The notification provisions of the Legal Profession Act

By Carol Webster*

It is little over twelve months since several amendments to the *Legal Profession Regulation 1994* were gazetted – largely in response to the *Sydney Morning Herald* articles in February 2001 regarding bankruptcy and barristers. The purpose of this article, written at the request of the editors of *Bar News*, is to provide some historical background and to collect together the relevant statutory provisions – beginning with the changes introduced in March 2001, which were followed by more substantial changes made in July 2001.[1]

The *Legal Profession Amendment (Notification) Regulation 2001* was gazetted on 9 March 2001 ('the Notification Regulation'). It applied to both barristers and solicitors. The changes made by the Notification Regulation required legal practitioners to report to the relevant Council certain bankruptcy events and offences. The president sent a circular to all members of the Association on 9 March 2001 drawing attention to the amendment and to the disclosure obligations imposed by the new regulation[2].

In *Bar Brief* No.82, March 2001, the president outlined the background to the introduction of the Regulation. The media publicity alleged that there were barristers who had taken advantage of the bankruptcy laws effectively to avoid paying their creditors, and that the Commissioner of Taxation had been owed large amounts in unpaid taxes by those barristers.

Some four months later, the *Legal Profession Act 1987* (LPA) was amended, by the *Legal Profession Amendment (Disciplinary Provisions) Act 2001*. At the same time, there was further amendment to the Regulation by the *Legal Profession Amendment (Disciplinary Provisions) Regulation 2001*. The amendments commenced on 27 July 2001. The extent of the obligation to notify was extended in some respects, and the Councils were given further, 'special', powers to cancel or suspend practising certificates. In *Bar Brief* No.85, July 2002, the president outlined the changes that had been made.

For events occurring after 27 July 2001 (bankruptcies and findings of guilt), the obligation to notify is set out in sec 38FB of the LPA[3]. The Regulation, as amended, sets out when a notification should be made, and what the disclosure statement should address[4].

Two decisions of the Court of Appeal and two first instance decisions in the Supreme Court have referred to and considered, to varying degrees, the effect of the notification provisions: *NSW Bar Association v Cummins* [2001] NSWCA 284[5]; *NSW Bar Association v Somosi* [2001] NSWCA 285[6]; *Murphy v The Bar Association of New South Wales* [2001] NSWSC 1191 (McClellan J, 21 December 2001)vii and, most recently, *Cameron v Bar Association of NSW* [2002] NSWSC 191 (Simpson J, 20 March 2002).

The decisions of the Court of Appeal in *Cummins and Somosi* will be considered below. The two cases might be viewed as being at the extreme end of the spectrum, but the remarks made in the course of the judgments could be expected to inform consideration, whether by a Council or the Court, of a barrister's fitness arising out of conduct not directly relating to professional practice.

As has been recorded in *Bar Brief*[8] and on the Bar Association's web site, Bar Council has considered a number of matters under the notification provisions, and made decisions with respect to some barristers' practising certificates. Appeals to the Supreme Court in respect of a number of those decisions await hearing. There are strict prohibitions in any event on disclosure of professional conduct matters, but as a number of matters are yet to be heard by the Court, no reference will be made in this article to any particular matter or to the work of the professional conduct committee that investigated matters under the notification provisions and reported to the Bar Council. The *Annual Report* of the Association contains a report on the work of all professional conduct committees.

Although it will undoubtedly make this article longer than many may think desirable, as there is no convenient reprint this article will refer in some detail both to the changes made by the Notification Regulation and the further changes made in July 2001.

Obligation to notify under the Notification Regulation

Offences

Clause 69D(1) of the *Legal Profession Regulation 1994*[9] imposed a *duty* on a barrister or solicitor[10] found guilty of an offence to notify the relevant Council of the finding and nature of the offence (in writing) and furnish other information required relating to the finding or commission of the offence. Clause 69D(2)(b) made it clear that a finding of guilt must be notified whether or not the court proceeded to a conviction for the offence. That is, whether or not the court applied the former sec 556A *Crimes Act 1900 (NSW)*, the present sec 10 *Crimes (Sentencing Procedure) Act 1999 (NSW)* or sec 19B *Crimes Act 1914 (Cth)*.

Clause 69D(2)(e) extended the notification obligation to any indictable offence whenever committed, including before commencement of the clause. Sub clause (2)(f) extended the notification obligation in respect of offences which were not indictable offences, to those committed within the period of ten years before commencement of the clause.

Bankruptcy

Clause 69E(2) of the *Legal Profession Regulation 1994*[11] imposed a *duty* on a barrister in respect of 'notifiable incidents'. Clause 69E(1) defines 'notifiable incidents':

- becoming bankrupt or presentation of a creditor's petition to the Court;
- presentation of a debtor's presentation of a declaration to the Official Receiver under sec 54A *Bankruptcy Act 1966* of intention to present a debtor's petition, or presentation of a debtor's petition under sec 55 *Bankruptcy Act*; or

- applying to take the benefit of any law for the relief of bankrupt or insolvent debtors, compounding with creditors or making an assignment of remuneration for the benefit of creditors.

The significance of the definition of 'notifiable incidents' including compounding with creditors is that a person who compounds under secs 73 or 74 *Bankruptcy Act 1966* and obtains the agreement of creditors to an annulment of his or her bankruptcy still must notify, because the 'annulment' does not matter for the purposes of Regulation.

The barrister was required to provide with the notification a statement as to why the barrister considered that, despite the notifiable incident, the barrister was a fit and proper person to hold a practising certificate. There was the same obligation as under cl 69D to provide any further information required by the Council relating to the cause of or circumstances surrounding the incident.

Applying for practising certificate

Clause 6 specifies the matters required to be notified in an application for a practising certificate. Clause 6(1)(d) was amended by the *Notification Regulation* to delete 'any indictable offence' and replace it with 'any offence (other than an excluded offence)'. 'Excluded offence' is defined in cl 3(1), as offences under the road transport legislation (formerly, traffic offences) other than specified traffic offences, eg. negligent driving where the barrister was sentenced to imprisonment or fined not less than $200, furious or reckless driving, or driving a speed or in a manner dangerous to the public etc. Notably, offences of driving with more than the prescribed concentration of alcohol were required to be disclosed: see cl 3(1)(a)(vii). There were a number of consequential amendments made reflecting the amendment to cl 6(1)(d).

Clause 6(1)(e) was introduced by the *Notification Regulation*, requiring a barrister to provide details of any incident which would be a 'notifiable incident' described above for the purposes of cl 69E and a statement as to why, notwithstanding, the practitioner is a fit and proper person to hold a practising certificate. By cl 6(3) the Council was given power to require a practitioner to further furnish further information relating to the cause of or circumstances surrounding such incident.

Clauses 6(1A)(g) and 6(1B) made it clear that information previously disclosed in an application for a practising certificate or under clauses 69D or 69E need not be disclosed again.

Time for notification

Clauses 69D(3) and 69E(3) set out the time within which a notification must be made:

- for an event occurring before 9 March 2001, within 28 days, ie 6 April 2001; and
- for an event occurring on or after 9 March 2001, within seven days of the event.

Refusing to issue, cancelling or suspending practising certificates

Section 37 LPA provided that a Council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder is required by the Council to explain specified conduct by the barrister or solicitor and fails, and continues to fail, to give an explanation satisfactory to the Council.

The president noted in *Bar Brief* that the Notification Regulation enhanced the Council's powers to investigate matters that may attract exercise of the power under sec 37, by requiring disclosure to be made of specified matters.

Changes made in July 2001

The most important of the amendments to the LPA was the insertion of a new Division 1AA in Part 3, although there were other, related, amendments. The essential elements of the disclosure regime introduced by the *Notification Regulation* were extended in some respects.

Division 1AA (ss 38FA — 38FJ) is headed 'Special powers in relation to practising certificates'.

Obligation to notify under sec 38FB

The main section is sec 38FB. This contains the primary obligation to notify, which is now cast in terms of having committed an act of bankruptcy (defined in sec 3(3)); or having been found guilty of an *indictable offence or a tax offence*.

The obligation under sec 38FB applies both at the time of application for a practising certificate – sec 38FB(1); or on one of the specified events occurring at any time after admission as a legal practitioner – sec 38FB(3). Where there is an obligation to notify, the barrister must also provide a written statement in accordance with the regulations[12] showing why, notwithstanding the relevant matter, the barrister is a fit and proper person to hold a practising certificate.

Clause 6(1)(d) of the Regulation still requires that an application for a practising certificate by a practitioner who has been found guilty of any offence (other than an excluded offence) must 'contain or be accompanied by' the nature of the offence. The definition of 'excluded offence' in cl 3, was inserted by the Notification Regulation[13].

'Act of bankruptcy' and 'tax offence'

A new sec 3(3) was inserted defining 'act of bankruptcy' for the purposes of the LPA, in terms of the matters described above as 'notifiable incidents'. A definition of 'tax offence' was also inserted, in sec 3(1) – it means any offence under the *Taxation Administration Act 1953*. Clauses 6(1)(e) and 6(1C) were amended to refer to the new concept of 'act of bankruptcy'. Clause 6(3) now defines 'offence' as including a tax offence.

Section 38FB(7) continues the position which applied under the *Notification Regulation*, as noted above, that the obligation to notify offences arises whether or not the court proceeded to conviction for the offence.

No fresh notification or determination is required where a written statement has previously been provided under sec 38FB or a determination made under sec 38FC (LPA ss 38FB(5), 38FC(7) and Schedule 8, which sets out transitional provisions, cl 69D(4) and 69E(3) of the Regulation).

Refusing to issue, cancelling or suspending practising certificates

Sections 38FC, 38FD and 38FE provide additional powers for a Council to refuse to issue, cancel or suspend a practising certificate.

Section 38FC(1) provides that a Council must refuse to issue, or must cancel or suspend a practising certificate if the Council is aware that since being admitted as a legal practitioner an

applicant for, or holder of, a practising certificate has committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence *and* the Council considers that act or offence was committed in circumstances that show that the applicant or holder is not a fit and proper person to hold practising certificate. Subsection 38FC(3) and (4) deal with matters occurring very close to the date when practising certificates would ordinarily expire.

Under sec 38FE a Council may refuse to issue or may cancel or suspend a practicing certificate if the applicant or holder has:

- failed to provide a sec 38FB statement when required to do so under the section; or
- failed in the sec 38FB statement to show that he or she is a fit and proper person.

Under sec 38FD a Council may refuse to issue, cancel or suspend a practicing certificate if the applicant or holder has 'failed to notify a matter (being a failure declared by the regulations to be professional misconduct)' and the Council considers the failure occurred without reasonable cause.

Further, sec 37(1)(a) was amended, and now provides that a Council may refuse to issue, may cancel or may suspend a practising certificate if the applicant or holder is required by the Council to explain specified conduct (whether or not related to practice as a barrister or solicitor) that the Council considers may indicate that the applicant or holder is not a fit and proper person to hold a practising certificate and fails, within the period specified by the Council, to give an explanation satisfactory to the Council.

Time for notification after 27 July 2001

Clause 69E as introduced by the *Notification Regulation* was deleted, and new clauses 69E — 69H inserted. Clause 69D was also amended, to refer back to the definition of tax offence in sec 3(1) of the LPA.

Clauses 69D(3)[14] and 69E(2) of the Regulation now prescribe these time requirements for a notification:

- for an act of bankruptcy committed before, or finding of guilt made before, 27 July 2001 by a person who was a barrister at 27 July 2001 – within seven days of 27 July 2001 ie 3 August 2001;
- for an act of bankruptcy committed, or finding of guilt made, on or after 27 July 2001 – within seven days after the act of bankruptcy was committed or finding of guilt made.

Clause 69F(1) provides that for the purposes of sec 38FB(1) an applicant for a practising certificate must provide the written statement required within 14 days after making an application for a practising certificate. Clause 69F(2) provides that for the purposes of sec 38FB(3) a barrister must provide the written statement within 14 days of the 'appropriate date'. 'Appropriate date' here is defined by cl 69F(3):

- for an act of bankruptcy committed before, or finding of guilt made before, 27 July 2001 by a person who was a barrister at 27 July 2001 – within seven days of 27 July 2001 ie 3 August 2001;
- for an act of bankruptcy committed, or finding of guilt made, on or after 27 July 2001 – the (first) date on which the act of bankruptcy was committed or finding of guilt made.

Under cl 69G the statements required under sec 38FB(2) and (4) with respect to a failure to notify must be provided within seven days of the appropriate date: cl 69G(1). 'Appropriate date' here is defined in cl 69G(2):

(a) if the barrister notifies *after* the notification was required under the *Notification Regulation*, and the last day for notification was before 27 July 2001 – 27 July;

(b) if the barrister notifies *after* the notification was required under the *Notification Regulation*, and the last day for notification was after 27 July 2001 – the date on which the notification was made; or

(c) if the Council has given a notice in writing under 38FC(2) in relation to the incident that should have been notified – the date on which the notice was given.

Notices requiring production of documents or information

Section 38FI is analogous to sec 152 in Part 10 of the LPA. The section gives power to a Council or the Commissioner to require a legal practitioner to provide information, produce documents or otherwise assist in or cooperate with the investigation of a matter under Division 1AA.

Failure to notify

A failure to notify can have quite serious consequences. Sections 38FB(2) and (4) provide that a barrister (or an applicant for a practicing certificate) who fails to notify a matter as required by the regulations[15], where the failure is one declared by the regulations to be professional misconduct[16], must provide a written statement, in accordance with regulations[17], showing why despite the failure to notify the barrister (or applicant) is a fit and proper person to hold a practising certificate.

If a Council becomes aware that an applicant for or holder of a practising certificate has, since being admitted as a legal practitioner, committed an act of bankruptcy or been found guilty of an indictable offence or a tax offence, under sec 38FC(2) the Council must, within 14 days, give notice in writing to the applicant or holder dealing with four matters:

- if the Council has not received a statement under sec 38FB in relation to the incident, require the applicant or holder to make a statement in accordance with sec 38FB;
- inform the applicant or holder that a determination in relation to the matter is required to be made under sec 38FC;
- inform the applicant or holder of the relevant period in relation to the determination of the matter and that the applicant or holder will be notified of any extension of the relevant period; and
- inform the applicant or holder of the effect of the automatic suspension provisions in sec 38FH in the event of the matter not being determined by the Council or the Commissioner within the relevant period.

'Relevant period' is defined in sec 38FA – three months commencing when (a) the notification is given, or (b) where no notification has been received by the time a sec 38FC(2) notice is sent, the date of issue of the notice under sec 38FC(2). It may be extended by the Commissioner under sec 38FA(2) but such extension is limited to a further month.

Definition of professional misconduct

As amended sec 127 of the LPA now provides:

1) For the purposes of this Part, professional misconduct includes: …

(b) conduct (whether consisting of an act or omission) occurring otherwise than in connection with the practice of law which, if established, would justify a finding that a legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners, or …
(c) conduct that is declared to be professional misconduct by any provision of this Act, or
(d) a contravention of a provision of this Act or the regulations, being a contravention that is declared by the regulations to be professional misconduct. …

4) For the avoidance of doubt, conduct:
(a) involving an act or acts of bankruptcy, or
(b) that gave rise to a finding of guilt of the commission of an indictable offence or a tax offence,
whether occurring before, on or after the commencement of this subsection, is professional misconduct if the conduct would justify a finding that the legal practitioner is not of good fame and character or is not a fit and proper person to remain on the roll of legal practitioners.

Failures to notify declared to be professional misconduct

Clause 69H(1) of the Regulations declares that each of the following failures to notify is professional misconduct:

(a) a failure to notify, without reasonable cause, information in relation to a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 6(1)(d);

(b) a failure to notify, without reasonable cause, information in relation to an act of bankruptcy as required by cl 6(1)(e);

(c) a failure to notify, without reasonable cause, a finding of guilt of the commission of an indictable offence or a tax offence as required by cl 69D in the time and manner specified in that clause;

(d) a failure to notify, without reasonable cause, an act of bankruptcy as required by cl 69E in the time and manner specified in that clause.

Clauses 6(1)(d), (1)(e), 69D and 69E have been discussed above.

Role of the Legal Services Commissioner

Under ss 59E(1) and (2) the Council is obliged to notify the Legal Services Commissioner of notifications received. The Commissioner has broad powers to request information. Further, under sec 38FG, the Commissioner may take over determination of a matter under sec 38FC. The Commissioner must also confirm Bar Council determinations in Part 3 matters.

The Court of Appeal decisions

The decisions in *Cummins and Somosi* were both delivered on 31 August 2001, after the introduction of Division 1AA into the LPA. Neither was an application under the Division, but rather applications by the Bar Association in the inherent jurisdiction of the Supreme Court for the name of the barrister to be removed from the Roll of Legal Practitioners. It is probably notorious that in each case the barrister had failed for a period of years to file income tax returns or to pay tax.

In *Cummins*, the facts were, briefly[18], that for a period of approximately 38 years from his admission to the Bar, until late 1999 or early 2000, the barrister did not lodge any taxation returns relating to his professional practice or any personal income. After returns were lodged, the ATO obtained judgment for a sum of approximately $1 million. The barrister became bankrupt on his own petition in December 2000. Creditors apart from the ATO were owed less than $20,000 in total.

In *Somosi*, the barrister had been convicted in the Local Court[19] of 17 offences against sec 8C(1)(a) of the *Taxation Administration Act 1953*, of failing to comply with a notice dated 3 November 1994 requiring him to file income tax returns for each of the 17 years ending 30 June 1978 to 30 June 1994. As at 30 March 2001, the barrister had not paid any income tax for the years ended 30 June 1978 to 30 June 1994.

Mason P had said in *New South Wales Bar Association v Hamman* [1999] NSWCA 404:

> [85] I emphatically dispute the proposition that defrauding 'the Revenue' for personal gain is of lesser seriousness than defrauding a client, a member of the public or a corporation. The demonstrated unfitness to be trusted in serious matters is identical. Each category of 'victim' is a juristic person whose rights to receive property are protected by law, including the criminal law in the case of dishonest interception. 'The Revenue' may not have a human face, but neither does a corporation. But behind each (in the final analysis) are human faces who are ultimately worse off in consequence of fraud. Dishonest non-disclosure of income also increases the burden on taxpayers generally because rates of tax inevitably reflect effective collection levels. That explains why there is no legal or moral distinction between defrauding an individual and defrauding 'the Revenue'.

In *Cummins*, Spigelman CJ (with whom the other members of the Court agreed) quoted that passage from *Hamman*[20] and continued:

> 19 … in some spheres significant public interests are involved in the conduct of particular persons and the state regulates and restricts those who are entitled to engage in those activities and acquire the privileges associated with a particular status. The legal profession has long required the highest standards of integrity.
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> 20 There are four interrelated interests involved. Clients must feel secure in confiding their secrets and entrusting their most personal affairs to lawyers. Fellow practitioners must be able to depend implicitly on the word and the behaviour of their colleagues. The judiciary must have confidence in those who appear before the courts. The public must have confidence in the legal profession by reason of the central role the profession plays in the administration of justice. Many aspects of the administration of justice depend on the trust by the judiciary and/or the public in the performance of professional obligations by professional people.
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> …
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> 21 As Kitto J said in *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 at 298:
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> > '... the Bar is no ordinary profession or occupation. These are not empty words, nor is it their purpose to express or encourage professional pretensions. They should be understood as a reminder that a barrister is more than his client's confidant, adviser and advocate, and must therefore possess more than honesty, learning and forensic ability. He is, by virtue of a long tradition, in a relationship of intimate collaboration with the judges, as well as with his fellow-members of the Bar, in the high task of endeavouring to make successful the service of the law to the community. That is a delicate relationship, and it carries exceptional privileges and

exceptional obligations. If a barrister is found to be, for any reason, an unsuitable person to share in the enjoyment of those privileges and in the effective discharge of those responsibilities, he is not a fit and proper person to remain at the Bar.
…

28 In the present case, I am satisfied that the barrister's complete disregard of his legal and civic obligations with respect to the payment of income tax was such that he must be regarded, at the present time, as permanently unfit to practice.

29 … For almost four decades, Mr Cummins took advantage of the full range of public services made available by taxation, not least in the provision of the court system in which he earned his income. He left the burden of all of this to his fellow citizens. Throughout the four decades he engaged in the rank hypocrisy of advocating that other people should perform their legal obligations, while systematically refusing to perform his own.

30 In the present case, unlike other cases, the barrister did not admit that his actions have jeopardised the reputation and standing of the legal profession. There is no doubt, however, that he has done so. The conduct of a barrister, particularly a barrister who has received the distinction of a Commission as one of Her Majesty's Counsel, who has behaved in such complete disregard of his legal and civic obligations, was necessarily such as to bring the entire legal profession into disrepute. …

50 It has not generally been useful or necessary to distinguish the terminology of 'professional misconduct' from other phrases such as a 'fit and proper person', 'good fame and character', 'unprofessional conduct', 'unsatisfactory professional conduct' etc. ….

51 The words 'professional misconduct' are broad and general words. Their meaning may vary from one context to another. …

52 It is possible to confine the words 'professional misconduct' to apply only to conduct in the course of actual professional practice narrowly defined. …

56 There is authority in favour of extending the terminology 'professional misconduct' to acts not occurring directly in the course of professional practice. That is not to say that any form of personal conduct may be regarded as professional misconduct. The authorities appear to me to suggest two kinds of relationships that justify applying the terminology in this broader way. First, acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice. Secondly, conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice. In this second case, the terminology of 'professional misconduct' overlaps with and, usually it is not necessary to distinguish it from, the terminology of 'good fame and character' or 'fit and proper person'. …

65 The decision of this Court in *Hamman*, to make a finding of professional misconduct in a case of avoidance of taxation, is supported by these authorities.

66 The preparation and filing of tax returns is closely related to the earning of income, including professional income. The link is 'sufficiently close' to justify a finding of professional misconduct on the basis of Mr Cummins' failure to lodge returns for thirty-eight years.

67 Similarly, and alternatively, the extent of Mr Cummins' failure to observe his legal obligations and civic responsibilities by such a systematic course of improper conduct over such a long period of time is of such gravity as to constitute professional misconduct, for the reasons I have mentioned above in relation to fitness.
…

69 As in the case of the declaration of unfitness, in my opinion, the maintenance of the confidence of the public in the legal profession makes it appropriate to formally declare that Mr Cummins' conduct was professional misconduct.

In *Somosi*, the Chief Justice, with whom the other members of the Court agreed, said

68 The factors to which I have referred in my judgment in *Cummins* are equally applicable here. Mr Somosi acted in complete disregard of his legal and civic obligations. He took advantage of the full range of public services made available by taxation, not least the provision of the court system in which he earned his income. He left the burden of all of this to his fellow citizens. Furthermore, for a period of almost two decades he engaged in what I described in *Cummins* as the hypocrisy of putting himself in a position, as a legal practitioner, in which he advocated that other people should perform their legal obligations, whilst systematically failing to perform his own.

69 In this case, unlike *Cummins*, the Court does have before it some information concerning the conduct of the legal practitioner in an attempt to rectify his failure to comply with his obligations. Mr Somosi did eventually reveal to the taxation authorities his long period of non-compliance…

73 These proceedings are not concerned to protect the revenue. These proceedings are concerned with what Mr Somosi's default reveals about his character and fitness. No doubt the taxation authorities are and were primarily concerned to get what they can. These authorities will no doubt consider issues of punishment for purposes of general deterrence. However, the jurisdiction which this Court is exercising is a protective jurisdiction. It is not directed at punishment. It is not concerned with revenue collection. Whether or not the taxation authorities were prepared to accept three years of returns in total satisfaction of Mr Somosi's taxation obligations, is not a matter entitled to significant weight for present purposes. What the taxation authorities were prepared to accept, in the exercise of their discretion, says nothing about Mr Somosi's character or fitness.

74 The recording of a conviction is often a matter of significance for issues of fitness. It would also be material to an issue of 'good fame and character' which, obviously overlaps with an issue of fitness. The issue of good fame and character has not directly arisen in these proceedings.

75 In the present case the conviction and penalty is not, of itself, a matter entitled to substantial weight. The significant matter is the conduct underlying the convictions. The convictions were for the failure to comply with a notice to file seventeen years of returns within a period of about a month from the Notice. However, the underlying conduct, to which the conviction only indirectly related, was the failure by a legal practitioner, over a long period of time and in a systematic way, to comply with his legal and civic obligations. It is that conduct that is entitled to determinative weight in making the judgments the Court has to make in these proceedings, both as to the findings of fact upon which it acts and also on the issue of relief.

76 I emphasise that, in this case it is the conduct itself that is entitled to such weight, not the fact that in an indirect manner that conduct has manifested itself in a particular conviction with a particular penalty. I am not saying the latter is irrelevant, but in

> the circumstances of this case I would come to no different conclusion, either in terms of identifying misconduct or in terms of determining what should be the relief, if there had never been a conviction at all. In the case of Cummins there was no conviction. …
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> 78 The determinative consideration for these proceedings is that he avoided tax for seventeen years. In the absence of any suggestion to the contrary in his own evidence, I find no difficulty in drawing the obvious inference that his failure to comply with his obligations over that period of time was deliberate and that he intended to avoid taxation. His subsequent conduct does not qualify the impropriety of this failure. Indeed, he has repeated the failure in two subsequent years. …
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> 81 In proceedings of this character the Court is entitled to assess the underlying conduct on which a conviction is based from the distinctive perspectives of professional misconduct and fitness to practice (see *Ziems v The Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279 esp at 283, 285-286, 288-291, 296, 297-298, 299-300, 301). In these matters the mere fact of conviction is not necessarily determinative. It is not in this case. …
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> 83 Mr Somosi did not oppose the Court making a declaration that he was not a fit and proper person to remain on the Roll. For the above reasons such a declaration should be made.
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> 84 Mr Somosi opposed the Court making a declaration that he has been guilty of professional misconduct. [His Counsel] submitted that the scope of professional misconduct should be confined to conduct in the course of practice … and stated that his client would abide the outcome in [*Cummins*].
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> 85 I consider this issue at some length in my judgment in *Cummins*. It is unnecessary to repeat those reasons here. For the reasons I expressed in *Cummins* it is appropriate to make the declaration in this case.

Murphy v The Bar Association of New South Wales [2001] NSWSC 1191

In *Murphy*, McClellan J held that the test to be applied when determining fitness to practice, in the context of bankruptcy, is whether the indebtedness which led to the bankruptcy was brought about or associated with dishonest conduct by the barrister. Conduct which reflects incompetent management of the person's affairs, without the intention to avoid lawful obligations, does not itself justify a finding the person is not 'fit and proper'[21].

McClellan J had rejected a submission that ss 38FB(1) and (3), 38FC and 38FE of the LPA create a presumption that, without adequate explanation, an act of bankruptcy or a finding of guilt of an indictable or tax offence make a person not fit and proper to hold a practising certificate, and that the decision pursuant sec 38FC as to whether a person is 'fit and proper' should be informed by that presumption. McClellan J considered that sec 38FC should be understood so that the act of bankruptcy raises the occasion for consideration of the practitioner's fitness to practice but does not raise any adverse presumption or impose any onus on the barrister.[22]

The barrister had been an employed solicitor, and then in sole practice until 1998. He was admitted as a barrister in August 1998. The barrister experienced significant increases in his income in the years ending 1990 and then 1992. The first was from practice income and the second attributable to a kindergarten business the barrister owned. In each case there was a significant tax liability and then a significant provisional tax assessment. McClellan J accepted that the barrister received bad advice that led to him failing to lodge income tax returns or taking steps to vary the provisional tax assessments, so that ultimately the ATO obtained judgment against the barrister for a very significant sum. The barrister had sold kindergarten business for a sum sufficient to clear the debts associated with it, but provided no surplus. The ATO served a creditor's petition. The barrister unsuccessfully proposed a deed of arrangement. It was rejected by the ATO as the most significant unsecured creditor, and the barrister then became bankrupt on his own petition in late 2000.

McClellan J agreed with a submission that the plaintiff could and should have paid more tax than he did in the years after 1993, although he would not have been able to pay the whole debt as by that time his indebtedness was accumulating at a greater rate than he could afford. His Honour found that the barrister honestly intended to try to trade out of his difficulties and by the sale of his remaining assets, to meet all his liabilities; and consequently held that the barrister's conduct could not be described as dishonest[23]. McClellan J. continued:

> [177] … I am satisfied that the plaintiff did not act dishonestly, was not motivated by greed and genuinely, although mistakenly, hoped he could trade out of his difficulties. His conduct, although deserving of criticism, even strong criticism, does not justify a finding that he is not 'a fit and proper person'. He was wrong to take the advice to delay filing his tax returns and he should have addressed his situation earlier and filed for bankruptcy when his position was obviously hopeless. He should also have made more taxation payments, rather than merely hope that from the sale of his remaining assets he would be able to meet all his obligations.
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> [179] However, in my view an inability to meet, for example, one's mortgage commitments or family maintenance obligations, through mismanagement, but without dishonest intent, would be unlikely to justify the ultimate disciplinary response. It would be otherwise if the failure was deliberate and intended to disadvantage the barrister's creditors and advantage the barrister.
> …
>
> [182] I do not accept that the plaintiff's failure to pay some of his tax, in circumstances where his ultimate object remained to pay out all his debts including his taxation liabilities, requires the conclusion that he is not a 'fit and proper person'.

Consequently the plaintiff's appeal against the cancellation of his practising certificate by the Bar Council was upheld.

As noted above, the Bar Association has appealed, and the appeal is expected to be heard mid year.

Cameron v Bar Association of NSW [2002] NSWSC 191

On 6 April 2001, after gazettal of the Notification Regulation, the plaintiff disclosed two convictions under sec 8C of the *Taxation Administration Act* 1953 for failing to comply with a notice to furnish income tax returns (for the years ended 1995 and 1999) and a further conviction under s 8H of the TAA of failing to comply with a court order to furnish an income tax return (for the year ended 1995); and that he had, on 5 January 2001, been served by the Deputy Commissioner of Taxation with a creditor's petition. In his application for a practising certificate in June 2001 the plaintiff disclosed that he had been a bankrupt, he had had a creditor's petition served on him, he had presented to the Official Receiver a declaration of intention to present a debtor's petition

and had in fact presented a debtor's petition; and that he had been found guilty of an offence other than an indictable offence in the preceding ten years[24]. An annexure provided details *inter alia* of a bankruptcy in December 1994[25] on the petition of the Deputy Commissioner of Taxation and a second bankruptcy in February 1995, again on the petition of the Deputy Commissioner of Taxation. The application did not provide any additional information about the offence or offences of which he had been found guilty.

On 1 November 2001, acting under sec 38FC and sec 38FE(1)(b), the Bar Council resolved to cancel the plaintiff's practising certificate. The plaintiff commenced proceedings in the Supreme Court in respect of the decision, but discontinued those proceedings in December 2001. On 26 March 2002 he filed a fresh summons, which came before Simpson J. His explanation for having discontinued the earlier proceedings was that he had become aware that the July 2001 amendments to the LPA had extended the disclosure requirements so as to require disclosure of any tax offence since admission as a legal practitioner – extending beyond the ten year period referred to in cl 69D of the Regulation – and believed it was inappropriate to appeal to the court without having disclosed further offences of which he had been convicted. On 13 February 2002 the plaintiff disclosed four offences contrary to s 8C of the TAA (for the years ended 1984, 1985, 1987 and 1989) and two offences contrary to sec 8H of that Act, of failing to comply with court orders to furnish returns (for years ended 1983 and 1988).

Simpson J was asked to grant interlocutory relief, including a stay of the cancellation of the plaintiff's practicing certificate and a declaration that he was a fit and proper person to practise as a barrister

It was accepted that the Deputy Commissioner of Taxation had lodged a proof of debt in the 1990 bankruptcy for $80,504 in unpaid income tax for the period 1979 to 1987, unpaid provisional tax, additional tax for late payment, interest on a judgment obtained, and judgment costs, in total $278,109.84. Following the 1995 bankruptcy the Deputy Commissioner for Taxation lodged a proof of debt of almost $90,000, almost $53,000 of which was attributable to unpaid tax for the years 1993 and 1994. The third creditor's petition presented by the Deputy Commissioner in December 2000 claimed $157,401.87 made up in part of unpaid tax for 1996, 1997, 1998 and 1999 tax years.

The plaintiff's counsel submitted that he should be seen as incompetent in the management of his own affairs, but not as delinquent, or, at least, not deliberately or culpably so, the plaintiff's troubles began with a failed tax minimisation scheme in about 1990 and he had not thereafter been able to extricate himself from the financial mire into which he had fallen. He relied on McClellan J's decision in *Murphy*. The Bar Association argued that the plaintiff's tax chronology demonstrated a continuous history of failure to discharge his taxation obligations, leaving a clear inference that he intended to adopt this course and that he did so deliberately, preferring all other creditors to the Deputy Commissioner.

The plaintiff pressed the construction of the words 'not a fit and proper person to hold a practising certificate' in sec 38FC of McClellan J in *Murphy*, as denoting dishonesty. The Bar Association expressly renounced the construction adopted by McClellan J but did not seek to argue that Simpson J should not adopt it, recognising the principles of comity that guide first instance judges. Her Honour said:

> [37] I have real reservations about McClellan J's construction of the words in the section; it seems to me that these words are intended to encompass conduct that goes outside dishonesty and embrace significant impropriety, lack of integrity or bad faith falling short of dishonesty. Dishonesty is itself a somewhat elastic concept, not necessarily conveying the same meaning to everybody.

In the circumstances, Simpson J approached the matter on the statutory construction stated in *Murphy*. Her Honour stated:

> [39] I have not the slightest doubt that the conduct engaged in by the plaintiff over many years was improper. The question I have to determine, in the circumstances, is whether that conduct should also be characterised as dishonest such as to warrant a conclusion that he is not a fit and proper person to hold a practising certificate.
>
> …
>
> [46] I am satisfied that, on the material before me, the plaintiff has been shown to have been guilty of relevant dishonesty and therefore to be not a fit and proper person to hold a practising certificate under the Act. I have come to this conclusion, as indicated, because it has been necessary to consider the question of dishonesty. Left to myself, without the constraints of *Murphy*, I would have found that the lack of integrity, and the extent of the impropriety in meeting tax obligations over the years, whether properly characterised as dishonest or not, produced the same result.

Simpson J did not need to consider the relationship between s 38FC and 38FE of the LPA discussed by McClellan J in *Murphy*. The proper construction of sec 38FC of the LPA and the relationship between secs 38FC and 38FE will have to await the decision of the Court of Appeal in *Murphy*.

Issues to note

Some matters can be noted:

No conviction recorded: Where a court finds an offence proved but does not formally record a conviction, for example under sec 19B *Crimes Act 1914* in respect of tax offences, there is still an obligation to notify the finding of guilt.

Time limits: The time limits imposed by the Act are quite restrictive, and there is only a limited ability to seek an extension, of a further month, from the Legal Services Commissioner: see sec 38FA(2). Section 38FH effects an automatic suspension of a practising certificate where the Bar Council has been unable to determine a matter within the 'relevant period' as defined.

Accordingly, particular attention would be needed, both to events which must be notified, and then to the information to be provided. Because of the time limits and the effect of sec 38FH, it would seem to be in a barrister's own interests to provide a full sec 38FB statement with as much information regarding the circumstances of the relevant matter when making a notification, and thereafter promptly to respond to any requests for further information, particularly any notice served under sec 38FI.

In this regard, assistance may be gathered from papers written in relation to Part 10 matters generally. R R Stitt QC & G C Lindsay SC delivered a CLE Seminar for the Bar 'Ethics and Disciplinary proceedings affecting barristers' on 16 June 1997. The paper, 'Disciplinary proceedings affecting barristers' was revised 28 January, 1999. It is available on the Bar Association web site on the professional conduct page. That paper referred to an article by Jeremy Gormly 'Conduct of Complaints against

Barristers' appeared in the Spring/Summer 1994 issue of *Bar News*. It was subsequently republished in the February 1998 edition of *Stop Press*, and copies are available in the Bar Library and from Professional Conduct Department staff.

One of the points made in Jeremy Gormly's paper is that it is usually desirable that some other person settles any correspondence with the Bar Association regarding complaints. The staff of the Professional Conduct Department suggest that the same advice would apply to notification matters.

Risk management strategies to consider:

- proper record keeping;

employ an accountant or financial adviser;

- get financial records to accountant or financial adviser on time to enable prompt completion of tax returns (and being aware of when tax returns are due);
- make provision for payment of income tax and GST, by setting money aside – which maybe by banking a percentage of gross receipts into a separate account;
- ensure that any change of address (personal or business) is notified to accountant or tax agent, or direct to the ATO, as appropriate;
- ensure that accountant or tax agent brings any notice served by the ATO to a barrister's attention by more than one means, preferably including some form of personal contact with the barrister;
- give priority to complying with any notice to file returns (and if needed, seek an extension of time before rather than after the due date); and
- finally, the Professional Conduct Department would remind us that our own affairs cannot be ignored (personal and family issues, and our own health) while attending to clients' affairs – BarCare is one avenue of assistance for barristers in the first instance at least.

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1 The assistance of BA Coles QC and Helen Barrett, Deputy Professional Affairs Director, each of whom read a draft of this article, is gratefully acknowledged.
2 The text of the Regulation was reproduced in that edition of *Bar Brief*
3 See from p44 below, under the heading *Obligation to notify under sec 38FB*
4 See at p44 below, under the heading *Time for notification after 27 July 2001*
5 Reported at 52 NSWLR 279
6 An application for special leave has been filed.
7 The Bar Association has appealed to the Court of Appeal against the decision.
8 No. 89 December 2001, No. 90 January 2002 and No. 91 February 2002
9 As inserted by the Notification Regulation
10 The same obligations were imposed on solicitors – the LPA and Regulation refer to 'practitioner' generally, but this article will refer simply to barristers.
11 As inserted by the Notification Regulation
12 See cl 69F
13 See p44 above, under the heading *Applying for practising certificate*
14 As amended by the Disciplinary Provisions Regulation
15 See clauses 69D and 69E
16 See cl 69H
17 See cl 69G
18 The Statement of Agreed Facts appears at [15] in the judgment of Spigelman CJ
19 The convictions were upheld by Graham DCJ in the District Court
20 At [18]
21 At [45]
22 See [13]-[14]
23 See [174]
24 As required by cl 69D, as inserted by the Notification Regulation
25 The reference to 1994 would appear to be an error in the judgment, as it later refers to a 1990 bankruptcy