

NOTICE OF DETERMINATION

A notice made under s318 of the *Legal Profession Uniform Law (Victoria)*

Complainant: Legal Services Commissioner
Respondent Lawyer: [REDACTED]
Ref: [REDACTED] / [REDACTED]

ORDERS

Pursuant to s 299(2) of the *Legal Profession Uniform Law (Victoria)* ("the Uniform Law"), I have decided that the Respondent Lawyer has engaged in unsatisfactory professional conduct and I make the following order –

- a) The Respondent Lawyer is cautioned pursuant to s 299(1)(a) of the Uniform Law.

STATEMENT OF REASONS

BACKGROUND

1. The Respondent Lawyer was admitted to practice in Victoria on 1 March 1978.
2. The Respondent Lawyer applied for his first practising certificate on 1 January 1981.
3. On 17 November 2016, the Legal Services Board (the Board) became aware that the Respondent Lawyer was operating a trust account whilst carrying only a principal practising certificate without trust authorisation.
4. On 17 November 2016, a Board Representative contacted the Respondent Lawyer and advised him to complete a variation application immediately via LSB Online and forward a preliminary statement in writing disclosing the matter.
5. On 18 November 2016, the Respondent Lawyer completed a variation application and emailed a preliminary written statement to the Board.
6. After reviewing the preliminary written statement, it was considered that the Respondent Lawyer had operated a trust account whilst carrying only a principal practising certificate without trust authorisation .
7. Furthermore, it was also revealed that the Respondent Lawyer had failed to renew his practising certificate by 30 June 2016 and that he had engaged in unqualified legal practice and operated a trust account without a valid practicing certificate from 1 July 2016 until 1 August 2016.
8. On 29 November 2016, the Respondent Lawyer was sent a notice under s 90(a)(i) of the Uniform Law alleging that he had engaged in legal practice outside the terms and conditions of his principal practising certificate without trust authorisation .
9. Pursuant to s 90(b) of the Uniform Law, the Respondent Lawyer was given 28 days to provide a statement showing cause why no action should be taken to cancel or refuse to vary his practising certificate.

10. The Respondent Lawyer was also advised to provide a written statement explaining why, despite the show cause event, he considers himself to be a fit and proper person to hold a certificate.
11. On 29 November 2016, the Respondent Lawyer contacted the Board and advised that he did not wish to submit a further response to the Board's notification of a designated show cause event letter.
12. On 6 December 2016, the Legal Services Commissioner notified the Respondent Lawyer that his conduct appeared to amount to unsatisfactory professional conduct and proposed a caution as an appropriate determination.
13. On 7 December 2016, the Respondent Lawyer consented in writing to the proposal to determine his conduct as unsatisfactory professional conduct and order a caution.

ISSUES UNDER INVESTIGATION

14. A suitability matter file ([REDACTED]) was opened on 17 November 2016 to establish if;
 - a. the Respondent Lawyer had engaged in unqualified legal practice; and,
 - b. the Respondent Lawyer had operated a trust account without a current practising certificate; and,
 - c. the Respondent Lawyer had engaged in legal practice outside the terms and conditions of his principal practising certificate without trust authorisation .
15. The issue under investigation here is whether that conduct amounts to unsatisfactory professional conduct.

RELEVANT LAW

16. Section 45(2) of the Uniform Law provides that the Board must not grant a practising certificate if it considers that the applicant is not a fit and proper person to hold the certificate. In considering whether a person is fit and proper, the Board may have regard to the matters set out in the *Legal Profession Uniform General Rules 2014* (the Uniform Rules), see s 45(3) of the Uniform Law.
17. Most relevant for the purpose of considering the Respondent Lawyer's suitability is r 3(d)(i) of the Uniform Rules which states that the Board may have regard to "...whether the applicant has engaged in legal practice in Australia when not permitted to do so under a law ... of a State or Territory".
18. Section 10(1) of the Uniform Law states that an entity must not engage in legal practice unless it is a qualified entity. A qualified entity is defined in s 6 of the Uniform Law as an Australian legal practitioner, and an Australian legal practitioner is defined, in turn, as someone who holds a current practising certificate.
19. The penalty for breach of this provision is 250 penalty units or imprisonment for two years, or both. The objectives of the unqualified legal practice provisions is to ensure that legal work is carried out only by those who are properly qualified and entitled to do so and to protect clients of law practices (s 9 of the Uniform Law).

20. Section 47(2) of the Uniform Law states that an Australian practising certificate granted in this jurisdiction is subject to a condition, as determined by the designated local regulatory authority, that the holder is authorised or not authorised to receive trust money.
21. Section 150(a) of the Uniform Law states that a law practice must not receive trust money unless a principal of the law practice holds an Australian practising certificate authorising the receipt of trust money. The penalty for breach of this provision is 250 penalty units.
22. Section 90(a)(i) of the Uniform Law states that a designated show cause event is the service of a notice on a holder of a certificate alleging that the holder has engaged in legal practice outside the terms of a condition restricting his or her practising entitlements.
23. Section 296 of the Uniform Law states that 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.
24. Section 298(a) of the Uniform Law provides that conduct consisting of a contravention of the Uniform Law is capable of constituting unsatisfactory professional conduct.

FINDINGS OF FACT ON ISSUES UNDER INVESTIGATION

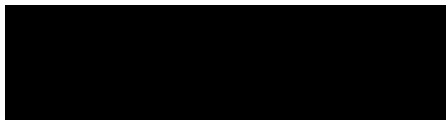
25. The key issues under determination are whether;
 - a. the Respondent Lawyer has engaged in unqualified legal practice; and,
 - b. the Respondent Lawyer has operated a trust account without a current practising certificate; and,
 - c. the Respondent Lawyer has engaged in legal practice outside the terms and conditions of his principal practising certificate without trust authorisation .
26. The Respondent Lawyer states that his practice manager who monitors his emails was on compassionate leave and therefore reminder notices were overlooked.
27. He further states that he was overseas in June 2016.
28. The Respondent Lawyer submits that it was a combination of these factors that resulted in the late application.
29. The Respondent Lawyer states that it was never his intention to carry a principal practising certificate without trust authorisation and put this down to human error.
30. It is clear that the Respondent Lawyer has breached s 10(1) of the Uniform Law by engaging in legal practice from 1 July 2016 until 1 August 2016 without a valid practicing certificate.
31. It is clear that the law practice continued to operate a trust account from 1 July 2016 until 1 August 2016 in breach of s 150 of the Uniform Law.
32. It is clear that the Respondent Lawyer operated a trust account whilst carrying only a principal practising certificate without trust authorisation between 2 August 2016 and 18 November 2016 in breach of s 47 (2) of the Uniform Law.

DETERMINATION & REASONS

33. Having considered all of the evidence and relevant law, and having found that the Respondent Lawyer engaged in unqualified legal practice, operated a trust account without a valid practising certificate and acted outside the terms and conditions of his practising certificate so as to amount to unsatisfactory professional conduct, I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.
34. The Respondent Lawyer's consent to this course of action and orders was also a reason for this determination.

APPEAL

35. Pursuant to s 314 of the Uniform Law, a respondent lawyer or a legal practitioner associate of a respondent law practice may, in accordance with the applicable legislation appeal to the Victorian Civil and Administrative Tribunal, or seek a review by the VCAT, of this determination made under s 299 of the Uniform Law.



Michael McGarvie
Legal Services Commissioner
Date: 22 December 2016