

**NOTICE OF DETERMINATION**

A notice made under s 318 of the Legal Profession Uniform Law (Victoria).

**Complainant: Commissioner**  
**Respondent Lawyer:** [REDACTED]  
**Ref:** [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 in New South Wales on 8 October 1999.
2. The Respondent Lawyer applied for her first practising certificate on 1 July 2012.
3. From July 2012 until September 2013, the Respondent Lawyer was employed at [REDACTED] ([REDACTED]).
4. In December 2013, the Respondent Lawyer set up her own practice ([REDACTED]).
5. On 21 April 2014 the Respondent Lawyer commenced practice at the [REDACTED] ([REDACTED]) and applied for a corporate practising certificate.
6. At the same time the Respondent Lawyer concurrently worked on an ad hoc basis for her own practice ([REDACTED]).
7. In March 2016, the Respondent Lawyer contacted the Board querying why she was unable to vary her practising certificate from a corporate to a principal.
8. Upon further investigation by Board staff it became apparent that no practice had been registered and the incorrect practising certificate was held.
9. On 1 April 2016, a suitability matter ([REDACTED]) was opened.
10. On 5 April 2016, the Respondent Lawyer was issued with a principal practising certificate without trust authorisation.
11. On 19 April 2016, the Respondent Lawyer was sent notice under s 90(a)(i) and (iii) of the *Legal Profession Uniform Law (Vic)* (Uniform Law) alleging that she had engaged in legal practice outside the terms and conditions of her practising certificate and without appropriate insurance.

12. On 28 April 2016, the Respondent Lawyer applied to renew her principal practising certificate.

### ISSUES UNDER INVESTIGATION

13. A suitability matter file ( [REDACTED] ) was opened on 1 April 2016 to establish if the Respondent Lawyer had:
- A. Failed to register as a sole practitioner in 2013;
  - B. Failed to vary her corporate practising certificate.

### RELEVANT LAW

14. 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.
15. 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).
16. Section 2.2.2 of the now repealed Legal Profession Act 2004 (LPA) also prohibited a person from engaging in legal practice unless that person is an Australian lawyer with a current practising certificate.
17. Section 45(2) of the Uniform Law provides that the Board must not grant a practising certificate if 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* (General Rules).
18. Most relevant for the purpose of considering the Respondent Lawyer's suitability to engage in legal practice are Rules 13(1)(d), (o), (p) and (s), which concern whether a practitioner has engaged in legal practice when not permitted to do so; in breach of a condition; and without professional indemnity insurance.
19. Section 47(1)(iii) states that an Australian practising certificate granted in this jurisdiction is subject to the condition, as determined by the designated local regulatory authority, that the holder is authorized to engage in legal practice as a corporate legal practitioner.
20. Section 211 of the Uniform Law states that an Australian legal practitioner must not engage in legal practice in this jurisdiction unless the practitioner holds or is covered by an approved insurance policy.
21. A failure to hold appropriate professional indemnity insurance may attract a civil penalty of 100 penalty units.
22. Rule 13(1)(s) states that the Board may have regard to 'whether the applicant has failed to comply with a requirement under an Australian Law relating to the legal profession in relation to professional indemnity insurance'.

23. Rule 13(1)(p) states that the Board may have regard to 'whether the applicant has contravened an Australian Law relating to the legal profession'.
24. Section 3.5.2 (1) of the now repealed LPA 2004 stated that before commencing legal practice in this jurisdiction, a law practice must obtain professional indemnity insurance.
25. 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.
26. 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**

27. The key issues under determination are whether the Respondent Lawyer;
  - A. Failed to register as a sole practitioner;
  - B. Failed to hold Professional Indemnity Insurance (December 2013 until 28 May 2014);
  - C. Failed to vary a corporate practising certificate (22 April 2014 and 5 April 2016);
  - D. Engaged in legal practice without a practising certificate (December 2013 until 22 April 2014).
28. The Respondent Lawyer argued in her written statement that;
  - A. She submitted the required registration forms to register as a sole practitioner in December 2013. It appears these documents were never received by the Board and the practice never registered.
  - B. She made an application for Professional Indemnity Insurance in December 2013. It appears these documents were never received by the Legal Practitioner's Liability Committee.
  - C. Upon commencing employment at [REDACTED] the Respondent Lawyer applied for a corporate practising certificate. The Respondent Lawyer states that she believed this was the most appropriate practising certificate for an in-house lawyer. The Respondent Lawyer argues that the work she did for her clients during this period did not constitute engaging in legal practice. She submits that her services might be characterised as those of an industrial/employment relations consultant.
  - D. The Respondent Lawyer submits that there may be scope to argue that the work undertaken did not amount to engaging in legal practice and therefore she was not required to hold a practising certificate.
29. Whilst it is accepted that the Respondent Lawyer may have submitted the required forms to register as a sole practitioner and obtain Professional Indemnity Insurance, it is ultimately the Respondent Lawyer's responsibility to ensure that these documents were received by the Board, the practice registered and appropriate insurance acquired.
30. While a significant amount of the work undertaken by the Respondent Lawyer may not have been legal work, it is clear that a small proportion would have been considered legal work. As this is the case, the Respondent Lawyer would have been required to hold a principal practising certificate. In carrying only a corporate certificate between 22 April 2014 and 5 April 2016, the practitioner acted outside the permissions defined by her corporate

practising certificate. Further, the Respondent Lawyer admits to holding herself out as a legal practitioner who was providing legal services during this period.

31. It is clear that a small proportion of the Respondent Lawyer's work is considered to be legal work. The Respondent Lawyer was not qualified when she engaged in legal practice from December 2013 until 22 April 2014 as she did not hold a current Australian practising certificate at that time. It is clear that there has been a breach of s 10 of the Uniform Law during this period.

#### **DETERMINATION & REASONS**

32. Having considered all of the evidence and relevant law, and having found that the Respondent Lawyer's actions amount to unsatisfactory professional conduct. I determine that it is fair and reasonable in all the circumstances to make the orders detailed above.
33. The Respondent Lawyer's consent to this course of action and orders was also a reason for this determination.

#### **APPEAL**

34. 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.

#### **NON-COMPLIANCE**

35. A failure to comply with a determination made under s 299 is capable of constituting unsatisfactory professional conduct or professional misconduct pursuant to s 298 (h) of the Uniform Law.



Michael McGarvie  
**Legal Services Commissioner**  
**Date: 18/11/2016**