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LEGAL SERVICES COMMISSIONER V MALOUF [2007] NSW ADT 215

By Steve Mark
Legal Services Commissioner

On 18 September 2007 the Administrative Decisions Tribunal (the Tribunal) found Gerard Francis Malouf guilty of professional misconduct relating to five contraventions of Part 14 of the Legal Profession Regulation 2002 and Part 18 of the Workers Compensation Regulation 2003 (the advertising Regulations). The Tribunal ordered that Mr Malouf be publicly reprimanded and that he pay a fine in the sum of $20,000 within three months. The Tribunal also ordered that Mr Malouf pay the OLSC costs.

Part 5, Division 2 of the advertising Regulations prohibit the publication of an advertisement by a solicitor or a barrister that includes any reference to or depiction of:

- Personal injury or [work injury];
- Any circumstance, activity or event that suggests personal injury [or work injury] or the possibility of personal injury [or work injury]; and
- Any connection to, or association with, personal injury or [work injury] or a cause of personal injury [or work injury].

The five complaints related to advertising in a variety of media including the website, www.gmp.net.au, Yellow Pages Online directory, 2005 Yellow Pages directory, signage outside the practitioner's Ryde office and the Central Coast Express newspaper. The following words / phrases were the subject of the Commissioner's complaints:

- Injury Compensation Lawyers
- Personal Injury News
- Public Liability / Slip & Fall
- Motor Accident Claims
- Medical Negligence
- Asbestos & Dust Diseases
- Product Liability
- Workers Compensation
- Slip, or Fall Claims
- Workplace Disputes/Claims
- Disability Claims
- Negligence Claims

Prior to the hearing Mr Malouf advised the Commissioner that he had admitted the complaints. A statement of agreed facts was tendered to the Tribunal.

In finding Mr Malouf guilty of professional misconduct in respect of each of the five grounds of complaint the Tribunal commented on the effect of the advertising legislation as follows:

> *"It is clearly designed to be highly restrictive of the rights of legal professionals to advertise a particular class of services. The underlying legislative intent cannot have been a matter of doubt to anyone practising in the relevant field."*

The Tribunal, having found Mr Malouf to be a truthful witness, came to the view that his personal feeling regarding this legislation may have played a part in leading him to the view that the advertising that he engaged in was "possibly" rather than "probably" in contravention of the legislation. The Tribunal nevertheless found that Mr Malouf failed to make an objective assessment of the requirements of the legislation and to comply with the legislation to the best of his ability.

The decision in the *Malouf* case was the first time these regulations have been tested in the Tribunal.

RESPONSIBILITIES OF SOLICITORS ACTING AS EXECUTORS – COSTS DISCLOSURE

Over the past few years there has been a noted increase in the practise of solicitors acting as executors in the estates of deceased clients. As an executor the solicitor has the same duties as any other executor. Such duties include for example, taking charge of the deceased's assets and property, ensuring that all funeral and administration expenses are paid, paying the debts and distributing the estate to the beneficiaries under the will. Solicitors who act as executors are also entitled to reimburse themselves for expenses they incur as part of administering an estate. Difficulties however can arise where a solicitor executor wishes to charge professional fees for his or her time. To do so, the will must specifically permit this by way of what is commonly called a "charging clause"." Where there is no charging clause, the solicitor/executor is restricted to claiming out of pocket expenses only.

Where there is a charging clause, there is no strict requirement to provide costs disclosure to beneficiaries, but they are entitled to have a solicitor executor's professional fees assessed. It is therefore considered prudent for the solicitor executor to provide written costs disclosure to the major beneficiaries for legal work associated with the administration of estates. Unfortunately, this does not seem to be happening.

The OLSC has recently received several complaints against practitioners who have been acting as executors or trustees for a client and have not provided written costs disclosure to the major beneficiaries who are unhappy with or suspicious about the costs billed. The complainants allege that they did not know that the practitioner had wanted to claim costs and that they are unhappy with the amount of costs being claimed.

The practice of providing costs disclosure to beneficiaries by solicitor executors has long been considered to be desirable. In 1996 the Law Society Journal published an article entitled, "*Executors and beneficiaries: An overview of duties, responsibilities and rights.*" On costs disclosure by solicitor executors the article stated:

> *"as a solicitor or accountant/executor cannot agree with him/herself, agreement on costs and expenses will need to be made with the beneficiaries, or at least the major beneficiaries".*[1]

More than 10 years later many solicitor executors are still not doing so. It is very important for solicitors acting as executors to disclose their costs for a number of reasons.

First and foremost it is prudent and indeed polite to do so.

Secondly, the execution of a will can be a highly emotive experience for beneficiaries. As a result beneficiaries are likely to be anxious and suspicious about the whole process of administering an estate. The more transparent you are in your dealings as solicitor executor the less chance beneficiaries will be inclined to send the matter to costs assessment which they can now do pursuant to section 350 of the *Legal Profession Act 2004.*

Thirdly, transparency by way of costs disclosure can also prevent a practitioner from being the subject of a complaint to the OLSC by a disgruntled beneficiary, which frequently occurs.

1 K. White, "Executors and beneficiaries: An overview of duties, responsibilities and rights", (1996) 34 NSW LSJ at p.60.

ARC RESEARCH GRANT – ETHICS AND LARGE LAW FIRMS

Over the past few months the OLSC has been involved in preparing an Australian Research Council (ARC) grant in conjunction with Monash University, the University of Melbourne, the University of Queensland and the University of Adelaide to study the ethical structures, attitudes and behaviours of large law firm lawyers. The aims and objectives of the study are to:

- "Identify how large law firms try to support or encourage ethical practice among individual employed lawyers and work teams within the firm, and what countervailing pressures they face that might diminish ethical practice.
- Evaluate the effectiveness of different mechanisms that law firms use to support or encourage ethical practice at the individual level.
- By concentrating on a number of important ethical areas, identify and evaluate how a range of mechanisms including professional regulation and discipline, professional education and professional liability insurance, including risk management, might best be aimed at promoting ethical practice within large law firms, and by extension all law firms."

Interestingly no published research of this type has ever been done in Australia before.

The methodology of the study will include interviews with the most senior persons responsible for ethics' policies and structures at each of the top 30 law firms about what influences ethical practice in the firm and what policies and structures their firm has in place to deal with ethical issues. Formal interviews will also be conducted with the Legal Services Commissioners in NSW, Victoria and Queensland to find out what they expect in relation to large law firms' ethics and how they enforce those expectations and with the state PI insurers in NSW, Victoria and Queensland on any observed connections between claims histories and conduct complaints or costs disputes. The study will also include interviews with governments as clients, interviews with in-house counsel from five of the largest corporations in Australia and interviews with ACCC, ASIC and any other relevant regulator about the way that their area of regulation impacts on large law firms' ethics.

The OLSC has been asked to join the project as a 'partner organisation' which means that if the application is successful we will provide asistance towards funding the project in part and allocate staff to assist.

It is hoped the project will help identify what 'appropriate management systems' and other mechanisms are required for ethical practice in law firms, and will develop legal and enforcement strategies for making sure these are put in place in incorporated law firms, and also law firms generally.

The application which is to be lodged this month seeks funding for a period of four years.

WITHOUT PREJUDICE VIA EMAIL

As indicated in our last issue the OLSC will send out future issues of *Without Prejudice* via email. If you would like to receive *Without Prejudice* via email and haven't already let us know please contact us at **OLSC@agd.nsw.gov.au**

Comments? Suggestions? Something you'd like to know more about? Write to us at **OLSC@agd.nsw.gov.au**

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ANTI MONEY LAUNDERING REVISISTED – THE TRANCHE TWO REFORMS

In the April 2007 edition of *Without Prejudice* (no.35) I discussed the new Anti Money Laundering and Counter Terrorist Financing (AML/CTF) legislation that had recently been enacted in Australia. As I pointed out tranche one of the new AML/CTF Act which directly relates to the financial services sector, the gambling sector and bullion dealers came into effect on 12 December 2006. I also pointed out that although the tranche one reforms are not supposed to affect the legal profession it is likely lawyers providing a financial service such that may be provided by some incorporated legal practices and multi-disciplinary practices will be covered under the Act.

In August this year the Government released draft tranche two reforms for comment. The tranche two reforms directly relate to the legal profession as well as accountants, trust and company service providers, real estate agents, and jewellers. These draft legislative provisions prescribe the new 'designated services', which will be inserted into section 6 of the AML/CTF Act. According to the draft second tranche legislation the following activities, in relation to the legal and accounting profession if provided in the course of "carrying on a business", will amount to a "designated service":

- Managing on behalf of a person, or giving advice on the management of, accounts, physical currency or property of that person;
- Making arrangements or preparations on behalf of a person in connection with the sale or purchase of a business;
- Making arrangements or preparations on behalf of the promoters of a new company, in connection with the formation of a new company;
- Giving or directing tailored advice to the promoters of a new company, in connection with the formation of the company;
- Making arrangements or preparations on behalf of the promoters of a new company, or providing tailored advice to the promoters of a new company in relation to equity finance or debt finance for the new company;
- Making arrangements or preparations on behalf of a company or providing tailored advice to a company, in relation to equity finance or debt finance for the company;
- Making arrangements or preparations on behalf of one or more persons in connection with the creation of a trust or partnership;
- Providing tailored advice to one or more persons in connection with the creation of a trust or partnership;
- Carrying out on behalf of a partnership, company or trust, any of its management activities or the day to day operations of the company, partnership or trust; and
- Giving tailored advice to a partnership, company or trust, in relation to the management activities or the day-to-day operations of the company, partnership or trust in relation to those activities or operations.[2]

Once again the proposed reforms are of great concern for the legal profession. Use of the phrase "carrying on a business" which is not defined in the legislation for example, is incredibly wide and could result in a number of businesses being subjected to the provisions that are really not related to the activity being targeted. Without definition the phrase will also include in-house professional services provided by the owners, partners or employees of a business to the business itself. Similarly, use of the phrase '"giving or directing of tailored advice" is too broad and will not include advice of a generic nature or advice that is provided after a transaction has been completed and become the subject of investigation or dispute. These concerns were recently raised by the Law Council of Australia.[3]

Consultation on the proposed tranche two reforms is continuing. We will keep you informed of any future developments and when the tranche two reforms are likely to come into effect.

2 See Attorney-General's Department, "Second Tranche of Reforms", Australian Government, available at http://www.ag.gov.au/www/agd/agd.nsf/Page/Anti-moneylaundering_SecondTrancheofReforms

3 Law Council of Australia, "Tranche Two AML Legislation", 6 September 2007 at p. 10 available at http://www.lawcouncil.asn.au/submissions.html;