

Legal Profession National Law

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Chapter 5 Dispute resolution and professional discipline

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Chapter 5 Dispute resolution and professional discipline

Part 5.1 Preliminary

Division 1 Introduction

5.1.1 Objectives

The objectives of this Chapter are:

- (a) to provide a national framework for the timely and effective resolution of disputes or issues between clients and lawyers or law practices; and
- (b) to provide a national scheme for the discipline of the Australian legal profession, in the interests of the administration of justice and for the protection of clients of law practices and the public generally; and
- (c) to monitor, promote and enforce the professional standards, competence and honesty of the Australian legal profession.

5.1.2 References to lawyers

The term *lawyer* when used alone in this Chapter refers to any of the following:

- (a) an Australian legal practitioner;
- (b) an Australian-registered foreign lawyer;
- (c) an Australian lawyer who is not an Australian legal practitioner;
- (d) a former Australian legal practitioner, a former Australian-registered foreign lawyer or a former Australian lawyer.

Division 2 Application of this Chapter

5.1.3 Application of this Chapter to conduct

- (1) This Chapter applies to conduct of a lawyer or law practice wherever occurring, whether:
 - (a) wholly within or outside Australia; or
 - (b) partly within and partly outside Australia.
- (2) This Chapter applies to conduct of a lawyer or law practice whether consisting of acts or omissions or a combination of both.
- (3) This Chapter extends to:
 - (a) a former Australian legal practitioner or former Australian-registered foreign lawyer in respect of conduct while an Australian legal practitioner or Australian-registered foreign lawyer in the same way as it applies to an Australian legal practitioner or Australian-registered foreign lawyer, with any necessary modifications; and
 - (b) a former Australian lawyer in respect of conduct occurring while an Australian lawyer who is not an Australian legal practitioner, in the same way as it applies to an Australian lawyer who is not an Australian legal practitioner, with any necessary modifications; and
 - (c) conduct of a lawyer as a public notary.

5.1.4 Application of this Chapter to lawyers and law practices

- (1) A provision of this Law or any other applicable law that protects a person from any

action, liability, claim or demand in connection with any conduct of the person does not affect the application of this Chapter to the person in respect of the conduct.

- (2) This Chapter does not apply to a person while the person holds:
- (a) office as a Justice of the High Court; or
 - (b) office as a judge or magistrate of a court created by the Parliament of the Commonwealth; or
 - (c) office as a judge or magistrate of a court, or a judicial member of a tribunal, of a jurisdiction; or
 - (d) an office specified in the National Rules for the purposes of this section;

regardless of whether the conduct the subject of a complaint allegedly occurred before or after the person's appointment to the office concerned.

Note. Conduct by holders of judicial offices that occurred before their appointment to those offices may be dealt with through jurisdictional arrangements.

- (3) For the purposes of this Chapter, conduct of an Australian legal practitioner in the exercise of official functions as an arbitrator or costs assessor constitutes conduct occurring in connection with the practice of law, except to the extent that the conduct was concerned with the justiciable aspects of decision making by the arbitrator or costs assessor.
- (4) For the purposes of this Chapter, conduct of an Australian legal practitioner does not constitute conduct occurring in connection with the practice of law to the extent that it is conduct engaged in in the exercise of executive or administrative functions under legislation as:
- (a) a government lawyer who is not required to hold an Australian practising certificate; or
 - (b) a person appointed to an office by the Governor-General, the Governor of a State or the Administrator of a Territory; or
 - (c) any member, officer or employee of a local representative or professional association.

5.1.5 Jurisdiction of Supreme Courts

- (1) The inherent jurisdiction and powers of the Supreme Court of this jurisdiction with respect to the control and discipline of Australian lawyers are not affected by anything in this Chapter, and extend to Australian legal practitioners whose home jurisdiction is this jurisdiction and to other Australian legal practitioners engaged in legal practice in this jurisdiction.
- (2) Nothing in this Chapter is intended to affect the jurisdiction and powers of the Supreme Court of another jurisdiction with respect to the control and discipline of Australian lawyers or Australian legal practitioners.

Part 5.2 Complaints

Division 1 Making complaints and other matters about complaints

5.2.1 What is a complaint?

A *complaint* is any dispute or issue about any conduct to which this Chapter applies.

Note. A complaint can be about the conduct of either a lawyer or a law practice or both.

5.2.2 Who may make a complaint?

- (1) Any person or body may make a complaint.
- (2) The Commissioner may initiate a complaint containing a disciplinary matter only.

5.2.3 How is a complaint made?

- (1) A complaint is made to or by the Commissioner.
- (2) A complaint must be made or recorded in writing and must:
 - (a) identify the complainant; and
 - (b) identify the lawyer or law practice about whom the complaint is made (or, if it is not possible to identify the lawyer, identify the law practice concerned); and
 - (c) describe the alleged conduct that is the subject of the complaint.

5.2.4 Matters in a complaint

- (1) A complaint may contain either or both of the following:
 - (a) a consumer matter;
 - (b) a disciplinary matter.
- (2) A dispute or issue about conduct that is the subject of a complaint can be both a consumer matter and a disciplinary matter.

Note. For example, a dispute or issue relating to costs could be both a consumer matter (ie a costs dispute) and a disciplinary matter.
- (3) A commercial or government client making a complaint cannot obtain relief under this Chapter in relation to a consumer matter, but this subsection does not prevent the dispute or issue that is the subject of the consumer matter from being dealt with as a disciplinary matter.

5.2.5 Consumer matters (including costs disputes)

- (1) A *consumer matter* is so much of a complaint about a lawyer or a law practice as relates to the provision of legal services to the complainant by the lawyer or law practice and as the Commissioner determines should be resolved by the exercise of functions relating to consumer matters.

Note. A determination of the Commissioner under subsection (1) does not prevent the dispute or issue also being dealt with as a disciplinary matter: see section 5.2.4 (2).

- (2) A *costs dispute* is a consumer matter involving a dispute about legal costs payable on a solicitor-client basis where the dispute is between a lawyer or law practice and a person who is charged with those legal costs or is liable to pay those legal costs (other than under a court or tribunal order for costs), whether as a client of the lawyer or law practice or as a third party payer.

Note. Section 5.3.7 enables the Commissioner to deal with costs disputes within certain monetary limits.

5.2.6 Disciplinary matters

A *disciplinary matter* is so much of a complaint about a lawyer or a law practice as would, if the conduct concerned were established, amount to unsatisfactory professional conduct or professional misconduct.

5.2.7 Mixed complaints

If a complaint contains or may contain both a consumer matter and a disciplinary matter, the Commissioner may give priority to resolving the consumer matter as soon as possible

and, if necessary and appropriate, separately from the disciplinary matter.

5.2.8 Time limits on making complaints

- (1) Subject to subsection (2), a complaint must be about conduct alleged to have occurred within the period of 3 years immediately before the complaint is made, but the Commissioner may waive the time requirement if satisfied that:
 - (a) it is just and fair to deal with the complaint having regard to the delay and the reasons for the delay; or
 - (b) the complaint involves an allegation of professional misconduct and it is in the public interest to deal with the complaint.
- (2) To the extent that a complaint involves a costs dispute, the complaint must be made within the required period referred to in subsection (3), but the Commissioner may waive the time requirement if satisfied that:
 - (a) the complaint is made within 4 months after the required period; and
 - (b) it is just and fair to deal with the complaint having regard to the delay and reasons for the delay; and
 - (c) the lawyer or law practice has not commenced legal proceedings in respect of the legal costs.
- (3) For the purposes of subsection (2), the *required period* is the period of:
 - (a) 60 days after the legal costs become payable, except as provided by paragraph (b); or
 - (b) if an itemised bill was requested in respect of those costs in accordance with section 4.3.18 (2)—30 days after the request was complied with.
- (4) The Commissioner's decision to waive or refuse to waive a time requirement under this section is final and cannot be challenged in any proceedings by the complainant or the respondent.

5.2.9 Withdrawing complaints

- (1) A complaint may be wholly or partly withdrawn by the complainant.
- (2) No further action is to be taken under this Chapter with respect to a consumer matter contained in a complaint to the extent it is withdrawn, but:
 - (a) the Commissioner may initiate or continue to investigate disciplinary matters, or proceed with disciplinary matters despite the whole or partial withdrawal of a complaint; and
 - (b) the whole or partial withdrawal of a complaint does not prevent:
 - (i) a further complaint being made under this Chapter, by the same or any other person, with respect to the same subject-matter; or
 - (ii) action being taken on any other complaint made with respect to the same subject-matter.
- (3) The whole or partial withdrawal of a complaint in any jurisdiction does not of itself affect any proceedings in the designated tribunal.

5.2.10 Where complaint is dealt with

A complaint is to be dealt with in the jurisdiction with which the complaint has the closest connection.

Note. Section 8.5.2 (4) provides that guidelines and directions may be issued for determining which local representative should deal with a matter where more than one

jurisdiction is or may be involved or there is uncertainty as to which jurisdiction is relevant in the circumstances.

5.2.11 Other rights not affected

This Division does not affect any other right of a person to complain about the conduct of a lawyer or a law practice under any other legislation or to seek a remedy at common law or in equity in relation to the conduct.

Division 2 Preliminary assessment of complaints

5.2.12 Preliminary assessment of complaint

- (1) The Commissioner must conduct a preliminary assessment of a complaint.
- (2) When conducting the preliminary assessment:
 - (a) the Commissioner may request further information to be provided within a specified period by the complainant, the respondent or another person who may have relevant information; and
 - (b) the Commissioner is not bound by rules of evidence and may inform himself or herself on any matter in any manner as he or she thinks fit.
- (3) Any evidence or information obtained by the Commissioner in the course of conducting a preliminary assessment may be used by the Commissioner or an investigator in or in relation to any later investigation or consideration of the complaint.
- (4) The Commissioner may complete a preliminary assessment even if requested information is not provided within the specified period.

5.2.13 Closure of whole or part of complaint after preliminary assessment

- (1) At any stage after preliminary assessment of a complaint, the Commissioner may close the complaint without further consideration of its merits for any of the following reasons to the extent they are applicable:
 - (a) the complaint is vexatious, misconceived, frivolous or lacking in substance;
 - (b) the complaint was made out of time;
 - (c) the complainant has not responded, or has responded inadequately, to a request for further information;
 - (d) the subject-matter of the complaint has been or is already being investigated;
 - (e) the subject-matter of the complaint would be better investigated or dealt with by police or another investigatory or law enforcement body;
 - (f) the Commissioner has made a recommendation to the Board under section 3.5.10 (4) in relation the lawyer concerned;
 - (g) the subject-matter of the complaint is the subject of civil proceedings, except so far as it is a disciplinary matter;
 - (h) the complaint is not one that the Commissioner has power to deal with;
 - (i) the Commissioner is satisfied that it is otherwise in the public interest to close the complaint.
- (2) After preliminary assessment of a complaint made by a commercial or government client, the Commissioner must immediately close the complaint without further consideration of its merits unless it contains or gives rise to a disciplinary matter.

Note. Section 5.2.4 (3) precludes a commercial or government client from obtaining relief

under this Chapter in relation to a consumer matter.

- (3) A complaint may be closed under this section without any investigation or without completing an investigation.
- (4) The Commissioner is not required to give a complainant, a lawyer or law practice an opportunity to be heard or make a submission to the Commissioner before determining whether or not to close a complaint under this section.
- (5) The power to close a complaint under this section extends to closure of part of a complaint.

5.2.14 Immediate suspension of practising or registration certificate

- (1) The Commissioner may recommend to the Board that an Australian practising certificate or Australian registration certificate be immediately suspended if:
 - (a) a complaint has been made about the conduct of an Australian legal practitioner, Australian-registered foreign lawyer or law practice; and
 - (b) the Commissioner considers the immediate suspension of the certificate is warranted in the public interest on the ground of the seriousness of the alleged conduct.
- (2) The Commissioner may make the recommendation whether or not an investigation of the complaint has begun or been completed.
- (3) The making of the recommendation does not prevent the Commissioner from continuing to deal with the complaint.

Note. Section 3.5.12 provides that in these circumstances the Board may suspend the certificate.

Division 3 Notification of and submissions by respondents

5.2.15 Notification of respondent about complaint

- (1) The Commissioner:
 - (a) may, after receiving a complaint, notify the respondent of the complaint or give the respondent a summary or details of the complaint; and
 - (b) subject to section 5.2.17, must, as soon as practicable after the Commissioner decides to investigate a complaint under section 5.2.18 and if he or she has not already done so, give the respondent a summary or details of the complaint and a notice informing the respondent of the right to make submissions; and
 - (c) must, before making a determination and if he or she has not already done so, give the respondent a summary or details of the complaint and a notice informing the respondent of the right to make submissions.
- (2) A notice informing the respondent of the right to make submissions must specify a period of 21 days in which submissions must be received or a shorter or longer period if the Commissioner reasonably believes a different period is warranted in the circumstances.

5.2.16 Submissions by respondent

- (1) The respondent to a complaint may, within the period specified under section 5.2.15, make submissions to the Commissioner about the complaint or decision or its subject-matter, unless the complaint has been closed.
- (2) The Commissioner may at his or her discretion extend the period in which submissions may be made.

- (3) The Commissioner must consider any submissions made by the respondent within the specified period in response to the notice of a decision to investigate a complaint before deciding what action is to be taken on the complaint, and may consider submissions received afterwards.
- (4) The rules of procedural fairness are not breached merely because no submissions are received within the specified period and the Commissioner makes a determination in relation to the complaint, even if submissions are received afterwards.

5.2.17 Exceptions to requirement for notification of complaint

- (1) Section 5.2.15 (1) (b) does not require the Commissioner to give the respondent a summary or details of a complaint or a notice about making submissions if the Commissioner reasonably believes that to do so will or is likely to:
 - (a) prejudice the investigation of the complaint; or
 - (b) prejudice an investigation by the police or another investigatory or law enforcement body of any matter with which the complaint is concerned; or
 - (c) place the complainant or another person at risk of intimidation or harassment; or
 - (d) prejudice pending court proceedings.
- (2) In that case, the Commissioner:
 - (a) may postpone giving the respondent the summary or details and the notice until of the opinion that it is appropriate to do so; or
 - (b) may at his or her discretion give the respondent the notice and a statement of the general nature of the complaint.

Division 4 Investigation of complaints

5.2.18 Power to investigate complaints

- (1) The Commissioner may investigate the whole or part of a complaint.
- (2) The Commissioner may appoint a suitably qualified person to conduct a complaints investigation.
- (3) The appointment may be made generally, or in relation to a particular law practice, or in relation to a particular complaints investigation.

Note. Chapter 7 applies to an investigation under this Division

5.2.19 Extending scope of investigation

- (1) The Commissioner may, if he or she considers it appropriate to do so, extend the scope of an investigation of a complaint so as to include conduct of the respondent revealed during the investigation.
- (2) Conduct so revealed, or anything arising from that conduct, may be made the subject of a new complaint.
- (3) The new complaint need not be the subject of a separate or further investigation if the Commissioner is satisfied that the subject-matter has already been sufficiently investigated or considered.

5.2.20 Referral of matters for costs assessment

- (1) For the purpose of investigating a complaint containing a disciplinary matter, the Commissioner may arrange for an assessment of costs charged or claimed by the respondent.

- (2) Any such application may be made outside any applicable time limit for making applications for costs assessments.

Part 5.3 Consumer matters

Division 1 Preliminary

5.3.1 Application of this Part

- (1) This Part applies to consumer matters.
- (2) Division 2 applies to all consumer matters, but has effect subject to Division 3 in relation to costs disputes.

Division 2 Provisions applicable to all consumer matters

5.3.2 Prerequisite to resolution action by Commissioner

Despite any other provision of this Division, the Commissioner is not to take action towards resolving a consumer matter unless he or she is of the opinion that:

- (a) at least one of the parties has made a reasonable attempt to resolve the matter and the attempt has been unsuccessful; or
- (b) it would be unreasonable to expect the complainant to be involved in such an attempt.

5.3.3 Informal resolution of consumer matters

The Commissioner must attempt to resolve a consumer matter by informal means as soon as practicable.

5.3.4 Mediation

- (1) This section applies to a complaint to the extent that it contains a consumer matter.
- (2) The Commissioner may order the parties to the complaint to attend mediation in good faith in relation to the consumer matter.
- (3) If mediation succeeds in relation to a consumer matter contained in the complaint, the Commissioner may close the complaint to that extent on the ground that it has been resolved.
- (4) If mediation fails in relation to a consumer matter contained in the complaint, the Commissioner may investigate the complaint further and proceed to a determination of the consumer matter.
- (5) If the complainant does not engage in mediation in good faith in relation to a consumer matter contained in the complaint, the Commissioner may instead close the complaint so far as it contains the consumer matter.
- (6) Neither evidence of anything said or admitted during a mediation or attempted mediation under this section of the whole or a part of the conduct that is the subject of a complaint nor a document prepared for the purposes of the mediation or attempted mediation:
 - (a) may be used by the Commissioner in making a determination; or
 - (b) is admissible in any proceedings in a court or before a person or body authorised to hear and receive evidence.

5.3.5 Settlement agreements

- (1) If the parties to a complaint involving a consumer matter reach agreement under this Part

or otherwise with respect to the consumer matter:

- (a) the Commissioner may prepare a written record of the agreement; and
 - (b) the record must be signed by or on behalf of each party and certified by the Commissioner; and
 - (c) the Commissioner must give each party a copy of the signed and certified record.
- (2) Any party, after giving written notice to the other party, may enforce the agreement by filing a copy of the certified record free of charge in a court.
 - (3) On filing, the record must be taken to be an order of the court in accordance with its terms, and may be enforced accordingly.
 - (4) A record may be filed only once under subsection (2).

5.3.6 Determination of consumer matters by Commissioner

- (1) The Commissioner may resolve a consumer matter by making a determination that, in the Commissioner's view, is fair and reasonable in all the circumstances.
- (2) In determining a consumer matter, the Commissioner may make any of the following orders:
 - (a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;
 - (b) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;
 - (c) an order requiring the respondent to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;
 - (d) an order requiring:
 - (i) the respondent Australian legal practitioner; or
 - (ii) the respondent law practice to arrange for a legal practitioner associate of the law practice;to undertake training, education, be supervised or undertake counselling;
 - (e) a compensation order against the respondent in accordance with Part 5.5.
- (3) A failure to comply with an order under this section is capable of constituting unsatisfactory professional conduct or professional misconduct on the part of:
 - (a) any principal of a respondent law practice; and
 - (b) any lawyer involved in the contravention.

Division 3 Further provisions applicable to costs disputes

5.3.7 General role of Commissioner in costs disputes

- (1) The Commissioner is, subject to the other provisions of this Division, to deal with a costs dispute in the same manner as other consumer matters if:
 - (a) the total bill for legal costs is less than \$100,000 (indexed) payable in respect of any one matter; or
 - (b) the total bill for legal costs equals or is more than \$100,000 (indexed) payable in respect of any one matter, but the total amount in dispute is less than \$10,000 (indexed).
- (2) If a complaint contains a costs dispute that cannot be dealt with under subsection (1), the

Commissioner is not to deal with or continue to deal with the dispute, but is to inform the parties of the right to apply for a costs assessment.

5.3.8 Binding determinations in costs disputes

- (1) The Commissioner may make a binding determination about costs in the circumstances referred to in subsection (2).
- (2) The determination may be made in circumstances where:
 - (a) the Commissioner is unable to resolve a costs dispute referred to in section 5.3.7 (1) (whether wholly or partly); and
 - (b) the total amount of legal costs still in dispute is less than \$10,000 (indexed).
- (3) The determination must specify the amount payable as legal costs (including a nil amount). The amount ordered as payable must be less than \$10,000 (indexed).
- (4) A determination is to be based on the Commissioner's assessment of what is fair and reasonable in all the circumstances.
- (5) In considering what is fair and reasonable in all the circumstances, the Commissioner must have regard to section 4.3.30.

5.3.9 Cases where binding determinations are not made in costs disputes

- (1) The Commissioner is to cease dealing with a costs dispute in the circumstances referred to in subsection (2), but is to inform the parties of the right to apply for a costs assessment.
- (2) The action under subsection (1) is to be taken where:
 - (a) an attempted resolution by the Commissioner of a costs dispute referred to in section 5.3.7 (1) is unsuccessful (whether wholly or partly); and
 - (b) either:
 - (i) the total amount of legal costs still in dispute is equal to or more than \$10,000 (indexed); or
 - (ii) the total amount of legal costs still in dispute is less than \$10,000 (indexed) and the Commissioner notifies the parties in writing that he or she is unable to resolve the dispute.

Note. Section 4.3.27 provides in part that legal costs that are or have been the subject of a costs dispute under this Chapter may not be the subject of a costs assessment unless the Commissioner is unable to resolve the costs dispute and has notified the parties of their entitlement to apply for a costs assessment. Consequently, a costs assessment is not available where a costs dispute is resolved.

5.3.10 GST excluded in calculations

Amounts payable by way of GST in respect of legal costs are to be disregarded when determining:

- (a) the total bill for legal costs referred to in section 5.3.7; or
- (b) the total amount of legal costs referred to in section 5.3.8.

5.3.11 Lodgment of disputed legal costs with Commissioner

- (1) The Commissioner may, by notice in writing, require a party to a complaint that involves a costs dispute to lodge the whole or a specified part of the disputed amount of the legal costs with the Commissioner within 28 days after giving the notice to the party.
- (2) The Commissioner may impose a requirement under subsection (1) only if satisfied that it would be fair and reasonable to do so.

- (3) The Commissioner cannot impose a requirement under subsection (1) on a lawyer or law practice if the complaint involving the costs dispute was made out of time or after the required period referred to in section 5.2.8 (3).
- (4) The Commissioner may close a complaint to the extent that it involves a costs dispute if the complainant fails to comply with this section.

5.3.12 Dealing with lodged costs

- (1) The Commissioner must cause money lodged under section 5.3.11 to be placed on deposit in an interest-bearing account with an ADI in the name of the Commissioner or an authority nominated in applicable jurisdictional legislation.
- (2) Money in the account, including interest earned on money deposited in the account, is to be paid (after the deduction of any relevant government duties and ADI charges and fees):
 - (a) if the costs dispute is successfully resolved by the Commissioner—as agreed by the parties; or
 - (b) if the complainant withdraws the complaint or does not apply to the designated tribunal of any jurisdiction or the complaint is closed—to the law practice or lawyer concerned; or
 - (c) despite paragraph (b) and if the Commissioner considers it appropriate to do so in the circumstances—to the complainant.

Part 5.4 Disciplinary matters

Division 1 Preliminary

5.4.1 Application of this Part

This Part applies to disciplinary matters.

5.4.2 Unsatisfactory professional conduct

For the purposes of this Law, *unsatisfactory professional conduct* includes conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

5.4.3 Professional misconduct

- (1) For the purposes of this Law, *professional misconduct* includes:
 - (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
 - (b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.
- (2) For the purpose of deciding whether a lawyer is or is not a fit and proper person to engage in legal practice as mentioned in subsection (1) (b), regard may be had to the matters that would be considered if the lawyer were an applicant for admission to the Australian legal profession or for the grant or renewal of an Australian practising certificate and any other relevant matters.

5.4.4 Conduct capable of being unsatisfactory professional conduct or professional misconduct

Without limitation, the following conduct is capable of being unsatisfactory professional conduct or professional misconduct:

- (a) conduct consisting of a contravention of this Law, whether or not:
 - (i) the person has been convicted of an offence in relation to the contravention; or
 - (ii) a pecuniary penalty order has been made against the person under Part 9.6 in relation to the contravention; or
 - (iii) the contravention is punishable by way of conviction or pecuniary penalty order;
- (b) conduct consisting of a contravention of the National Rules;
- (c) conduct involving contravention of the Legal Profession National Law Act of this or any other jurisdiction (other than this Law), whether or not the person has been convicted of an offence in relation to the contravention;
- (d) charging more than a fair and reasonable amount for legal costs in connection with the practice of law;
- (e) conduct in respect of which there is a conviction for:
 - (i) a serious offence; or
 - (ii) a tax offence; or
 - (iii) an offence involving dishonesty;
- (f) conduct as or in becoming an insolvent under administration;
- (g) conduct in becoming disqualified from managing or being involved in the management of any corporation under the Corporations Act;
- (h) conduct consisting of a failure to comply with the requirements of a notice under this Law or the National Rules;
- (i) conduct in failing to comply with an order of a designated tribunal made under this Law (including but not limited to a failure to pay wholly or partly a fine imposed under this Law);
- (j) conduct in failing to comply with a compensation order made under this Chapter.

Division 2 Determination by Commissioner

5.4.5 Determination by Commissioner—unsatisfactory professional conduct

- (1) The Commissioner may, in relation to a disciplinary matter, find that the respondent lawyer or a legal practitioner associate of the respondent law practice has engaged in unsatisfactory professional conduct and may determine the disciplinary matter by making any of the following orders:
 - (a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;
 - (b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;
 - (c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;

- (d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;
 - (e) an order requiring:
 - (i) the respondent lawyer; or
 - (ii) the respondent law practice to arrange for a legal practitioner associate of the law practice;
 - to undertake training, education or counselling or be supervised;
 - (f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding \$25,000) to the fund referred to in section 9.6.7;
 - (g) an order recommending that the Board impose a specified condition on the Australian practising certificate or Australian registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice.
- (2) If the Commissioner proposes to determine a disciplinary matter under this section:
 - (a) the Commissioner must provide the respondent or associate and the complainant with details of the proposed determination and invite them to make written submissions to the Commissioner within a specified period; and
 - (b) the Commissioner must take into consideration any written submissions made to the Commissioner within the specified period, and may but need not consider submissions received afterwards; and
 - (c) the Commissioner is not required to repeat the process if the Commissioner decides to make a determination in different terms after taking into account any written submissions received during the specified period; and
 - (d) the rules of procedural fairness are not breached merely because no submissions are received within the specified period and the Commissioner makes a determination in relation to the complaint, even if submissions are received afterwards.
 - (3) If the Commissioner determines a disciplinary matter under this section, no further action is to be taken under this Chapter with respect to the complaint.
 - (4) If a complaint contains both a consumer matter and a disciplinary matter and the Commissioner has already made a determination of the consumer matter under section 5.3.6, the Commissioner may, in subsequently making a determination about the disciplinary matter, take into account the determination already made about the consumer matter, but not so as to make further orders under that section.

Division 3 Role of designated tribunal

5.4.6 Initiation and prosecution of proceedings in designated tribunal

- (1) The Commissioner may initiate and prosecute proceedings against a respondent lawyer in the designated tribunal of this jurisdiction if the Commissioner is of the opinion that:
 - (a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the designated tribunal; or
 - (b) the alleged conduct may amount to professional misconduct.
- (2) As soon as practicable after deciding to initiate proceedings under this section, the Commissioner must give the complainant and the respondent to the complaint written

notice of the decision.

5.4.7 Procedure of designated tribunal

- (1) Proceedings initiated under this Chapter in the designated tribunal are to be dealt with in accordance with the procedures of the designated tribunal.
- (2) Subject to any procedural requirements, the designated tribunal may determine proceedings without conducting a formal hearing, but is bound by the rules of procedural fairness.
- (3) The designated tribunal is bound by the rules of evidence in conducting a hearing in relation to an allegation of professional misconduct, but is otherwise not bound by those rules in relation to matters arising under this Chapter.

5.4.8 Determination by designated tribunal—disciplinary matters

- (1) If, after it has completed a hearing under this Part into the conduct of a respondent lawyer, the designated tribunal finds that the lawyer is guilty of unsatisfactory professional conduct or professional misconduct, the designated tribunal may make such orders as it thinks fit, including any of the orders that the Commissioner can make under section 5.4.5 in relation to a lawyer and any one or more of the following:
 - (a) an order that the lawyer do or refrain from doing something in connection with the practice of law;
 - (b) an order that the lawyer cease to accept instructions as a public notary in relation to notarial services;
 - (c) an order that the lawyer's practice be managed for a specified period in a specified way or subject to specified conditions;
 - (d) an order that the lawyer's practice be subject to periodic inspection by a specified person for a specified period;
 - (e) an order that the lawyer seek advice in relation to the management of the lawyer's practice from a specified person;
 - (f) an order recommending that the name of the lawyer be removed from a roll kept by a Supreme Court and the Australian Legal Profession Register;
 - (g) an order requiring the Board to impose a specified condition on the Australian practising certificate or Australian registration certificate of the lawyer;
 - (h) an order that the lawyer's Australian practising certificate or Australian registration certificate be suspended for a specified period or cancelled;
 - (i) an order that an Australian practising certificate or Australian registration certificate not be granted to the lawyer before the end of a specified period;
 - (j) an order that the lawyer not apply for an Australian practising certificate or Australian registration certificate before the end of a specified period;
 - (k) a compensation order against the lawyer in accordance with Part 5.5;
 - (l) an order that the lawyer pay a fine of a specified amount not exceeding \$50,000 if the lawyer is found guilty professional misconduct.
- (2) Subject to section 5.4.9, the designated tribunal may make ancillary or other orders, including:
 - (a) an order for payment by the lawyer of expenses associated with orders under this section, as assessed or reviewed in or in accordance with the order or as agreed; and
 - (b) an interlocutory or interim order, including an order of the kind referred to in

subsection (1).

- (3) The designated tribunal may find a person guilty of unsatisfactory professional conduct even though the complaint or charge alleged professional misconduct.
- (4) If the designated tribunal makes an order that a lawyer pay a fine, a copy of the order may be filed in the registry of a court having jurisdiction to give judgment for a debt of the same amount as the amount of the fine and the order may be enforced as if it were an order of the court.
- (5) To avoid doubt, the power of the designated tribunal under subsection (1) to make any of the orders that the Commissioner can make under section 5.4.5 extends to making orders of that kind in relation to a lawyer whom the tribunal finds is guilty of professional misconduct.

5.4.9 Costs

- (1) The designated tribunal must make orders requiring a lawyer whom it has found guilty of unsatisfactory professional conduct or professional misconduct to pay costs (including costs of the Commissioner and the complainant), unless the designated tribunal is satisfied that exceptional circumstances exist.
- (2) The designated tribunal may make orders requiring a lawyer whom it has not found guilty of unsatisfactory professional conduct or professional misconduct to pay costs (including costs of the Commissioner and the complainant), if satisfied that:
 - (a) the sole or principal reason why the proceedings were instituted in the designated tribunal was a failure of the lawyer to co-operate with the Commissioner; or
 - (b) there is some other reason warranting the making of an order in the particular circumstances.
- (3) The designated tribunal may make orders requiring:
 - (a) the Commissioner or the Board; or
 - (b) a person, body or fund nominated in relevant jurisdictional legislation for the purposes of this section;to pay costs, but may do so only if satisfied that the lawyer concerned is not guilty of unsatisfactory professional conduct or professional misconduct and the designated tribunal considers that special circumstances warrant the making of the orders.
- (4) The designated tribunal may make orders requiring:
 - (a) a lawyer in respect of whom proceedings are pending before the designated tribunal; or
 - (b) a person, body or fund nominated in relevant jurisdictional legislation for the purposes of this section;to pay costs on an interlocutory or interim basis.
- (5) An order for costs:
 - (a) may be for a specified amount; or
 - (b) may be for an unspecified amount but must specify the basis on which the amount is to be determined.
- (6) An order for costs may specify the terms on which costs must be paid.

Note. Jurisdictional legislation may provide a right of appeal against or a right of review of the designated tribunal's decision.

5.4.10 Compliance with determinations and orders

Persons and bodies (other than a Supreme Court) having relevant functions under this Law must give effect to the orders of a tribunal under this Law.

Note. Section 2.2.9 provides that a Supreme Court may remove the name of a lawyer from a roll on the recommendation of the Board or a designated tribunal under this Law.

5.4.11 Power to disregard procedural lapses

- (1) The designated tribunal may order that a failure by the Commissioner to observe a procedural requirement in relation to a complaint is to be disregarded, if satisfied that the parties to the hearing have not been prejudiced by the failure.
- (2) This section applies to a failure occurring before proceedings were instituted in the designated tribunal in relation to the complaint as well as to a failure occurring afterwards.

Part 5.5 Compensation orders

5.5.1 Making of compensation orders

- (1) For the purposes of section 5.3.6, the Commissioner may make a compensation order against a respondent lawyer or law practice in accordance with this Part.
- (2) For the purposes of section 5.4.8, the designated tribunal may make a compensation order against a respondent lawyer in accordance with this Part.

5.5.2 Request by complainant for compensation order

- (1) A complainant may request:
 - (a) the Commissioner; or
 - (b) the designated tribunal in proceedings under Division 3 of Part 5.4;to make a compensation order.
- (2) A compensation order may be requested in respect of loss suffered by:
 - (a) the complainant; or
 - (b) another person who is a client of the respondent;(or both) because of the conduct the subject of the complaint. The complainant, or other person, suffering the loss is referred to in this Part as an ***aggrieved person***.
- (3) A complainant who makes such a request must describe the loss suffered by the aggrieved person and the relevant circumstances.
- (4) A request may be made in the complaint or to the Commissioner at any time after the complaint is made and before it is disposed of.
- (5) However, a request may not be made after proceedings have been initiated in the designated tribunal with respect to the complaint unless the designated tribunal grants the complainant leave to make the request.

5.5.3 Nature of compensation orders

- (1) A compensation order is an order to compensate the aggrieved person for loss suffered because of conduct that is the subject of a complaint and consists of one or more of the orders referred to in subsections (2), (3) and (4).
- (2) A compensation order may include an order that the respondent lawyer or law practice pay to the aggrieved person, by way of monetary compensation for the loss, a specified

amount not exceeding:

- (a) where the compensation order is made by the Commissioner—\$25,000; or
 - (b) where the compensation order is made by the designated tribunal—\$25,000 or a greater amount agreed to with the consent of both the complainant and the lawyer or law practice.
- (3) A compensation order may include an order that the respondent lawyer or law practice cannot recover or must repay the whole or a specified part of the amount charged to the aggrieved person by the lawyer or law practice in respect of specified legal services. An order under this subsection is effective:
- (a) to prevent recovery of an amount even if proceedings to recover the amount (or any part of it) have been commenced by or on behalf of the lawyer or law practice; and
 - (b) to require repayment of an amount even if a court has ordered payment of the amount (or an amount of which it is part) in proceedings brought by or on behalf of the lawyer or law practice.
- (4) A compensation order may include an order discharging a lien possessed by the lawyer or law practice in respect of a specified document or class of documents.
- (5) A compensation order may specify the person to whom monetary compensation is payable, whether to the aggrieved person or to another person on behalf of the aggrieved person.

Note. Section 5.5.6 provides that compensation awarded under this Part does not affect any other remedy available for the loss.

5.5.4 Prerequisites for making of compensation orders

- (1) Unless the complainant and the respondent lawyer or law practice concerned agree, a compensation order is not to be made unless the Commissioner or designated tribunal (as the case requires) is satisfied that:
- (a) the aggrieved person has suffered loss because of the conduct concerned; and
 - (b) it is in the interests of justice that the order be made.
- (2) A compensation order is not to be made in respect of any loss for which the aggrieved person has received or is entitled to receive:
- (a) compensation under an order that has been made by a court; or
 - (b) compensation paid or payable from a fidelity fund of any jurisdiction, where a relevant claim for payment from that fund has been made or determined.
- (3) Subsection (2) does not apply where a fidelity authority is seeking a compensation order under its subrogation to the rights and remedies of a claimant (see section 4.5.28).

5.5.5 Enforcement of compensation orders

A copy of a compensation order made by the Commissioner may be filed in a court of competent jurisdiction and the order (so far as it relates to any amount payable under the order) may be enforced as if it were an order of the court.

5.5.6 Other remedies not affected

The recovery of compensation awarded under this Part does not affect any other remedy available to an aggrieved person, but any compensation so awarded must be taken into account, and appropriate adjustments made, in any other proceedings by or on behalf of the aggrieved person in respect of the same loss.

Part 5.6 Appeal or review

5.6.1 Finality of determinations of Commissioner

The determination of a complaint or matter by the Commissioner under this Chapter is final, except as provided by this Part.

5.6.2 Internal review of decisions of Commissioner

- (1) The Commissioner may, at his or her absolute discretion, conduct an internal review of a decision made by the Commissioner if the Commissioner considers it appropriate to do so.
- (2) On the review, the Commissioner is to consider whether the decision was dealt with appropriately and whether the decision was based on reasonable grounds.
- (3) On the review, the Commissioner may confirm the original decision, make a new decision, or refer the matter back to the original decision-maker.

5.6.3 Right of appeal or review of decisions of Commissioner

- (1) A respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with applicable jurisdictional legislation, appeal to the designated tribunal against, or seek a review by the designated tribunal of, a determination of the Commissioner under:
 - (a) section 5.3.6, in relation to a compensation order for more than \$10,000; or
 - (b) section 5.4.5.
- (2) The designated tribunal may make any order it considers appropriate on the appeal or review.

Note. Jurisdictional legislation may provide a right of appeal against or a right of review of the designated tribunal's decision.

Part 5.7 General duties of Commissioner

5.7.1 Duty to deal with complaints

It is the duty of the Commissioner to deal with all complaints properly made and to deal with them in accordance with this Law and the National Rules.

5.7.2 Duty to exercise discretions fairly

It is the duty of the Commissioner, in exercising or considering whether or how to exercise any applicable discretions when dealing with a complaint (including the conduct of any investigation), to act in a fair manner, having regard to the respective interests of the complainant and the respondent and to the public interest.

5.7.3 Duty to deal with complaints efficiently and expeditiously

It is the duty of the Commissioner to deal with complaints (including the conduct of any investigations) as efficiently and expeditiously as is practicable.

5.7.4 Notice of decisions and determinations

- (1) It is the duty of the Commissioner in relation to a complaint to give the complainant and the respondent written notice of:
 - (a) a decision to close the complaint; or
 - (b) a determination made in relation to the complaint (including a costs dispute); or
 - (c) a decision made as a result of an internal review in connection with the complaint.

- (2) A notice under this section must be given as soon as practicable after the decision or determination is made, and must include a statement of reasons for the decision.
- (3) The Commissioner need not give a party to a complaint notice of a decision or determination to close the complaint if the Commissioner considers that it would be appropriate in the circumstances to dispense with notifying that party.

Note. Section 5.4.6 provides for notice to be given of a decision to initiate proceedings in the designated tribunal.

5.7.5 Rules of procedural fairness

- (1) The rules of procedural fairness, to the extent that they are not inconsistent with the provisions of this Law or the National Rules, apply in relation to:
 - (a) the investigation and determination of complaints by the Commissioner; and
 - (b) the making of other decisions by the Commissioner in respect of complaints; and
 - (c) the procedures of the Commissioner in respect of complaints and any associated matters.
- (2) Subsection (1) does not apply in relation to a decision of the Commissioner that the whole or part of a complaint should be resolved by the exercise of functions relating to consumer matters (see section 5.2.5(1)).