QUEENSLAND CIVIL AND ADMINISTRATIVE TRIBUNAL

CITATION:	*Legal Services Commissioner v Feeney* [2020] QCAT 122
PARTIES:	**LEGAL SERVICES COMMISSIONER** (applicant) **v** **WILLIAM ROBERT FEENEY** (respondent)
APPLICATION NO/S:	OCR061-18
MATTER TYPE:	Occupational regulation matters
DELIVERED ON:	19 May 2020
HEARING DATE:	On the papers
HEARD AT:	Brisbane
DECISION OF:	Hon Peter Lyons QC, Judicial Member Assisted by: Ms Julie Cork, Lay Panel Member Ms Susan Forrest, Legal Panel Member
ORDERS:	**1. The matter is to be determined by the Tribunal on the basis of the documents, without the parties, their representatives or witnesses appearing at a hearing.** **2. It is declared that the respondent's conduct, the subject of his conviction in the District Court of Queensland at Mackay on 23 August 2017, amounts to professional misconduct.** **3. It is recommended that the name of the respondent be removed from the local roll of practitioners.** **4. The respondent is to pay the applicant's costs of and incidental to the application fixed at $20,000 as follows:** **(a) $10,000 to be paid within 7 days; and** **(b) $1,000 to be paid on the first day of each month commencing 1 July 2020 for 10 months.**
CATCHWORDS:	PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – DISCIPLINARY

PROCEEDINGS – QUEENSLAND – PROCEEDINGS IN TRIBUNALS – where the respondent was admitted to practice but did not hold a practising certificate – where the respondent was an 'Australian lawyer' within the meaning of s 5 of the *Legal Profession Act* 2007 (Qld) but not an 'Australian legal practitioner' as defined in s 6 – whether a discipline application can be brought against an 'Australian lawyer'

PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT – GENERALLY – where the respondent was charged and convicted of dishonestly causing a risk of a loss to the Commonwealth under the *Criminal Code Act* 1995 (Cth) for not remitting PAYG tax withholdings to the Australian Taxation Office – where the respondent was sentenced to a term of imprisonment and ordered to pay reparation – where a discipline application was subsequently brought against the respondent by the applicant Commissioner pursuant to s 452 of the *Legal Profession Act* 2007 (Qld) – where the respondent admits the allegations in the discipline application and accepts that the conduct should be characterised as professional misconduct – where the respondent accepts that an order recommending his removal from the local roll should be made – where the parties have agreed on an order for costs – whether the respondent's conduct should be characterised as professional misconduct – whether an order recommending the removal of the respondent's name from the local roll should be made – whether an order for costs should be made in terms agreed by the parties

Criminal Code Act 1995 (Cth) Schedule s 135.1(5)
Legal Profession Act 2007 (Qld) s 5, s 6, s 417, s 419, s 452, s 456

Allinson v General Council of Medical Education and Registration [1894] 1 QB 750
Attorney-General of the State of Queensland v Legal Services Commissioner; Attorney-General of the State of Queensland v Shand [2018] QCA 66
Legal Services Commissioner v Puryer [2012] QCAT 48
Legal Services Commissioner v Watts [2016] QCA 224

REPRESENTATION:

Applicant:	D A Holliday instructed by the Legal Services Commission
Respondent:	Self-represented
APPEARANCES:	This matter was heard and determined on the papers

pursuant to s 32 of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld)

REASONS FOR DECISION

[1] The respondent has been convicted of one count of the Commonwealth offence of dishonestly causing a risk of a loss to the Commonwealth.[1] Having conducted an investigation, the applicant has brought the present discipline application.

[2] When the matter came on for hearing on 24 April 2019, the allegations made by the applicant in the application were not contested. However, the respondent sought to oppose the applicant's application for costs. The matter was then adjourned, to enable him to prepare material for that purpose. The applicant gave notice that it was necessary to cross-examine the respondent. A question also arose about whether a non-publication order should be made about some material filed in the matter. There were then difficulties in finding a hearing date suitable to all parties. One of the panel members subsequently became unavailable. At a hearing on 17 February 2020, where the remaining panel member attended to assist the Tribunal, it was accepted that it was appropriate to terminate the hearing without making a decision, to enable the appointment of another panel member so that the matter might proceed. At that point, it was still intended that the respondent be cross-examined.

[3] On 20 February 2020, an order was made terminating the hearing, and a fresh appointment for the Tribunal and panel members was made. The parties then advised that the respondent admitted the allegations in the discipline application, that he accepted that his conduct should be characterised as professional misconduct, and that he accepted that an order should be made recommending his removal from the local roll. They also agreed on an order for costs.

[4] The parties also agreed that the matter should now be determined on the basis of the documents, including the transcripts from the earlier hearings, without the attendance of the parties or witnesses. In view of the history of the matter, and the attitude of the parties, it is appropriate to follow that course. It is, however, desirable to set out some of the relevant circumstances.

Background

[5] It is alleged in the application, and admitted by the respondent, that at all material times he was – and is – an Australian lawyer, as that expression is defined in s 5(1) of the *Legal Profession Act* 2007 (Qld) ('*LP Act*'). The applicant's submissions state that the respondent was admitted to practice on 6 November 2006, and that he has not held a practising certificate. A report of Dr Luke Hatzepetrou, discussed later in these reasons, records some of the respondent's background, including that he worked for two law firms over a period of several years from 2002. Notwithstanding the absence of proper evidence, it seems appropriate to accept these matters to be true.

[6] From 2008 to 2013, the respondent was a director of NMMS Pty Ltd ('NMMS'). It appears that he had ceased working in any form of legal practice by that time. The company provided mine maintenance services to large mining companies in central

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1 *Criminal Code Act* 1995 (Cth) Schedule s 135.1(5).

Queensland. Until 2010, it employed a substantial number of persons to provide those services. It also owned machinery used in the business.

[7] The respondent was also the sole director of NMG Services Pty Ltd ('NMG Services') until its liquidation on 25 October 2010. In January 2010, the respondent proposed to his fellow director of NMMS that labour be hired and provided by NMG Services, with machinery continuing to be provided by NMMS. That proposal was implemented, with labour being employed by NMG Services, and provided to NMMS to enable it to perform its contracts.

[8] From 26 January 2010, payslips issued to staff recorded that NMG Services was their employer. From 1 January 2010 to 30 June 2011, staff payslips recorded that $2,321,892 was withheld from wages as Pay As You Go ('PAYG') tax. Most of this was not remitted to the Australian Taxation Office ('ATO'), and it has been calculated that NMG Services had debts of PAYG tax withheld totalling $2,172,377 for the 2010-11 financial year. However, at the respondent's sentence for the Commonwealth offence, it was an agreed fact that the total amount of PAYG tax not remitted to the ATO was $2,321,892; the difference apparently being amounts not remitted by NMMS.

[9] The respondent and his wife had control of bank accounts for a trust called the Wilky Trust. The respondent caused amounts to be transferred from the bank account of NMG Services to the bank accounts of the Wilky Trust. These amounts totalled $921,806.21. He also transferred $503,389 from the bank account of NMMS to one of the bank accounts of the Wilky Trust.

[10] Withheld tax has not been paid by NMG Services to the ATO, which resulted in a debt, at the time of the sentence, of $2,807,843.50, including penalties.

[11] Needless to say, the respondent took various steps to conceal what had happened. He had control of the issuing of pay slips and the accounts. An accounts payable clerk identified that PAYG tax was not being remitted to the ATO. The respondent instructed her that an accountant 'down south' was attending to the Business Activity Statements, and that it was not her responsibility.

[12] NMG Services did not invoice NMMS for all of the labour it provided, the amount not invoiced totalling $1,606,917.35. Had it done so (and been paid), NMG Services would have had sufficient funds to meet its PAYG tax withholding obligations.

[13] The clerk who queried the non-payment of PAYG tax also queried the withdrawals totalling $921,806.21, previously mentioned. The respondent told her (falsely) that they were payments to his accountants for the ATO.

[14] In September 2011, the respondent falsely denied involvement in NMG Services to an ATO auditor. At about the same time, he arranged to have ASIC records for this company changed, no doubt to disguise his involvement.

[15] These matters appear from the agreed statement of facts placed before the court at the respondent's sentence. They are not in issue.

[16] The sentencing remarks also record that the money transferred to the accounts of the Wilky Trust was put towards the purchase of real estate for $3.82 million, later sold for $6.39 million. The respondent was sentenced, on 23 August 2017, to a term of

imprisonment of three years and six months, with a non-parole period of 14 months. He was also ordered to pay reparation of $1,425,194.

Consideration

[17] The material establishes that the respondent was and is an Australian lawyer, as defined in s 5 of the *LP Act*; but not an Australian legal practitioner, as defined in s 6. The difference is, for present purposes, the holding of a practising certificate. Sections 452 and 456 refer to making a discipline application for an order, and the making of findings about the conduct of such a practitioner, with consequential orders. These provisions are found in Chapter 4 of the Act. Section 417, also found in Chapter 4, provides that the chapter applies to Australian lawyers in relation to conduct happening while they were Australian lawyers in the same way that it applies to Australian legal practitioners, with any necessary changes. That provides the Tribunal with jurisdiction to proceed to deal with the present application, and to make orders under s 456.[2]

[18] A report of Dr Luke Hatzepetrou, a psychologist, was tendered at the sentence, and is included in the material before the Tribunal. It recorded symptoms of a persistent depressive disorder. However, the respondent has not relied on this in the present application. It is unnecessary to consider the respondent's mental state further.

[19] The applicant has contended that the respondent's conviction, though relating to conduct happening otherwise than in connection with the practice of law, demonstrates that he is not a fit and proper person to engage in legal practice;[3] and that his conduct would reasonably be regarded as disgraceful or dishonourable by the lawyer's professional colleagues of good repute and competency.[4] On both grounds, his conduct should be characterised as professional misconduct.

[20] These submissions were not contested and should be accepted. The amount involved, the sentence, and the reparation order, all demonstrate the seriousness of the conduct. It is apparent from the agreed statement of facts before the sentencing court that significant dishonesty was involved. His conduct should be found to be professional misconduct.

[21] Although the respondent has now been released from prison, no attempt has been made to demonstrate any material change to his character since the time of this conduct. The probability, on the material before the Tribunal, is that the respondent is permanently unfit to practise.[5] Accordingly, it is appropriate to recommend that his name be removed from the local roll of practitioners. The respondent does not oppose this course.

Costs

[22] The parties have agreed on a costs order. There is no reason not to make an order, generally in accordance with their agreement.

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2 See *Legal Services Commissioner v Puryer* [2012] QCAT 48, [2].

3 See *Legal Profession Act* 2007 (Qld) s 419(1).

4 See *Allinson v General Council of Medical Education and Registration* [1894] 1 QB 750; see also the discussion in G E Dal Pont, *Lawyers' Professional Responsibility* (Lawbook Co, 6th ed, 2017) [23.85].

5 See *Legal Services Commissioner v Watts* [2016] QCA 224, [46]; *Attorney-General of the State of Queensland v Legal Services Commissioner; Attorney-General of the State of Queensland v Shand* [2018] QCA 66, [57].

Orders

[23] The following orders are made:

1. The matter is to be determined by the Tribunal on the basis of the documents, without the parties, their representatives or witnesses appearing at a hearing;

2. It is declared that the respondent's conduct, the subject of his conviction in the District Court of Queensland at Mackay on 23 August 2017, amounts to professional misconduct;

3. It is recommended that the name of the respondent be removed from the local roll of practitioners; and

4. The respondent is to pay the applicant's costs of and incidental to the application fixed at $20,000 as follows:

   (a) $10,000 to be paid within 7 days; and

   (b) $1,000 to be paid on the first day of each month commencing 1 July 2020 for 10 months.