

# Ethics part 2

# Today

- Legal Profession Uniform Law (Schedule 1 of the Legal Profession Uniform Law Application Act 2014 (Vic))
  - Part 5.4 (Disciplinary Matters)
- Civil Procedure Act 2010 (Vic)

# Legal Profession Uniform Law: disciplinary matters

- Starting point: definitions
- **296 Unsatisfactory professional conduct**
  - Lower standard of seriousness
- **297 Professional misconduct**
  - Higher standard of seriousness
- The preliminary characterisation may have consequences for who is fact finder, and possible orders which may be made for contravention

- **296 Unsatisfactory professional conduct**

- For the purposes of this Law, unsatisfactory professional conduct includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

- **297 Professional misconduct**

- For the purposes of this Law, "professional misconduct" includes—
- (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
- (b) conduct of a lawyer 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 lawyer is not a fit and proper person to engage in legal practice.
- (ie not limited to conduct that occurs in practice of law, this can extend to conduct in a lawyer's personal life)
- This is more serious than unsatisfactory professional conduct

## S 298 Conduct capable of constituting unsatisfactory professional conduct or professional misconduct (examples)

- A contravention of the Uniform Law or other regulations governing the conduct of lawyers.
- Charging excessive legal costs.
- Conduct arising from a conviction of a serious offence, a tax offence or an offence involving dishonesty.
- Conduct in connection with bankruptcy/an insolvency event.
- Becoming disqualified from managing a corporation.
- Failing to comply with an order of a disciplinary body.
- Failing to comply with a compensation order made under the Uniform Law.

# External regulation of lawyers (including barristers)

- Two layers of accountability:
  - Local regulatory authority, which in Victoria includes the Legal Services Board and Commissioner, and
  - Designated tribunal, which in Victoria is VCAT

## Determination by 'local regulatory authority' (s 299)

- The authority (Victorian Legal Services Board and Commissioner) has jurisdiction in relation to unsatisfactory professional conduct, but not professional misconduct
- If the authority finds that a lawyer has engaged in UPC (not PM), it may determine the matter by ordering the lawyer:
  - with a caution or reprimand;
  - to apologise;
  - to redo the work the subject of a complaint at no cost or with a reduction of fees;
  - to undertake training, education or counselling;
  - to conduct legal practice under supervision of another lawyer;
  - to pay a fine (not exceeding \$25,000); or
  - to practise with a condition placed on their practising certificate.
- The authority must provide details of the proposed determination to the lawyer and complainant and consider any written submissions made before imposing the determination.



## Determination by 'designated tribunal' (ss 300 to 302)

- S 300: The VLSB+C may initiate and prosecute proceedings against a respondent lawyer in the designated tribunal if the designated local regulatory authority is of the opinion that—
  - (a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the designated tribunal; or
  - (b) the alleged conduct may amount to professional misconduct.
- S 301: The proceeding is conducted in accordance with usual VCAT rules.

# Determination by 'designated tribunal' (s 302)

- If after conducting a hearing into the conduct of a lawyer, VCAT makes a finding that the lawyer is guilty of unsatisfactory professional conduct or professional misconduct, VCAT can order any of the powers of the VLSB+C under s 299, and/or that:
  - the lawyer do or refrain from doing something in connection with practice of law;
  - the lawyer's practice be externally managed or subject to periodic inspection;
  - the lawyer seek advice about their practice;
  - certain conditions be placed on the lawyer's practising certificate;
  - the lawyer not apply for a practising certificate, or that they not be granted a practising certificate, for a specified period;
  - an amount of compensation ('compensation order') be paid by the lawyer;
  - the lawyer pay a fine (not exceeding \$100,000) for PM; or
  - it recommends that the lawyer be removed from the Supreme Court roll.
- VCAT can find the lawyer guilty of UPC, even if the VLSB+C alleges PM.

## Determination by 'designated tribunal' (ss 303 to 305)

- If a lawyer is found guilty, VCAT must order that they pay the costs of the VLSB+C or the complainant unless exceptional circumstances exist.
- If a lawyer is found not guilty, VCAT may make orders that they pay the costs of the VLSB+C or the complainant if the lawyer failed to cooperate with the VLSB+C or other exceptional circumstances exist.
- VCAT may order the VLSB+C pay costs of the lawyer if they are found not guilty and special circumstances warrant the order.

# The Civil Procedure Act and consequences for ethics

- The Civil Procedure Act creates “overarching obligations,” which apply not only to parties, but also to legal practitioners acting for or on behalf of a party (*CPA*, s 10(1)(b))
- These overarching obligations apply in respect of the conduct of any aspect of a civil proceeding including, but not limited to interlocutory applications and proceedings, appeals from orders and judgments, and during appropriate dispute resolution stages
- So, if your fact pattern involves dubious behaviour in a civil proceeding, cross-reference between the various sources of responsibilities

# The overarching obligations

- s 16 – Paramount duty to court to further the admin of justice
- s 17 – Requirement to act honestly
  - See also Barristers' Rules, r 8: A barrister must not engage in conduct which is (a) dishonest or otherwise discreditable to a barrister, ...)
- s 18 – Requirement for claim/response to claim to have proper basis (and not be vexatious, frivolous, an abuse of process)
- s 19 – Requirement to only take steps to resolve/determine the dispute
  - i.e. B must reasonably believe step facilitates the resolution/determination of the dispute
  - Serves purpose of avoiding undue delay and expense

- s 20 – Requirement to cooperate with parties and court in conduct of proceedings
- s 21 – Requirement not to engage in misleading/deceptive conduct (or conduct likely to mislead/deceive)
  - See also Barristers' Rules rr 8 (above), 24 (A barrister must not deceive or knowingly or recklessly mislead the court), 25 (A barrister must take all necessary steps to correct any misleading statement made by the barrister to a court as soon as possible after the barrister becomes aware that the statement was misleading)
- s 22 – Requirement to use reasonable endeavours to resolve dispute (including appropriate DR unless not in interest of justice)

- **s 23** – Requirement to narrow issues in dispute
  - See also Barristers' Rules, r 58: A barrister must seek to ensure that work which the barrister is briefed to do in relation to a case is done so as to: (a) confine the case to identified issues which are genuinely in dispute, (b) have the case ready to be heard as soon as practicable, (c) present the identified issues in dispute clearly and succinctly, (d) limit evidence, including cross-examination, to that which is reasonably necessary to advance and protect the client's interests which are at stake in the case, and (e) occupy as short a time in court as is reasonably necessary to advance and protect the client's interests which are at stake in the case
- **s 24** – Requirement to ensure costs are reasonable and proportionate to complexity or importance of issues/amount in dispute

- **s 25** – Requirement to minimise delay
  - See also Barristers' Rules, r 57: A barrister: (a) must seek to ensure that the barrister does work which the barrister is briefed to do in sufficient time to enable compliance with orders, directions, rules or practice notes of the court, and (b) if the barrister has reasonable grounds to believe that the barrister may not complete any such work on time, must promptly inform the instructing solicitor or the client.
- **s 26** – Requirement to disclose existence of documents



# Practical consequences of contravening OO

- **s 28** – Court **may** take contravention of OO into account, including in exercise of discretion with respect to costs.
- **s 29(1)** – if C satisfied on balance of probabilities\* that X has contravened any OO, C **may** make **any order** it considers appropriate in the interests of justice, including:
  - An order that a person pay some/all costs and expenses arising from a contravention – **29(1)(a)**
  - An order that legal/other costs be payable and enforceable immediately – **s 29(1)(b)**
  - An order that a person pay compensation for financial loss that was materially contributed to by a contravention (including penalty interest, no interest or reduced interest) – **s 29(1)(c)**
  - An order that a person take certain steps to remedy a contravention – **s 29(1)(d)**
  - An order that a person not be permitted to take certain steps in the proceeding – **s 29(1)(e)**
  - Any other order C considers is in the interests of a person prejudicially affected by the contravention – **s 29(1)(f)**

\*Serious nature of breach requires briginshaw 'standard' - requires 'clear and cogent proof' – *Giles v Jeffrey* [2016] VSCA 314 [122]

- s 29 permits a Court to *sanction* a party or legal practitioner
  - Cf powers under SCR which serve a *compensatory* purpose (e.g. r 63.23) – *Yara v Oswal* [18]
- *Yara Australia P/L & Ors v Oswal* [2013] VSCA 337
  - App to COA for leave to appeal security for costs order
  - Party over-represented by counsel; over-production of materials  
→ contravention of s 24
  - Orders included order against sols for portion of costs & prohibited sols from recovering those costs from their client
- **Time limit:** application for an order under s29 must be made before finalisation of the proceeding to which the application relates – **s 30**
- May apply for ext. of time if not aware of breach until after finalisation – **s 31**

## How Courts have dealt with breaches of ss 17-26

- Making orders to remedy a contravention of an OO (s20) – *Matthews v SPI Electricity Pty Ltd & Anor (No 3)* [2013]
- Refusing to grant an extension of time where applicant failed to comply with the OO to minimise delay (s25) – *Kuek v Devflan Pty Ltd & Anor* [2012] VSC 571
- Ordering that a trial proceed in a party's absence, where party failed to attend court (breach of OOs to cooperate in the conduct of the proceeding, minimise delay and ensure costs are reasonable and proportionate) – *Grech v Deak-Fabrikant* [2014] VSC 558
- Making an indemnity costs order against Ps who filed and persisted with subpoenas which, if properly advised, they should have known were not likely to withstand objection, where concerns repeatedly raised by opponent re scope of the subpoenas and Ps did not respond / responded inadequately (breach the OOs to cooperate, to only take steps to resolve or determine the dispute) – *Naumovski & Ors v Ugrinovski & Ors* [2015] VSC 49

- Ordering the P's sols to pay the D's costs thrown away due to trial adjournment at a late stage where that adj was the result of the sols failing to inform court of relevant matters at the final DH re late filing of med reports that gave rise to an AmSOC – *Cody Wallace & Anor v Bannister & Anor* [2015] VSC 483
- Ordering P's sols to pay the D's costs thrown away due to trial adjournment because sols did not raise with their client the need to raise a substantial sum to go to trial until day before the final DH – *Illievski v Zhou* [2014] VSC 442
- Both parties bearing their own costs, despite the D being substantially successful at the hearing, where both breached their duties to cooperate and to use reasonable endeavours to resolve the dispute – *Babcock & Brown DIF III Global v Babcock & Brown International Pty Ltd* [2015] VSC 612
- Order indemnity costs against P for multiple breaches of OOs by engaging in protracted and largely meritless litigation to avoid costs consequences of rejecting an early offer of compromise – *Hambleton v State Trustees Ltd (who act as administrator of Estate of Campbell (dec'd))* [2016] VSC 215.

# *Final cross-references back to the LPUC (Barristers) Rules 2015 – rr 57-68*

## **Barrister's duty to the efficient administration of justice**

- B must complete work in sufficient time to comply with orders, directions, rules, practice note – **r 57(a)**
- If B believes (on reasonable grounds) that work will not be completed on time, B must promptly notify instructor/client – **r 57(b)**
- B must: confine case to the issues in dispute; have case ready to be heard as soon as practicable; present the issues clearly and succinctly; limit evidence including xxn and occupy as short at time in court as reasonable necessary to advance/protect the client's interests – **r 58**
- B must inform opponent asap of an adjournment app and the grounds for the adj – **r 59**

## Responsible use of court process and privilege

- B must ensure that their advice to invoke the court's coercive powers is— reasonably justified on material available; appropriate for the advancement of client's case; not principally to harass/embarrass a person or to gain collateral advantage – **r 60**
- B must ensure the decision to make allegations or suggestions under privilege against any person is— reasonably justified on material available; appropriate for the advancement of client's case; not principally to harass/embarrass a person – **r 61**
- In xxn of a complainant witness of alleged sexual assault, indecent assault, or act of indecency, B must (a) not question with intent to mislead/confuse W, be unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; and (b) take into account any particular vulnerability of W and manner/tone of qs – **r 62** (cf EA s 41)
- No breach of r 62 if a q. merely challenges truthfulness/consistency/accuracy of W's statements, or requires W to give evidence they might consider offensive, distasteful, private – **r 63** (cf EA s 41(5))

## **Responsible use of court process and privilege**

- B must not allege any matter of fact (in a doc, submission, opening/closing address) unless B believes that the material available provides a proper basis – **r 64** (cf CPA s 18)
- B must not allege criminality, fraud or serious misconduct unless B believes that material available provides a proper basis and client is properly advised and instructs to make allegation – **r 65**
- Note: B may regard instructor's opinion based on the available material as a reasonable ground for belief of proper basis under rr.64/65– **r 66**
- B must not make a suggestion in xtn on credit unless B believes that acceptance of the suggestion would diminish the credibility of W's evidence – **r 67**
- If B's subs on mitigation of client's criminality involve allegations of serious misconduct against someone unable to answer allegations, B must seek to avoid disclosing the person's identity directly or indirectly unless B believes it necessary for the proper conduct of the case – **r 68**