

50-50 rule: Court of Appeal upholds decision

The Legal Services Commissioner made an application to the Supreme Court last year seeking declarations as to the proper construction of Section 481C of the now repealed *Queensland Law Society Act 1952* for the purpose of determining whether a practitioner had overcharged two former clients.

On September 25, 2007, Chesterman J made orders to the following effect as the result of that application (*Legal Services Commissioner v Dempsey* [2007] QSC 270):

1. A declaration that disbursements and outlays paid from the practitioner's trust account in the prosecution of their actions were disbursements as defined by s481C of the *Queensland Law Society Act 1952*.

2. A declaration that the maximum amount of fees that the practitioner was entitled to charge his clients in accordance with the formula specified in s481C of the *Queensland Law Society Act 1952* included GST.

3. A declaration that the respondent was not entitled to charge his clients, or deduct from their settlement monies, any amount in respect of GST he may have been liable to pay on the supply of legal services to those clients.

The practitioner lodged an appeal against these orders. On May 23, 2008, the Court of Appeal (*Legal Services Commissioner v Dempsey* [2008] QCA 122) upheld the orders made by Chesterman J.

Background

Section 481C effectively capped the amount that could be paid to a practitioner or firm in a speculative personal injury matter to 50 percent of the net damages available after refunds and the payment of disbursements.

The clients obtained litigation loans from an independent litigation funder for the purpose of paying the disbursements incurred in their speculative personal injury matters, the practitioner agreeing that he would only charge professional fees to the clients if their actions were successful.

The money advanced by the litigation funder was paid into the practitioner's trust account.

Disbursements declaration

The definition of disbursements in Section 481C was that it was the total amount of disbursements the client must pay, or reimburse,

to the practitioner or firm in relation to the speculative personal injury matter (*underlining has been added for emphasis*).

It was the practitioner's position, after having taken advice from senior counsel, that a disbursement was only a disbursement for the purpose of Section 481C if it was paid by the practitioner or firm from the practitioner or firm's own funds.

Accordingly, in calculating the maximum amount that could be paid to the practitioner pursuant to Section 481C, the practitioner did not deduct from the gross proceeds amounts paid for disbursements that were funded by the litigation lender.

Chesterman J ordered, and the Court of Appeal upheld, that a disbursement is a disbursement for the purpose of Section 481C, irrespective of how it was funded.

GST declarations

Chesterman J ordered, and the Court of Appeal upheld, that:

- the *GST Act* imposes on the supplier of goods and services (the practitioner) the obligation to pay GST from the amount received for the supply of the goods and services
- Section 481C capped the amount payable for the supply of the services to 50 percent of the net proceeds
- Consequently the practitioner was obliged to pay the GST from the 50 percent of the net proceeds payable to him for professional fees.

Present position

The *Legal Profession Act 2007* (LPA) commenced on July 1, 2007. Section 347 of the LPA replaced Section 481C.

The declarations are consistent with Section 347 of the LPA, which clearly provides that a disbursement is a disbursement irrespective of who pays it and the statutorily capped amount is inclusive of GST.

Practitioners who incorrectly applied the 50/50 Rule

In a notice sent to the profession in QLS Update on May 27, 2008, Legal Services Commissioner John Briton advised the profession that he requires all law practices to review their files and refund clients any amounts charged in breach of the legislation since November 6, 2003 (the date Section 481C came into effect). The commissioner has since issued guidelines to this effect.

The commissioner's guidelines, which can be accessed from the commission's website – www.lsc.qld.gov.au – under the tab 'Policies and guidelines', provide, *inter alia*:

"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 investigated or considered by the Commissioner provided the law practices concerned review their files and refund clients any amounts charged in breach of the legislation since 6 November 2003 (the date Div 2A of Pt 4B of the of the *Queensland Law Society Act* came into operation), together with interest at the rate prescribed on default judgments (currently 10%);
- "will be disinclined to initiate disciplinary proceedings in relation to breaches which occurred before 23 May 2008 (the date of the Court of Appeal's decision), provided the law practices concerned can demonstrate that they have, prior to the alleged breaches coming to the Commissioner's attention, reviewed their files and refunded clients any amounts charged in breach of the legislation since 6 November 2003 together with interest as outlined above; and
- "will have no such disinclination and will initiate disciplinary proceedings in relation to breaches which occur after 23 May 2008.

"In short, the Commissioner expects law practices to review their billing practices to ensure they don't bill their clients more than the amounts they are entitled to charge under the relevant legislation and, if they have charged for and been paid more than the amounts allowed, to refund their clients for any such amounts charged to them after 6 November 2003 with interest at the rate prescribed on default judgments." ■

Australia China Legal Group introduces Chinese dignitaries to Queensland: Queensland regions Emerald, Rockhampton, Mackay, Bowen and Airlie Beach hosted a journey of discovery for a group of high-profile Chinese dignitaries last month. The Australia China Legal Group Central Queensland Tour aimed to build and enhance social and economic relationships between Queensland and China. The legal group is an initiative of MacDonnells Law, which has had connections with China for nearly 120 years. In 1889 MacDonnells was engaged by the Hop Wah Syndicate, a group of Chinese farmers, to establish one of the first sugar plantations in north Queensland and a sugar mill (now the Mulgrave Mill). Early clients also included Chinese market gardeners who engaged MacDonnells to prepare agricultural leases in the late 1800s. ■