

# Failure of a Law Practice to meet Tax and Superannuation Obligations – Suitability Matter

## Introduction

This is the Society policy regarding law practices which have failed to meet obligations pursuant to the *Taxation Administration Act 1953* and the *A New Tax System (Goods and Services Tax) Act 1999*, specifically the obligations of and inherent in a Business Activity Statement and Instalment Activity Statement and obligations pursuant to the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Guarantee Charge Act 1992*.

It sets out:

- (1) the Society's position on such matters as regards the suitability of the principals of the law practice to hold practising certificates;
- (2) the action the Society expects principals of law practices in such circumstances to take and;
- (3) the action to be taken by the Society in circumstances when law practices do not comply with taxation obligations and/or superannuation obligations

## Definitions

In this policy

“affairs of a law practice” has the same meaning as in the Act

“australian legal practitioner” has the same meaning as in the Act

“australian registered foreign lawyer” has the same meaning as in the Act

“business activity statement” means any of the approved forms so named issued by the Commissioner of Taxation pursuant to 388-50 of Schedule 1 of the *Taxation Administration Act 1953*.

“Act” means the *Legal Profession Act 2007 (Q)*

“default” has the same meaning as at s356 of the Act

“incorporated legal practice” has the same meaning as in the Act

“Instalment Activity Statement means any of the approved forms so named issued by Commissioner of Taxation pursuant to 388-50 of Schedule 1 of the *Taxation Administration Act 1953*.

“law firm” has the same meaning as in the Act

“law practice has the same meaning as in the Act

“legal practitioner director” has the same meaning as in the Act

“multi disciplinary partnership “ has the same meaning as in the Act

“practising certificate” has the same meaning as in the Act

“professional misconduct” has the same meaning as in the Act

“principal” has the same meaning as in the Act

“superannuation obligations” means

- (a) the obligation to pay the superannuation guarantee as required by the *Superannuation Guarantee (Administration) Act 1992*. That is at the time of publication of this policy 9.5% of employees salary into a designated superannuation fund by the 28th day of each April, July, October and February; or
- (b) to, as required by the *Superannuation Guarantee (Administration) Act 1992* and the *Superannuation Charge Act 1992*, lodge a superannuation guarantee statement and pay superannuation shortfall (including choice liability), interest chargeable and any administration fee by the 28th day of each May, August, November and February.

“taxation obligations” means

- (a) to lodge business activity statements by the due date applicable to the law practice;
- (b) to pay, by the due date:
  - a. monies owing to the Australian Taxation Office (ATO) in accordance with a business activity statement;
  - b. any penalties, interest or charges assessed by the ATO as payable in relation to business activity statements
- (c) where a law practice is not required to lodge business activity statements to pay by the due date the amount assessed as owing by the ATO as advised in an Instalment Activity Statement.

Society means the Queensland Law Society Inc as continued in the Act.

“sole practitioner” has the same meaning as in the Act

“suitability matter” means a suitability matter pursuant to the Act

“unsatisfactory professional conduct” has the same meaning as in the Act.

## Background

The Society is empowered to investigate the affairs of a law practice. The principal purposes of such an investigation are to determine whether the law practice has complied with the trust account provisions of the Act and to detect and prevent defaults in relation to the law practice.

Affairs of a law practice includes not only all the records and accounts required to be kept by the practice but also any transaction to which the practice or an associate or former associate of the practice was or is a party. Accordingly the taxation obligations and superannuation obligations of a law practice fall within the scope of an investigation pursuant to s263 of the Act.

The Society considers that a law practice failing to comply with its taxation obligations and/or superannuation obligations are factors which increase the risk of default in relation to that law practice.

The failure of a law practice to comply with an obligation to pay tax is conduct capable of constituting professional misconduct on the part of its principals, even where there is no conviction for a tax offence. In *Legal Services Commissioner v Hewlett* [2008] LPT 3 the respondent conceded that his actions in failing to lodge income tax returns for the financial years of 1991-2001 was professional misconduct, he had voluntarily reported the position to the ATO and attempted to settle the debt. The tribunal found that Mr Hewlett's actions amounted to professional misconduct and the respondent was struck off. The tribunal noted that:

*"One of the substantial obligations of a legal practitioner is to uphold the law, and to ensure the due application of the law in furthering his or her clients' affairs. The practitioner's capacity and commitment in those regards will be thrown into question where the practitioner is himself or herself guilty of a substantial contravention of the law, knowingly and deliberately, and for his or her own financial advancement."* [24]

It is well established that the failure to meet superannuation obligations is conduct capable of constituting professional misconduct. In *Council of the Law Society of New South Wales v Dalla* [2011] NSWDT 130 the tribunal was satisfied the conduct described in the agreed facts constituted professional misconduct. The tribunal noted that:

*"In five Tribunal decisions of which we are aware, the failure by a solicitor to pay superannuation contributions to which his or her employees were entitled by virtue of their employment has been held to constitute professional misconduct at common law and/or under the statutory definition...."*[23]

In *Legal Services Commissioner v Hope* [2010] QCAT 184 the practitioner was found guilty of three counts of unsatisfactory professional conduct for failing to pay superannuation payments for employees between 2002-2003. He had no previous adverse findings by a disciplinary body and poor health and a deteriorating financial position were mitigating factors.

In the *Council of the Law Society of NSW v Adams* [2011] NSWADT the practitioner had failed to pay superannuation contributions, failed to remit PAYG deductions and GST and failed to file tax returns. He faced three counts of alleged professional misconduct. The tribunal found that each of the three grounds were established:

*"they are part of a pattern of behaviour from 1987 through to August 2008 that involved systematic failure to comply with legal obligations for the purpose of preferring his own financial interests over those of others. Each of the grounds is inconsistent with the Respondent being of good fame and character. Each is inconsistent with him being a person of integrity. Each of them constitutes professional misconduct."*@ [152]

## **Legislative Framework**

### **A Law Practice**

The Act, at schedule 2 defines law practice to mean an Australian Legal Practitioner who is a sole practitioner or a law firm or an incorporated legal practice or a multidisciplinary partnership. Schedule 2 further defines a law firm as meaning a partnership consisting only of Australian Legal Practitioners or one or more Australian Legal Practitioners and one or more Australian registered foreign lawyers.

### **A Principal**

The Act at s7(4) provides that a principal of a law practice is an Australian legal practitioner who is a sole practitioner if the law practice is constituted by the practitioner; a partner in the law practice if the law practice is a law firm; a legal practitioner director in the law practice if the law practice is an incorporated legal practice; or a legal practitioner partner in the law practice if the law practice is a multi-disciplinary partnership.

### **Grant or Renew a Practising Certificate**

Under s51(1) of the Act, the Society may grant a practising certificate. Subsection 51(4)(b) provides that the Society must not grant a practising certificate unless it is satisfied that the applicant is a fit and proper person to hold the certificate.

Subsection 51(5)(b) provides that the Society must not renew a practising certificate if it is satisfied that the applicant is not a fit and proper person to continue to hold the certificate.

Subsection 46(2) provides that the Society in considering whether or not a person is, or is no longer, a fit and proper person to hold a practising certificate, may take into account, amongst other matters, “any suitability matter” relating to the person.

Suitability matters are dealt with in ss9 and 46 and include sub s46(2)(i), “matters the Society thinks are appropriate”.

When a suitability matter is declared to the Society, the Society may under section 46(3) of the Act consider a person fit and proper to hold a practising certificate even if the person falls within any of the categories mentioned in s46(2) if the Society considers that the circumstances warrant the decision.

### **Amend, Suspend or Cancel a Practising Certificate**

Under ss60, 61 and 62, the Society may amend, suspend or cancel a practising certificate where it believes a ground exists to do so. Under s60(a) it is a ground that the holder is no longer a fit and proper person to hold the certificate.

### **Investigating the Affairs of a Law Practice**

The Society may, on its own initiative investigate the affairs of a law practice. The Society is permitted to do this pursuant to s263(1) of the Act. Subsection 263(3) of the Act provides that the principal purposes of such an investigation are to find out whether the law practice has complied with the trust accounting provisions of the Act (part 3.3 of the Act – ss236 to 298) and to detect and prevent defaults in relation to the law practice.

### **Obligations of Incorporated Legal Practitioner directors of Incorporated Legal Practices**

At s111 the Act defines an incorporated legal practice as a corporation which engages in legal practice within the jurisdiction of Queensland. Such a corporation must have at least one legal practitioner director. All such directors are responsible for the management of legal services by the law practice (s117(1) and (2) of the Act). Those legal practitioner directors are for the purposes of this policy the Principals of that law practice.

### **Multidisciplinary Partnerships**

Section 144(1) of the Act provides that a multidisciplinary partnership is a partnership between one or more Australian Legal Practitioners and one or more other persons who are not Australian Legal Practitioners and the partnership business includes the provision of legal services within this jurisdiction as well as other services. The partners of the multidisciplinary partnership who are Australian Legal Practitioners are for the purposes of this policy the Principals of the law practice.

## Policy and Guidelines

This policy takes effect on 1 March 2021 and applies to all failures by a law practice to comply with taxation and/or superannuation obligations that exist unremedied at that date or that occur after that date.

To clarify if there has been a failure to comply with taxation or superannuation obligations before 1 March 2021 and that failure has been completely remedied before that date the policy is not applicable to those failures of compliance. If the failure is not completely remedied by 1 March 2021 then the policy applies to that failure of compliance

A law practice failing to comply with its taxation obligations and/or its superannuation obligations is conduct capable of constituting professional misconduct on the part of the principals of the law practice.

The Society thinks it appropriate that a law practice failing to comply with its taxation obligations or superannuation obligations is a suitability matter within the Act for the Principal of that law practice (see s46(2)(i) of the Act).

Such failure to comply must be reported to the Society by each principal of the law practice either jointly or severally in accordance with the obligation to report suitability matters. The suitability matter must be reported no later than the application for renewal the principal's practising certificate immediately following the failure to comply

Where such a suitability matter arises it may be necessary to monitor the progress of the law practice in reaching compliance in order to protect against defaults and meeting the professional obligations of the principals of the law practice

The Society recognises that this requirement may apply to the entire taxation affairs, both of their law practice and other activities, of some sole practitioners. Where a sole practitioner practices as a trustee the Society is concerned only with the taxation obligations of the trust.

Where the law practice is a law firm of multidisciplinary partnership the Society is concerned with the taxation obligations of the partnership.

Where the law practice is an Incorporated Legal Practice the Society is concerned only with the taxation obligations of the corporation.

In the course of an investigation of the affairs of the practice, a law practice will be asked to disclose its current position in relation to its taxation and superannuation obligations.

### Action to be taken upon disclosure or report

When a failure to comply is declared to or discovered by the Society, it will make inquiries to determine what action it may take.

When considering what action the circumstances warrant the Society may take into consideration any material provided to the Society, including:

- (1) the reasons for the failure to comply;
- (2) the circumstances in which the failure to comply came to the attention of the Society;
- (3) the amounts required to be paid to discharge the failure to comply;
- (4) the period of time there has been a failure to comply;
- (5) the arrangements made to remedy the failure to comply;
- (6) the additional charges penalties and interest incurred upon the failure to comply;
- (7) the level of cooperation by the law practice with the Society;
- (8) any other action taken by the law practice to rectify the failure to comply
- (9) any previous failure to comply;
- (10) Any action taken by the ATO upon the failure to comply
- (11) any other matters the Society regards as relevant.

The Society may take any of the following actions:

- a. Determine that the person is or continues to be a fit and proper person to hold a practising certificate and take no further action;
- b. Request the practitioner agree or undertake to provide to the Society information regarding the reinstatement of the arrears e.g repayment plans and payments made thereunder
- c. If the failure to comply is declared by a practitioner on an application to renew a practising certificate, the Society may require the practitioner to make submissions why, despite the failure to comply they are a fit and proper person for the renewal of a practising certificate and upon consideration of the material provided may be satisfied:
  - i. The practitioner is or continues to be a fit and proper person to hold a practising certificate and renew that certificate; or
  - ii. The practitioner is not or no longer continues to be a fit and proper person to hold the practising certificate and refuse to renew that certificate
- d. Require a practitioner to show cause why the Society ought not cancel, suspend or amend a practising certificate to show cause; or
- e. Upon the completion of such a show cause process:
  - i. Take no further action; or
  - ii. cancel, suspend or amend a practising certificate
- f. Report the matter to the Legal Services Commission as a matter which may constitute unsatisfactory professional conduct or professional misconduct.