

**IN THE LEGAL PRACTITIONERS
DISCIPLINARY TRIBUNAL**

ACTION No. 3 of 2023

THE LEGAL PRACTITIONERS ACT 1981

IN THE MATTER OF:

JOHN MARK FITZPATRICK

REASONS

Background

1. In this action the Legal Profession Conduct Commissioner (“the **Commissioner**”) has charged John Mark Fitzpatrick (“the **Practitioner**”) with 14 counts of professional misconduct and one of unsatisfactory professional conduct pursuant to s82(2) of the *Legal Practitioners Act 1981* (SA) (“the **Act**”).
2. The Practitioner is a sole practitioner operating from an inner north-eastern suburb of Adelaide. He did not file a response to the charge. The conduct the subject of this inquiry falls into three categories.
Whitehouse Complaint
3. The alleged professional misconduct in counts 1-11 arises out of the Practitioner’s representation of All Type Roofing Gutters and Verandahs Pty Ltd (“**All Type Roofing**”) in the period June 2019 – July 2021, the Practitioner’s dealings with the Commissioner following a complaint by the director of All Type Roofing, Mr James Whitehouse, and then with solicitors for All Type Roofing/Mr Whitehouse engaged with respect to a claim against the Practitioner for professional negligence.
Mandatory CPD Requirements
4. The alleged unsatisfactory conduct in count 12 arises from a failure to comply with the Mandatory Continuing Professional Development (“**CPD**”) requirements for the 2020-2021 year, specifically that the Practitioner did not complete the Legal Ethics unit during that year and failed to rectify the default. Professional misconduct is

alleged to arise as a result of the Practitioner's failure to respond to the Commissioner's own initiative investigation into the failure to complete all required CPD units in the 2020-2021 year (count 13) and to comply with a Notice issued by the Commissioner pursuant to clause 4(1) of Schedule 4 of the Act in the course of his investigation (count 14).

McPhedran Complaint

5. Count 15 alleges professional misconduct by:
 - a. failing to return certain original documents (a Will, death certificate and financial records) to a former client, Mr Robert McPhedran or to provide them to Mr McPhedran's new solicitor; and
 - b. making a false statement to the effect that the documents had been sent to the new solicitor when they had not been sent.
6. The hearing of the inquiry into the charge proceeded concurrently with actions 4 of 2017, 7 of 2018 and 3 of 2023 on 28 May 2024. The Practitioner did not participate in the hearing.

Evidence

7. The Tribunal admitted a Book of Documents prepared by the Commissioner (Exhibit C3). No witnesses were called to give oral evidence.

Consideration – Whitehouse Complaint

8. All Type Roofing was given notice of certain contractual claims by AJ Grant Group Pty Ltd ("**AJ Grant**") arising out of alleged defective work on a construction project at Broken Hill. Mr Whitehouse engaged the Practitioner to act for All Type Roofing to respond to, and hopefully resolve those claims. The Practitioner first wrote to AJ Grant on 21 June 2019 advising that he had been retained and that he needed time to review the claims.¹ The Practitioner noted that several of the claims "may involve responsibility on the part of subcontractors".
9. Mr Whitehouse emailed the Practitioner what Mr Whitehouse referred to as his "rebuttal to all claims made by AJ Grant". It can be inferred that these instructions included that the need for some, but not all, rectification works was conceded, the cost of the rectification was in dispute and that some of the defects alleged were not caused by All Type Roofing. Mr Whitehouse instructed the Practitioner to try to settle the dispute.

¹ Exhibit C3 p.24.

10. The Sydney-based solicitors for AJ Grant, Hilliard and Berry, wrote to the Practitioner on 24 July 2019 and issued a letter of demand on 21 August 2019,² but received no response. On 1 June 2020 they issued a further letter of demand seeking payment by All Type Roofing of \$115,479.64 by 15 June 2020.³
11. Although the Practitioner sent short emails on 16 and 17 June 2020,⁴ he did not provide any substantive response to the claims, despite having been engaged for approximately one year.
12. Hilliard and Berry sent an email on 7 September 2020 asking the Practitioner to confirm he was still acting for All Type Roofing, but did not receive any reply.
13. Unsurprisingly, AJ Grant commenced proceedings against All Type Roofing in the District Court of NSW on 20 October 2020, action number 2020/00302766 (“the **Proceedings**”). Mr Whitehouse was aware of attempts to serve the claim on All Type Roofing, and so he contacted the Practitioner who said he would arrange to have the court documents directed to his office.⁵
14. On 2 December 2020 Hilliard and Berry emailed the Practitioner noting that the time to file a defence had passed and no defence had been filed. Notice was given that AJ Grant would be seeking default judgment if the defence was not filed by 5 December 2020.⁶
15. The Practitioner responded on 4 December 2020⁷ and again on 7 December 2020⁸ claiming to have had technical difficulties with the Court’s online Registry and asking that AJ Grant refrain from seeking a default judgment. It is suspicious that no copy of the defence was attached to either of those emails, which is what one would expect if the defence had been prepared and approved by the client, but there were difficulties in uploading it to the Registry for filing.
16. The Proceedings were first before the Court on 16 December 2020 and the Practitioner failed to appear or instruct Counsel or a town agent to do so. The matter was adjourned “pending confirmation of service of the defendant(s) and appearances”. Hilliard and Berry notified the Practitioner of the Orders made by email on 11 January 2021.⁹

² Exhibit C3 pp.32-33.

³ Exhibit C3 pp.34-36.

⁴ Exhibit C3 pp. 38 and 37.

⁵ Affidavit of Mr Whitehouse dated 23 September 2021 at [7] Exhibit C3 p.63. Mr Whitehouse refers here to early October 2020 but in his complaint to the Commissioner on p.74 early November 2020. Given the date of filing of the claim, the latter must be correct.

⁶ Exhibit C3 p.40.

⁷ Exhibit C3 p.41.

⁸ Exhibit C3 p.42.

⁹ Exhibit C3 p.43.

17. On 2 February 2021 default judgment was entered, with costs, against All Type Roofing and the matter was listed for a hearing to assess damages on 23 February 2021.¹⁰
18. On each of 23 February 2021, 29 March 2021, 27 April 2021 and 2 June 2021 the Practitioner sought adjournments of the assessment of damages. Adjournments were granted on each occasion, with two Orders made for All Type Roofing to pay costs thrown away.¹¹
19. On 2 June 2021 the Practitioner wrote to the Court seeking a further adjournment but on this occasion it was not granted.¹² On 3 June 2021, being the final adjourned date for the assessment of damages, judgment was entered against All Type Roofing in the amount of \$124,719.40 plus costs, including reserved costs.¹³
20. On 28 July 2021 AJ Grant issued a creditor's statutory demand to All Type Roofing based upon the non-payment of the judgment debt.¹⁴
21. The statutory demand was served on All Type Roofing's registered office, being the address of its accountants, HLB Mann Judd. On 12 August 2021 Mr Whitehouse received a telephone call from HLB Mann Judd advising him that legal documents had been served, and he immediately went to collect them.¹⁵
22. It was only at this point that Mr Whitehouse became aware that the Proceedings had continued and resulted in judgment being entered against All Type Roofing.¹⁶ Mr Whitehouse had not been asked to provide instructions with respect to any of the applications for adjournments and had not been advised of the steps necessary, and filing deadlines, to defend the claim. Nor had Mr Whitehouse been provided with copies, or advised of the content, of communications from Hilliard and Barry. This was despite multiple written requests by email and text message for updates on the matter from Mr Whitehouse.¹⁷
23. Shortly after service of AJ Grant's claim, Mr Whitehouse had met with the Practitioner at a café and briefly looked at the court documents. Mr Whitehouse was aware that AJ Grant was "*taking me to court in NSW for \$120,000 odd dollars due to the rectification work.*" According to his written complaint to the Commissioner dated 14 August 2021, during this meeting the Practitioner said

¹⁰ Exhibit C3 p.44.

¹¹ In the amount of \$3,740 on 23 February 2021 payable within 28 days and \$1,450 on 28 April 2021 payable within 7 days.

¹² Exhibit C3 p.56

¹³ Exhibit C3 p.57.

¹⁴ Exhibit C3 pp.60-61.

¹⁵ Affidavit of Mr Whitehouse dated 23 September 2021 at [14]-[16] Exhibit C3 p.64.

¹⁶ Affidavit of Mr Whitehouse dated 23 September 2021 at [16]-[17] Exhibit C3 p.64

¹⁷ 5 August 2019, 6 August 2019, 10 August 2019, 24 March 2021, 8 April 2021 and 16 April 2021.

words to the effect "*not to worry all was in hand and these types of issues take "years" to sort out.*"¹⁸

24. The Tribunal accepts that this is what Mr Whitehouse was told at the café meeting in around mid-November 2020, and that in subsequent months in the period up to late July 2021 when Mr Whitehouse asked about the dispute, the Practitioner assured him "*all was in hand and that they had not made contact*".¹⁹
25. Count 1 of the charge is that between August 2019 and June 2021 the Practitioner failed to communicate adequately, or at all, with All Type Roofing in breach of Australian Solicitors Conduct Rules (ASCRs) Rule 4.1.1 (act in the best interest of the client) and Rule 4.1.3 (deliver services competently, diligently and as promptly as reasonably possible). For the reasons outlined above, this count is plainly established. Most developments in the Proceedings were not communicated to the client at all. The limited communications which did take place were not only inadequate, but misleading (which is the subject of count 7).
26. The Tribunal observes that when the Practitioner was seeking adjournments of the Proceedings, he often raised his own ill health as a basis. Whilst illness or injury on the part of a legal practitioner might be a proper reason to seek an adjournment, where the illness is known ahead of the scheduled hearing time, an application must only be made with the client's knowledge and on instructions. If possible, consideration should be giving to avoiding an adjournment (and thereby delay) by instructing Counsel to appear. Notice should be provided to other practitioners involved in the matter, and the other party's (or parties') consent sought ahead of the hearing – see ASCR 22.8. Where a practitioner falls ill without sufficient time to seek instructions then they, or the practitioner seeking an adjournment on their behalf, should inform the Court of the inability to obtain instructions and only seek the shortest adjournment appropriate to enable instructions to be obtained.
27. It would rarely, if ever, be appropriate for the client to be responsible for any costs thrown away which were ordered as a result of their legal practitioner's unavailability.
28. Furthermore, where ill health is protracted and interferes with a legal practitioner's ability to progress a matter promptly, the client must be offered the opportunity to seek alternative legal representation rather than have their matter delayed.
29. All Type Roofing was afforded none of these basic client rights and courtesies.

¹⁸ Exhibit C3 p.75.

¹⁹ Exhibit C3 p.75.

30. Count 2 of the charge is that between July 2019 and February 2021 the Practitioner failed to communicate adequately, or at all, with AJ Grant's solicitors in breach of ASCR 4.1.1 (act in the best interest of his client) and Rule 4.1.3 (deliver services competently, diligently and as promptly as reasonably possible).
31. The Tribunal accepts and finds that the failure of the Practitioner to communicate with AJ Grant's solicitors was in breach of these Rules, and also 4.1.1 which requires courtesy in all dealings in the course of legal practice. The failure to communicate was not only a very serious departure from the obligations owed to the client, but discourteous to the legal practitioners on the other side who repeatedly tried to engage with the Practitioner about the substance of the dispute.
32. Count 3 of the charge relates to the failure to file a defence in the Proceedings or to take any steps to prevent the entry of default judgment against All Type Roofing which eventually resulted in the issue of a statutory demand by AJ Grant. Count 4 is that the Practitioner failed to take steps to set aside the default judgment, in particular following Order 3 made in the Proceedings on 23 February 2021:
Should the Defendant wish to apply to set aside default judgment, a Notice of Motion and supporting affidavit in relation to that matter are to be filed and served no later than 4pm Tuesday 9 March 2021.
33. As with counts 1 and 2, the conduct the subject of counts 3 and 4 is alleged to be in breach of ASCR 4.1.1 and 4.1.3. The Tribunal finds that counts 3 and 4 of the charge are established. There is no evidence that the Practitioner:
- a. took any steps to avoid the entry of default judgment (ie to either file and serve a defence to the claim or alternatively make an application for an extension of time for the filing of the defence supported by affidavit evidence justifying the need for an extension);
 - b. took any steps to set aside the default judgment, as invited by Order 3 made 23 February 2021.
34. This was despite Mr Whitehouse's instructions that All Type Roofing did have defences to the claim, there was a dispute both as to liability and quantum, and a possibility of third party claims against sub-contractors.
35. Count 5 is that the Practitioner failed to provide clear and timely advice, or any advice, to All Type Roofing during the course of the Proceedings. Based on the Tribunal's acceptance of the evidence of Mr Whitehouse in his Affidavit of 23

- September 2021,²⁰ count 5 is established. The failure to provide advice is in breach of ASCR 7.1 which states:
- A legal practitioner must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken during the course of a matter, consistent with the terms of the engagement.*
36. Count 6 is that the Practitioner acted without instructions when he informed the District Court of NSW on 23 February 2021 that All Type Roofing would meet the costs thrown away by reason of the adjournment sought on that day.
37. The Tribunal finds that count 6 is established on the basis of the Practitioner's email to the Court at 10:00am on 23 February 2021²¹ together with Mr Whitehouse's evidence that he was not told about any of the adjournments.²² The Practitioner did not have instructions to seek the adjournment, let alone to offer that All Type Roofing meet costs thrown away.
38. This conduct was in breach of ASCR 8 - *A legal practitioner must follow a client's lawful, proper and competent instructions.*
39. Count 7 is that the Practitioner misled All Type Roofing about the status of the dispute with AJ Grant by advising it on or about Monday 16 November 2020 that the claim that had been issued by AJ Grant was "nothing to be concerned about and that all was in hand" when that was not the case.
40. On the basis of Mr Whitehouse's Affidavit of 23 September 2021 at [8], which was not contradicted by any other evidence before the Tribunal, we are satisfied that count 7 is established, save that the date cannot be particularised more precisely than in mid-November 2020.²³ The statement made by the Practitioner to Mr Whitehouse was misleading because firstly, the matter was serious, and second, it was not "in hand" in circumstances where the Practitioner had been ignoring requests from AJ Grant's solicitors for a substantive response to the claim for months. Furthermore, All Type Roofing's defence was due imminently, yet Mr Whitehouse's instructions on a draft defence had not been sought and we infer that no defence had been drafted by the Practitioner.
41. Count 8 relates to the Practitioner's failure in breach of ASCR 43 to respond "in a timely, open and frank manner, or at all, to the Commissioner's communications during the course of the Commissioner's investigation" into the complaint made in

²⁰ Exhibit C3 pp.63 – 68, in particular at [6]-[11], [14]-[20], see also Mr Whitehouse's letter of complaint to the Commissioner pp.74-75.

²¹ Exhibit C3 p.45.

²² Exhibit C3 pp.63 – 68, in particular at [19]-[20].

²³ Exhibit C3 pp.63.

August 2021 by Mr Whitehouse about the Practitioner's conduct in acting for All Type Roofing.

42. Rule 43 provides that - *Subject only to his or her duty to the client, a legal practitioner must be timely, open, and frank in his or her dealings with a regulatory authority.*
43. The evidence in support of count 8 is behind tab B in Exhibit C3 at pages 78 - 120. Mr Whitehouse's complaint was published to the Practitioner under cover of a letter dated 9 November 2021. The Practitioner's response was requested by 30 November 2021. A number of extensions were granted, to 17 December 2021 then until 14 January 2022 and finally until 27 January 2022.
44. In an email dated 27 January 2022, the Practitioner claimed to have sent a response by post, but by 3 February 2022 nothing had been received. This prompted an exchange of emails over the following month in which the Commissioner's office repeatedly requested a scanned copy of the response allegedly sent by post.
45. The Practitioner did not send a scanned copy of his response to Mr Whitehouse's complaint, and no response was received by the Commissioner's office in the mail. All that was received was a letter from the Practitioner dated 25 January 2022 requesting that the solicitor handling the complaint, Ms Caird be removed due to her involvement in other complaints against him. Commissioner May responded by letter dated 11 February 2022, declining to reallocate the complaint to a different solicitor and setting a further deadline of 18 February 2022 for the Practitioner to respond.
46. What followed was a repeat of the Practitioner claiming to have sent a response by post (his email of 21 February 2022), nothing being received in the mail, repeated requests for a scanned or Word copy to be sent by email, and the Practitioner re-sending the 25 January 2022 letter along with other attachments which could not be opened (and emails with no attachments at all).
47. On 24 February 2022 the Practitioner offered by email to deliver copies to the Commissioner's office, and the following day Commissioner May suggested copies be sent by courier. No delivery occurred. The Practitioner did state (in his email of 24 February 2024) that "*Mr Whitehouse has engaged solicitors who are pursuing a claim on his behalf. In those circumstances, it would appear to me that the appropriate approach would be for that matter to be dealt with in the ordinary course of making such a claim.*"
48. If the Practitioner ever prepared a substantive response, which is doubtful, he did not provide it to the Commissioner's office in any format. The request that Ms Caird

be removed from the investigation and the reference to a civil claim by Mr Whitehouse are not substantive responses to the complaint. There was therefore no response provided to the Commissioner's office. Count 8 is proven.

49. On 1 March 2022 the Commissioner issued a Notice to the Practitioner²⁴ pursuant to clause 4(1) of Schedule 4 to the Act requiring a detailed response to Mr Whitehouse's complaint, the response to the Commissioner's letter dated 11 February 2022 and production of the All Type Roofing file relating to the dispute with AJ Grant. The Notice was emailed to the Practitioner on 1 March 2022²⁵ and required production by 5pm on 22 March 2022. A reminder email was sent to the Practitioner by Ms Caird on 17 March 2022.²⁶ The Practitioner's failure to comply with the Notice is the subject of count 9.
50. On 22 March 2022 the Practitioner claimed in an email to have sent a reply by post.²⁷ Once again, nothing was ever received by the Commissioner's office by mail, nor by any other method despite an invitation to send the documents "by post, by courier, by email, or by some combination of those delivery methods."²⁸
51. The Practitioner advised in an email dated 24 March 2022 that he would "be retiring from legal practice on 30 June 2022, due to the state of my health."²⁹ He was reminded by Commissioner May that his obligations under the Act would continue even if he no longer held a practising certificate, including the obligation to respond to complaints under investigation.³⁰
52. On count 9, the Tribunal finds that the Practitioner failed to comply with the Notice by 22 March 2022, or at all.
53. Count 10 relates to the Practitioner's failure to the Commissioner's Own Initiative Investigation, which was notified by way of letter dated 7 April 2022. The Own Initiative Investigation was into the same conduct as is now the subject of counts 8-9 above and count 11 dealt with in these reasons below. The Practitioner's response was due by 28 April 2022. The evidence relevant to count 10 is in Exhibit C3 at pages 134 – 141.

²⁴ Exhibit C3 pp.121-123.

²⁵ Exhibit C3 p.127.

²⁶ Exhibit C3 p.128.

²⁷ Exhibit C3 p.129.

²⁸ Exhibit C3 p.132.

²⁹ Exhibit C3 p.131.

³⁰ Exhibit C3 p.132.

54. Other than an email on 23 May 2022³¹ to say that he had been unable to respond due to illness but "*I am in the course of preparing a response, which I shall be sending to you shortly,*" the Practitioner did not respond.
55. The Tribunal finds that the Practitioner did not respond to the Commissioner's Own Initiative Investigation by 28 April 2022, or at all, and that this omission was in breach of ASCR 43.
56. Count 11 is that the Practitioner was dishonest in his dealings with Johnsons Lawyers in breach of ASCR 4.1.2, "by informing them that he was in communication with Law Claims and had provided a Pre-Action Notice of Claim to Law Claims, when he had not done so."
57. Mr Whitehouse had engaged Johnsons Lawyers to act for All Type Roofing in relation to a potential civil claim against the Practitioner arising out of the mishandling of the defence to the claim by AJ Grant. On 31 August 2021 Johnsons Lawyers sent a Pre-Action Notice of Claim to the Practitioner by registered post and email.³² The Pre-Action Notice of Claim included a request that the Practitioner "*provide a copy of this letter to his insurers and confirm that he has done so within 2 business days.*"
58. On 29 September 2021 Ms Charlotte Viergever of Johnson Lawyers sent a follow-up email noting that no response had been received in accordance with the Uniform Civil Rules SA nor had they received confirmation that Law Claims had been advised of the matter. The email ended with "*We would be grateful if you could revert back to us regarding notification of your insurer and the delivery of the files before the end of the week.*"³³
59. On 5 October 2021 the Practitioner responded, and his email included the following statement:³⁴
- Please note that I am in communication with Law Claims, and I expect that they will be in contact with you shortly regarding your client's claim [emphasis added].*
60. Ms Viergever provided a copy of the Practitioner's 5 October 2021 email to Law Claims and enquired whether notification had in fact occurred.³⁵
61. On 3 February 2022, Mr John Doyle of Law Claims replied to Ms Viergever and stated:³⁶
- Law Claims to date has not received a notice of claim from Mr Fitzpatrick.*

³¹ Exhibit C3 p.140.

³² Exhibit C3 pp.142-151.

³³ Exhibit C3 p.153.

³⁴ Exhibit C3 p.154.

³⁵ Exhibit C3 pp.155-156.

³⁶ Exhibit C3 p.155.

Law Claims position remains as per our letter of 28 September 2021.

62. The letter of 28 September 2021³⁷ relevantly provides:

We have, to date, not received notification within the meaning of the policy.

63. It is not entirely clear from Mr Doyle's email that it should be interpreted as the Practitioner not having provided Law Claims with a copy of the Pre-Action Notice of Claim (as specifically alleged in the charge). Although providing a copy would be an obvious way to make a notification of a claim under the Practitioner's statutory professional indemnity insurance (and is a necessary step in cooperating with the insurer), the Tribunal acknowledges it is not the only way to give notice. It would be possible to give notice to Law Claims and then later provide a copy of the relevant Pre-Action Notice. We accept however that it can be inferred from Mr Doyle's email that the Pre-Action Notice from Johnsons Lawyers on behalf of All Type Roofing had not been provided by the Practitioner to Law Claims as at 3 February 2022, because if it had, it would have constituted a "notice of claim."

64. The difficulty with count 11 is that the Practitioner's email of 5 October 2021 does not say that he had provided the Pre-Action Notice to Law Claims – only that he was "in communication with Law Claims".

65. Neither the email from Mr Doyle, nor the letter of 28 September 2021, says that there has been no communication at all between Law Claims and the Practitioner, only that there was no notice of claim.

66. For the Commissioner to establish the whole of count 11, he would have needed to call evidence from Mr Doyle (and/or other representatives of Law Claims) to make good on the assertion that there were no communications whatsoever from the Practitioner in the relevant period.

67. The Tribunal finds the facts of count 11 are only proven insofar as it alleges that the Pre-Action Notice of Claim was not provided to Law Claims.

68. What the Practitioner told Johnson Lawyers in his email of 5 October 2021 was firstly, *I am in communication with Law Claims* - we are unable to find that this statement was dishonest for the reasons explained.

69. However, we find his further statement in the same email was dishonest: *As regards to the matter in your letter, which I received in the post, I have forwarded that to Law Claims.* This can only be a reference to the Pre Action Claim, which we are satisfied was not forwarded to Law Claims.

³⁷ Exhibit C4.

Consideration – Mandatory CPD Requirements

70. The Practitioner was selected for a Mandatory CPD audit by the Ethics and Practice unit of the Law Society of South Australia (“the **Society**”) with respect to the year ended 31 March 2021. The findings of the audit were that the Practitioner had not completed any activity which met the requirements of the compulsory unit in Legal Ethics. He was invited to rectify this by undertaking a compliant Legal Ethics activity by 10 December 2021.
71. Despite numerous communications by email and telephone by staff of the Society, the Practitioner did not enrol in, nor complete, the required CPD by 10 December 2021. He was given an extension until 28 January 2022.
72. On 31 January 2022 the Practitioner signed a statutory declaration in which he stated he had completed 1.5 units of Legal Ethics but went on to acknowledge the outcome of the audit and said:
- Rather than have a dispute regarding compliance, I nominate the following session to earn an additional unit: Ethical Considerations for Trust and Estate Practitioners.*
73. The statutory declaration was sent to the Society under cover of a letter seeking confirmation of “*whether that fulfils your requirements – if so, I will go ahead and book it.*” Of course, by this date the deadline for rectification had already passed.
74. There is no evidence that the Practitioner ever undertook the course he nominated, or any other Legal Ethics unit, in order to rectify the shortfall in the 2020-2021 CPD year.
75. Accordingly, and noting the documentary evidence contained behind Tab C of Exhibit C3, count 12 of the charge is established. The Tribunal finds that in breach of Rule 43 of the SALPCR the Practitioner failed to comply with the Mandatory CPD requirements for the period 1 April 2020 to 31 March 2021 and failed to rectify the default within a reasonable time, or at all.
76. By letter dated 30 May 2022 the Society made a report to the Commissioner regarding the Practitioner’s failed Mandatory CPD audit pursuant to s14AB(1)(c) of the Act.
77. On 30 November 2022 the Commissioner commenced an Own Initiative Investigation. By letter sent by email to the Practitioner dated 5 December 2022 a response to the investigation was sought by 23 December 2022.³⁸ When no response was received, a further letter dated 24 January 2023 was sent by email inviting a response by 31 January 2023.³⁹ Again no response was received.

³⁸ Exhibit C3 p.181.

³⁹ Exhibit C3 p.183.

78. The failure to respond to the Own Initiative Investigation is the subject of count 13 of the charge. The Tribunal is satisfied that count 13 is established.
79. On 27 October 2022 the Commissioner issued a Notice to the Practitioner pursuant to clause 4(1) of Schedule 4 to the Act requiring a response by 10 November 2022.⁴⁰ The written information required to be produced as specified in the Schedule to the Notice was:
- Your detailed response to the own initiative investigation that was commended by Commissioner May on 20 June 2022 into your failure to comply with the mandatory continuing professional development (MCDP) requirements for the MCDP period 2020/2021 details of which were published to you by letter dated 20 June 2022. A copy of that letter is attached to this Notice for your ease of reference.*
80. The Practitioner did not provide a response to the Notice.
81. The failure to respond to the Own Initiative Investigation is the subject of count 14 of the charge. The Tribunal is satisfied that count 14 is established.
82. The Tribunal repeats the observations made in the matter of *Dorrian*⁴¹ as to the seriousness of failing to cooperate with investigations by the Commissioner. In this instance, without explanation, the Practitioner has completely ignored the correspondence and Notice.

Consideration – McPhedran Complaint

83. On 20 March 2023 a former client of the Practitioner, Mr Robert McPhedran made a complaint⁴² to the Commissioner about the Practitioner's conduct.
84. Mr McPhedran had instructed the Practitioner in mid-May 2022 to apply for a Grant of Probate with respect to the Will of Mr McPhedran's late mother. The Practitioner was given the original Will, death certificate and financial records of the deceased.
85. The application for Probate was not lodged until 8 December 2022 and, for reasons which are unclear, was withdrawn by the Practitioner on 12 December 2022. Mr McPhedran instructed a new solicitor, Mr Barry Paraskeva to take over from the Practitioner.
86. Although Mr McPhedran was frustrated about the delay in lodging the application for Probate and its withdrawal, his complaint was about the Practitioner's failure to promptly return the documents the Practitioner had been instructed with, in

⁴⁰ Exhibit C3 pp.176-178, sent by email p.179.

⁴¹ In the matter of *Dorrian* LPDT 15 April 2020 at [31] – [38].

⁴² Exhibit C3 pp. 184-190.

particular the deceased's original Will, without which the matter could not be efficiently progressed.⁴³

87. Mr McPhedran (Rob) and his wife Mrs Patricia McPhedran (Pat) contacted the Practitioner numerous times by text message regarding the return of the documents, commencing 13 December 2022. A bundle of their messages, and the Practitioner's replies, are contained in Exhibit C3 behind Tab D.⁴⁴

88. Mr Paraskeva also contacted the Practitioner multiple times seeking to make arrangements for the return of the documents. Mr Paraskeva made contact by email (22 December 2022, 2 February 2023), telephone call (10 January 2023, 17 January 2023) and text message (24 January 2023).⁴⁵

89. On 14 December 2022 the Practitioner sent a text message stating:

*Good Morning Pat – I will deliver the documents to your solicitor
So your solicitor can make a new probate application*

90. Mrs McPhedran responded by forwarding the address of Mr Paraskeva's office.

91. On 19 December Mr McPhedran enquired by text message:

Hi John enquiring if our paperwork has been forwarded

92. The Practitioner replied:

Yes – I have arranged for it to be forwarded

93. On 21 December 2022 at 12:31pm Mrs McPhedran sent another text message:

Hi John

*We will come to your unit and collect the paper work as we need to get this rolling
as they haven't received anything yet*

Cheers Pat

94. The Practitioner immediately replied:

Hi Pat – I have sent on the paperwork already

I would like to think it already should have arrived

95. This message clearly conveyed that the Practitioner had sent the documents to Mr Paraskeva. The statement was untrue, because:⁴⁶

- a. The documents were not received by Mr Paraskeva at or around this time;
- b. In their telephone conversation on 10 January 2023 the Practitioner told Mr Paraskeva that he was away on holidays but upon his return the following would provide the documents to Mr McPhedran; and

⁴³ The evidence before the Tribunal did not disclose whether the original Will was ever returned or whether an application was made based on a copy. Mr Paraskeva was unable to continue acting and the matter was transferred to a third solicitor, Mr Mark Quaglia.

⁴⁴ See pp.191-226, in particular from p.210.

⁴⁵ Exhibit C3 pp.234-236.

⁴⁶ Exhibit C3 p.234.

- c. In their telephone conversation on 17 January 2023 the Practitioner apologised to Mr Paraskeva for the delay.
96. Count 15 of the charge has two components. The first is that the Practitioner failed, or otherwise refused, to return an original Will, death certificate and financial records to his client, Mr McPhedran or forward those documents to the client's new solicitor, Mr Paraskeva, despite numerous requests. The second is that the Practitioner made a false and misleading statement by his text message of 21 December 2022 at 12:32pm⁴⁷ saying "I have sent on the paperwork already", when he had not.
97. ASCR 14.1 provides:
- A legal practitioner with designated responsibility for a client's matter, must ensure that, upon completion or termination of the law practice's engagement: the client or former client; or another person authorised by the client or former client, is given any client documents, (or if they are electronic documents copies of those documents), as soon as reasonably possible when requested to do so by the client, unless there is an effective lien.*
98. As to the first component of count 15, the Tribunal is satisfied that the Practitioner failed to return the documents to his former client, or forward them on to the new solicitor, within a reasonable time. The first request was made on 13 December 2022 and Mr Paraskeva was still following up with the Practitioner on 2 February 2023, with numerous communications from him and the McPhedrants to the Practitioner in between. As at 13 February 2023 Mr Paraskeva was still trying to obtain the documents and advised Mr McPhedran that the Probate Registry did not have the original Will (a scanned copy had been uploaded with the application made by the Practitioner).⁴⁸ The Tribunal is unable to find that the documents were never provided as there is no evidence of what became of them, including the original Will. Mr McPhedran stated in his complaint that he was able to purchase a replacement death certificate. By itself the delay is unacceptable and would amount to unsatisfactory professional conduct. However, the Tribunal is also satisfied that in the text message of 21 December 2022, the Practitioner lied to Mr McPhedran. This dishonesty elevates the seriousness of the conduct complained of in count 15 to professional misconduct.

The Tribunal Orders:

⁴⁷ Exhibit C3 p.215.

⁴⁸ Exhibit C3 p.231.

1. On counts 1 – 7 inclusive the Practitioner has engaged in professional misconduct by engaging in a course of conduct whilst acting for for All Type Roofing involving multiple breaches of the Australian Solicitors Conduct Rules including:
 - a. Failing to act in the best interests of the client;
 - b. Failing to deliver services competently, diligently and as promptly as reasonably possible;
 - c. Acting without the client's instructions;
 - d. Failing to provide clear and timely advice;
 - e. Misleading the client;
 - f. Discourtesy in failing to communicate with the opposing party's solicitors.
2. On counts 8, 9 and 10 the Practitioner has engaged in a course of conduct amounting to professional misconduct by failing to respond to the Commissioner's investigation into the complaint made by Mr Whitehouse, by failing to comply with the Notice dated 1 March 2022 issued to the Practitioner pursuant to clause 4(1) of Schedule 4 to the Act and by failing to respond to the Commissioner's Own Initiative Investigation.
3. Count 11 is proven in part and the Practitioner has engaged in professional misconduct by dishonestly stating to Johnsons Lawyers that he had forwarded their letter (a Pre-Action Claim) to Law Claims when he had not done so.
4. On count 12 the Practitioner has engaged in unsatisfactory professional conduct by failing to complete the required Legal Ethics unit of mandatory CPD in the 2020-2021 year.
5. On counts 13 and 14 the Practitioner has engaged in a course of conduct amounting to professional misconduct by failing to respond at all to the Commissioner's Own Initiative Investigation and failing to comply with the Notice dated 27 October 2022 issued to the Practitioner pursuant to clause 4(1) of Schedule 4 to the Act.
6. On count 15 the Practitioner has engaged in professional misconduct by failing to return original documents to his former client, or forward them on to the new solicitor, within a reasonable time and by making a false and misleading statement in a text message to his former client on 21 December 2022 to the effect that he had forwarded the original documents when he had not done so.
7. The Tribunal will invite submissions as to the appropriate sanction(s).
8. Costs reserved.

DATED the 11th of June 2024.



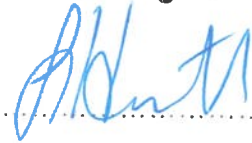
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K Clark SC



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A Burgess AM



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L Hastwell