

## Legal Profession (Solicitors) Rule 2007

### Contents

<b>Introduction</b> .....	<b>3</b>
<b>Definitions</b> .....	<b>4</b>
<b>Object of rules</b> .....	<b>7</b>
Serving the interests of justice and complying with the law .....	7
Application of rules to government legal officers.....	7
Application of rules to Australian-registered foreign lawyers .....	7
Commencement.....	8
<b>Relations with clients</b> .....	<b>9</b>
(Statement of general principle) .....	9
1 Duty to client .....	9
2 Agreeing to act for a client .....	9
3 Confidentiality .....	11
4 Acting against a former client .....	13
5 Solicitors employed otherwise than by a solicitor.....	13
6 Termination of retainer.....	14
7 Ownership of clients' documents – termination of retainer .....	14
8 Acting for more than one party.....	15
9 Avoiding conflict of interest (where solicitor's own interest involved) .....	17
10 Receiving a benefit under a will or other instrument.....	17
11 Solicitor and client – borrowing transactions .....	18
<b>Advocacy and litigation rules</b> .....	<b>19</b>
(Statement of general principle) .....	19
12 Duty to client .....	19
13 Independence – avoidance of personal bias .....	19
14 Frankness in court.....	20
15 Delinquent or guilty clients.....	21
16 Responsible use of privilege.....	22
17 Integrity of evidence .....	23
18 Communications with opponent .....	24
19 Integrity of hearings.....	25
20 Prosecutor's duties.....	25
<b>Relations with other practitioners</b> .....	<b>26</b>
(Statement of general principle) .....	26
21 Communications .....	26
22 Undertakings .....	26
23 Taking over a matter from another legal practitioner.....	26
24 Transfer of a solicitor's practice .....	27
25 Communicating with another legal practitioner's client .....	28
<b>Relations with third parties</b> .....	<b>29</b>
(Statement of general principle) .....	29
26 Contracting for services .....	29
27 Undertakings .....	29
28 Communications .....	29
29 Debt collection or mercantile agencies.....	30

<b>Legal practice .....</b>	<b>31</b>
(Statement of general principle) .....	31
30 Standard of conduct .....	31
31 Conducting another business .....	31
32 Referral fees – taking unfair advantage of potential clients – commissions .....	32
33 Sharing of receipts .....	33
34 Conducting a branch office .....	33
35 Sharing of premises .....	33
36 Advertising .....	34
37 Supervision .....	36
38 Mortgage financing and managed investment schemes .....	36
<b>Appendix 1 – Legal Services Commission’s Guidelines – Charging Outlays and Disbursements.....</b>	<b>37</b>
<b>Appendix 2 – Execution of Search Warrant on Solicitor’s Premises – Queensland Police Procedures.....</b>	<b>40</b>
<b>Appendix 3 – Exercise by the ATO of its Access Powers – Access to Lawyers’ Premises .....</b>	<b>43</b>

## Legal Profession (Solicitors) Rule 2007

### Introduction

These Rules apply to persons who may engage in legal practice in this jurisdiction as a solicitor [as defined in Schedule 2 of the *Legal Profession Act 2007* (the Act)], or the practice of foreign law in this jurisdiction as an Australian registered foreign lawyer [section 219(2) of the Act] and, where specified, to government legal officers [section 221 of the Act].

The Rules are divided into five categories under the following headings:

- 1 Relations with clients
- 2 Advocacy and litigation rules
- 3 Relations with other lawyers
- 4 Relations with third parties
- 5 Legal practice

Each of the categories is preceded by a statement of general principle, which is not intended to constitute by itself a rule, but is intended to describe the underlying principles and objectives of the rules which follow.

The Rules are based upon the *Model Rules of Professional Conduct and Practice*, Law Council of Australia, March 2002, which each Constituent Body of the Law Council might agree to adopt with a view to ensuring greater uniformity in the regulation of legal practitioners throughout Australia. The LCA Model Rules have been supplemented, as necessary, to meet the requirements of this jurisdiction.

It will be noted that some of the draft conduct rules are statements of a solicitor's ethical duties in their dealings with the courts, clients, other legal practitioners and members of the public which must then be applied in day-to-day practice. It is the Society's intention to provide comments and guidelines for the mutual benefit of legal practitioners and members of the public in applying these rules to practical situations and identifying areas of risk and best practice for avoiding possible breaches. Some guidelines and comments have been included in this Rule by way of illustration but they do not form part of the Rule. These Conduct Rules, together with such comments and guidelines, will be published on the Society's website for ease of reference.

Attached as Appendices are a number of guidelines and procedures produced by other entities (the Legal Services Commissioner, the Queensland Police Service and the ATO) that are relevant to the conduct of a legal practice. They have been included in this document for ease of reference by the profession but do not form part of the Rule.

## Definitions

In these Rules, unless the context requires otherwise, the following terms have the following meaning:

'Act'	means the <i>Legal Profession Act 2007</i> .
'associate'	in reference to a solicitor means: <ul style="list-style-type: none"><li>(a) a partner, employee, or agent of the solicitor or of the solicitor's law practice;</li><li>(b) a corporation or partnership in which the solicitor has a material beneficial interest;</li><li>(c) a member of the solicitor's immediate family; or</li><li>(d) a member of the immediate family of a partner of the solicitor's law practice.</li></ul>
'Australian-registered foreign lawyer'	as defined in Schedule 2 of the Act.
'case'	includes: <ul style="list-style-type: none"><li>(a) the court proceedings for which the solicitor is engaged; or</li><li>(b) the dispute in which the solicitor is advising.</li></ul>
'client'	with respect to a solicitor or a solicitor's law practice means a person (not an instructing solicitor) for whom the solicitor is engaged to provide legal services for a matter.
'compromise'	includes any form of settlement of a case, whether pursuant to a formal offer under the rules or procedure of a court, or otherwise.
'legal costs'	includes disbursements.
'council'	means the Council of the Queensland Law Society Inc.
'court'	means: <ul style="list-style-type: none"><li>(a) any body described as such;</li><li>(b) any tribunal exercising judicial, or quasi-judicial, functions;</li><li>(c) a professional disciplinary tribunal;</li><li>(d) an industrial tribunal;</li><li>(e) an administrative tribunal;</li><li>(f) an investigation or inquiry established or conducted under statute or by a Parliament;</li><li>(g) a Royal Commission;</li><li>(h) an arbitration or mediation or any other form of dispute resolution.</li></ul>
'current proceedings'	means proceedings which have not been determined, including proceedings in which there is still the real possibility of an appeal or other challenge to a decision being filed, heard or decided.

‘forensic judgments’	<p>means a decision of the solicitor made in the course of a case, but does not include a decision as to:</p> <ul style="list-style-type: none"> <li>(a) the commencement of proceedings;</li> <li>(b) the joinder of parties;</li> <li>(c) admissions or concessions of fact;</li> <li>(d) amendments of pleadings;</li> <li>(e) undertakings to a court;</li> <li>(f) a plea in criminal proceedings,</li> </ul> <p>but does include advice given to assist the client or the instructing solicitor to make such decisions.</p>
‘Government Legal Officer’	as defined in section 12 of the <i>Legal Profession Act 2007</i> .
‘immediate family’	means the spouse (which expression may include a de facto spouse or partner of the same sex), or a child, grandchild, sibling, parent or grandparent of a solicitor.
‘instructing solicitor’	means a solicitor or law practice who engages another legal practitioner to provide legal services for a client for a matter.
‘insurance company’	includes any entity, whether statutory or otherwise, which indemnifies persons against civil claims.
‘legal services’	as defined in the Act, Schedule 2.
‘managed investment scheme’	has the same meaning as in the <i>Corporations Act 2001</i> (Cth).
‘matter’	<p>means any legal service the subject of a retainer or required to be provided by the solicitor or law practice to fulfil a retainer and includes services provided for:</p> <ul style="list-style-type: none"> <li>(a) a case;</li> <li>(b) a dealing between parties that may affect, create or be related to a right, entitlement or interest in property of any kind;</li> <li>(c) advice on the law; or</li> <li>(d) preparation of a document or submission.</li> </ul>
‘mortgage financing’	<p>means facilitating a loan secured or intended to be secured by mortgage by –</p> <ul style="list-style-type: none"> <li>(a) acting as an intermediary to match a prospective lender and borrower; or</li> <li>(b) arranging the loan; or</li> <li>(c) receiving or dealing with payments under the loan;</li> </ul> <p>but does not include:</p> <ul style="list-style-type: none"> <li>(d) providing legal advice, or preparing an instrument, for the loan; or</li> <li>(e) merely referring a person to a prospective lender or borrower, without contacting the prospective lender or borrower on that person’s behalf; or</li> </ul>

- (f) facilitating a loan between family members; or
- (g) facilitating a loan secured by a mortgage:
  - (i) of which an Australian legal practitioner is the beneficial owner; or
  - (ii) held by an Australian legal practitioner or a corporation in his, her or its capacity as the trustee of any will or settlement, or which will be so held once executed or transferred.

‘opponent’

means:

- (a) the legal practitioner appearing for a party opposed to the client of the solicitor in question; or
- (b) that party, if the party is unrepresented.

‘order’

includes a judgment, decision or determination.

‘prosecutor’

includes an Australian lawyer who appears for the complainant or Crown in criminal proceedings.

‘retainer’

means the appointment of a solicitor or of a solicitor’s law practice to provide legal services for a matter.

‘solicitor’

as defined in Schedule 2 of the Act.

## Object of rules

The object of these rules is to ensure that each solicitor:

- (i) acts in accordance with the general principles of professional conduct;
- (ii) discharges that solicitor's obligations in relation to the administration of justice; and
- (iii) supplies to clients legal services of the highest standard unaffected by self interest.

## Serving the interests of justice and complying with the law

A solicitor should not, in the course of engaging in legal practice, engage in, or assist, conduct which is:

- (i) dishonest or otherwise discreditable to a solicitor;
- (ii) prejudicial to the administration of justice; or
- (iii) likely to diminish public confidence in the legal profession or in the administration of justice or otherwise bring the legal profession into disrepute.

### Commentary

The above comments are a statement of fundamental principles and do not operate as an independent professional conduct rule.

## Application of rules to government legal officers

As provided for by section 221 of the *Legal Profession Act 2007*, the following rules apply to Government Legal Officers who engage in government work in the manner of a solicitor: 1, 2.1.1, 2.2, 3, 4, 9, 20, 25.1, 27.1, 27.2, 28 and 30.

### Commentary

The *Legal Profession Regulation 2007* modifies the operation of the above provision. Section 23 of the Regulation provides:

#### **23 Government legal officers and application of legal profession rules**

- (1) This section has effect for section 229 of the Act.
- (2) This section applies if a provision of the solicitors rules or the barristers rules states the rules apply, or a provision of the rules applies, to a government legal officer however the application is expressed.
- (3) The provision does not have effect in relation to a government legal officer unless the officer holds a local practising certificate granted by the regulatory authority that made the rules.
- (4) Also, a provision of the solicitors rules or the barristers rules does not have effect in relation to a government legal officer who holds a local practising certificate granted by the regulatory authority that made the rules if compliance with the provision would involve the officer committing an act contrary to, or failing to do an act for a purpose of, another Act that applies to the officer because of his or her employment or appointment in an entity mentioned in section 12(1) of the Act or section 5.

## Application of rules to Australian-registered foreign lawyers

As provided for by section 222(1)(a) of the *Legal Profession Act 2007* these rules, other than rules 12.4, 14.9, 14.11, 15.2 and 20, apply to Australian-registered foreign lawyers in accordance with section 169.

### Commentary

See section 167 of the Act which sets out the scope of legal services that an Australian-registered foreign lawyer is entitled to provide in this jurisdiction.

Section 169 of the Act provides, so far as is relevant:

- '(1) An Australian-registered foreign lawyer must not engage in any conduct in practising foreign law that would, if the conduct were engaged in by an Australian legal practitioner in practising Australian law in this jurisdiction, be capable of constituting unsatisfactory professional conduct or professional misconduct.
- ...
- (4) Without limiting the matters that may be taken into account in deciding whether a person should be disciplined for a contravention of subsection (1), the following matters may be taken into account –
  - (a) Whether the conduct of the person was consistent with the standard of professional conduct of the legal profession in any foreign country where the person is registered;
  - (b) Whether the person contravened the subsection wilfully or without reasonable excuse.'

## **Commencement**

These rules commence on 1 July 2007.

## Relations with clients

### (Statement of general principle)

Solicitors should serve their clients competently and diligently. They should be acutely aware of the fiduciary nature of their relationship with their clients, and always deal with their clients fairly, free of the influence of any interest which may conflict with a client's best interests. Solicitors should maintain the confidentiality of their clients' affairs, and give their clients the benefit of all information relevant to their clients' affairs of which they have knowledge. Solicitors should not, in the service of their clients, engage in, or assist, conduct that is calculated to defeat the ends of justice or is otherwise in breach of the law.

### 1 Duty to client

A solicitor must act honestly and fairly, and with competence and diligence, in the service of a client.

#### Guidelines

A solicitor generally has a choice whether to accept instructions from any particular client.

In relation to the situation where a solicitor accepts instructions which are beyond the solicitor's competence: see the comments of Chief Justice de Jersey AC, 'Negligence – The Impact of Specialisation', presented at the Specialist Accreditation Conference on 8 April 2005, where at pp 5-6, the Chief Justice said:

'Looking at the obverse, it is plainly of great importance for a practitioner not to take on work beyond his or her capacity, but that should not give rise to undue timidity where the capacity exists. Where the capacity is lacking, it is not only potentially negligent, but in my view unethical as well, for the practitioner to act. As said in *Vulic v Bilinsky* (1983) 2 NSWLR 427, 483:

"... if a solicitor inexperienced and lacking knowledge in the field accepts instructions to act for a person injured at work, he should inform the client of his lack of experience and give the client the alternative to instruct a solicitor who has a degree of experience and expertise in that field. At the very least, if such an inexperienced solicitor wishes to accept those instructions, he should protect himself and his client by seeking advice from Counsel, and this means the furnishing of proper material to Counsel upon which advice might be given." '

### 2 Agreeing to act for a client

2.1 A solicitor should agree to act for a client in a matter only when the solicitor reasonably expects:

- 2.1.1 to serve the client honestly and fairly, and with competence and diligence; and
- 2.1.2 to attend to the work required with reasonable promptness.

#### Guidelines

If a solicitor receives instructions and it is or becomes apparent to the solicitor that the solicitor cannot perform the work with 'reasonable promptness', the solicitor should inform the client of that fact to enable the client to make a fully informed decision as to what further action is to be taken in the matter so as to properly protect and advance the client's interests.

A solicitor should not take steps or perform work in such a manner as to unnecessarily increase costs to the client and should fully inform the client of rights and possible courses of conduct regarding issues of substantial importance and keep the client apprised of all significant developments in the matter entrusted to the solicitor by that client unless the solicitor has been instructed to do otherwise.

- 2.2 A client's instruction should be confirmed in writing to the client unless valid reasons exist for this not to occur.

### Guidelines

The Council of the Queensland Law Society considers it good practice that a solicitor, on or before the commencement of any matter, advise the client the name of the nominated Client Care Officer for the law practice and that if the client has any concern or query it is able to be referred, in the first instance, to the nominated Client Care Officer. The Client Care Officer could be a solicitor, or executive in the law practice, or a nominated solicitor outside the law practice, or a nominated person approved by the Queensland Law Society. Persons employed by the Queensland Law Society may also be appointed as Client Care Officer.

Where instructions are received not from a client but from a third party on behalf of that client, the solicitor should obtain written confirmation of the instructions from the client who wishes the practitioner to act or see the client in order to obtain instructions directly from the client.

### Commentary

See, for example, the comments of Kirby P in *Mercantile Mutual Life Insurance Co Ltd v Gosper* (1991) 25 NSWLR 32 at 35. The facts of this case indicated that a law firm had purportedly acted on behalf of Mrs Gosper in relation to her mortgage and, in a letter to the appellant, enclosed a number of documents including a variation of mortgage in duplicate, the deed of covenant and deed of guarantee, all stated to be duly executed and stamped. However, Mr Gosper had forged his wife's signature and lied to the firm as Mrs Gosper knew nothing of this transaction.

### Who is a Client?

Whether or not a client-solicitor relationship exists falls to be determined according to the ordinary principles of contract law: *Maxwell v Chittick & Ors*<sup>1</sup> and *Apple v Wily*,<sup>2</sup>

Thus, a signed costs agreement between a solicitor and a person for the provision of legal services by the solicitor or firm to or for the benefit of that individual is evidence that the individual would be a client. In the absence of a written client agreement, one needs to examine the conduct of the parties as a retainer may be implied by conduct<sup>3</sup> if all essential elements of a binding contract are satisfied.<sup>4</sup>

In *Pegrum v Fatharly*,<sup>5</sup> the Full Court of the Supreme Court of WA found that the plaintiffs (husband and wife) were the respondent solicitor's clients. In this case the plaintiff husband had met the solicitor once through the other party to the transaction, the plaintiff wife had never met the solicitor, the solicitor was initially introduced to the plaintiff husband as the other party's lawyer, the other party had agreed to pay the plaintiffs' costs by including them in his fee for his monthly retainer of the solicitor, and the solicitor sent the relevant contracts to the other party and had no direct discussions with the plaintiffs about the documents.

This can be contrasted with the case of *Simmons v Story*,<sup>6</sup> where the Victorian Court of Appeal (which considered the decision in *Pegrum v Fatharly*) held that the appellant was not a client of the practitioner. In this case the practitioner had been retained by a company (of which the appellant was chairman and majority shareholder) in relation to the purchase of a framing business. Prior to this transaction, the appellant had sold a chemical business and retained the practitioner in relation to the sale of that business. The proceeds of the sale of that chemical business were then utilised in the purchase of the framing business. The practitioner had attended a meeting with all of the investors in the framing business to discuss the business structure to be used to effect the purchase and the bill of costs indicated that the practitioner had spoken to the appellant in relation to the purchase of the framing business a number of times following that meeting. The practitioner had also provided the vendor's solicitors with a certificate certifying that the guarantors (including the appellant) understood their obligations under the business guarantees. The practitioner had also been retained, quite separately, to act for the appellant in a family matter.

A person who retains a law practice, and enters into a costs agreement with and instructs the law practice under a Power of Attorney on behalf of another, may also be a client of the practice.<sup>7</sup> See the comments of Murray J in *Tobin v Dodd & Ors*, at para [38] to [41].

<sup>1</sup> (Unreported, NSWCA, 23 August 1994).

<sup>2</sup> [2002] NSWSC 855.

<sup>3</sup> *Day v Mead* [1987] 2 NZLR 443 per Somers J, cited in *Apple v Wily*, *Wong v Kelly*, *Comptroller General of Customs* (1999) 154 FLR 200, *Beach Petroleum NL v Kennedy & Ors* [1999] NSWCA 408 at para 208.

<sup>4</sup> *Integrated Computer Services Pty Limited v Digital Equipment Corporation (Australia) Pty Limited* (Unreported, NSWCA, 23 December 1988, per McHugh JA).

<sup>5</sup> (1996) 14 WAR 92.

<sup>6</sup> [2001] VSCA 187.

<sup>7</sup> *Tobin v Dodd & Ors* [2004] WASCA 288 at para 41.

In *Apple v Wily*,<sup>8</sup> a company liquidator who had discussed litigation strategies with the solicitor of the creditors of the company was found not to be in a solicitor-client relationship with the creditors' solicitor (even if a duty of confidence existed), because the discussions amounted to 'suggestions' and not the provision of legal advice to the liquidator.

As to whether an auditor of a company is in a solicitor-client relationship with the company's solicitor; see *Westpac Banking Corporation v 789TEN Pty Ltd*.<sup>9</sup>

Where the client is a corporate entity, it is possible for a solicitor to be retained by a holding company to advise about its corporate structure and the inter-relationship with its subsidiaries, but the solicitor is not necessarily in a solicitor-client relationship with any of the subsidiaries, even though the advice might affect them. The question of the existence of a retainer is to be determined by reference to the objective facts, not by the belief of the solicitor as to the companies for whom s/he is acting: *Beach Petroleum NL v Kennedy & Ors*.<sup>10</sup>

### 3 Confidentiality

A solicitor must never disclose to any person, who is not a partner or employee of the solicitor's law practice, any information which is confidential to a client and acquired by the solicitor or by the solicitor's law practice during the client's retainer, unless:

- 3.1 the client authorises disclosure;
- 3.2 the solicitor is permitted or compelled by law to disclose;
- 3.3 the solicitor discloses the information to a particular person in circumstances in which the solicitor believes on reasonable grounds that the law would compel its disclosure to that person, whether or not a client makes a claim of legal professional privilege or confidentiality;
- 3.4 the solicitor discloses the information to a particular person in circumstances in which the solicitor believes on reasonable grounds that it is necessary to disclose that information to that person for the sole purpose of avoiding the probable commission of a serious offence;
- 3.5 the information has lost its confidentiality;
- 3.6 the solicitor obtains the information from another person who is not bound by the confidentiality owed by the solicitor to the client and who does not give the information confidentially to the solicitor; or
- 3.7 in the solicitor's opinion the disclosure of the information is required to prevent imminent serious physical harm to the client or to another person.

#### Commentary

##### Client Legal Privilege

The law in relation to client legal privilege (commonly referred to as legal professional privilege) was summarised by Kenny J in *Commissioner of Taxation v Pratt Holdings Pty Ltd and Another*.<sup>11</sup>

'The common law in Australia is, therefore, that legal professional privilege attaches to:

- (1) confidential communications passing between a client and the client's legal advise for the dominant purpose of obtaining or giving legal advice (legal advice privilege); and
- (2) confidential communications passing between a client and, the client's legal advisor and third parties, for the dominant purpose of use in or in relation to litigation, which is either pending or in contemplation (litigation privilege).

See *Mitsubishi Electric Australia Pty Ltd v Victorian WorkCover Authority* (2002) 4 VR 332 (*Mitsubishi*) at 335-6 [8] per Batt JA, with whom Charles and Callaway JJA agreed, and *Grant v Downs* at CLR 677 per Barwick CJ. As the majority observed in *Esso* (at CLR 64; ALR 132-3):

The privilege exists to serve the public interest in the administration of justice by encouraging full and frank disclosure by clients to their lawyers.'

<sup>8</sup> *Supra*, fn 2.

<sup>9</sup> [2005] NSWCA 321.

<sup>10</sup> [1999] NSWCA 408.

<sup>11</sup> (2003) 195 ALR 717 at 726.

Clearly, the scope of what is covered by 'legal advice privilege' and 'litigation privilege' differ. One such difference, in the words of Kenny J in *Commissioner of Taxation v Pratt Holdings Pty Ltd and Another*:<sup>12</sup>

'... is that, unlike litigation privilege, advice privilege is not available "where one of the parties to the communication is a third party who is not the agent of the client for the purpose of the communication": see *Mitsubishi* at 336 [9] per Batt J A. Where, as in this case, litigation is neither pending nor contemplated, communications between a person or his legal advisor and a third party (who is not the agent of either of them) are not privileged, even though the communications were made for the purpose of giving or obtaining legal advice. The law in England and New Zealand would appear to the same as that in Australia in this regard: ...'

The privilege does not extend to advice sought or given in the furtherance of, or to facilitate, criminal, fraudulent or other unlawful purposes.<sup>13</sup> Whether or not the lawyer was a party to, or ignorant of, those purposes is immaterial; the client's purpose is the relevant inquiry.<sup>14</sup>

Communications falling outside the privilege are not limited to those in pursuit of a crime or fraud, but extend to communications in pursuit of an illegal or improper object. In *Southern Equities Corporation Ltd (in Liq) v Arthur Andersen and Co*, Doyle C J stated (at 174) that the exception covers '... a range of legal wrongs that have deception, deliberate abuse of or misuse of legal powers or deliberate breach of a legal duty at their heart.'

Other examples include *Attorney-General (NT) v Kerney*<sup>15</sup> which involved a challenge by the Northern Land Council to the validity of regulations made by the Northern Territory pursuant to statutory town planning powers. The Council established a prima facie case that the advice came into being as part of a scheme to defeat land claims and the High Court found that legal professional privilege could not be used to protect communications made to further a deliberate abuse of statutory power and by that abuse to prevent others from exercising their rights under the law.

#### **Disclosure of Solicitor's Representation Letters (current as at 5 October 2006)**

To enable auditors to discharge their obligations under sections 297 and 305 of the *Corporations Act 2001* (Cth), companies are required to advise the likely amount of their contingent liabilities. This includes the value of any liability expected to result from litigation. Companies generally instruct their solicitors to write to the auditor setting out the directors' estimate of the financial settlement (including costs) and whether the solicitors agree with that estimate. These letters are commonly known as 'solicitor's representation letters'. They contain information about the solicitors' advice to the company and the solicitors' view on prospects and the likely quantum of damages.

Solicitor's representation letters were the subject of the decision of the New South Wales Court of Appeal in *Westpac Banking Corporation v 789Ten Pty Ltd* (2005) 55 ACSR 519; [2005] NSWCA 321, which was handed down on 19 September 2005. The court held that, on a narrow construction of sections 118 and 119 of the *Evidence Act 1995* (NSW), client legal privilege did not apply to the solicitor's representation letters in that case because they were not prepared for the dominant purpose of either providing legal advice or pending litigation.

The Court recognised the adverse effect of the decision, but was bound to interpret the *Evidence Act* in accordance with established legal principles. In noting that solicitor's representation letters are a necessary consequence of almost all litigation entered into by a company, Tobias JA stated:

*'[65] There is obviously a problem which may require legislative intervention. However, any such intervention (for instance, by amendment to the Evidence Act or the Corporations Act) should only be made in a manner which would not unduly extend the rationale which underpins the privilege in question and which, essentially, is no different to that which applies under the general law with respect to litigation privilege where the relevant confidential information is directly related to assisting the prosecution, defence or compromise of pending or contemplated proceedings.'*

The equivalent privilege in Queensland is common law legal professional privilege, to which the dominant purpose test also applies (*Esso Australia Resources Ltd v Commissioner of Taxation (Cth)* (1999) 201 CLR 49).

On 16 December 2005, the High Court refused special leave to appeal the *Westpac* decision. Consequently, the only remaining avenue to address this issue in Queensland is by amending the *Corporations Act*.

<sup>12</sup> *Ibid.*

<sup>13</sup> *R v Cox and Railton* (1884) 14 QBD 153; *R v Bell* (1980) 146 CLR 141 at 145 per Gibbs J, at 152-3 per Stephen J, at 161-2 per Wilson J; *Baker v Campbell* (1983) 153 CLR 52 at 86-7 per Murphy J.

<sup>14</sup> *Southern Equities Corporation Ltd (in Liq) v Arthur Andersen and Co* (1997) 70 SASR 166 at 174 per Doyle C J.

<sup>15</sup> (1985) 158 CLR 500.

## 4 Acting against a former client

A solicitor must not accept a retainer to act for another person in any matter against, or in opposition to, the interest of a person ('the former client'):

- 4.1 for whom the solicitor or the solicitor's current or former law practice or the former law practice of a partner or employee of the solicitor or of the solicitor's law practice has acted previously and has thereby acquired information confidential to the former client and material to the matter; and
- 4.2 if the former client might reasonably conclude that there is a real possibility the information will be used to the former client's detriment.

### Commentary

As to the distinction between acting for more than one party in the same matter and acting against a former client, in *Beach Petroleum NL v Kennedy & Ors* (1999) 48 NSWLR 1 the court said at 47-48:

'There is a distinction between a case in which a fiduciary acts for separate clients in the one matter and a case in which a fiduciary has, on an earlier occasion, acquired information which is relevant to another matter when he acted for a different client. This distinction has been described as one between "simultaneous" representation and "successive" representation: "Developments in the Law; Conflict of Interest in the Legal Profession" (1980-1981) 94 *Harvard Law Review* 1244 at 1292 and 1315. Professor Finn, as His Honour then was, has described the two situations as respectively, "same matter conflicts" and "separate matter conflicts". The former is "the very heartland of fiduciary law". The latter, "in Anglo Australian law is not seen as involving any question of fiduciary law". Rather, Professor Finn has suggested that such a case falls to be determined under the law of negligence, breach of contract, confidential information, etc: see Finn "Fiduciary Law and Modern Commercial World" in McKendric (ed) *Commercial Aspects of Trust and Fiduciary Obligations* (1992) Clarendon Press, Oxford at 22 and 31.

The distinction has recently been affirmed by Lord Millett in *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 WLR 215 at 224-225 in a judgement with which the other members of the House of Lords agreed:

... a fiduciary cannot act at the same time both for and against the same client and his firm is in no better position... his disqualification has nothing to do with the confidentiality of client information. It is based upon the inescapable conflict of interest which is inherent in the situation.

...

Where the court's intervention is sought by a former client, however, the position is entirely different. The court's jurisdiction cannot be based on any conflict of interest, real or perceived, for there is none. The fiduciary relationship which subsists between a solicitor and client comes to an end with the termination of the retainer. Thereafter the solicitor has no obligation to defend and advance the interests of his former client. The only duty to a former client which survives the termination of the client relationship is a continuing duty to preserve the confidentiality of the information imparted during its subsistence.'

As to a duty of loyalty and its existence beyond Victoria: see *Asia Pacific Telecommunications Ltd v Optus Networks Pty Ltd* [2005] NSWSC 550.

## 5 Solicitors employed otherwise than by a solicitor

- 5.1 A solicitor, who is employed by a corporation (not being an incorporated legal practice) or by any other person who is not a solicitor, must not, despite any contrary direction from the solicitor's employer, act as a solicitor in the performance of any legal service in breach of any of the provisions of the Act or these rules.
- 5.2 To remove any doubt, such a solicitor is not entitled to act for any employee of the corporate employer in relation to any matter that is not directly related to the discharge of the employee's duties.
- 5.3 An employed solicitor who is not employed and remunerated by a law practice shall not permit the solicitor's name together with qualification or words indicating that the employee is a solicitor to be printed on the letterhead in general use by the employer.

## Commentary

The employed solicitor is subject to the same ethical and practising rules as a solicitor in private practice and where the duty as an employee is in conflict with a duty as a solicitor, the employee will not be excused from responsibility by virtue of their position as an employee.

Notwithstanding the relationship of employer and employee so existing, the relationship of solicitor and client is paramount.

A solicitor who is employed by a corporation will generally hold an Employee Level Practising Certificate. This does not entitle the solicitor to act as a principal in their own right. Further, it does not entitle such a Certificate holder to represent parties other than the corporation or a related body corporate.

Should a solicitor wish to carry on work in their own name, they are required to obtain the appropriate Principal Practising Certificate and hold appropriate professional indemnity insurance and comply with all other laws and rules relating to the conduct of the practice as a solicitor.

## 6 Termination of retainer

- 6.1 A solicitor must complete the legal services required by the solicitor's retainer, unless:
- 6.1.1 the solicitor and the solicitor's client have otherwise agreed;
  - 6.1.2 the solicitor is discharged from the retainer by the client; or
  - 6.1.3 the solicitor terminates the retainer for just cause, and on reasonable notice to the client.
- 6.2 Despite the above Rule, a solicitor, who is engaged to act for a client required to stand trial for a serious criminal offence, must not terminate the retainer and withdraw from the current proceedings on the ground that the client has failed to make arrangements satisfactory to the solicitor for payment of the solicitor's costs, unless the solicitor has, at a reasonable time before the date appointed for the commencement of the trial, or the commencement of the sittings of the Court in which the trial is listed:
- 6.2.1 served notice in writing on the client of the solicitor's intention to terminate the retainer and withdraw from the current proceedings at the expiration of seven (7) days if the client fails, within that time, to make satisfactory arrangements for payment of the solicitor's costs; and
  - 6.2.2 given appropriate notice to the Registrar of the Court in which the trial is listed to commence.
- 6.3 Without limiting the general application of rule 6.1, a solicitor, who is acting for a legally assisted client in any current proceedings, may terminate the solicitor's retainer upon giving reasonable notice in writing to the client of the solicitor's intention so to do, if the client's grant of legal aid is withdrawn, or otherwise terminated, and the client is unable to make any other satisfactory arrangements for payment of the solicitor's costs which would be incurred if the retainer continued.

## Commentary

Termination of a retainer is not to be confused with a solicitor's obligation to withdraw from the record in current proceedings in accordance with the relevant Court or Tribunal rules governing this issue. Whether or not a solicitor's application to withdraw from the record is granted is a matter for the relevant Court/Tribunal.

## 7 Ownership of clients' documents – termination of retainer

- 7.1 The following Rules apply subject to any contrary order which may be made in respect of a client's documents by any court of competent jurisdiction.
- 7.2 A solicitor must retain, securely and confidentially, documents relating to a particular matter and to which a client is entitled:
- 7.2.1 during the solicitor's retainer for that matter and at least six (6) years thereafter; or
  - 7.2.2 until the solicitor gives them to the client or a person authorised by the client; or
  - 7.2.3 until the client instructs the solicitor to deal with them in some other manner.

- 7.3 Upon completion or termination of a solicitor's retainer, a solicitor must, when requested so to do by the solicitor's client, give to the client, or another person authorised by the client, any documents related to the retainer to which the client is entitled, unless the solicitor claims a lien over the documents for costs due to the solicitor by the client.
- 7.4 Despite rule 7.3, a solicitor who claims to exercise a lien for unpaid costs over a client's documents which are essential to the client's defence or prosecution of current proceedings, must:
- 7.4.1 deal with the documents as provided in rule 23.4, if another solicitor is acting for the client; or
  - 7.4.2 upon receiving satisfactory security for the unpaid costs, deliver the documents to the client.
- 7.5 For the purposes of the above Rules the documents to which a client of a solicitor is entitled include:
- 7.5.1 documents prepared by a solicitor for the client, or predominantly for the purposes of the client, for the purposes of the client's matter;
  - 7.5.2 documents received by a solicitor from a third party in the course of the solicitor's retainer for or on behalf of the client or for the purposes of a client's matter and intended for the use or information of the client;

#### **Commentary**

The Council of the Queensland Law Society is of the view that:

- (a) documents prepared by the solicitor for the solicitor's benefit and for which a charge is made; and
- (b) documents sent by the client to the solicitor, the property in which is intended to remain with the client,

are the client's property.

## **8 Acting for more than one party**

- 8.1 For the purposes of rules 8.2 to 8.7, inclusive:
- 8.1.1 'party' includes each one of the persons or corporations who, or which, is jointly a party to any matter.
  - 8.1.2 'solicitor' includes a solicitor's partner, employee or law practice.
  - 8.1.3 'guarantor' includes indemnifier, surety or a person or company providing security for a loan or finance.
- 8.2 A solicitor must avoid any conflict of interest between two or more clients of the solicitor or of the solicitor's law practice.
- 8.3 A solicitor who or whose law practice intends to act for a party to any matter where the solicitor or the solicitor's law practice is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting a retainer to act, that each party is aware that the solicitor is intending to act for the others and consents to the solicitor so acting in the knowledge that the solicitor:
- 8.3.1 may be, thereby, prevented from:
    - (a) disclosing to each party all information relevant to the matter within the solicitor's knowledge; or
    - (b) giving advice to one party which is contrary to the interests of another; and
  - 8.3.2 will cease to act for all parties if the solicitor would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them.

- 8.4 If a solicitor who is acting or whose law practice is acting for more than one party to any matter determines that the solicitor or the solicitor's law practice cannot continue to act for all of the parties without acting in a manner contrary to the interests of one or more of them, the solicitor or the law practice must thereupon cease to act for all parties.
- 8.5 A solicitor must not act where the solicitor or the solicitor's law practice is acting or intending to act:
- 8.5.1 for both vendor and purchaser in connection with the contract for the sale of land or a transfer of land for value at arm's length;
  - 8.5.2 for both vendor and purchaser in connection with the contract for the sale of a business at arm's length;
  - 8.5.3 for both lessor and lessee in connection with the lease of land or an agreement for the lease of land for value at arm's length;
  - 8.5.4 for both financier and borrower in connection with the loan of money or provision of finance or an agreement to lend money or provide finance; or
  - 8.5.5 for both the purchaser of land and the lender of money or provider of finance intended to be secured by a mortgage of that land;

unless and until the solicitor or the solicitor's law practice obtains a satisfactory written acknowledgment from each party of the receipt of information as to the basis on which the solicitor acts, and after first fully informing that party in writing concerning the potential disadvantages to that party of the solicitor so acting.

#### **Guidelines**

The Council is of the view that a solicitor should not be a party to an agreement in which the solicitor acts or intends to act for a vendor or purchaser where the real estate agent acting in the transaction has paid or intends to pay the solicitor's fees unless the solicitor obtains the fully informed consent of their client.

Further, a solicitor should not act for both vendor and purchaser in a transaction where either the vendor or the purchaser:

- (i) offers to pay or pays the other party's legal fees; or
- (ii) provides any other financial inducement to such other party to instruct the solicitor to act for both parties in that transaction,

unless the solicitor obtains the fully informed consent of both parties.

- 8.6 A solicitor must not act for a guarantor in connection with the loan of money or the provision of finance or an agreement to lend money or provide finance where the solicitor or the solicitor's law practice is also acting in the same transaction for the borrower or the financier. This subrule does not prohibit the solicitor acting for a borrower and a guarantor if in the same transaction the guarantor is:
- 8.6.1 a borrower;
  - 8.6.2 a director of a borrower;
  - 8.6.3 a shareholder of a borrower;
  - 8.6.4 a beneficiary in a trust of which the borrower is the trustee;
  - 8.6.5 a party holding a beneficial interest in the borrower;
  - 8.6.6 a body corporate related to a borrower within the meaning of the Corporations Act;
  - 8.6.7 a director of such a related body corporate;
  - 8.6.8 a shareholder of such a related body corporate; or
  - 8.6.9 a party holding a beneficial interest in such a related body corporate;

nor does this Rule prohibit the solicitor acting for both the financier and the guarantor in the same transaction if they are related bodies corporate within the meaning of the Corporations Act.

- 8.7 A solicitor must not act in any matter or transaction for value at arm's length relating to land for a person or entity carrying on business as a builder, developer or subdivider where the solicitor is acting or is intending to act for any other party contracting with that person or entity in the course of that business in relation to the land.

## **9 Avoiding conflict of interest (where solicitor's own interest involved)**

- 9.1 A solicitor must not, in any dealings with a client:
- 9.1.1 allow an interest of the solicitor or an associate of the solicitor to conflict with the client's interest;
  - 9.1.2 exercise any undue influence intended to dispose the client to benefit the solicitor or an associate in excess of the solicitor's fair remuneration for the legal services provided to the client.
- 9.2 A solicitor must not accept instructions to act or continue to act for a person in any matter when the solicitor is, or becomes, aware that the person's interest in the matter is, or would be, in conflict with the solicitor's own interest or the interest of an associate.

### **Guidelines**

In relation to the sale/purchase of residential properties, solicitors acting for the buyer would be well aware of their obligations pursuant to section 365B of the *Property Agents and Motor Dealers Act 2000* to issue the Lawyer's Certificate in the approved form (currently Form 32a). Whether a solicitor has a 'business relationship' with the Seller's Agent based upon the number of referrals made by that Agent to the solicitor, solicitors are reminded of the Guidelines issued by the Society concerning this subject which provide, amongst other things:

'A consistent referral source from a Seller's Agent to you of Buyers who do not have their own solicitor may, depending on the number of referrals, remove your ability to confirm genuine independence. Referrals will be a question of fact and degree for each practitioner to consider.'

### **Commentary**

This rule is in addition to the general duty of a solicitor to deal with their client honestly and fairly as provided for in rule 2 and to not prefer the interests of other persons to those of the client.

Guidelines for charging outlays and disbursements have been set by the Legal Services Commissioner in consultation with the Society and those Guidelines are reproduced in Appendix 1 to these Rules.

## **10 Receiving a benefit under a will or other instrument**

- 10.1 A solicitor who receives instructions from a client to draw a will appointing the solicitor an executor must inform the client in writing before the client signs the will:
- 10.1.1 of any entitlement of the solicitor, of the solicitor's law practice or associate, to claim commission;
  - 10.1.2 of the inclusion in the will of any provision entitling the solicitor, or the solicitor's law practice or associate, to charge professional fees in relation to the administration of the estate; and
  - 10.1.3 if the solicitor or the solicitor's law practice or associate has an entitlement to claim commission that the person could appoint as executor a person who might make no claim for commission.
- 10.2 A solicitor who receives instructions from a person to:
- 10.2.1 draw a will under which the solicitor or the solicitor's law practice or associate will, or may, receive a substantial benefit other than any proper entitlement to commission (if the solicitor is also to be appointed executor) or the reasonable professional fees of the solicitor or the solicitor's law practice; or

10.2.2 draw any other instrument under which the solicitor or the solicitor's law practice or associate will, or may, receive a substantial benefit in addition to the reasonable remuneration,

must:

- (a) decline to act on those instructions; and
- (b) offer to refer the person, for advice, to another solicitor who is not an associate of the solicitor;

unless the person instructing the solicitor is either:

- (i) a member of the solicitor's immediate family; or
- (ii) a solicitor, or a member of the immediate family of a solicitor, who is a partner, employer, or employee, of the solicitor.

10.3 For the purposes of this Rule:

'substantial benefit' means a benefit which has a substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

## **11 Solicitor and client – borrowing transactions**

11.1 A solicitor must not borrow any money, nor permit or assist an associate to borrow any money from:

11.1.1 a client of the solicitor, or the solicitor's law practice;

11.1.2 a former client of the solicitor or solicitor's law practice who has indicated continuing reliance upon the advice of the solicitor or the solicitor's law practice in relation to the investment of money; or

11.1.3 a person who has sought from the solicitor, or the solicitor's law practice, advice in relation to the investment of money or the management of the person's financial affairs.

11.2 This Rule does not prevent a solicitor or an associate borrowing from a client which is:

- (a) a holder of an Australian financial services licence within the meaning of the *Corporations Act 2001 (Cth)* or a person who is exempt from holding such a licence;
- (b) a body regulated by APRA within the meaning of the *Australian Prudential Regulation Authority Act 1998 (Cth)*;
- (c) a related body corporate (within the meaning of the *Corporations Act 2001 (Cth)*) to any company within described in paragraph (a) or (b);
- (d) a trustee company specified in the Second Schedule to the *Trustee Companies Act 1968* or authorised to carry on business under corresponding legislation of any State or Territory of Australia;
- (e) a registered corporation in terms of the *Financial Sector (Collection of Data) Act 2001* or a related body corporate thereof;
- (f) a company listed on any Stock Exchange in Australia or a related body corporate thereof;
- (g) a government, governmental body, agency, department, authority or instrumentality whether foreign, federal, state or local;
- (h) the employer of the solicitor;
- (i) a member of the family of the solicitor or any corporation, partnership, syndicate, joint venture or trust in which or the shares in which the whole of the beneficial interest is presently vested or is capable only of being vested in one or more members of the immediate family of such solicitor.

## **Advocacy and litigation rules**

### **(Statement of general principle)**

Solicitors, in all their dealings with the courts, whether those dealings involve the obtaining and presentation of evidence, the preparation and filing of documents, instructing an advocate or appearing as an advocate, should act with competence, honesty and candour. Solicitors should be frank in their responses and disclosures to the court, and diligent in their observance of undertakings which they give to the court or their opponents.

### **12 Duty to client**

- 12.1 A solicitor must seek to advance and protect the client's interests to the best of the solicitor's skill and diligence, uninfluenced by the solicitor's personal view of the client or the client's activities, and notwithstanding any threatened unpopularity or criticism of the solicitor or any other person, and always in accordance with the law including these Rules.
- 12.2 A solicitor must seek to assist the client to understand the issues in the case and the client's possible rights and obligations if the solicitor is instructed to give advice on any such matter, sufficiently to permit the client to give proper instructions, particularly in connection with any compromise of the case.
- 12.3 A solicitor must where appropriate inform the client about the reasonably available alternatives to fully contested adjudication of the case unless the solicitor believes on reasonable grounds that the client already has such an understanding of those alternatives as to permit the client to make decisions about the client's best interests in relation to the litigation.
- 12.4 A solicitor must (unless circumstances warrant otherwise in the solicitor's considered opinion) advise a client who is charged with a criminal offence about any law, procedure or practice which in substance holds out the prospect of some advantage (including diminution of penalty) if the client pleads guilty or authorises other steps towards reducing the issues, time, cost or distress involved in the proceedings.

### **13 Independence – avoidance of personal bias**

- 13.1 A solicitor must not act as the mere mouthpiece of the client or of the instructing legal practitioner and must exercise the forensic judgments called for during the case independently, after appropriate consideration of the client's and the instructing solicitor's wishes, where practicable.
- 13.2 A solicitor will not have breached the solicitor's duty to the client, and will not have failed to give appropriate consideration to the client's or the instructing legal practitioner's wishes, simply by choosing, contrary to those wishes, to exercise the forensic judgments called for during the case so as to:
  - 13.2.1 confine any hearing to those issues which the solicitor believes to be the real issues;
  - 13.2.2 present the client's case as quickly and simply as may be consistent with its robust advancement; or
  - 13.2.3 inform the court of any persuasive authority against the client's case.
- 13.3 Except where otherwise required by law or a court, a solicitor must not make submissions or express views to a court on any material evidence or material issue in the case in terms which convey or appear to convey the solicitor's personal opinion on the merits of that evidence or issue.

13.4 A solicitor must not unless exceptional circumstances warrant otherwise in the solicitor's considered opinion:

13.4.1 appear for a client at any hearing, or

13.4.2 continue to act for a client,

in a case in which it is known, or becomes apparent, that the solicitor will be required to give evidence material to the determination of contested issues before the court.

#### **Guidelines**

Given the great variety of circumstances in which the problem addressed by rule 13.4 may arise, it is desirable to provide some guidance as to the reasons for the rule, and hence as to the proper course in the circumstances which have arisen. The reasons for the rule include:

- (i) the concern that the solicitor's performance as an advocate or the Court's assessment of credibility of the solicitor as a witness may be affected by the suggestion that the solicitor's evidence is tainted by the desire to assist the client, and even by the possibility of avoiding a complaint by the client as to the solicitor's performance as such in the matters which gave rise to the litigation;
- (ii) a concern that the client's prospects of frank and disinterested advice may be diminished by reason of the solicitor's involvement in the matters which have led to the litigation.

13.5 A solicitor must not become the surety for the client's bail.

#### **Commentary**

Because it is necessary to ensure that a client receives frank and disinterested advice and because it is undesirable there be any suggestion that a solicitor's representation of his or her client or evidence given by the solicitors has been affected by the solicitor's own interests, a solicitor must not become the surety for the client's bail.

## **14 Frankness in court**

14.1 A solicitor must not knowingly make a misleading statement to a court.

14.2 A solicitor must take all necessary steps to correct any misleading statement made by the solicitor to a court as soon as possible after the solicitor becomes aware that the statement was misleading.

14.3 A solicitor will not have made a misleading statement to a court simply by failing to correct an error in a statement made to the court by the opponent or any other person.

14.4 A solicitor seeking any interlocutory relief in an ex parte application must disclose to the court all relevant factual and legal matters which:

14.4.1 are within the solicitor's knowledge;

14.4.2 are not protected by legal professional privilege; and

14.4.3 the solicitor has reasonable grounds to believe would support an argument against granting the relief or limiting its terms adversely to the client.

14.5 A solicitor who has knowledge of matters which are within rule 14.4.3:

14.5.1 must seek instructions for the waiver of legal professional privilege, if the information is protected by that privilege, so as to permit the solicitor to disclose that information under rule 14.4; and

14.5.2 if the client does not waive the privilege as sought by the solicitor:

(a) must inform the client of the client's responsibility to authorise such disclosure and the possible consequences of not doing so; and

(b) must inform the court that the solicitor cannot assure the court that all matters which should be disclosed have been disclosed to the court.

- 14.6 A solicitor must, at the appropriate time in the hearing of the case and if the court has not yet been so informed, inform the court of:
- 14.6.1 any binding authority;
  - 14.6.2 any authority decided by an intermediate court of appeal in Australia;
  - 14.6.3 any authority on the same or materially similar legislation as that in question in the case, including any authority decided at first instance in the Federal Court or a Supreme Court, or by superior appellate courts, which has not been disapproved; or
  - 14.6.4 any applicable legislation;
- of which the solicitor is aware, and which the solicitor has reasonable grounds to believe to be directly in point, against the client's case.
- 14.7 A solicitor need not inform the court of matters within rule 14.6 at a time when the opponent tells the court that the opponent's whole case will be withdrawn or the opponent will consent to final judgment in favour of the client, unless the appropriate time for the solicitor to have informed the court of such matters in the ordinary course has already arrived or passed.
- 14.8 A solicitor who becomes aware of matters within rule 14.6 after judgment or decision has been reserved and while it remains pending, whether the authority or legislation came into existence before or after argument, must inform the court of that matter by:
- 14.8.1 a letter to the court, copied to the opponent, and limited to the relevant reference unless the opponent has consented beforehand to further material in the letter; or
  - 14.8.2 requesting the court to re-list the case for further argument on a convenient date, after first notifying the opponent of the intended request and consulting the opponent as to the convenient date for further argument.
- 14.9 A solicitor need not inform the court of any matter otherwise within rule 14.6 which would have rendered admissible any evidence tendered by the prosecution which the court has ruled inadmissible without calling on the defence.
- 14.10 A solicitor will not have made a misleading statement to a court simply by failing to disclose facts known to the solicitor concerning the client's character or past, when the solicitor makes other statements concerning those matters to the court, and those statements are not themselves misleading.
- 14.11 A solicitor who knows or suspects that the prosecution is unaware of the client's previous conviction must not ask a prosecution witness whether there are previous convictions, in the hope of a negative answer.
- 14.12 A solicitor must inform the court in civil proceedings of any misapprehension by the court as to the effect of an order which the court is making, as soon as the solicitor becomes aware of the misapprehension.

## **15 Delinquent or guilty clients**

- 15.1 A solicitor whose client informs the solicitor, before judgment or decision that the client has lied in a material particular to the court or has procured another person to lie to the court or has falsified or procured another person to falsify in any way a document which has been tendered:
- 15.1.1 must advise the client that the court should be informed of the lie or falsification and request authority so to inform the court;
  - 15.1.2 must refuse to take any further part in the case unless the client authorises the solicitor to inform the court of the lie or falsification;
  - 15.1.3 must promptly inform the court of the lie or falsification upon the client authorising the solicitor to do so; but

- 15.1.4 must not otherwise inform the court of the lie or falsification.
- 15.2 A solicitor whose client in criminal proceedings confesses guilt to the solicitor but maintains a plea of not guilty:
- 15.2.1 may cease to act, if there is enough time for another solicitor to take over the case properly before the hearing, and the client does not insist on the solicitor continuing to appear for the client;
- 15.2.2 in cases where the solicitor continues to act for the client:
- (a) must not falsely suggest that some other person committed the offence charged;
  - (b) must not set up an affirmative case inconsistent with the confession;
  - (c) may argue that the evidence as a whole does not prove that the client is guilty of the offence charged;
  - (d) may argue that for some reason of law the client is not guilty of the offence charged; or
  - (e) may argue that for any other reason not prohibited by (a) and (b) the client should not be convicted of the offence charged.
- 15.3 A solicitor whose client informs the solicitor that the client intends to disobey a court's order must:
- 15.3.1 advise the client against that course and warn the client of its dangers;
- 15.3.2 not advise the client how to carry out or conceal that course;
- 15.3.3 not inform the court or the opponent of the client's intention unless:
- (a) the client has authorised the solicitor to do so beforehand; or
  - (b) the solicitor believes on reasonable grounds that the client's conduct constitutes a threat to any person's safety.

## **16 Responsible use of privilege**

- 16.1 A solicitor must, when exercising the forensic judgments called for throughout a case, take care to ensure that decisions by the solicitor or on the solicitor's advice to invoke the coercive powers of a court or to make allegations or suggestions under privilege against any person:
- 16.1.1 are reasonably justified by the material then available to the solicitor;
- 16.1.2 are appropriate for the robust advancement of the client's case on its merits;
- 16.1.3 are not made principally in order to harass or embarrass the person; and
- 16.1.4 are not made principally in order to gain some collateral advantage for the client or the solicitor or the instructing solicitor out of court.
- 16.2 A solicitor must not draw or settle any court document alleging criminality, fraud or other serious misconduct unless the solicitor believes on reasonable grounds that:
- 16.2.1 factual material already available to the solicitor provides a proper basis for the allegation;
- 16.2.2 the evidence by which the allegation is made, if the evidence is in written form, will be admissible in the case; and
- 16.2.3 the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.
- 16.3 A solicitor must not open as a fact any allegation which the solicitor does not then believe on reasonable grounds will be capable of support by the evidence which will be available to support the client's case.

- 16.4 A solicitor must not cross-examine so as to suggest criminality, fraud or other serious misconduct on the part of any person unless:
- 16.4.1 the solicitor believes on reasonable grounds that the material already available to the solicitor provides a proper basis for the suggestion; and
  - 16.4.2 in cross-examination going to credit alone, the solicitor believes on reasonable grounds that affirmative answers to the suggestion would diminish the witness's credibility.
- 16.5 A solicitor may regard the opinion of an instructing legal practitioner that material exists which appears to support a suggestion or allegation to which rules 16.1, 16.2, 16.3 and 16.4 applies as a reasonable ground for holding the belief required by those Rules, except in the case of a closing address or submission on the evidence.
- 16.6 A solicitor must make reasonable enquiries to the extent which is practicable before the solicitor can have reasonable grounds for holding the belief required by rules 16.1, 16.2, 16.3 and 16.4, unless the solicitor has received and accepted an opinion from the instructing legal practitioner within rule 16.5.
- 16.7 A solicitor must not suggest criminality, fraud or other serious misconduct against any person in the course of the solicitor's address on the evidence unless the solicitor believes on reasonable grounds that the evidence in the case provides a proper basis for the suggestion.
- 16.8 A solicitor who has instructions which justify submissions for the client in mitigation of the client's criminality and which involve allegations of serious misconduct against any other person not able to answer the allegations in the case must seek to avoid disclosing the other person's identity directly or indirectly unless the solicitor believes on reasonable grounds that such disclosure is necessary for the robust defence of the client.

## **17 Integrity of evidence**

- 17.1 A solicitor shall not advise or suggest to a witness that false or misleading evidence should be given nor condone another person doing so.
- 17.2 A solicitor must not suggest to or condone another person suggesting in any way to any prospective witness (including a party or the client) the content of any particular evidence which the witness should give at any stage in the proceedings.
- 17.3 A solicitor will not have breached rules 17.1 or 17.2 by:
- 17.3.1 expressing a general admonition to tell the truth;
  - 17.3.2 questioning and testing in conference the version of evidence to be given by a prospective witness; or
  - 17.3.3 drawing the witness's attention to inconsistencies or other difficulties with the evidence, but must not coach or encourage the witness to give evidence different from the evidence which the witness believes to be true.
- 17.4 A solicitor must not confer with, or condone another legal practitioner conferring with, more than one lay witness (including a party or client) at the same time, about any issue:
- 17.4.1 as to which there are reasonable grounds for the solicitor to believe it may be contentious at a hearing; or
  - 17.4.2 which could be affected by, or may affect, evidence to be given by any of those witnesses,
- unless the solicitor believes on reasonable grounds that special circumstances require such a conference.
- 17.5 A solicitor will not have breached rule 17.4 by conferring with, or condoning another legal practitioner conferring with, more than one client about undertakings to a court, admissions or concessions of fact, amendments of pleadings or compromise.

- 17.6 A solicitor must not confer with any witness (including a party or client) called by the solicitor on any matter related to the proceedings while that witness remains under cross-examination, unless:
- 17.6.1 the cross-examiner has consented beforehand to the solicitor doing so; or
  - 17.6.2 the solicitor:
    - (a) believes on reasonable grounds that special circumstances (including the need for instructions on a proposed compromise) require such a conference;
    - (b) has, if possible, informed the cross-examiner beforehand of the solicitor's intention to do so; and
    - (c) otherwise does inform the cross-examiner as soon as possible of the solicitor having done so.
- 17.7 A solicitor must not take any step to prevent or discourage a prospective witness or a witness from conferring with the opponent or being interviewed by or on behalf of any other person involved in the proceedings.
- 17.8 A solicitor will not have breached rule 17.7 simply by telling a prospective witness or a witness that the witness need not agree to confer or to be interviewed or by advising about relevant obligations of confidentiality.

## **18 Communications with opponent**

- 18.1 A solicitor must not knowingly make a false statement to the opponent in relation to the case (including its compromise).
- 18.2 A solicitor must take all necessary steps to correct any false statement unknowingly made by the solicitor to the opponent as soon as possible after the solicitor becomes aware that the statement was false.
- 18.3 A solicitor does not make a false statement to the opponent simply by failing to correct an error on any matter stated to the solicitor by the opponent.
- 18.4 A solicitor must not deal directly with the opponent's client in relation to the case for which the opponent is instructed unless:
- 18.4.1 the opponent has previously consented;
  - 18.4.2 the solicitor believes on reasonable grounds that:
    - (a) the circumstances are so urgent as to require the solicitor to do so; and
    - (b) the dealing would not be unfair to the opponent's client; or
  - 18.4.3 the substance of the dealing is solely to enquire whether the person is represented and, if so, by whom.
- 18.5 A solicitor must not confer or deal directly with the party opposed to the solicitor's client in relation to the case for which the solicitor is instructed, where that party is not represented by a legal practitioner for the case, unless:
- 18.5.1 the party is not being indemnified by an insurance company which is actively engaged in contesting the proceedings; or
  - 18.5.2 the party is being indemnified by an insurance company which is actively engaged in contesting the proceedings and the solicitor:
    - (a) has no reasonable grounds to believe that any statements made by the party to the solicitor may harm the party's interests under the insurance policy; or
    - (b) has reasonable grounds for the belief referred to in (a) but has clearly informed the party beforehand of that possibility; or

- 18.5.3 the party, being indemnified by an insurance company which is actively engaged in contesting the proceedings, is personally represented but not in the case and the solicitor:
- (a) has notified the party's representative of the solicitor's intention to do so; and
  - (b) has allowed enough time for the party to be advised by the party's representative.
- 18.6 A solicitor must not, outside an ex parte application or a hearing of which the opponent has had proper notice, communicate in the opponent's absence with the court concerning any matter of substance in connection with current proceedings unless:
- 18.6.1 the court has first communicated with the solicitor in such a way as to require the solicitor to respond to the court; or
  - 18.6.2 the opponent has consented beforehand to the solicitor communicating with the court in a specific manner notified to the opponent by the solicitor.
- 18.7 A solicitor must promptly tell the opponent what passes between the solicitor and a court in a communication referred to in rule 18.6.
- 18.8 A solicitor must not raise any matter with a court in connection with current proceedings on any occasion to which the opponent has consented under rule 18.6.2, other than the matters specifically notified by the solicitor to the opponent when seeking the opponent's consent.

## **19 Integrity of hearings**

- 19.1 A solicitor must not publish, or take steps towards the publication of, any material concerning current proceedings for which the practitioner is engaged which may prejudice a fair trial of those proceedings or prejudice the administration of justice.
- 19.2 A solicitor must not in the presence of any of the parties or legal practitioners deal with a court, or deal with any legal practitioner appearing before the solicitor when the solicitor is a referee, arbitrator or mediator, on terms of informal personal familiarity which may reasonably give the appearance that the solicitor has special favour with the court or towards the legal practitioner.

## **20 Prosecutor's duties**

- 20.1 A solicitor who is retained to prosecute in any matter under State legislation or for the Crown in right of the State of Queensland shall observe and comply in all respects with the written guidelines issued by the Director of Public Prosecutions pursuant to section 11(1)(a) of the *Director of Public Prosecutions Act 1984* as of 1 July 2007.
- 20.2 A solicitor who is retained to prosecute in any matter under Commonwealth legislation or for the Crown in right of the Commonwealth of Australia shall observe and comply in all respects with the written 'Prosecution Policy of the Commonwealth' and the 'Statement of Prosecution Disclosure' issued by the Commonwealth Director of Public Prosecutions as of 1 July 2007.

## Relations with other practitioners

### (Statement of general principle)

In all of their dealings with other practitioners, solicitors should act with honesty, fairness and courtesy, and adhere faithfully to their undertakings, in order to transact lawfully and competently the business which they undertake for their clients in a manner that is consistent with the public interest.

### 21 Communications

A solicitor, in all of the solicitor's dealings with other legal practitioners, must take all reasonable care to maintain the integrity and reputation of the legal profession by ensuring that the solicitor's communications are courteous and that the solicitor avoids offensive or provocative language or conduct.

### 22 Undertakings

- 22.1 A solicitor who, in the course of the solicitor's practice, communicates with another legal practitioner or their employee orally, or in writing, in terms which expressly, or by necessary implication, constitute an undertaking on the part of the solicitor personally to ensure the performance of some action or obligation, in circumstances where it might reasonably be expected that the other legal practitioner will rely on it must honour the undertaking so given strictly in accordance with its terms, and within the time promised, or, if no precise time limit is specified, within a reasonable time.
- 22.2 A solicitor must not give to another legal practitioner or their employee an undertaking compliance with which requires the co-operation of a third party, who is not a party to the undertaking, and whose co-operation cannot be guaranteed by the solicitor.
- 22.3 A solicitor must not, in the course of the solicitor's practice, seek from another legal practitioner or that legal practitioner's employee, an undertaking, compliance with which would require the co-operation of a third party who is not a party to the undertaking, and whose co-operation could not be guaranteed by the legal practitioner or employee asked to give the undertaking.

### 23 Taking over a matter from another legal practitioner

- 23.1 Where a solicitor's retainer is terminated before the completion of the matter, and the client instructs another legal practitioner to take over the conduct of the matter the following rules shall apply, subject to any orders which may be made by a court of competent jurisdiction in respect of the delivery of the client's documents.
- 23.2 The first solicitor must promptly, on receipt of a direction in writing from the client, deliver to the second legal practitioner all relevant documents to which the client is entitled and any information which is necessary for the proper conduct of the matter, unless the first solicitor claims a lien over the documents for unpaid costs.
- 23.3 If the client has terminated the first solicitor's retainer, the first solicitor may retain possession of the documents until the solicitor's costs are paid, or their payment to the solicitor is satisfactorily secured.
- 23.4 If the first solicitor has terminated the retainer and the client's documents are essential to the defence or prosecution of current proceedings which are continuing before a court, the solicitor must surrender possession of the documents to the client, upon receiving satisfactory security for the unpaid costs, or to the second legal practitioner, if so directed by the client, and, provided that the second legal practitioner:

- 23.4.1 holds the documents subject to the first solicitor's lien, if that is practicable, and provides reasonable security for the payment of the first solicitor's costs; or
  - 23.4.2 enters into an agreement with the client and the first solicitor to procure payment of the first solicitor's costs upon completion of the relevant proceedings.
- 23.5 A solicitor who receives a client's documents from another legal practitioner pursuant to an agreement between the client and both legal practitioners, providing that the solicitor receiving the documents will pay the first solicitor's costs from money recovered on the client's behalf in respect of the matter to which the documents relate, must do all things which are reasonably practicable on the solicitor's part to ensure compliance with the agreement.

## **24 Transfer of a solicitor's practice**

- 24.1 When a solicitor intends to transfer to another legal practitioner the whole or part of the solicitor's practice, including clients' work in progress, and to put the other legal practitioner in possession of the documents held by the solicitor on behalf of clients, the solicitor must give to each client, fourteen (14) days (or such other period as may be reasonable in the circumstances) before the solicitor delivers possession of the practice to the legal practitioner acquiring it, notice in writing:
- 24.1.1 of the intended transfer of documents to the legal practitioner acquiring the practice, unless a contrary direction is received from the client; and
  - 24.1.2 of the client's right to give to the solicitor a contrary direction in relation to the conduct of the client's affairs and the delivery of the client's documents.
- 24.2 The notice which is sent to any client, on whose behalf the solicitor holds money in trust or under the solicitor's control, must advise the client of:
- 24.2.1 the balance of money held on the client's behalf;
  - 24.2.2 the solicitor's intention to transfer the relevant account to the legal practitioner acquiring the practice, unless advised by the client to the contrary; and
  - 24.2.3 the client's right to give to the solicitor a contrary direction as to the manner in which the solicitor should deal with the account on the client's behalf.
- 24.3 The solicitor, in addition to giving notice to clients as required by rules 24.1 and 24.2, must comply with all other legislative provisions applicable to the trust money or controlled money held by the solicitor.
- 24.4 Rules 24.1, 24.2 and 24.3 do not apply where a new partner is admitted to a partnership which continues to conduct the practice or where a partner retires from practice and another partner of the same law practice continues to conduct the practice.

### **Guidelines**

This Rule should not be interpreted as giving the transferee practitioner a retainer unless a contrary direction is received from the client. The client's failure to give a 'contrary direction' within rule 24.1.1 may be due to a number of reasons including the non-receipt of the Notice required by this Rule. In such a case, it is difficult to argue that the transferee practitioner has a retainer with the client.

A prudent transferee practitioner should obtain a clear specific retainer to continue the matter and should not rely on a non-response from the client to the transferor solicitor's correspondence to establish the existence of a retainer to act.

## **25 Communicating with another legal practitioner's client**

- 25.1 A solicitor who is acting on behalf of a party in any matter other than in relation to a case in court (which matters are governed by rules 18.4 and 18.5) must not communicate directly with any other party for whom, to the solicitor's knowledge, another legal practitioner is currently acting, unless:
- 25.1.1 (a) notice of the solicitor's intention to communicate with the other party, in default of a reply from the other legal practitioner, has been given to that legal practitioner, who has failed, after a reasonable time, to reply;
  - (b) the communication is made for the sole purpose of informing the other party that the solicitor has been unable to obtain a reply from that party's legal practitioner and requests that party to contact the solicitor; and
  - (c) the solicitor, thereafter, notifies the other legal practitioner of the communication; or
- 25.1.2 the other legal practitioner consents; or
- 25.1.3 (a) the circumstances are so urgent as to require the solicitor to do so; and
- (b) the communication would not be unfair to the other party.
- 25.2 A solicitor who receives notice from another legal practitioner that the solicitor's client has instructed or retained that legal practitioner may, after notifying the other legal practitioner, communicate with the client for the purpose of confirming the client's instructions and arranging for the orderly transfer of the client's matters to the other legal practitioner.

## Relations with third parties

### (Statement of general principle)

Solicitors should, in the course of their practice, conduct their dealings with other members of the community, and the affairs of their clients which affect the rights of others, according to the same principles of honesty and fairness which are required in relations with the courts and other lawyers and in a manner that is consistent with the public interest.

### 26 Contracting for services

A solicitor who deals with a third party on behalf of a client for the purpose of obtaining some service in respect of the client's matters, must inform the third party when the service is requested, that the solicitor will accept personal liability for payment of the fees to be charged for the service or, if the solicitor is not to accept personal liability, the solicitor must inform the third party of the arrangements intended to be made for payment of the fees.

### 27 Undertakings

- 27.1 A solicitor who, in the course of providing legal services to a client, communicates with a third party orally, or in writing, in terms which, expressly or by necessary implication, constitute an undertaking on the part of the solicitor to ensure the performance of some action or obligation must honour the undertaking so given strictly in accordance with its terms, and within the time promised (if any) or within a reasonable time.
- 27.2 A solicitor must comply with any personal undertaking given by the solicitor, whether or not in the course of, or in connection with, the solicitor engaging in legal practice:
- (a) to a court;
  - (b) to the Legal Services Commissioner; or
  - (c) to the council.
- 27.3 For the purposes of rule 27.1, an undertaking given by an employee of a law practice, whether or not the employee is a solicitor, shall be deemed to be an undertaking given by the law practice unless the employee being a solicitor, makes expressly clear that the undertaking is the employee's personal undertaking and not that of the employer.

#### Commentary

As to the power of a court to punish for contempt arising from a failure to comply with an undertaking: see *Lade & Co Pty Ltd v Black* [2005] QSC 325.

### 28 Communications

A solicitor must not, in connection with the practice of law, in any communication with another person:

- 28.1 represent to that person that anything is true which the solicitor knows, or reasonably believes, is untrue; or
- 28.2 make any statement that is calculated to mislead or intimidate the other person, and which grossly exceeds the legitimate assertion of the rights or entitlement of the solicitor's client; or
- 28.3 threaten the institution of criminal or disciplinary proceedings against the other person in default of the person's satisfying a concurrent civil liability to the solicitor's client.
- 28.4 where the other person is not, to the solicitor's knowledge, represented by another legal practitioner, assert that the other person should submit to a personal interview or do some act that might affect the legal rights of that person without first suggesting that the person seek independent legal advice.

28.5 make any statement that is abusive, offensive or insulting or which is unbecoming of a solicitor or which could bring the profession into disrepute.

## **29 Debt collection or mercantile agencies**

29.1 A solicitor must not allow the solicitor's business name or stationery to be used by a debt collection, or mercantile, agent in a manner that is likely to mislead the public.

29.2 A solicitor who receives, from a debt collection or mercantile agent, instructions to act for a client creditor, must ensure that:

29.2.1 the solicitor's relationship to the agent is fully disclosed to the client;

29.2.2 the information required to be disclosed to the client by any relevant legislation and these Rules is communicated to the client;

29.2.3 the solicitor maintains direct control and supervision of any proceedings and any correspondence or communication with the client and the client's debtor to which correspondence or communication the solicitor is or purports to be a party on behalf of the client; and

29.2.4 that any money recovered on behalf of the client is accounted for by the solicitor.

## Legal practice

### (Statement of general principle)

A solicitor is endowed by law with considerable privileges, including exclusive entitlement to appear in some courts and tribunals, exclusive entitlement to conduct some transactions and draw some documents, and special protection against disclosure of client confidences. These privileges require that the community has confidence that a solicitor must at all times be fit to enjoy those privileges. A solicitor ought also to act in ways which uphold the system of administration of justice in relation to which those privileges are conferred.

### 30 Standard of conduct

A solicitor must not engage in conduct, whether in the course of practice or otherwise, which is:

- 30.1 dishonest;
- 30.2 calculated, or likely to a material degree, to:
  - (a) be prejudicial to the administration of justice;
  - (b) diminish public confidence in the administration of justice;
  - (c) adversely prejudice a solicitor's ability to practice according to these rules.

### 31 Conducting another business

31.1 A solicitor who engages in the conduct of another business concurrently, but not directly in association, with the conduct of the solicitor's legal practice must:

- 31.1.1 ensure that the other business is not of such a nature that the solicitor's involvement in it would be likely to impair, or conflict with, the solicitor's duties to clients in the conduct of the practice;
- 31.1.2 maintain separate and independent files, records and accounts in respect of the legal practice, and the other business;
- 31.1.3 disclose to any client of the solicitor, who, in the course of dealing with the solicitor, deals with the other business, the solicitor's financial or other interest in that business. The disclosure should be acknowledged in writing by the client and contain the following minimum information:
  - (i) the name and address of the client/customer and the name of the business;
  - (ii) that the client/customer has been informed that the law practice or a Principal thereof has an interest in the business;
  - (iii) that the client/customer has been advised that the business is entirely separate from the law practice;
  - (iv) that the client/customer has been advised that they are not the clients of the solicitor/law firm for the purpose of the work to be performed on their behalf by the business;
  - (v) that the client/customer has/has not been referred to the business by the solicitor/law firm; and
  - (vi) that the client/customer has been advised that the provisions of the Act do not apply to the business and the protection of the Legal Practitioners' Fidelity Guarantee Fund does not extend to any transaction involving the business.

Upon written application by the solicitor or law practice, the Council may exempt a solicitor or law practice from the requirements of subrule 31.1.3, if satisfied that there is no reasonable likelihood of the client of the business believing that such business is part of the law practice.

31.1.4 cease to act for the client if the solicitor's independent service of the client's interest is reasonably likely to be affected by the solicitor's interest in the other business.

#### **Guidelines**

Council considers that, as a matter of best practice, solicitors should consider making a similar disclosure to a person who, although not a client of the law practice, may in dealings with the 'other business' wrongly assume they are dealing with the solicitor in his or her capacity as a solicitor. Adoption of such a practice would assist in managing this risk and enhance consumer understanding with whom they are dealing.

- 31.2 A solicitor will be deemed to be engaged in the conduct of another business where the solicitor, or an associate:
- 31.2.1 is entitled, at law or in equity, to an interest in the assets of the business which is significant or of relatively substantial value;
  - 31.2.2 exercises any material control over the conduct and operation of the business; or
  - 31.2.3 has an entitlement to a share of the income of the business which is substantial, having regard to the total income which is derived from it.
- 31.3 To remove any doubt, this Rule does not apply to either:
- 31.3.1 a legal practitioner director or an Australian legal practitioner employed by an incorporated legal practice that provides services other than legal services (as the solicitor's disclosure obligations are set out in section 123 of the Act); or
  - 31.3.2 a legal practitioner partner in, or an Australian legal practitioner employed by, a multi-disciplinary partnership (as the solicitor's disclosure obligations are set out in section 152 of the Act).

## **32 Referral fees – taking unfair advantage of potential clients – commissions**

- 32.1 In the conduct or promotion of a solicitor's practice, the solicitor must not:
- 32.1.1 accept a retainer to provide legal services to a person, who has been introduced or referred to the solicitor by a third party to whom the solicitor has given or offered to provide a fee, benefit or reward for the referral of clients or potential clients, unless the solicitor has first disclosed to the person referred the solicitor's arrangement with the third party; or
  - 32.1.2 seek a retainer for the provision of legal services in a manner likely to oppress or harass a person who, by reason of some recent trauma or injury, or other circumstances, is, or might reasonably be expected to be, at a significant disadvantage in dealing with the solicitor at the time when the retainer is sought.
- 32.2 A solicitor must not act for a client in any dealing with a third party from whom the solicitor may receive, directly or indirectly, any fee, benefit or reward in respect of that dealing unless:
- 32.2.1 the solicitor is able to advise and, in fact, advises the client free of any constraint or influence which might be imposed on the solicitor by the third party;
  - 32.2.2 the solicitor's advice is fair and free of any bias caused by the solicitor's relationship with the third party; and
  - 32.2.3 the nature and value of any fee, benefit, or reward, which may be received by the solicitor, are:
    - (a) fair and reasonable, having regard to objective commercial standards; and
    - (b) are disclosed fully in writing to the client before the dealing is commenced.

## Guidelines

In relation to the sale/purchase of residential properties, solicitors acting for the buyer would be well aware of their obligations pursuant to section 365B of the *Property Agents and Motor Dealers Act 2000* to issue the Lawyer's Certificate in the approved form (currently Form 32a). Whether a solicitor has a 'business relationship' with the Seller's Agent based upon the number of referrals made by that Agent to the solicitor, solicitors are reminded of the Guidelines issued by the Society concerning this subject which provide, amongst other things:

'A consistent referral source from a Seller's Agent to you of Buyers who do not have their own solicitor may, depending on the number of referrals, remove your ability to confirm genuine independence. Referrals will be a question of fact and degree for each practitioner to consider.'

### 33 Sharing of receipts

Subject to the provisions of Chapter 2, Part 2.7 and the provisions of any barristers rule made pursuant to section 220 of the Act, a solicitor must not, in relation to the conduct of the solicitor's practice, or the delivery of legal services, share, or enter into any arrangement for the sharing of, the receipts arising from the provision of legal services by the solicitor, with:

- 33.1 any disqualified person;
- 33.2 any person convicted of an indictable offence that involved dishonest conduct, whether or not a conviction was recorded, unless otherwise approved by Council; or
- 33.3 any other person which limits or restricts the exercise by the solicitor of authority or responsibility for the management of the practice or the discharge of the solicitor's professional obligations.

### 34 Conducting a branch office

A practitioner must exercise effective control of each office maintained by the practitioner for the purpose of conducting the practitioner's practice and, in particular, the practitioner must ensure that at each office:

- 34.1 the practitioner or a partner of the practitioner undertakes personally, or supervises adequately, the work done and the legal services provided;
- 34.2 all work undertaken and all communications received are given prompt attention; and
- 34.3 the qualifications and status of the persons engaged in the practitioner's practice are represented accurately to any persons who have dealings with the practitioner's practice.

### 35 Sharing of premises

- 35.1 This Rule is to be read in conjunction with rule 31.
- 35.2 Where a law practice shares an office with any other entity or business engaged in another calling, the solicitor who provides the services for the law practice must disclose to any client who, in the course of dealing with the law practice, deals with the other entity or business, the following minimum information, which disclosure should be acknowledged in writing by the client:
  - (i) the name and address of the client/customer and the name of the entity or business;
  - (ii) that the client/customer has been advised that the entity or business is entirely separate from the law practice;
  - (iii) that the client/customer has been advised that they are not the clients of the law practice for the purpose of the work to be performed on their behalf by the other entity or business;
  - (iv) that the client/customer has/has not been referred to the entity or business by the law practice; and

- (v) that the client/customer has been advised that the provisions of the Act do not apply to the other entity or business and the protection of the Legal Practitioners' Fidelity Guarantee Fund does not extend to any transaction involving the other entity or business.
- 35.3 Upon written application by a law practice, the Council may exempt the law practice from the requirements of this rule, if satisfied that there is no reasonable likelihood of the client of the other entity or business believing that such entity or business is part of the law practice.
- 35.4 This rule does not apply to an incorporated legal practice or a multi-disciplinary partnership in the provision of its non-legal services.

#### Commentary

So as to remove any doubt, subrule 35.4 makes it clear that this rule does not apply to an ILP or a MDP *in the provision of its non-legal services*. This is because the Act imposes disclosure obligations on an ILP, when it provides services other than legal services (see section 123), and a MDP (see section 152).

The purpose of this rule and rule 31 is to protect consumers from potentially confusing situations and to bring to consumers attention that the provisions of the *Legal Profession Act 2007* and its beneficial schemes (such as the Legal Practitioners Fidelity Guarantee Fund and the requirement that all solicitors be covered by professional indemnity insurance) only extend to the provision of legal services. Such a policy is consistent with the underlying policy of sections 123 and 152 of the *Legal Profession Act 2007* dealing with the disclosure obligations placed on an ILP that provides services other than legal services and a MDP, respectively.

## 36 Advertising

A solicitor must not advertise the solicitor's expertise or practice if that advertising:

- 36.1 is false;
- 36.2 is misleading or deceptive, or likely to mislead or deceive;
- 36.3 is vulgar, sensational, or otherwise as would bring or be likely to bring a court, the solicitor, another solicitor or the legal profession into disrepute;
- 36.4 uses the words 'accredited specialist' or a derivative of those words, including the associated post-nominals, unless the solicitor is an accredited specialist, in which case the accredited specialist must use those words, or a derivative of those words, including the associated post-nominals, in compliance with the agreement entered into by the accredited specialist with the Queensland Law Society concerning the use of those words, or derivatives of those words, and the associated post-nominals;
- 36.5 uses the accredited specialist logo (reproduced below) except as permitted by the agreement entered into by the accredited specialist with the Queensland Law Society concerning use of the logo.

The Accredited Specialist logo:



#### Guidelines

In relation to advertising for personal injuries – see the Guidelines published by the Legal Services Commissioner on his website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au). These guidelines were published in the July 2006 edition of *Proctor*.

## Commentary

Sections 153 and 88A of the *Corporations Act 2001* require a company to set out its name and ACN on business letters, statements of account, invoices, receipts, orders for goods/services and official notices. The relevant provisions of the *Corporations Act* are set out below.

### 153 Using a name and ACN on documents

- (1) A company must set out its name on all its public documents and negotiable instruments.
- (2) Subject to sections 154 and 155, if the company's ACN is not used in its name, the company must also set out with its name, or with 1 of the references to its name, either:
  - (a) the expression "Australian Company Number" followed by the company's ACN; or
  - (b) if the last 9 digits of the company's ABN are the same, and in the same order, as the last 9 digits of its ACN – the words "Australian Business Number" followed by the company's ABN.

If the company's name appears on 2 or more pages of the document or instrument, this must be done on the first of those pages.

Note 1: If a company has a common seal, its name and ACN or ABN must be set out on the seal (see section 123).

Note 2: A public company must display its name at its registered office. Every company must display its name at places at which the company carries on business and that are open to the public (see section 144).

Note 3: Section 149 provides that "ACN" is an acceptable abbreviation of "Australian Company Number", and that "ABN" is an acceptable abbreviation of "Australian Business Number".

Note 4: In any case where the company's ACN would be used, the company's ABN may be used instead if section 1344 is satisfied.

- (3) An offence based on subsection (1) or (2) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

### 154 Exception to requirement to have ACN on receipts

A company does not have to set out the expression "Australian Company Number" followed by its ACN on a receipt (for example, a cash register receipt) that sets out information recorded in the machine that produced the receipt.

### 155 Regulations may exempt from requirement to set out information on documents

The regulations may exempt a specified company, or a class of companies, from the requirement in subsection 153(2) to set out information on its public documents and negotiable instruments. The exemption may relate to specified documents or instruments, or a class of documents or instruments.

### 88A Public document of a body corporate

- (1) Subject to this section, *public document*, in relation to a body, means:
  - (a) an instrument of, or purporting to be signed, issued or published by or on behalf of, the body that:
    - (i) when signed, issued or published, is intended to be lodged or is required by or under this Act or the ASIC Act to be lodged; or
    - (ii) is signed, issued or published under or for the purposes of this Act, the ASIC Act or any other Australian law; or
  - (b) an instrument of, or purporting to be signed or issued by or on behalf of, the body that is signed or issued in the course of, or for the purposes of, a particular transaction or dealing; or
  - (c) without limiting paragraph (a) or (b), a business letter, statement of account, invoice, receipt, order for goods, order for services or official notice of, or purporting to be signed or issued by or on behalf of, the body.
- (2) A thing is not a public document of a body if it:
  - (a) is applied, or is intended or required to be applied:
    - (i) to goods; or
    - (ii) to a package, label, reel or thing in or with which goods are, or are to be, supplied; and
  - (b) is so applied, or is intended or required to be so applied, for a purpose connected with the supply of the goods.'

### **37 Supervision**

A principal is responsible for exercising reasonable supervision over solicitors and all other employees in their provision of legal services by the law practice.

### **38 Mortgage financing and managed investment schemes**

A solicitor must not, whether as a principal, officer or employee of the law practice, in conjunction with or as part of the law practice,:

- 38.1 conduct a managed investment scheme, or
- 38.2 engage in mortgage financing,

even if the law practice or solicitor is the holder of an Australian financial services licence under the *Corporations Act 2001* covering the provision of the service set out in subrule 39.1 and whether or not any exemption exists from the requirement to hold an Australian financial services licence.

## Appendix 1 – Legal Services Commission’s Guidelines – Charging Outlays and Disbursements

Note: This Appendix does not form part of the *Legal Profession (Solicitors) Rule 2007*.

Guidelines for charging outlays and disbursements have been set by the Legal Services Commissioner in consultation with the Society.

Those guidelines were originally published in the June 2006 edition of *Proctor* for the information of practitioners to inform them of the guidelines and the Commissioner’s proposed approach to initiating disciplinary proceedings in respect of:

- 1 practitioners who have, in the past, billed outlays and disbursements in a manner different to that expressed in the guidelines; and
- 2 practitioners who, in the future, bill outlays and disbursements in a manner inconsistent to that expressed in the guidelines.

After further consultation with the Society, the guidelines have been amended to:

- 1 Clarify that, as a general rule, the Commissioner does not expect law practices to review their past bills to identify and refund any postages and petties/sundries, photocopying and facsimiles charged to clients in excess of the actual amounts paid out on behalf of clients.
- 2 Clarify that law practices should only bill postages and petties/sundries, photocopying and facsimiles to clients as outlays or disbursements if they are capable of and have been accurately costed.
- 3 Clarify that if postages and petties/sundries, photocopying and facsimiles cannot be accurately costed, they can be billed to clients under the heading ‘professional fees’ provided the amounts are agreed with or adequately disclosed to clients prior to or at the time the clients retain the law practice to act on their behalf.

For example, a law practice might agree to charge professional fees at the rate of \$300.00 per hour plus an amount of 50c (or some other amount) for each page photocopied on behalf of the client, plus an amount of 50c per page (or some other amount) for each page sent or received by facsimile and plus an amount of \$30.00 (or some other amount) for postage and petties (or sundries).

The revised guidelines were published in the July 2006 edition of *Proctor* and are reproduced below.

### **‘Guidelines for charging outlays and disbursements’<sup>1</sup>**

The Legal Services Commissioner and the Queensland Law Society have agreed a common position regarding billing practices in relation to outlays and disbursements after having considered a number of circumstances in which law practices charged more for outlays and disbursements than the amounts they actually expended.

We believe that a law practice is not entitled to charge a client for the practice’s overheads as if they were outlays or disbursements.<sup>2</sup> The words ‘outlay’ and ‘disbursement’ in ordinary speech refer to amounts that have actually been paid out on a client’s behalf to some other person or entity.

It has come to our attention, however, that some law practices are charging undisclosed mark ups or surcharges on the actual amounts they have paid out as outlays or disbursements.

<sup>1</sup> These guidelines are a slightly expanded version of the guidelines that were published in the June edition of the Queensland Law Society’s publication, *Proctor*.

<sup>2</sup> See *Equuscorp Pty Ltd v Wilmoth Field Warne (No 4)* [2006] VSC 28 Byrne J, with particular reference to disbursements at paragraphs 53-58.

It has come to our attention also that some law practices are charging their clients and describing as outlays, or disbursements, items including the following: client registration fees, file opening fees, archive fees, file retrieval fees, file closing fees, in-house stamping administration fees, Citec administration fees, contributions to professional indemnity insurance, bank charges (as distinct from bank cheque fees) and settlement fees (when there is no agent). Similarly, some law practices are charging their clients stationery, printing and email charges and describing them as outlays or disbursements.

Neither undisclosed mark ups nor surcharges nor any of the above or other like charges are outlays or disbursements, and in our view it is misleading and arguably dishonest to describe them as such.

Some items including postage and petties/sundries, photocopying and facsimiles have traditionally been billed to clients as outlays or disbursements when the actual cost to the clients either hasn't or can't be accurately identified. In our view, such items should only be billed to clients as outlays or disbursements if they are capable of and have been accurately costed. If not, they may be billed to clients under the heading 'professional fees' provided the amounts are agreed with or adequately disclosed to clients prior to or at the time the clients retain the law practice to act on their behalf.

### **Principles involved in charging outlays and disbursements**

We believe that:

- without the client's informed consent,<sup>3</sup> a law practice is only entitled to charge and recover as an outlay, or disbursement, the actual amount paid out on the client's behalf.
- to obtain a client's informed consent to charge more than the amount actually paid out on the client's behalf, a law practice:
  - o must disclose to the client the amount of the proposed mark up or surcharge in either dollar terms or as a percentage of the actual amount; and
  - o make that disclosure to the client in plain English and in writing prior to or at the time the client retains the practitioner; and
  - o ensure the disclosure isn't 'buried in the fine print'. It may take the form, where there is no client agreement, of a notice designed specifically for the purpose or, where there is a client agreement or contract relating to the provision of the legal services in question, of a discrete schedule or annexure to the agreement or contract.

### **Principles involved when services are provided by an associated or related entity**

Similarly, we believe that:

- a law practice is not entitled to charge or recover as an outlay or disbursement amounts paid to the practice's service company, or an entity in which one or more of the partners of the law practice has an interest, whether direct or indirect, unless the law practice:
  - o discloses to the client its interest in the service company or entity; and
  - o discloses the actual amount paid out on the client's behalf to a third party and the amount of the fees, mark up, or surcharge proposed to be paid to the service company or entity in excess of that actual amount, either in dollar terms or as a percentage of the actual amount paid out on behalf of the client; and
  - o makes those disclosures to the client in plain English in writing prior to or at the time the client retains the practitioner; and

<sup>3</sup> See GE Dal Pont, *Lawyers Professional Responsibility*, 3rd edition, at pp 142-144.

- o ensures the disclosures aren't 'buried in the fine print'. They may take the form, where there is no client agreement, of a notice designed specifically for the purpose or, where there is a client agreement or contract relating to the provision of the legal services in question, of a discrete schedule or annexure to the agreement or contract.

### **The Commissioner's approach to initiating disciplinary proceedings for breaches of these principles**

The Commissioner and the Society having agreed these principles, it remained for the Commissioner to decide how to deal with breaches, past and future.

The Commissioner will decide each matter on its own individual merits in accordance with the Commission's *Prosecution Guidelines*<sup>4</sup> but, as a general rule, in the absence of any demonstrable fraud or dishonesty, the Commissioner:

- will be disinclined to initiate disciplinary proceedings in relation to breaches presently being considered by the Commissioner and the Society provided the law practices concerned review their files and refund clients any undisclosed mark ups or surcharges or other charges in excess of the amounts actually paid by the law practice or an associated or related entity on behalf of the clients and that were charged to the clients after 1 July 2004;
- will be disinclined to initiate disciplinary proceedings in relation to breaches which occurred *before* the publication of these guidelines<sup>5</sup> provided the law practices concerned can demonstrate that they have, prior to the alleged breaches coming to the Commissioner's or the Society's attention, reviewed their files and refunded clients any undisclosed mark ups or surcharges or other charges in excess of the amounts actually paid by the law practice or an associated or related entity on behalf of the clients and that were charged after 1 July 2004; and
- will have no such disinclination and will initiate disciplinary proceedings in relation to breaches which occur *after* the publication of these guidelines.

In short, the Commissioner expects law practices to review their billing practices to ensure they don't bill their clients more for outlays or disbursements than the amounts they or an associated or related entity actually pay out and, if they have charged for and been paid more than the amounts they actually paid out, to refund their clients for any such amounts charged to them after 1 July 2004.

The Commissioner does not however expect law practices to review their past bills to identify and refund any postage and petties/sundries, photocopying and facsimiles charged to clients in excess of the actual amounts paid out.<sup>7</sup>

<sup>4</sup> The Commission's *Prosecution Guidelines* are published on its website at [www.lsc.qld.gov.au](http://www.lsc.qld.gov.au).

<sup>5</sup> The Commission published the guidelines on 1 June 2006 to coincide with their publication in *Proctor*. Additionally, the President of the Law Society wrote to the principals of all Queensland law firms on 29 May 2006 to draw their attention to the forthcoming article in *Proctor* and the Society intends to draw them to the attention of its members more generally in its weekly publication, *QLS Update*, on 6 June 2006.

## **Appendix 2 – Execution of Search Warrant on Solicitor’s Premises – Queensland Police Procedures**

Following is the Queensland Police Service’s procedures concerning the execution of search warrants on a solicitor’s practice. These procedures were current as of June 2007.

### **‘Execution of search warrants on premises of lawyers**

#### **Legal professional privilege**

##### **Procedure**

Certain oral and written communications between lawyers and clients are immune from examination by virtue of legal professional privilege. The privilege applies under the following conditions:

- (i) communications passing between a client and a legal adviser may not be given in evidence without the consent of the client, if they were made:
  - (a) with reference to litigation that was actually taking place or was reasonably expected by the client to take place; or
  - (b) to enable the client to obtain, or the adviser to give legal advice; or
- (ii) in relation to documents or copies of documents, brought into existence for the sole purpose of submission to legal advisers for obtaining or giving legal advice or for use in legal proceedings or contemplated legal proceedings;

No legal professional privilege applies to:

- (i) documents which are the means of carrying out a transaction, or constitute evidence of a transaction, e.g. a contract or conveyance, where the transaction is not of itself the giving or receiving of legal advice, or part of the conduct of actual or anticipated litigation; or
- (ii) communications which would otherwise amount to participation in an offence.

Any document to which legal professional privilege applies and in respect to which a determination has been made by the issuing authority may not be retained or examined by an officer, either to produce as evidence or to use in the course of an investigation.

#### **Executing warrants generally**

##### **Procedure**

In circumstances where a claim of legal professional privilege is raised by a claimant as a result of the execution of a search warrant, officers should:

- (i) record the number of pages of the document(s) and place the document(s) subject to the claim of legal professional privilege in a sealed container;
- (ii) obtain from the claimant:
  - (a) a description as to the nature of each document placed in the sealed container; and
  - (b) the grounds upon which the claim is based. The answers provided by a claimant should be recorded.
- (iii) ensure the container is sealed in the presence of the claimant. The sealed container should then be signed by both the investigating officer and the claimant;
- (iv) advise the claimant that the documents have been seized provisionally and will be dealt with in accordance with the law;

- (v) ensure that anything seized is dealt with as prescribed by the Act under which the warrant was issued and place an endorsement on the executed warrant that the documents are subject to a claim of legal professional privilege; and
- (vi) within 30 days deliver the sealed container to a Justice of the Peace (Magistrates Court) or a Magistrate, who may make a determination in accordance with s426: 'Application for order in relation to seized things' of the *Police Powers and Responsibilities Act* as to whether the documents are subject to legal professional privilege. The Magistrate may also direct who will have custody of the documents.

Where a Justice of the Peace, (Magistrates Court) or a Magistrate cannot be located, the sealed container subject to the claim of legal professional privilege should be delivered to a clerk of the court pending a determination by the Justice of the Peace (Magistrates Court) or Magistrate.

The officer who delivers the sealed container to a clerk of the court, Justice of the Peace (Magistrates Court) or Magistrate for a determination is to advise, as soon as practicable:

- (i) the officer in charge of police prosecutions corps for the magistrates court district in which the determination is to be made; and
- (ii) the commissioned officer in line command of that officer so as to consider whether the matter should be directed to the Director of Public Prosecutions.

## **Executing warrants on lawyers' premises**

### **Order**

Officers intending to search the premises of a lawyer for documents are to prepare the search warrant and grounds upon which it relies in terms which are as specific as possible. Officers are to ensure warrants and grounds are not prepared in vague or generalised terms, but are to, as far as is possible, identify the specific documents sought (see s68 'Search warrant application' of the *Police Powers and Responsibilities Act*).

If the application for the warrant is to be made to a magistrate in accordance with s68 of the *Police Powers and Responsibilities Act*, the application is to indicate that a direction is required in the warrant by the magistrate for the person in possession of the documents to give all documents relevant to the offence for which the warrant is sought to police.

Officers intending to search the premises of a lawyer are to obtain the warrant from a Magistrate unless otherwise required to obtain the warrant from a judge or Supreme Court judge.

### **Procedure**

After obtaining a search warrant for the premises of a lawyer, the following steps should be taken in the execution thereof:

- (i) on arrival at the lawyer's premises, the senior officer present should explain the purpose of the search and invite the lawyer to cooperate with police in the conduct of the search. Identification of all officers present should be provided to the lawyer. Officers and persons comprising the search team should be kept to a minimum;
- (ii) if no lawyer is in attendance at the premises, then, if it is practicable to do so, the premises or that part of the premises which is of interest should be sealed and the execution of the warrant deferred for a reasonable period consistent with the prevailing circumstances to allow attendance of a lawyer;
- (iii) if access to the office index system is required, request the lawyer to explain how the system functions so that all necessary documents can be located with a minimum of disturbance;

- (iv) generally, the documents required by the officer will normally be located by the lawyer. The lawyer should compile a list of the documents showing:
  - (a) general information as to the nature of each document; and
  - (b) the number of pages in each document;
- (v) a reasonable time should be allowed for the lawyer to obtain legal advice where such a request is made;
- (vi) a reasonable time should be allowed for the lawyer to consult with any client/s;
- (vii) if a claim for privilege is made by the lawyer concerning the documents, the officer should ask the lawyer on whose behalf and on what grounds the claim is made. The answers to these questions should be recorded;
- (viii) if a claim for privilege is made concerning any of the documents, the list made by the lawyer should be noted and the documents placed in a sealed container which should then be signed by both the officer and the lawyer. The lawyer should be advised that the documents are provisionally seized pursuant to the search warrant and will be dealt with in accordance with the law;
- (ix) if a claim of privilege is made concerning any of the documents; the senior officer present and the lawyer should then deliver the sealed container, the list prepared by the lawyer and the executed search warrant forthwith to the Magistrate, or if applicable, judge or Supreme Court judge who issued the warrant;
- (x) where a claim of privilege is made concerning any of the documents the issuer will also direct who will have custody of the documents; and
- (xi) advise the lawyer from whom the documents were seized that they may inspect any of the documents held in the custody of police in accordance with the provisions of s381: 'Right to inspect seized documents' of the *Police Powers and Responsibilities Act*.

### **Action where lawyer uncooperative**

#### **Procedure**

The steps outlined above have been developed after consultation with the Law Society and Bar Association and those organisations have distributed guidelines to their members. As such, an officer who executes a search warrant on the premises of a lawyer could expect the cooperation of the lawyer to the extent indicated previously in this section.

#### **Policy**

Where a lawyer elects not to cooperate with an officer in the execution of a warrant, the officer should advise the lawyer that the search will proceed in any case. The lawyer should also be advised that because the officer is not familiar with the office index system, a search of all files and documents in the office may be necessary to give full effect to the authority conferred by the warrant.

Where the lawyer still refuses to cooperate and does not claim privilege, or refuses to cooperate and claims privilege, the search should go ahead with the following conditions:

- (i) the lawyer should be advised that a document will not be seized unless, in the opinion of the officer, it falls within the scope of the warrant; and
- (ii) during the course of the search, any document located which may be subject to a future claim for privilege should be brought to the attention of the lawyer and should be dealt with in accordance with the provisions outlined above.'

## Appendix 3 – Exercise by the ATO of its Access Powers – Access to Lawyers’ Premises

Following, is a reproduction of the guidelines agreed between the ATO and the Law Council of Australia on this topic.

### Introduction

- 1 These guidelines have been agreed between the Commissioner of Taxation (Commissioner) and the Law Council of Australia (Council) in relation to the exercise of the access powers provided under taxation legislation at lawyers’ premises in circumstances where a claim of legal professional privilege is made.

Section 263 of the *Income Tax Assessment Act* 1936 (ITAA 1936) reads:

- The Commissioner, or any officer authorised by him in that behalf, shall at all times have full and free access to all buildings, places, books, documents and other papers for any of the purposes of this Act, and for that purpose may make extracts from or copies of any such books, documents or papers.
- An officer is not entitled to enter or remain on or in any building or place under this section if, on being requested by the occupier of the building or place for proof of authority, the officer does not produce an authority in writing signed by the Commissioner stating that the officer is authorised to exercise powers under this section.
- The occupier of a building or place entered or proposed to be entered by the Commissioner, or by an officer, under subsection (1) shall provide the Commissioner or the officer with all reasonable facilities and assistance for the effective exercise of powers under this section.

Penalty: 30 penalty units.

- 2 Other tax legislation contains similar provisions viz., section 12E of the *Sales Tax Procedure Act* 1934 and section 127 of the *Fringe Benefits Tax Assessment Act* 1986, section 66 of the *Taxation Administration Act* 1953 and section 58 of the *Debts Tax Administration Act* 1982. The guidelines apply equally to all taxation legislation, operative at the relevant time.
- 3 Difficulties are sometimes experienced where a taxation officer wishes to inspect documents and records located at the office of a solicitor or the chambers of a barrister. In two cases, *FCT & Ors v Citibank Ltd* 89 ATC 4268; (1989) 20 ATR 292 and *Allen & Hemsley v DFCT & Ors* 89 ATC 4294; (1989) 20 ATR 321, the Full Federal Court held that the doctrine of legal professional privilege applies to restrict the powers of the Commissioner under section 263. Accordingly, the power of access in section 263 should be read as not referring to documents to which the privilege applies. The Court also held the taxation officer was obliged to ensure that Citibank and in particular its staff had, in the circumstances, adequate opportunity to make claims of privilege on behalf of its clients.
- 4
  - (a) The Commissioner recognises that a lawyer has an obligation to a client or former client not to permit access to privileged documents unless the client has waived the privilege and that difficulties could arise in certain circumstances in determining the proper application of the law.
  - (b) The Council recognises the Commissioner’s right to access to all documents that are not subject to the claim of privilege. The Commissioner’s right of access to books, documents and other papers is limited only by the requirement that the power must be exercised in good faith and in the proper exercise of the Commissioner’s powers under the relevant taxation laws.

- 5 It is therefore seen as desirable by the Commissioner and the Council that an agreed procedure should be laid down for dealing with documents which may be subject to claims of legal professional privilege.
- 6 Accordingly, these guidelines have been agreed between the Commissioner and the Council. The latter organisation through its constituent bodies, the Bar Associations and the Law Societies of the States and Territories, represents the great majority of Australia's practising lawyers.
- 7 Taxation officers will follow the guidelines when seeking access to documents held on lawyers' premises. For its part, the Council encourages lawyers to positively assist in meeting access requests made by taxation officers in the proper exercise of the Commissioner's powers under the relevant taxation laws.
- 8 The aim of these guidelines is to provide taxation officers and lawyers with guidelines as to the procedure to be followed where issues of legal professional privilege arise in relation to documents on lawyers' premises to which access is sought pursuant to a relevant Act, being guidelines which will:
- lawyers have the opportunity at all times to make any proper claim of legal professional privilege on behalf of their client in respect of privileged documents;
  - ensure, while claims are made and determined, the integrity of the documents is assured;
  - minimise both the frequency and volume of disputes;
  - resolve any disputes as quickly as possible and with minimal disruption to all parties; and
  - assist taxation officers in obtaining access to documents which are not the subject of privilege claims.

### **Legal Professional Privilege**

- 9 Legal professional privilege attaches to confidential communications passing between a client and his/her or its lawyer if the communications were made for the dominant (previously sole – High Court changed test in *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49; (1999) 2000 ATC 4042; (1999) 43 ATR 506) purpose of:
- enabling the client to obtain or the adviser to give legal advice; or
  - litigation that is actually taking place or was in the contemplation of the client.
- 10 Legal professional privilege also attaches to confidential communications passing between the lawyer or client and third parties if made for the dominant purpose of litigation which is actually taking place or is in contemplation at the time (*Esso Australia Resources Ltd v Federal Commissioner of Taxation, supra*).
- 11 The communication will be privileged only where the lawyer was acting in that capacity and the relationship of lawyer and client existed: *Cross on Evidence* 6th Australian Ed at p 715.
- 12 The privilege does not apply to communications made:
- before the client contemplated obtaining, or the lawyer contemplated giving, legal advice; or
  - for, or to facilitate the commission of, a fraud, crime or illegal purpose.

- 13 Legal professional privilege does not extend:
- to protect things lodged with a lawyer simply for the purpose of obtaining immunity from production: *FCT v ANZ Banking Group Ltd* 79 ATC 4039; (1979) 9 ATR 483 and *Baker v Campbell* (1983) 49 ALR 385; (1983) 153 CLR 52; or
  - to physical objects, for example, cash or bullion contained in a safety deposit box: *Baker v Campbell, supra*.
- 14 The privilege is the privilege of the client, not that of the lawyer, and may be waived by the client only.

### **Documents that would usually be privileged**

- 15 Only documents representing legal advice or created or brought into existence for the dominant purpose either of submission to lawyers for advice, or use in actual or contemplated legal proceedings, fall within the privilege.
- 16 In *Trade Practices Commission v Sterling* (1978) 36 FLR 244 at 245, 246 Lockhart J described a number of classes of documents which attracted legal professional privilege. His Honour made it clear that legal professional privilege was not limited to these types of documents. The purpose of setting them out was to give guidance to those making an assessment as to whether legal professional privilege applied. Those classes of documents are as follows:
- Any communication between a party and his professional lawyer if it is confidential and made to or by the professional adviser in his professional capacity and with a view to obtaining or giving legal advice or assistance; notwithstanding that the communication is made through agents of the party and the solicitor or agent of either of them.
  - Any document prepared with a view to its being used as a communication of this class, although not in fact so used.
  - Communications between the various lawyers of the client, for example between the solicitor and his partner or his city agent with a view to the client's obtaining legal advice or assistance.
  - Notes, memoranda, minutes or other documents made by the client or officers of the client or the lawyer of the client of communications which are themselves privileged, or containing a record of those communications, or relate to information sought by the client's lawyer to enable him to advise the client or to conduct litigation on his behalf.
  - Communications and documents passing between the party's solicitor and a third party if they are made or prepared when litigation is anticipated or commenced, for the purposes of the litigation, with a view to obtaining advice as to it or evidence to be used in it or information which may result in the obtaining of such evidence.
  - Communications passing between the party and a third party (who is not the agent of the solicitor to receive the communication from the party) if they are made with reference to litigation either anticipated or commenced, and at the request or suggestion of the party's solicitor; or, even without any such request or suggestion, they are made for the purpose of being put before the solicitor with the object of obtaining his advice or enabling him to prosecute or defend an action.
  - Knowledge, information or belief of the client derived from privileged communications made to him by his solicitor or his solicitor or his agent.

- 17 Examples of privileged communications or documents include:
- A detailed bill of costs or memorandum of fees but only if it discloses the nature of the advice sought or given (*Packer v DFCT* 84 ATC 4666).
  - Advice and opinions of a solicitor or legal counsel (*Brewer v Castles (No. 3)* (1984) 52 ALR 581).
  - A solicitor's notes of a conference with officers of a client company (*Macedonia Pty Ltd v FCT* (1987) 18 ATR 929).
  - Copies of privileged documents generally will also be privileged (*Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652).
  - Drafts or copies of documents created for the purpose of submitting a report to or seeking the advice of a solicitor (*Brambles Holdings v Trade Practices Commission (No. 3)* (1981) 58 FLR 452).
  - Briefs and copies of solicitors' briefs to counsel.
  - Written communications, formal or informal, by the client to solicitor or barrister or vice versa.
  - Solicitor's diary notes including Counsel's advice.

These are merely examples; the above list is not intended to be exhaustive and each is subject to the requirements of paragraph 9.

- 18 Whether and in what circumstances legal advice given by an in-house lawyer is subject to privilege has been discussed in a number of authorities (*Waterford v Commonwealth of Australia* (1987) 163 CLR 54; *DFCT v Citibank* 88 ATC 4941; *Alfred Crompton Amusement Machines Ltd v Customs & Excise Commissioners* [1972] 2 QB 102 at p129; and *A-G (NT) v Kearney* (1985) 158 CLR 500). Until a conclusive precede

### **Documents not covered by privilege**

- 19 Having regard to the authorities, the following non-exhaustive categories of communications would not, in the absence of unusual circumstances, attract privilege:
- Documents which constitute or evidence transactions; for example, contracts, conveyances, declarations of trust, offers or receipts, even if they are delivered to a solicitor or counsel for advice or use in litigation *Baker v Campbell*, per Murphy J at p 409 *supra*; also accounting, financial or banking records, invoices, company minutes, etc.
  - Documents which would otherwise satisfy the requirements of privilege but which were not intended to be confidential when made; *Lloyd v Mostyn* 152 ER 558 and *Baker v Campbell*, *supra*.
  - Documents or communications made for or involving the participation in a fraud or an illegal purpose. (*Clements, Dunn & Bell Pty Ltd v Commissioner Federal Police*) Murphy J, in *Baker v Campbell*, *supra*, said:

‘It is not available if a client seeks legal advice in order to facilitate the commission of crime or fraud or civil offence (whether the adviser knows or does not know of the unlawful purpose).’
  - A solicitor's trust account records; *Packer and Ors v Deputy Federal Commissioner of Taxation* 84 ATC 4666 and *Allen Allen & Hemsley v DFCT & Ors* (1988) 81 ALR 617, 626.

- Documents brought into existence for more than one purpose and the claimant is unable to prove that the dominant purpose of the communication was the giving or receiving of legal advice or for use in litigation taking place or reasonably anticipated.
  - Fax books recording faxes sent, to the extent that they do not disclose the actual advice (*Sharp v DFCT* 88 ATC 4165, 4184).
  - A written communication directing a solicitor to send money to a third party, *Allen Allen & Hemsley v DFCT, supra*.
  - Lists of clients or associates, *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240 and *McCormack v DCT* 2001 ATC 4740.
- 20 Where a taxation officer has requested access to documents held by a taxpayer and the taxpayer claims privilege, the taxpayer will be given the opportunity to request that the documents be delivered to his/her/its lawyer. If the taxpayer requests such action the documents are to be placed in envelopes/container and sealed to the satisfaction of the taxation officer. The envelopes/container are then to be delivered, in the company of the taxation officer and the taxpayer to the taxpayer's lawyer, whereupon the guidelines as set out below are to be followed. While the guidelines are concerned with access to lawyer's premises the spirit of the guidelines will apply where a solicitor or barrister has received a notice under section 264 of the ITAA (or its equivalent).

### Guidelines

- 21 These guidelines proceed on the assumption that the taxation officer seeking access to documents has been properly authorised by the Commissioner or a delegate of the Commissioner. Taxation officers are expected to demonstrate courtesy, integrity, fairness and impartiality during access to the lawyers' premises and will endeavour not to draw attention to the proceedings at hand.
- 22 The effect of these guidelines, in summary, is that a taxation officer will not inspect any document to which access is being sought and which is held by a lawyer, until the lawyer has been given the opportunity to claim legal professional privilege on behalf of the client in respect of any of those documents. Where a claim is made but it is disputed by the taxation officer, the taxation officer will not inspect any document the subject of the claim until either:
- the claim is abandoned or waived; or
  - the claim is dismissed by a court.
- 23 As a general rule, access to documents at a lawyers' premises would be sought after the taxation officer had given adequate notice to ensure that the lawyer will be present and provide the lawyer with an opportunity to review the documents. What represents adequate notice will depend on the facts of each case. However, in routine cases where it is unlikely that the documents sought would be privileged (for example, see paragraph 17) and an appropriate senior lawyer is available the steps outlined below may constitute adequate notice.
- 24 (a) When seeking access to documents held at the premises of a lawyer, taxation officers will:
- identify themselves by name, advise they are authorised officers of the ATO and produce their authorities (the authority should always be retained by the taxation officer and not be surrendered to another person);
  - advise they are acting under the powers conferred by section 263 of the ITAA (or its equivalent in other taxation legislation) and are making enquiries for the purpose of the relevant Act;

- indicate the types of books, documents or other papers to which access is sought;
  - seek the assistance of the occupier in facilitating access in accordance with section 263(3); and
  - make available to the occupier a copy of these guidelines, for the occupier to make a copy or to read them.
- (b) If no partner, principal or lawyer authorised by a partner or principal is in attendance at the premises then, if practicable, relevant documents or that part of the premises where they are held or believed to be held should be sealed and the access deferred for a reasonable period to enable a partner, principal or an authorised lawyer to attend. If sealing the premises is impracticable then the taxation officer, in an appropriate case, might simply await the arrival of one of the above persons.
- (c) A reasonable time will be allowed to enable the lawyer to consult his or her client(s) and/or to obtain legal advice from another lawyer.

The lawyer should seek instructions from the client(s) to accept the guidelines as set out below and enable the lawyer to give a written undertaking to the taxation officer that the document(s), subject to these guidelines will be secured (e.g., in a locked cabinet or safe) and not removed from the lawyer 's premises unless otherwise specified in these guidelines. The taxation officer would normally remain on the premises during this period.

- (d) However, where the lawyer cannot obtain the client's instructions and/or legal advice within a short space of time or where there are a substantial number of documents for the lawyer to peruse and consider claims to privilege, the taxation officer, on being satisfied as to the security of the documents sought and having received a list of the documents as outlined at paragraph 22(j)(i)–(vi) and (viii) and a written undertaking from the lawyer that the secured documents are not to be removed from the lawyer's office within 20 working days or such other period as the parties agree to, will make an appointment to return to inspect the documents at the earliest possible date.
- (e) In the circumstances where the lawyer is unable to provide a written undertaking (referred to in subparagraph 22(c)) due to the unavailability of his/her client(s) the ATO recognises that the lawyer may undertake to secure the document(s) while awaiting the instructions from his/her client but cannot be bound by that undertaking if the client demands the return of the document(s) that may be privileged.
- (f) In circumstances such as the above the taxation officer must decide on the appropriate course of action to be taken given the urgency of the matter, the documents requested and the likelihood that the client will agree to the undertaking.
- (g) Where an undertaking is not provided by the lawyer due to the instructions of the client, such action as is appropriate may be taken by the taxation officer (refer paragraphs 23 and 24).
- (h) Having informed the client(s) of the position and/or having obtained legal advice, where appropriate, the lawyer should assist the taxation officer by locating all documents which the taxation officer wishes to inspect.

If the taxation officer requires access to the office index system, the lawyer should assist, if necessary by explaining the index system to the officer.

- (i) The procedures set out below should then be followed:
- Where ATO access to documents is required and the lawyer believes some of the documents to be privileged, the taxation officer will allow the lawyer sufficient time in which to examine the documents and, if necessary, to seek advice on them. In the normal course of events, where prior notice has been given to the lawyer, it is envisaged that the lawyer will have sought instructions from the client and have examined the document(s) prior to access being sought. Where more time is appropriate, the lawyer should undertake the examination within a period agreed to by the lawyer and the taxation officer and ensure the security of the documents. The ATO reserves its right in these circumstances to be present while the lawyer examines the documents. However, documents may not be viewed by the taxation officer.
  - In respect of all documents identified by the lawyer and/or identified by the taxation officer in discussions with the lawyer as potentially within the access request, the taxation officer shall, before proceeding to inspect and copy the documents, ask the lawyer if he/she wishes to claim legal professional privilege on behalf of the client in respect of any of the documents. If a claim of legal professional privilege is then asserted in relation to any of those documents sought to be inspected, the lawyer shall indicate to the taxation officer an adequate description of the document(s) and in whose name the claim is made, and indicate the grounds upon which the claim is made, at least in general terms. The more specific the grounds indicated, the better placed the taxation officer will be to determine whether or not to concede the claim.
  - Where a claim of privilege is made on behalf of the client(s) the lawyer should contact the client(s) to seek instructions as to whether the claim should be maintained.
  - In respect of those documents which the lawyer claims are subject to legal professional privilege, the taxation officer should proceed in accordance with the guidelines set out below. In respect of the remaining documents, the taxation officer may then proceed to inspect and, if required, copy the documents.
- (j) A list of the documents in respect of which the lawyer asserts legal professional privilege and which the taxation officer does not concede or is not in a position to concede are so privileged should be prepared by either the lawyer or the taxation officer acting on information from the lawyer. The list will contain the following details:
- the nature of the document(s), for example, letter, memorandum, opinion, statement of claim, advice file note, contract or other form of document, in relation to, for instance: a takeover, lease, financial arrangement, etc. The more specific a description of the nature of the document is, the better placed the taxation officer will be to determine whether or not to concede the claim;
  - the exact number of documents and pages contained in that document withheld;
  - the date each document was prepared or executed, if not available this should be indicated;

- the identity of the person who prepared and/or signed each document and to whom directed, if known;
- a physical description of each document, e.g. typed or handwritten;
- whether the document is an original, a photocopy, facsimile or a carbon copy;
- the grounds on which legal professional privilege is claimed at least in general terms, in respect of each document; and
- the person in whose name the claim is made.

However, the details provided pursuant to paragraphs (i) to (viii) above should not result in the disclosure of privileged information. The document should also be designated by number or letter on the document to enable accurate identification. The disclosure of the above information in no way waives the privilege claimed.

- (k) The list should then be endorsed to the effect that having regard to the claim of legal professional privilege made by the lawyer on behalf of his or her client(s), ATO access has been sought but has not been obtained in respect of the listed documents and those documents have been sealed in the envelopes/container (see paragraph 22(m) below).
- (l) The endorsed list should then be signed by the taxation officer and the lawyer. The original list should be held by the taxation officer. Two copies of the endorsed list should be made, one held by the lawyer and the other copy retained with the envelopes/container.
- (m) All documents in respect of which privilege has been claimed should be placed by the lawyer and/or the lawyer's staff, in the presence of the taxation officer, in envelopes/container which should then be sealed and placed in a secure place on the lawyer's premises (for example, such as a locked filing cabinet or safe). The lawyer should be permitted to take copies of any of the documents before they are placed in the envelopes/container (copies should be made by the lawyer if he/she will need to show the documents to the client or to enable the lawyer to carry out duties as lawyer to the client or to seek legal advice). The sealed envelopes/container will not be opened unless in the presence of the taxation officer or subject to the agreement of the ATO. However, the taxation officer shall not be entitled to inspect these documents. Copies taken of the documents will also be covered by the claim of privilege.
- (n) Within three working days (or such time as is agreed by the parties) the lawyer will review the privilege claim in consultation with the client and advise whether it will be waived or abandoned in respect of any of the documents and if so, which documents. Any papers or documents which are no longer the subject of a claim will be made available to the taxation officer.
- (o) If within 14 days (or such longer period as may be agreed upon by the parties as reasonable) after the review period mentioned in 22(n) above, the lawyer has not contacted the taxation officer to advise on the maintenance of the claim of privilege, the ATO will inform the lawyer that instructions to institute proceedings to determine the entitlement to access will be sent to the Australian Government Solicitor and no further steps will be taken in relation to ATO access to the documents until either:
  - a further period of 14 working days (or such further period as may be agreed upon as reasonable) elapses without such proceedings having been instituted; or

- proceedings to contest the privilege are successful; or
  - an agreement is reached between the parties as to the disclosure of some or all of the documents subject to the claim of legal professional privilege.
- (p) Where proceedings to establish the privilege claim have been instituted arrangements should immediately be made to deliver the documents into the possession of the Registrar of the Court. The documents shall then be held by the Registrar pending the order of the Court.
- (q) There the 14 working days as mentioned in paragraph 22(o)(i) above (or such further period as may have been agreed to) expire without the ATO instituting proceedings and advising the lawyer, the lawyer need not continue to maintain the documents as outlined in paragraph 22(m) above.
- 25 Where a lawyer takes the view that he/she must follow a course other than that described in the guidelines every effort should be made to acquaint the taxation officer with the reasons for this course and the lawyer's proposed method of securing the documents subject to the claim of privilege.
- 26 If agreement cannot be reached as to the security/integrity of the documents to the satisfaction of the taxation officer, the taxation officer may, as one course of action, seek an injunction. A taxation officer may stay on the premises while conferring with his/her supervisor as to the course of action to take.
- 27 The Commissioner recognises the duty that a lawyer owes to his/her client. However, the Commissioner and the Council expect that the lawyer will assert a claim for privilege only on documents which are or may be properly the subject of such a claim. Claims of privilege that appear to a taxation officer not to be well founded should be tested promptly by appropriate court action because the Courts have said that legal professional privilege will not be permitted to be a 'cloak for fraud' (*A-G (NT) v Kearney* (1985) 158 CLR 500). It should be noted that a person could also face prosecution under section 149.1 of the *Criminal Code Act 1995* for hindering or obstructing a taxation officer in the performance of his duties under section 263 of the ITAA. However, the Commissioner recognises that a lawyer who complies with the guidelines will not in so doing be hindering or obstructing a taxation officer in the performance of his/her duties.

## Review

- 28 It is intended that these guidelines will be monitored and reviewed from time to time, to ensure the required outcomes are being attained. This review should commence no later than November 1992.

## Inspection Agreement Template

THESE TERMS OF INSPECTION are made on <insert date>

BETWEEN

COMMISSIONER OF TAXATION and his authorised officers ^name^ of ^address^  
(‘Authorised Officers’)

AND

^name\_of\_claimant^ of ^address^ (‘Claimant’)

AND

^name^ of ^address^ (‘Appointee’)

### Recitals

Pursuant to section 263 of the *Income Tax Assessment Act* 1936 the Authorised Officers took access to documents at the premises of the Claimant at ^insert\_address^.

Before taking access to those documents the Authorised Officers allowed the Claimant an opportunity to consider the documents with a view to making claims of legal professional privilege, and representatives of the Claimant inspected the documents for that purpose.

The Claimant has claimed that certain of those documents (‘the Documents’) are subject to legal professional privilege and those documents have been sealed in envelopes and are held in the custody of legal adviser for the Claimant, ^name^ of the firm ^insert name of firm^, for safe-keeping.

The Authorised Officers and the Claimant have agreed to attempt to resolve the claims of legal professional privilege by means of a joint inspection of the Documents (‘the Inspection’), on the terms set out in these Terms of Inspection.

The Inspection is to be conducted jointly by:

- the Appointee, who has been appointed by the Commissioner of Taxation and the Authorised Officers, and who, subject to these Terms of Inspection, acts on behalf of the Authorised Officers.
- the Claimant’s Legal adviser, who has been retained by the Claimant to act on his behalf for the purposes of the Inspection.

The Authorised Officers and the Claimant have agreed to be bound by any agreement(s) that may be reached between the Appointee and the Claimant’s Legal adviser that documents, or parts thereof, are, or are not, subject to legal professional privilege able to be claimed by the Claimant.

In the event that agreement cannot be reached in respect of any particular claim of privilege, the parties have agreed that the Claimant will commence proceedings in the Federal Court of Australia to establish whether the documents on which the Appointee and the Claimant’s Legal adviser are unable to reach agreement are subject to legal professional privilege.

The Parties COVENANT and AGREE:

### Definitions

‘Appointee’ means:

a person who has been appointed by authorised officer and who subject to the terms of inspection acts in the interest of the authorised officer

'Claimant's Legal adviser' means:

- ^name\_of\_Claimant's\_legal adviser^, of ^address^, a ^barrister/partner/associate\_with\_the\_firm\_of^, or
- the legal adviser nominated as a replacement under clause [..]

acting for the Claimant in relation to the claim for legal professional privilege;

'Confidential Information' means:

the existence, nature and contents of any Document inspected by the Appointee; and any information provided to the Appointee by the Claimant or the Claimant's Legal adviser, including any communications pursuant to the inspection process ('Claimant's Confidential Information'); and

any information provided to the Appointee on behalf of the Authorised Officers, including any communications pursuant to clause [..] ('ATO Confidential Information')

for the purpose of these Terms of Inspection;

'**Disputed Documents Box**' means the box referred to in clause [..];

'**document**' has the same meaning as in the *Evidence Act* 1995 (Cth), and includes information stored or recorded by means of a computer;

'**Documents**' has the meaning given in recital C and includes ^define^, and 'Document' has a corresponding meaning;

'**Inspection**' means the inspection referred to in Recital D;

'**Party**' means the Authorised Officers, the Claimant and the Appointee according to the context, and 'Parties' has a corresponding meaning;

'**Relevant Documents Computer Disks**' means the computer compact disks made available to the Appointee and the Claimant's Legal adviser for the purpose of these Terms of Inspection.

## Interpretation

### Singular and plural

In these Terms of Inspection, unless the contrary intention appears, the singular includes the plural and vice versa.

### Reference to a person and a body corporate

In these Terms of Inspection, unless the contrary intention appears:

- a reference to a body corporate includes a natural person; and
- a reference to a person includes a body corporate.

### Reference to the Claimant's Legal adviser

In these Terms of Inspection, a reference to the Claimant's Legal adviser, includes a reference to such other person or persons as the Claimant may nominate in writing to the other Parties to represent him as a replacement for ^Name\_of\_Claimant's\_legal adviser^, or a previous replacement, during the course of the Inspection and in particular to do any or all of the following:

- attend the Inspection;
- exercise any or all of the powers conferred on the Claimant's Legal adviser under these Terms of Inspection; and

- perform any function capable of being performed by the Claimant's Legal adviser under these Terms of Inspection.

#### **Legal professional privilege**

The doctrine of legal professional privilege is to be construed according to the law of New South Wales and is not modified by these Terms of Inspection.

#### **Place of Inspection**

The Inspection will take place at the ^describe^.

#### **Period of Inspection**

The Inspection will take place between ^date^ and ^date^, inclusive, unless otherwise agreed between the Authorised Officers and the Claimant.

The determinations required to be made under clause [...] are to be made by ^date^, or such other date as is agreed by the Authorised Officers and the Claimant.

#### **Custody of Documents**

The Claimant and the Authorised Officers will authorise and direct ^name^ to deliver the sealed envelopes containing the Documents to the Appointee.

On receipt of the sealed envelopes containing the Documents:

- the Appointee will retain custody of the Documents in secure conditions until they are dealt with in accordance with these Terms of Inspection; and
- the Appointee will check the sealed envelopes to ensure that the seals are in place, and if any of the seals are not in place he will inform the Authorised Officers and the Claimants of that fact forthwith.

#### **Persons Present During the Inspection**

The persons to be present during the Inspection will be the Appointee and the Claimant's Legal adviser, unless the Authorised Officers and the Claimant consent to any other person being present.

#### **Purpose of Inspection**

The Appointee and the Claimant's Legal adviser must:

- examine each of the Documents; and
- determine whether, in their opinion, each Document or part thereof is the subject of legal professional privilege able to be claimed by the Claimant in response to the access sought by the Authorised Officers.

#### **Process of Inspection**

If the Appointee and the Claimant's Legal adviser agree that a Document or part thereof is the subject of legal professional privilege able to be claimed by the Claimant, then:

- if the whole of the Document is protected by legal professional privilege, the Document is to be returned to the Claimant, as soon as practicable and is not to be accessed by the Authorised Officers;
- if a part of the Document is covered by legal professional privilege able to be claimed by the Claimant, the procedures outlined in clause [...] will apply.

In the case of computer records, the procedures set out in clause [...] will be followed. A list of such documents is to be provided by the Appointee to the Authorised Officers and the Claimant at the end of the Inspection.

If the Appointee and the Claimant's Legal adviser agree that a particular Document, or part thereof, is not the subject of legal professional privilege or no claim of legal professional privilege is able to be maintained by the Claimant, then a copy of the Document, or such part thereof, is to be delivered by the Appointee to the Authorised Officers as soon as practicable. A list of such documents is to be provided to the Authorised Officers and the Claimant at the end of the Inspection. In the case of computer records the disk or other media containing the files is to be dealt as provided in clause [..] below.

If the Appointee and the Claimant's Legal adviser agree that a part of a Document is subject to legal professional privilege able to be claimed by the Claimant then they are to copy the Document and redact the copy by masking that part of the Document subject to legal professional privilege. A redacted copy is to be dealt with in accordance with clause [..]. The original document and a redacted copy are to be returned to the Claimant as soon as practicable. In the case of computer records, a record may be printed out and dealt with as a hard copy document and the computer record is to be dealt with as set out in clause [..].

If the Appointee and the Claimant's Legal adviser do not agree that a particular Document or part thereof is, or is not, the subject of legal professional privilege able to be claimed by the Claimant within the period of the Inspection, then in respect of each such Document:

- the Document and any computer compact disk referred to in clause [..] is to be placed in a box set aside for such documents and disks ('the Disputed Documents Box'). Until the completion of the Inspection, the Disputed Documents Box shall be kept in the joint custody of the Appointee; and
- at the end of the Inspection:
  - 1 the Appointee (with such administrative assistance as he may reasonably require) is to make a list of the Documents in the Disputed Documents Box, which list is to be provided to the Authorised Officers and the Claimant;
  - 2 the Disputed Documents Box is then to be sealed, and the seal is to be signed, by the Appointee; and
  - 3 the Disputed Documents Box is to be produced by the Appointee to the Federal Court once the proceedings referred to in recital G have been commenced.

In the case of computer records:

- 1 From the Relevant Documents Computer Disks:
  - A the Appointee and the Claimant's Legal adviser will make one electronic copy of the class of documents described in clause [..] and store them on a computer compact disk. The computer compact disk is to be delivered to the Claimant's Legal adviser;
  - B the Appointee and the Claimant's Legal adviser will make two electronic copies of the class of documents described in clause [..] and store them on two computer compact disks, one of which is to be delivered to the Authorised Officers, and the second of which is to be delivered to the Claimant's Legal adviser;
  - C the Appointee and the Claimant's Legal adviser will make two electronic copies of the class of documents described in clause [..] and store them on a computer compact disk. The Appointee and the Claimant's Legal adviser are to delete from each Document on the computer compact disk that part of the Document that is subject to legal professional privilege. The computer compact disk so redacted is to be copied and the copy is to be delivered to the Authorised Officers. The computer compact disk so redacted is to be delivered to the Claimant's Legal adviser;

- D the Appointee and the Claimant's Legal adviser will make two electronic copies of the class of documents described in clause 8(d) and store them on two computer compact disks. One computer compact disk is to be delivered to the Claimant's Legal adviser. The second computer compact disk is to be placed in the Disputed Documents Box in accordance with clause [...].
- 2 On completion of the Inspection the Relevant Documents Computer Disks will be sealed by the Appointee and the Claimant's Legal adviser and are to be retained by the Appointee pending further order or agreement between the Authorised Officers and the Claimant.
- 3 A hard copy may be printed of any document contained on the Relevant Documents Computer Disks for the purpose of inspection as set out in clause 7 and such hard copy documents shall be dealt with in accordance with the process described in clause [...].
- 4 A directory listing of the contents of the Relevant Documents Computer Disks may be printed out by the Appointee and the Claimant's Legal adviser.

No document contained on the Relevant Documents Computer Disks shall be stored, copied or retained on the hard drive of any computer used by the Appointee and the Claimant's Legal adviser to carry out the process provided for in clause [...]. A record shall be made in writing by the Appointee and the Claimant's Legal adviser:

- of the date and time at which any copy of any computer record containing the materials was made and by whom;
- of the location of such copy specifying the relevant computer and the precise location within that computer.

## **Confidentiality**

### **Basis of Inspection**

The Parties agree that the Inspection is to proceed on a confidential basis.

The Authorised Officers and the Claimant not to breach confidentiality

Save as provided for in these Terms of Inspection the Authorised Officers and the Claimant agree with each other and with the Appointee that they will not:

- take any step for the purpose of obtaining the Confidential Information from the Appointee, or which would have a tendency to disclose the Confidential Information held by the Appointee;
- bring any legal proceeding whatsoever against the Appointee, nor seek to subpoena or interrogate or seek discovery from the Appointee in any legal proceeding, in respect of the Confidential Information, including (without limitation) agreements made pursuant to clause 8.

### **Appointee's obligation of confidentiality**

The Appointee must:

- keep confidential, and take all reasonable steps to preserve the confidentiality of, the Confidential Information;
- save as provided for in these Terms of Inspection, not disclose the Claimant's Confidential Information to the Authorised Officers or to any other person; and
- not disclose ATO Confidential Information to the Claimant's Legal adviser, the Claimant or to any other person without the prior consent of the Authorised Officers.

### **Parties Bound by Agreements**

The Authorised Officers and the Claimant agree that the agreements reached by the Appointee and the Claimant's Legal adviser in relation to the Documents pursuant to clause 8 shall be final and binding on the them and they mutually release and discharge each other from, and waive, all claims and legal rights of action (including, without limitation, rights to prerogative relief or judicial review) they have or they may have in connection with agreements reached pursuant to clause 8, and they shall indemnify and keep indemnified the Appointee in respect of any claim they have or may have in respect of any such claims and legal rights of action.

### **Assistance to the Appointee**

The Appointee may request another Party to provide such assistance to him to assist him to form an opinion whether a document is subject to legal professional privilege.

The Appointee may employ such administrative assistance as he may need to perform his obligations under this agreement. Any administrative assistant may be from the office of the Australian Government Solicitor. Any such administrative assistant will be subject to the same obligations of confidentiality as the Appointee.

### **Fees and Expenses**

The Commissioner of Taxation will be responsible for payment of the Appointee's fee (including administrative assistance) for performing his obligations under these Terms of Inspection.

The Parties agree to bear their own costs and expenses of and incidental to these Terms of Inspection.

### **Warranty**

The Claimant and the Claimant's Legal adviser warrant to the Authorised Officers and the Appointee that the Claimant's Legal adviser holds full authority to act on behalf of the Claimant for the purposes of these Terms of Inspection, including (without limitation) authority to make decisions on whether the documents are or are not subject to legal professional privilege. The Claimant and the Claimant's Legal adviser must immediately advise the Authorised Officers of any change in the scope of the authority of the Claimant's Legal adviser to act for the Claimant.

**Executed as an Agreement**

.....  
Appointee

.....  
Claimant

OR:

.....  
The Common Seal of the claimant  
was hereunto affixed  
in accordance with its articles of association  
in the presence of:

.....  
.....  
(print name)

A solicitor employed by the  
Australian Government Solicitor,  
for and on behalf of the Commissioner of Taxation  
and the Authorised Officers

## Reference materials

Auburn, J 2000, *Legal professional privilege: law and theory*, Oxford; Portland, Or.  
Howard, MN (ed) 20th ed. 2000, *Phipson on evidence*, Sweet & Maxwell, London.  
Desiatnik, RJ 1999, *Legal professional privilege in Australia*, Prospect Media, Sydney.  
Heydon, JD 6th Australian ed. 2000, *Cross on evidence*, Butterworths, Sydney.  
Wigmore, JH 1961, *Evidence in trials at common law*, Little, Brown, Boston, Ma.  
McNicol, SB 1992, *Law of privilege*, Law Book Co, Sydney  
McNicol, SB and Mortimer D 2nd ed. 2001, *Evidence*, Butterworths, Sydney  
Passmore, C 1998, *Privilege*, Central Law Training, Sutton Coldfield  
Williams, D 1987, *Investigations by administrative agencies*, Law Book Co, Sydney

## Footnotes

- <sup>1</sup> (1983) 83 ATC 4606; (1983) 14 ATR 713; (1983) 153 CLR 52
- <sup>2</sup> (2002) 213 CLR 543; (2002) 192 ALR 561
- <sup>3</sup> (1976) 135 CLR 674; (1976) 11 ALR 577
- <sup>4</sup> per Stephen, Mason and Murphy JJ (1976) 135 CLR 674 at 685
- <sup>5</sup> per Dawson J in *Baker v Campbell* (1983) 83 ATC 4606 at 4649
- <sup>6</sup> *Baker v Campbell* (1983) 83 ATC 4606 at 4649
- <sup>7</sup> *Cross on Evidence* (6th Australian ed) at 25210 p 704; McNicol and Mortimer, *Evidence*, 2nd ed, (Butterworths 2001) at 4.4.1 p 47
- <sup>8</sup> *Australian Competition & Consumer Commission v Australian Safeway Stores Pty Ltd* (1998) 81 FCR 526; (1998) 153 ALR 393
- <sup>9</sup> per Lockhart J in *Trade Practices Commission v Sterling* (1979) 36 FLR 244 at 245-246
- <sup>10</sup> *Standard Chartered Bank of Australia Ltd v Antico* (1993) 36 NSWLR 87 at 95
- <sup>11</sup> *National Crime Authority v S* (1991) 29 FCR 203; (1991) 100 ALR 151
- <sup>12</sup> *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 69, *Seven Network Ltd v News Ltd* [2005] FCA 142 (unreported)
- <sup>13</sup> *Waterford v The Commonwealth* (1987) 163 CLR 54 per Deane J at 84 quoting with approval Hamilton LJ in the *Birmingham & Midland Motor Omnibus Company Ltd v London & North Western Railway Company* [1913] 3 KB 850 at 860
- <sup>14</sup> *National Crime Authority v S* (1991) 100 ALR 151 at 159
- <sup>15</sup> *Lazenby v Zammit* [1987] Tas R 54 at 56
- <sup>16</sup> *Kadlunga Proprietors v Electricity Trust of South Australia* (1985) 39 SASR 410
- <sup>17</sup> (1989) 89 ATC 4268, at 4293
- <sup>18</sup> (2004) 2004 ATC 4916; (2004) 57 ATR 365
- <sup>19</sup> *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49; (1999) 2000 ATC 4042; (1999) 43 ATR 506
- <sup>20</sup> *Kennedy v Wallace* (2004) 208 ALR 424, *Sydney Airports Corporation v Singapore Airline* [2005] NSWCA 47 (Unreported)
- <sup>21</sup> *Esso Australia Resources Ltd v Commissioner of Taxation of the Commonwealth of Australia* (1999) 201 CLR 49; (1999) 2000 ATC 4042; (1999) 43 ATR 506
- <sup>22</sup> (1999) 201 CLR 49 at 66
- <sup>23</sup> 208 ALR 424
- <sup>24</sup> *Dinsdale v Commissioner of Inland Revenue* (1997) 10 PRNZ 704
- <sup>25</sup> *Kennedy v Wallace* 208 ALR 424
- <sup>26</sup> (1999) 201 CLR 49 at 80
- <sup>27</sup> *Glengallan Investments Pty Ltd v Arthur Andersen* [2002] 1 Qd R 233 Williams JA at 247
- <sup>28</sup> *Vance v McCormack*
- <sup>29</sup> [2004] 3 All ER 168; [2004] 2 WLR 1065
- <sup>30</sup> Legal professional privilege only covers situations where there is 'professional confidence' and 'legitimate professional employment' between the lawyer and the client: *R v Cox & Railton* (1884) 14 QBD 153; [1881-5] All ER Rep 68. See also *Re Moage Ltd (in liq)*; *Sheahan (as liquidator of Moage Ltd (in liq)) v Pitterino and Ors* (1998) 82 FCR 10; (1998) 163 ALR 65, *Fairfax Publications Pty Ltd v Abernethy* [1999] NSWSC 826 (Unreported), *Baker v Evans* (1987) 77 ALR 565
- <sup>31</sup> *Beazley v Steinhardt* [1999] 106 A Crim R 21, *Plumb v Monck & Bohm* (1974) 4 ALR 405, *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 428 (Unreported); *R v Liddy (No 2)* (2001) 79 SASR 401; (2001) 160 FLR 342, *Watson v McLernon* [2000] NSWSC 306 (Unreported) and Commissioner, *Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501; (1997) 35 ATR 130 (per Brennan CJ)
- <sup>32</sup> *Clements, Dunne & Bell Pty Ltd v Commissioner of the Australian Federal Police* (2001) 188 ALR 515; 2002 ATC 4072, *Capar v Commissioner of Police* (1994) 34 NSWLR 715; (1994) 74 A Crim R 428, *R v Central Criminal Court; Ex parte Francis & Francis* [1989] AC 346
- <sup>33</sup> (1985) 158 CLR 500; (1985) 61 ALR 55
- <sup>34</sup> (1980) 146 CLR 141; (1980) 30 ALR 489
- <sup>35</sup> (2001) 188 ALR 515; 2002 ATC 4072
- <sup>36</sup> *Brown v Foster* (1857) 1 H & N 736; (1857) 156 ER 1397
- <sup>37</sup> (1991) 100 ALR 151; (1991) 29 FCR 203
- <sup>38</sup> (1991) 100 ALR 151 at 159
- <sup>39</sup> (1999) 92 FCR 240; (1999) 42 ATR 356; see also *McCormack v Deputy Commissioner of Taxation* (2001) 114 FCR 574; 2001 ATC 474 where the Federal Court upheld the validity of a s264(1)(a) notice to three partners of an accountancy firm which notices required the applicants to furnish names and addresses and tax file numbers of clients for whom the partners provided services.
- <sup>40</sup> *Re Stanhill Consolidated Limited* [1967] VR 749 at 752
- <sup>41</sup> McNicol, S, *The Law of Privilege*, (LBC) 1992, p 21
- <sup>42</sup> *Re Stanhill Consolidated Limited* [1967] VR 749 per Menhennitt J at 752-753
- <sup>43</sup> 210 ALR 220; 57 ATR 52
- <sup>44</sup> *Mann v Carnell* (1999) 201 CLR 1; (1999) 168 ALR 86
- <sup>45</sup> *Lovegrove Turf Services Pty Ltd & Anor v Minister for Education* [2003] WASC 213 (Unreported)
- <sup>46</sup> *Fort Dodge Australia Pty Ltd v Nature Vet Pty Ltd* [2002] FCA 501 (Unreported), *Diamond Offshore General Co v Woodside Energy Ltd* [2000] WASC 204 (Unreported), *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* [2000] FCA 593 (Unreported), *Gleem Pty Ltd v Gas & Fuel Corporation of Victoria* (Unreported, Supreme Court of Victoria, Mandie J, 25 August 1995), *Curlex Manufacturing Pty Ltd v Carlingford Australia General Insurance Ltd* [1987] 2 Qd R 335, *Grofam Pty Ltd v Australia & New Zealand Banking Group Ltd* (1993) 43 FCR 408; (1993) 93 ATC 4672, *Trade Practices Commission v Ampol Petroleum (Victoria) Pty Ltd*, (Unreported; Federal Court of Australia, Olney J; 14 April 1994) and *Optus Communications Pty Ltd, Optus Networks Pty Ltd & Optus Mobile Pty Ltd v Telstra Corporation Ltd* (Unreported, Federal Court of Australia, Lockhart J, 27 April 1995).
- <sup>47</sup> See also McHugh J (dissented) on the severance of facts going to a non-legal purpose from facts going to a relevant legal purpose in *Esso's* case (1999) 201 CLR 49 at 79-80.

- <sup>48</sup> (1987) 163 CLR 54
- <sup>49</sup> *Ritz Hotel Ltd v Charles of the Ritz Ltd (No 4)* (1987) 14 NSWLR 100
- <sup>50</sup> See *Southern Equities Corp Ltd v Arthur Andersen & Co (No 6)* [2001] SASC 398 (Unreported)
- <sup>51</sup> *Minter v Priest* [1930] AC 588 at 568 per Lord Buckmaster
- <sup>52</sup> *Australian Hospital Care Pty Ltd & Anor v Duggan & Ors (No. 2)* [1999] VSC 131 (Unreported)
- <sup>53</sup> See E Kyrou, 'Dual Roles: Implications for Legal Professional Privilege' (2000) 74 *LLJ* 54 at 55
- <sup>54</sup> *Waterford v Commonwealth* (1987) 163 CLR 54
- <sup>55</sup> *Belle Rosa Holdings Pty Ltd v Hancock Prospecting Pty Ltd* (1992) 8 WAR 435. See also, E. Kyrou, *op cit* at 55
- <sup>56</sup> (1993) 36 NSWLR 87 at 91-93
- <sup>57</sup> 2002 ATC 4170; (2002) 49 ATR 178
- <sup>58</sup> Finn J at para 44
- <sup>59</sup> *Three Rivers District Council v Governor and Company of the Bank of England* [2004] 3 All ER 168; [2004] 2 WLR 1065
- <sup>60</sup> Legal professional privilege only covers situations where there is 'professional confidence' and 'legitimate professional employment' between the lawyer and the client: *R v Cox & Railton* (1884) 14 QBD 153; [1881-5] All ER Rep 68. See also *Re Moage Ltd (in liq); Sheahan (as liquidator of Moage Ltd (in liq)) v Pitterino and Ors* (1998) 82 FCR 10; (1998) 163 ALR 65, *Fairfax Publications Pty Ltd v Abernethy* [1999] NSWSC 826 (Unreported), *Baker v Evans* (1987) 77 ALR 565.
- <sup>61</sup> *Brambles Holdings Ltd v Trade Practices Commission (No 3)* (1981) 58 FLR 452, *Vardas v South British Insurance Co Ltd* [1984] 2 NSWLR 652, at 656 per Clarke J
- <sup>62</sup> (1997) 188 CLR 501
- <sup>63</sup> *National Crime Authority v S* (1991) 100 ALR 151 at 159-160
- <sup>64</sup> *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 70
- <sup>65</sup> *Packer v Deputy Commissioner of Taxation (Qld)* [1985] 1 Qd R 275; (1984) 84 ATC 4666
- <sup>66</sup> *Allen Allen & Hemsley v Deputy Commissioner of Taxation (NSW)* (1989) 20 FCR 576; (1989) 89 ATC 4294
- <sup>67</sup> *Federal Commissioner of Taxation v Coombes* (1999) 92 FCR 240; (1999) 99 ATC 4634
- <sup>68</sup> *South Australia v Peat Marwick Mitchell & Co* (1995) 65 SASR 72, *Bulk Materials (Coal Handling) Services Pty Ltd v Coal & Allied Operations Pty Ltd* (1988) 13 NSWLR 689
- <sup>69</sup> *Somerville v Australian Securities Commission* (1995) 60 FCR 319; (1995) 131 ALR 517
- <sup>70</sup> *South Australia v Peat Marwick Mitchell & Co* (1995) 65 SASR 72
- <sup>71</sup> *Pioneer Concrete (NSW) Pty Ltd v Webb* (1995) 18 ACSR 418; (1995) 13 ACLR 1749
- <sup>72</sup> [1988] VR 621
- <sup>73</sup> *National Crime Authority v S* (1991) 29 FCR 203; (1991) 100 ALR 151
- <sup>74</sup> *National Crime Authority v S* (1991) 100 ALR 151 at 159-160

Last Modified: Tuesday, 19 July 2005