
  - (v) the Commissioner may order the legal practitioner to pay a fine not exceeding \$5 000;

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<sup>2</sup> Emphasis added.

- (vi) the Commissioner may make an order imposing specified conditions on the practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate)—
  - (A) relating to the practitioner's legal practice; or
  - (B) requiring that the practitioner, within a specified time, complete further education or training, or receive counselling, of a type specified by the Commissioner;
- (vii) the Commissioner may, with the consent of the legal practitioner, make any other order the Commissioner considers appropriate in the circumstances; or
- (b) the Commissioner may, if the legal practitioner consents to such a course of action, determine not to lay a charge before the Tribunal and may instead exercise one or more of the following powers:
  - (i) if the Commissioner believes that the legal practitioner may be suffering from an illness or a physical or mental impairment, disability, condition or disorder (including an addiction to alcohol or a drug, whether or not prescribed) that has detrimentally affected his or her ability to practise the law, the Commissioner may order the legal practitioner to—
    - (A) submit to a medical examination by a medical practitioner nominated by the Commissioner and to undertake any treatment recommended by the medical practitioner; or
    - (B) receive counselling of a type specified by the Commissioner; or
    - (C) participate in a program of supervised treatment or rehabilitation designed to address behavioural problems, substance abuse or mental impairment;
  - (ii) the Commissioner may order the legal practitioner to enter into a professional mentoring agreement with the Commissioner and to comply with all conditions of the agreement;
  - (iii) the Commissioner may make orders with respect to the examination of the legal practitioner's files and records by a person approved by the Commissioner (at the expense of the legal practitioner) at the intervals, and for the period, specified in the order;
  - (iv) the Commissioner may order the legal practitioner to pay a fine not exceeding \$10 000;
  - (v) the Commissioner may make an order suspending the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate) until the end of the period specified in the order (not exceeding 3 months);
  - (vi) the Commissioner may make an order requiring that the legal practitioner make a specified payment (whether to a client of the practitioner or to any other person) or do or refrain from doing a specified act in connection with legal practice.

...

- (2) If, after conducting an investigation into conduct by a legal practitioner under this Division, the Commissioner is satisfied that there is evidence of professional misconduct and that the misconduct in question can be adequately dealt with under this subsection, the Commissioner may, if the legal practitioner consents to such a course of action, determine not to lay a charge before the Tribunal and may instead exercise any 1 or more of the following powers:

(a) the Commissioner may reprimand the legal practitioner;

...

(3) Despite section 72(3), subsections (1) and (2) do not apply in relation to a former legal practitioner, but if, after conducting an investigation into conduct by a former legal practitioner under this Division, the Commissioner is satisfied that there is evidence of unsatisfactory professional conduct or professional misconduct that occurred while the former legal practitioner remained a legal practitioner and that the conduct in question can be adequately dealt with under this subsection—

(a) In the case of unsatisfactory professional conduct, the Commissioner may —

(i) determine not to lay a charge before the Tribunal and may instead order the former legal practitioner to pay a fine not exceeding \$5 000; or

(ii) if the former legal practitioner consents to such a course of action, determine not to lay a charge before the Tribunal and may instead order the former legal practitioner to pay a fine not exceeding \$10 000; and

(b) in the case of professional misconduct, the Commissioner may, if the former legal practitioner consents to such a course of action, determine not to lay a charge before the Tribunal and may instead order the former legal practitioner to pay a fine not exceeding \$20 000.<sup>3</sup>

...

### Consideration

33. At the hearing before the Tribunal the Commissioner was represented by Mr C McCarthy of counsel. The Complainant appeared in person. The Complainant relied on his written submissions dated 23 February 2015 and made oral submissions. The Commissioner relied on his written submissions dated 24 April 2015. The Commissioner with the consent of the Complainant filed a book to supplement the Commissioner's submissions which contained the determination, some extrinsic material regarding the Amending Act and some literature regarding categories of appeal. The Commissioner made oral submissions through his counsel.

34. As to whether the Tribunal has the jurisdiction to hear an appeal from the determination of the Commissioner, the substance of which is noted in [30] above, is to be resolved through a construction of sections s 77K and 77J, the two provisions governing the question of whether a statutory right of appeal exists under the Act in the present circumstances.

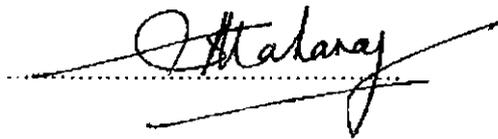
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<sup>3</sup> Emphasis added.

35. Section 77K(1) gives a right of appeal against a determination of the Commissioner made under s 77J(1)(a) or s 77J(3)(a)(i). Thus, only a determination made by the Commissioner under these subsections can be appealed by virtue of s 77K(1). Section 77K(2) gives a right of appeal against a determination of the Commissioner made under s 77J(1)(b), s 77J(2), s 77J(3)(a)(ii), or s 77J(3)(b). Thus, only a determination made by the Commissioner under these subsections can be appealed by virtue of s 77K(2). The Commissioner's determination has to be studied to ascertain whether any of these subsections are invoked.
36. For s 77J(1)(a) to be invoked "the Commissioner [has to be] satisfied that there is evidence of "[u]nsatisfactory" professional conduct". Section 77J(1)(a) empowers the Commissioner, if after conducting an investigation, he is satisfied that there is evidence of unsatisfactory professional conduct, and that the conduct in question can be adequately dealt with under this subsection, to determine not to lay a charge before the Tribunal and instead exercise any one or more of seven powers adumbrated in s 77(c). As the Commissioner formed no such satisfaction, s 77J(1)(a) is not invoked. In the absence of this requisite satisfaction s 77J(1)(b) is also not invoked.
37. Further, as it cannot be said that the Commissioner was satisfied that there was evidence of professional misconduct let alone that it could be adequately dealt with under s 77J(2), s 77J(2) is also not invoked.
38. It is equally clear that sections 77J(3)(a)(i), s 77J(3)(a)(ii), and s 77J(3)(b), also fail to give the Complainant a right of appeal. As the Practitioner was a current practitioner, not a former practitioner at the relevant time, as required by the said subsections, these subsections are not invoked. In any event, it cannot be said given the terms of the determination that the "the Commissioner [was] satisfied that there [was] evidence of unsatisfactory professional conduct or professional misconduct that occurred while the former legal practitioner remained a legal practitioner..." as required by s 77J(3)(a)(i) and (ii) and s 77J(3)(b). Therefore no right of appeal exists under these subsections.
39. It is clear given the terms of the determination that there is no statutory right of appeal available to the Complainant under s 77K(1) or (2) in respect of the determination of the Commissioner. Given the Australian jurisprudence, that a right of appeal in the circumstances of the present case has to be bestowed by statute, the question of

whether the Complainant has right of appeal at common law or in equity, as contended for by the Complainant, does not arise.

40. The Complainant may have other forms of redress through judicial review proceedings in the Supreme Court of South Australia in respect of the determination but this is not a matter for this Tribunal. I am not in a position to, nor am I inclined to, assess whether such a right in fact exists, and, if it does, the merits or otherwise of it.
41. I am of the view that this Tribunal is without jurisdiction to hear the Appeal against the determination, and the related applications for summonses to produce documents.
42. The parties are at liberty to address in writing (submissions not to exceed two pages) within ten business days of the date of these reasons, whether this Tribunal has jurisdiction to award costs, and if it does, what if any orders ought to be made on the issue of costs.

A handwritten signature in black ink, appearing to read 'SJ Maharaj', is written over a horizontal dotted line. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Deputy President of the Disciplinary Appeals Tribunal

SJ Maharaj QC

6 August 2015