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LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

IN THE LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

Action No. 5 of 2020

Action No. 6 of 2020

Action No. 2 of 2021

IN THE MATTER OF:

THE LEGAL PRACTITIONER'S ACT 1981

- and -

ATANAS MICHAEL RADIN

REASONS FOR DECISION

Background

1. On 14 September 2021 the Tribunal granted an extension of time in which to lay the charges in each of Actions No. 5 of 2020, No. 6 of 2020 and No. 2 of 2021. The inquiries into each set of charges were conducted concurrently in a hearing on 22, 23, 24 September 2021. The Legal Profession Conduct Commissioner ("**the Commissioner**") filed written closing submissions on 8 October 2021 and the Tribunal heard oral closing submissions from both parties on 5 November 2021.
2. The Tribunal now publishes its reasons for its findings in each of the three actions as to whether the charges against Mr Radin ("**the Practitioner**") have been established.

Action No.5 of 2020 – Unpaid Counsel Fees

3. This action involves the alleged failure by the Practitioner to pay the invoices of six barristers within the time in which payment was due, or at all. Each failure to pay is pleaded as a separate count. The relevant facts are almost all admitted by the Practitioner.
4. Counsel for the Commissioner helpfully provided an annotated version of the charge (Exhibit P5A) which cross references the facts alleged to the relevant documents in Exhibit 2. We set out the annotated charge in full below.

CHARGE	**Page Reference in Book of Documents**
Recitals	
A. At all relevant times the Practitioner was the sole director and principal of Radin Legal Pty Ltd trading as "Radin Legal" from offices at Gawler.	93
B. In the course of that legal practice the Practitioner briefed various barristers to appear for and advise different clients of the practice.	
C. In the course of that legal practice the Practitioner briefed various barristers to appear for himself, Radin Legal Pty Ltd or other of his companies from time to time.	
Count 1	

1. The Practitioner retained Ms Eliza Bergin to act as Counsel for his client Ms Menka Milosevski in August 2017, but has never paid Ms Bergin's counsel fees for her work.	27 – 29 82 - 83
Particulars	
1.1. Ms Bergin was briefed for Radin Legal client Ms Milosevski in defending litigation brought by her sister over their parents' estates. There was a house to be sold at Fulham Gardens, and her sister made an application for a freezing order in the Supreme Court over the proceeds of the sale.	28
1.2. The Practitioner briefed Ms Bergin on 8 August 2017 to appear and to oppose the order being made.	27
1.3. Ms Bergin sent a costs agreement addressed to the Practitioner on 8 August 2017.	30 - 31
1.4. Paragraphs 1 of that Costs Agreement said: *"I confirm that you as solicitor have engaged me as a barrister only to act for you in this matter in which you act for Menka Milosevski.*	30
1.5. Paragraph 3 of the Costs Agreement said: *"I confirm that you are retaining me in your own right only and not as agent of the lay client."*	30

1.6.	Paragraph 8 of the Costs Agreement said: *"Subject to any other agreement, my fees are payable 14 days after the issue of an invoice."*	31
1.7.	The Practitioner told Ms Bergin that there would be money in his Trust account from the sale of a house property the subject of the dispute which would cover her Counsel fees.	82 at point 3 35 131
1.8.	In accordance with her instructions Ms Bergin appeared for Ms Milosevski in the Supreme Court on 9 August 2017 and 16 August 2017 before Judge Dart.	34 & 39
1.9.	Ms Bergin issued her first invoice for $900.00 plus GST to the Practitioner on 9 August 2017.	32 - 34
1.10.	The substantive litigation was settled between the parties on 4 September 2017 and Ms Bergin issued a second invoice on that day for her further fees of $1,020.00 plus GST.	37 - 39
1.11.	The settlement between the parties required the sale of a house property at Fulham Gardens, which was settled on 15 September 2017.	28
1.12.	The Practitioner had told Ms Milosevski that he would charge her $12,500.00 in total, and assured her that he would "take care of" Ms Bergin's fees out of that $12,500.00.	84 132 at point A.

1.13. With Ms Milosevski's written authority, the conveyancer paid $12,500.00 from the proceeds of the sale of the house directly into the Radin Legal office account, all of which the Practitioner then appropriated for his fees.	40
1.14. Ms Bergin has never received any payment on either of her two accounts, which remain outstanding.	82 - 83
Count 2	
2. The Practitioner retained Mr Matthew Murphy to act as Counsel for his client Mr Angel Stojanov in August 2017, but has never paid Mr Murphy's counsel fees for his work.	194 - 196
Particulars	
2.1. Mr Murphy was briefed for the Practitioner's client Mr Stojanov in relation to his action against the Copper Coast Council over a development at Wallaroo by his company AB Investments (SA) Pty Ltd.	202
2.2. Upon being briefed Mr Murphy attended a directions hearing at short notice for Mr Stojanov.	207
2.3. When Mr Murphy then received continuing instructions in the matter he sent a retainer agreement dated 13 April 2016 to Radin Legal.	204

2.4.	Paragraphs 17 of that retainer agreement said: *"Your Firm is responsible for the payment of my fees, disbursements and GST".*	205
2.5.	The retainer agreement further provided that payment was to be made regardless of the outcome of the case, and that if an invoice was not paid within 60 days of issue, Mr Murphy may "*recover [my] fees from your firm as a debt due under this agreement.*"	205 at point 21.4
2.6.	Paragraph 22 of that retainer agreement said that: *"You acknowledge that failure to pay my fees, in the absence of a genuine dispute, is unethical."*	205
2.7.	The retainer agreement further said at paragraph 28*:* *"In the event of a dispute as to my fees you will provide to me written particulars of the grounds on which you dispute my fees within 14 days of the date of the invoice."*	206
2.8.	The retainer was not signed, but was accepted by providing continuing instructions to Mr Murphy.	231
2.9.	In response to a request on 16 December 2016, Mr Murphy gave a fee estimate of $14,520.00, based on a three day hearing in the Environment, Resources and Development Court.	194

2.10.	The Practitioner told Mr Murphy that he was not to start trial preparation until money was received into Trust from the client to cover his fees.	194 - 195
2.11.	The Practitioner asked Mr Stojanov to pay all his outstanding Radin Legal accounts and to place $10,000 into Trust for Mr Murphy's counsel fees, to secure his booking for the trial which was commencing on 28 March 2017.	209 216 (last paragraph)
2.12.	A trust receipt from Radin Legal Pty Ltd Trust account shows a deposit by Mr Stojanov of $10,000.00 dated 22 February 2017.	211
2.13.	In late February 2017 Ben Williams, a junior solicitor assisting the Practitioner, telephoned Mr Murphy and told him that the client had paid $10,000 into trust and that as a result he could commence trial preparation. [*The Commissioner accepted in submissions that the amount in trust was not relayed to Mr Murphy.*]	195 223
2.14.	Mr Murphy commenced work to prepare for the trial, commencing with a meeting on site with the client and his father at Wallaroo on 6 March 2017.	195
2.15.	Mr Murphy appeared for Mr Stojanov at the trial which ran for three days.	230

2.16.	Mr Murphy then issued his account for $14,520.00, which he says he reduced to stay within his previous estimate, on 6 April 2017.	229 – 230 231 at point 5
2.17.	The Practitioner did not pay Mr Murphy's account and in May 2017 Mr Murphy received a call from Ben Williams to say that the client was disputing *"Radin Legal's bill, including [Mr Murphy's] bill, and that while funds were in trust Michael Radin was not prepared to disburse the trust funds until the complaint had been resolved."*	195
2.18.	Mr Murphy received no particulars of the grounds of the dispute, as required by his retainer agreement.	231 234
2.19.	Mr Stojanov asserts strongly that the amount of $10,000.00 was paid into Radin Legal Trust account specifically for the Counsel fees of Mr Murphy, and was shocked later to get another request from Radin Legal to pay money into trust to cover Mr Murphy's fees.	222 233, 241
2.20.	Mr Stojanov maintains that he did have a dispute with the Practitioner about the fees of Radin Legal, but he never disputed Mr Murphy's account.	
2.21.	The Practitioner preferred his own interests in that he appropriated all of the $10,000 deposited by Mr Stojanov on 22 February 2017 for Mr Murphy's	213, 243

	Counsel fees and deposited it into his office account for his own fees.	
2.22.	Mr Murphy has never been paid anything at all by the Practitioner on his account.	243
2.23.	Mr Stojanovic complained to the Commissioner against the Practitioner, both for overcharging and for misuse of his funds in failing to pay Mr Murphy from money he says he deposited for that specific purpose.	161 - 171
Count 3		
3.	The Practitioner retained Mr Paul Bullock to act as Counsel for his client Ms Tuckey in August 2017, but has never paid Mr Bullock's counsel fees for his work.	250
Particulars		
3.1.	The Practitioner acted for Ms Tuckey in defending a claim made under the Inheritance (Family Provision) Act.	250
3.2.	There was no written retainer or costs agreement between the Practitioner and Mr Bullock. However Mr Bullock says that there was a verbal agreement with the Practitioner , in which he made it clear that that he did not work on a speculative or contingency basis and his fees were payable by the Practitioner's Firm.	251 at point 5 251 at point 3a.

3.3.	Mr Bullock further maintains that he also agreed with the Practitioner that payment would be made to him upon settlement of the matter, from estate funds to be paid into the Practitioner's Trust account.	251 at point 3c.
3.4.	There was a lengthy mediation in the matter in which Mr Bullock appeared for Ms Tuckey without an instructing solicitor present.	252 at point 9
3.5.	Settlement of the dispute was achieved and Mr Bullock rendered an account for $11,687.50 on 15 September 2016.	252 at point 12
3.6.	As a result of the settlement, in excess of $200,000 was paid into the Practitioner's Trust account for Ms Tuckey between December 2016 and January 2017.	247 at point 22
3.7.	The Practitioner appropriated $45,000 from the money in Trust for his fees in December 2016. He paid nothing to Mr Bullock.	247 at point 23 263 - 264
3.8.	Mr Bullock also advised on an estate tax liability that had cropped up unexpectedly in the matter in March 2017. On 13 October 2017 Mr Bullock sent a second account to the Practitioner for $545.60 for that further advice.	254 at points 18 – 20 267
3.9.	The Practitioner's company Radin Legal Pty Ltd and his Service Trust company Radtra Pty Ltd	

	were both placed into liquidation by order of the Federal Court on 19 September 2017.	
3.10.	Mr Bullock has been paid nothing from either the Practitioner or the liquidators, in spite of having registered as an unsecured creditor.	246 at point 17
3.11.	Mr Bullock eventually claimed on Fidelity Fund established under the Act. His claim was accepted for $11,121.00 (without GST) on the basis of a fiduciary or professional default by the Practitioner in failing to pay Mr Bullock his fees.	273 247 at point 25
3.12.	The Practitioner preferred his own interests to Counsel's in appropriating $45,000 from the Trust account for his fees without paying Counsel.	
Count 4		
4.	The Practitioner personally retained Mr Edward Stratton-Smith to act as his Counsel in 2016, but has never paid Mr Stratton-Smith's counsel fees for his work.	284
Particulars		
4.1.	The Practitioner retained Mr Stratton-Smith to defend him before the Legal Practitioners Disciplinary Tribunal on an application by the Commissioner in 2016 in action numbers 3 of 2016 and 4 of 2016.	287

4.2. There was no written retainer or costs agreement between the Practitioner and Mr Stratton-Smith.	286
4.3. For his work Mr Stratton-Smith sent the Practitioner an account for $3,217.00 dated 31 October 2016.	287
4.4. The Practitioner has never paid this account.	
Count 5	
5. The Practitioner personally retained Ms Daniella Di Girolamo to act as his Counsel in March 2017, but has never paid Ms Di Girolamo's counsel fees for her work.	291 - 292
Particulars	
5.1. The Practitioner retained Ms Di Girolamo to advise and appear for his company Radtra Pty Ltd against an application by the Australian Taxation Office. She was briefed by him to attempt to set aside a statutory demand on the company.	291 - 292
5.2. Ms Di Girolamo sent a letter of retainer to the Practitioner dated 14 March 2017 before doing the work.	291 - 292
5.3. Within that letter of retainer were the following provisions: *"You have engaged me as a barrister in circumstances where you act for the lay*	291

client, Radtra Pty Ltd. Accordingly, you are my client, your lay client has no direct obligation to pay my fees and no ability to give me instructions other than indirectly through you, and you have engaged me in your own right and on behalf of your firm, not as the agent for your lay client....My bills are payable 30 days after receipt."	292
5.4. Ms Di Girolamo sent an account to the Practitioner dated 19 May 2017 for $880.00 for her work on his behalf. The Practitioner has never paid Ms Di Girolamo's account or any part of it.	293
Count 6	
6. The Practitioner personally retained Mr Chad Jacobi to act as his Counsel in defending a claim for non-payment of consulting fees by Ms Adriana Pasquale in 2016, but has never paid [all of] Mr Jacobi's counsel fees for his work.	294 297
Particulars	
6.1. Ms Pasquale was formerly employed or retained by the Practitioner as a junior solicitor in his practice. She made a successful claim against the Practitioner in the Adelaide Magistrates Court in about early 2016.	
6.2. The Practitioner appealed the decision against him, and retained Mr Jacobi to advise and appear for him in the District Court on that appeal.	296

6.3.	Mr Jacobi sent the Practitioner a retainer letter and costs agreement by email on 4 July 2016 and although the agreement was not signed, he subsequently received instructions to act in the matter.	299 - 303
6.4.	The costs agreement provided that Mr Jacobi's counsel fees were to be paid regardless of the outcome of the matter, the amount of any settlement or judgment or the result of any taxation of costs.	301 at point 6
6.5.	Mr Jacobi sent an invoice to the Practitioner dated 7 August 2016 for $6,666.00 for his work, less $3,000.00 which had been paid to him in December 2016.	297
6.6.	Mr Jacobi has never been paid the balance of $3,666.00 by the Practitioner.	304

5. In the absence of express agreement to the contrary, it is a solicitor's obligation to pay counsel regardless of whether the client has paid or otherwise made funds available. The only exception is where there is a genuine dispute as to counsel's fees, in which case the amount which is not in dispute should still be paid on time.
6. In the event that a client has not paid their solicitor promptly, so as to enable counsel's invoice to be paid within terms, it is expected that the solicitor will pay counsel from their firm's account, or if necessary, from their own personal funds. To guard against the need to do this, prudent solicitors should request

that their clients place funds in trust sufficient to cover counsel's estimated fees before instructing counsel to carry out the work in question.

7. A solicitor's failure to pay counsel is a serious departure from centuries-old accepted ethical practice in the law. Failure to do so where monies have been made available to the solicitor for the express purpose of paying counsel is even more egregious and dishonourable.
8. As Her Honour Vice President Judge Hampel stated *in Victorian Legal Services Commissioner v Mehri* [2021] VCAT 1246 ("*Mehri*") at [45]:

   "Barristers are entitled to expect, when retained by a solicitor, that they can trust they will be paid for the services they are retained to provide, and paid in accordance with the terms of their retainer, not at the whim of the solicitor. They should be able to trust that a solicitor will use the moneys received from the client for their fees to pay them, not to pay other expenses, for their own benefit."

Eliza Bergin

9. The Tribunal finds that Count 1 is proven. Ms Bergin was owed, but never paid, the amount of $2,112 including GST for her two invoices dated 9 August 2017 and 4 September 2017 for her work on behalf of the Practitioner's client Ms Milosevski in the Supreme Court of South Australia. We find that both Ms Bergin and Ms Milosevski expected that counsel's fees would be paid from the proceeds of the sale of the property at Fulham Gardens, which were received into the Practitioner's firm's office account on 15 September 2017 in the amount of $12,500.
10. The Practitioner asserted that there may have been some misunderstanding about this, and although he accepted that his client Ms Milosevski was truthful

in stating that she thought counsel would be paid from the settlement monies, his own belief was that Ms Milosevski would be responsible for paying Ms Bergin (either direct, or by providing additional payment to the firm above the amount of the settlement monies).

11. The Tribunal rejects this as a proper explanation for the failure to pay Ms Bergin. In the absence of an express written agreement in which the client agreed to pay counsel directly, and written confirmation that counsel was willing to be retained on this unusual basis (indeed directly contrary to Ms Bergin's terms of engagement and in breach of Solicitor's Conduct Rule 35.1[1]), it was the Practitioner's contractual and ethical responsibility to ensure counsel's invoices were paid in full and on time.

12. Instead, the Practitioner applied the settlement monies received from the sale of the Fulham Gardens property to his firm's own professional fees, thereby preferring his own interests to those of Ms Bergin.

13. The Practitioner also submitted that his firm was placed into external administration a matter of days after receipt of the $12,500 and that he may have been able to pay Ms Bergin within a reasonable time had this not occurred. The fact is that Ms Bergin was never paid, and what "might" have happened in the hypothetical scenario postulated is not relevant to our decision.

14. What is relevant is that fact that the Practitioner was well aware of his firm's financial difficulties as at 15 September 2017 and was attempting to "juggle" funds so as to keep the firm afloat. In doing so, he utilised the settlement monies

[1] Requiring that if a solicitor is not intending to accept personal liability for payment of a third party's fees (including counsel or an expert), the solicitor must advise the third party in advance.

which should have been used (in part) to pay Ms Bergin in accordance with Ms Milosevski's instructions in a failed attempt to bolster his firm's financial viability.

Matthew Murphy

15. The Tribunal finds that Count 2 is proven. Count 2 relates to the failure to pay Mr Murphy $14,520 including GST due on his invoice dated 6 April 2017 for a trial he conducted in the Environment Resources and Development Court on behalf of the Stojanov family, who were long-standing clients of the Practitioner.
16. In late 2016 Mr Murphy was asked to give an estimate of his fees, which he did, in the amount of $14,520, and told he should not commence work until funds had been paid into trust. The Practitioner gave evidence that he recalls Mr Murphy giving a verbal estimate of $8,000 at some stage. If this did occur, which the Tribunal accepts is possible, it must have been prior to the $14,520 estimate and was likely before the matter was listed and allocated 3 days for trial. This is because Mr Murphy's $14,520 estimate was clearly predicated on a 3-day hearing.
17. Ill-advisedly, and for reasons that were unclear,[2] only $10,000 was obtained in trust. That amount was deposited by the client on 22 February 2017. We find that the amount was paid into trust by Mr Stojanov exclusively for the purpose of counsel fees.
18. Shortly thereafter, a junior solicitor working under the Practitioner, Ben Williams advised Mr Murphy that the client had paid funds into trust and that he could commence preparation for the trial. Mr Murphy was unfortunately not told how much had been paid into trust.

[2] The decision to request funds in trust was, according to the Practitioner, made by his office manager who did not give evidence.

19. After the trial concluded, Mr Murphy rendered his invoice, writing the amount charged down so that it matched the amount of his estimate. He was under no obligation to do this as he had not provided a quote or undertaken to conduct the trial for a fixed fee.

20. The invoice, which was due to be paid within 14 days, was never paid at all. Over the period 23 February to 8 June 2017 a number of transactions were made at the conclusion of which the whole of the $10,000 had been transferred to the firm's office account and allocated to the payment of the firm's fees.

21. The Practitioner's only explanations for this blatant misappropriation of trust funds was that:

    a. He understood Mr Murphy to have given an estimate of only $8,000;

    b. He was in dispute with the Stojanovs over fees;

    c. He believed the trust funds were available to meet both counsel and solicitor's fees.

22. This was not a situation where there was a genuine dispute as to counsel's fees, nor did the Practitioner suggest that Mr Murphy's fees were in any way unreasonable. If the Practitioner was not across the detail of the Stojanov file, and was still working from an old estimate in determining the amount to request in trust, the Practitioner has only himself to blame.

23. The dispute with the client regarding payment of fees should not have impacted upon counsel. There was no reason to delay paying Mr Murphy in circumstances where the Practitioner knew counsel had performed the work requested and billed for it properly, in accordance with his retainer. This circumstance does not fall within the "genuine dispute" exception to the obligation to pay counsel. The proper course would have been to obtain

instructions to pay the $10,000 immediately towards counsel's invoice and then to invoice the client to facilitate payment of the balance. In the event that the client refused or neglected to pay, or only approved payment of $8,000, then the Practitioner should have paid the balance of the invoice himself, not waited until the dispute with his client was resolved.

24. The Tribunal rejects the Practitioner's evidence that the trust funds were not paid in exclusively for counsel fees. First, it does not make any practical sense because if it was intended to cover fees for both solicitors and counsel, the amount requested would need to have been much larger. Secondly, if it was genuinely intended to be shared, one would expect at least some portion of it (and arguably on the Practitioner's own evidence, $8,000) to have been immediately paid to Mr Murphy. Thirdly, the amount was paid in circumstances where Mr Murphy had been told not to commence work until it was paid, then given the "go ahead" as soon as it was. This strongly suggests the payment was specifically on account of counsel fees. Fourthly, we give greater weight to the evidence recording Mr Stojanov's belief as to the purpose of the funds (he made a formal complaint that the $10,000 was not used for counsel's fees as intended). Whilst accepting that there was a breakdown in the relationship between the Practitioner and his former clients, we reject the Practitioner's contention that Mr Stojanov was lying about the purpose of the $10,000. Finally, the Practitioner's evidence is self-serving. It is an attempt to excuse the inexcusable, namely preferring his own interests to those of Mr Murphy and in doing so misappropriating trust funds.

Paul Bullock

25. The Tribunal finds that Count 3 is proven. Mr Bullock was engaged to act for the Practitioner's client Ms Tuckey in a dispute under the *Inheritance (Family Provision) Act* in the Supreme Court. The terms of Mr Bullock's retainer were that he would be paid regardless of the outcome, but not until sufficient funds from the estate the subject of the dispute were distributed at the conclusion of the matter.
26. The Supreme Court action was resolved after a lengthy mediation and Mr Bullock issued an invoice on 15 September 2016 for $11,687.50 including GST.
27. Mr Bullock then provided some advice in relation to an estate-related tax liability in March 2017and issued a further invoice dated 13 October 2017 for $545.50.
28. Neither invoice was paid by the Practitioner, though Mr Bullock did eventually recover $11,121 (the amount of the first invoice without GST) from the Fidelity Fund.
29. Monies resulting from the settlement of the dispute and the distribution of the estate were paid into the Practitioner's trust account in seven different deposits over the period 2 December 2016 – 13 January 2017. The total amount was $232,302.10, yet none was applied to counsel's first invoice.[3]
30. The Practitioner instead caused $45,000 to be applied to his firm's own fees, and the rest of the funds to be paid out to the client.
31. The Practitioner's explanation for the failure to pay Mr Bullock was that the client had contracted to purchase a house and needed the funds from the settlement urgently to complete that purchase. The Practitioner further

[3] The second had yet to be issued.

suggested that he might have reached an agreement with Mr Bullock to extend the time for payment, but was unable to be sure because he no longer had access to Ms Tuckey's file. He submitted that his defence was prejudiced by no longer having records of his communications with Mr Bullock and Ms Tuckey.

32. The Tribunal finds that there was no agreement with Mr Bullock to extend the time for payment. This was a matter for the Practitioner to prove, and he made insufficient effort to identify the firm to which Mr Tuckey's file was transferred, to make enquiries of records held by Mr Bullock, or if necessary to have a subpoena issued.

33. We find that the time for payment of the first invoice was 5 December 2016, the next business day after 2 December 2016 when sufficient settlement funds came into the Practitioner's trust account. We find that the time for payment of the second invoice (in circumstances where Mr Bullock did not have a written retainer, and the law implies a reasonable time for payment) was 30 days from the date of issue namely 13 November 2017.

34. Even if the client had been anxious to secure funds to complete the purchase of a new property, which the Tribunal accepts was likely the case, the Practitioner has not established that Ms Tuckey gave him express instructions in which she refused to pay Mr Bullock out of the estate settlement funds received into the Practitioner's trust account. Even if this had occurred, it was still the Practitioner's professional obligation to ensure payment of Mr Bullock's invoice, if necessary from his own funds. He could have done this from the $45,000 transferred to the firm's office account, but chose not to.

35. The Practitioner has ultimately preferred his own interests to those of Mr Bullock, as was the case with Mr Murphy and Ms Bergin.

Edward Stratton-Smith

36. Count 4 is in a different category to the others. Mr Stratton-Smith was engaged by the Practitioner to represent him before this Tribunal in the period 30 September 2016 – 31 October 2016. It is not entirely clear from the material before the Tribunal if and when counsel expected to be paid. Fees were not discussed at the outset of the retainer (which was not recorded in writing), and the Practitioner gave evidence which we accept, that he and Mr Stratton-Smith were colleagues and friends.

37. Whilst the Practitioner gave evidence that he had briefed Mr Stratton-Smith numerous times previously, and therefore could be assumed to be familiar with counsel's fee structure, that is an insufficient basis on which to find that a retainer was entered into on counsel's usual terms.

38. It appears a distinct possibility that Mr Stratton-Smith acted for the Practitioner as a professional courtesy, to assist him in difficult times, without any firm expectation of remuneration (especially given the Practitioner's financial difficulties were almost certainly known to counsel). This sometimes occurs in matters before the Tribunal, to the credit of those barristers who appear without remuneration.

39. An invoice was issued by Mr Stratton-Smith on 31 October 2016 in the sum of $3,712.50. The Practitioner's evidence was that he himself may have urged counsel to issue it. Whilst it might be said that once this happened, the obligation to pay crystalised, the Tribunal is conscious of the serious consequences flowing from each failure to pay a barrister. The Practitioner gave oral evidence that Mr Stratton-Smith's attitude was "casual" and "accommodating" as to when and how he would be paid.

40. The best evidence we have from Mr Stratton-Smith is what he wrote in an email to Ms Branson dated 26 June 2020 (Exhibit 2 at p.286) which states:

"We did not discuss fess in any detail. I had it in my head that he would eventually pay me. I did not expect immediate payment because I knew Mr Radin had a fair bit on his plate. I expected to be paid once he was back on his feet." This calls into question whether the invoice has ever truly fallen due given the Practitioner's present circumstances.

41. Due to the uncertainty surrounding the terms of Mr Stratton-Smith's oral engagement (and in particular the time for payment), in order to make good the findings sought, we consider the Commissioner needed to call Mr Stratton-Smith as a witness in the inquiry. The Commissioner elected not to do so, and the Tribunal finds that the burden of proof has not been discharged with respect to Count 4.

Daniella Di Girolamo

42. The Tribunal finds that Count 5 is proven. Ms Di Girolamo acted for the Practitioner's company Radtra Pty Ltd in a dispute with the Australian Taxation Office. She issued an invoice for $880, none of which has ever been paid. Although he could not specifically recall the circumstances, the Practitioner accepted that Ms Di Girolamo was due this amount.

Chad Jacobi

43. The Tribunal finds that Count 6 is proven. Mr Jacobi (now of King's Counsel) acted for the Practitioner defending a claim in the Magistrates Court brought against the Practitioner by a consultant solicitor for failure to pay her consulting fees.

44. Mr Jacobi issued an invoice dated 7 August 2016 for $6,666, and received a part payment of $3,000. The balance of $3,666, which was then re-invoiced by counsel, has never been paid. The Practitioner accepted that Mr Jacobi was due this amount and said the only reason for the failure to pay was the financial difficulties encountered by his firm.

Conclusion in Action No.5 of 2020

45. There is ample authority that a solicitor's failure to pay counsel may be professional misconduct at common law; *Rhodes v Fielder, Jones and Harrison* [1918-19] All ER Rep 846 at 847, *Carver v NSW Legal Profession Disciplinary Tribunal* (1991) 7 LPDR 8 at 12, *Re Robb* (1996) 134 FLR 294 at 310.

46. Whilst this law developed in a context where historically there was no enforceable contract between solicitors and counsel, the moral and ethical position has not changed in modern times and now that counsel are entitled to sue their instructors for breach of their retainer agreement (see for example, *Mehri*).

47. A failure to pay counsel which involves the misappropriation of funds intended for that purpose will of course be seen as more serious. However, a failure to pay counsel merely because the client has not paid the solicitor will still amount to professional misconduct. It is not necessary for the Commissioner to show wilful or persistent refusal to pay multiple barristers in different matters over an extended period of time. Every instance of a failure to pay counsel in full and on time in accordance with their retainer, in the absence of a genuine dispute or negotiated payment plan, is professional misconduct under s69 of the Act.

48. Financial inability on the part of the solicitor to pay counsel from their firm's or personal resources is a factor to be taken into account in determining the

appropriate disciplinary sanction, but it is not relevant to whether a practitioner is guilty of professional misconduct. Likewise, the eventual payment or part-payment of counsel by the solicitor some months or years after their fees fell due.

49. The failure to pay counsel in Counts 1, 2, 3, 5 and 6 each separately amounts to professional misconduct. The Tribunal will make orders accordingly.

Action No.6 of 2020 – Lambert

50. This action involves the conduct of the Practitioner in relation to the manner in which he and Steven Clark ("**Clark**") who practised together through an incorporated legal practice known as "Juris Prudence II Pty Ltd ("**the company**") operated the Clark Radin Lawyers Trust Account ("**the Trust Account**").

51. Mr Trevor Lambert had instructed Clark in relation to two matters namely a motor vehicle accident claim for personal injury damages ("**the MVA matter**") and a dispute regarding the deceased estate of Mr Reints ("**the Estate Matter**").

52. The charge against the Practitioner relates to the manner in which the Practitioner and Clark dealt with the settlement funds received into the Trust Account as a result of the settlement of the MVA matter, some of which were subsequently applied to costs incurred in the Estate matter.

53. As with the previous action the Commissioner helpfully provided an annotated version of the charge (Exhibit P6) which cross references the facts alleged to the relevant documents in exhibit 3.

54. We set out the annotated charge in full below.

CHARGE		Page Reference too Book of Documents
Recitals		
D.	At all material times until 10 June 2011, the Practitioner practised through an incorporated legal practice known as Jurisprudence II Pty Ltd ("the company") which traded as "Clark Radin Lawyers". Steven Michael Clark ("Clark"), practitioner, was the Practitioner's co-director of the company.	237 at point 1.3
E.	Mr Lambert instructed Clark in 2008 to act for him in two matters, a motor vehicle accident claim for personal injury damages ("the MVA matter") and a dispute regarding the deceased estate of a Mr Reints ("the estate matter").	
F.	Clark settled the MVA matter in early 2011 for $48,000.00 inclusive of costs, interest and disbursements. Clark subsequently settled the estate matter on 21 March 2011.	200
G.	The proceeds of the MVA settlement were received on 24 March 2011 and immediately banked into trust and credited to the firm's Lambert MVA Trust Account ledger.	43
H.	On 25 March 2011 Clark appropriated the sum of $18,465.06 for costs on the MVA matter.	43
I.	On 28 March 2011 Clark appropriated the further sum of $25,000.00 for costs incurred on the estate matter, by taking those funds from the Lambert MVA matter Trust Account	43

	ledger without obtaining the proper authority of Mr Lambert to do so.	44
J.	Upon receiving a complaint about this from Mr Lambert, and after inspecting the firm's Trust account, the Law Society of South Australia ("the Society") on 8 August 2011 required and directed the Practitioner and Clark to reinstate the $25,000 taken from Trust back into the Lambert MVA client Trust ledger by 19 August 2011 at the latest.	191
K.	The Practitioner and Clark did not repay any money into the Trust account to the credit of the Lambert MVA ledger until 31 August 2011, despite demands from Mr Lambert and the direction from the Society to repay the amount.	89
L.	On 31 August 2011, an amount of only $18,488.00 was repaid into the Trust account for the credit of Mr Lambert.	89
Count 1		
7.	The Practitioner mislead the Society in August 2011 in that he signed and sent to the Professional Standards section a letter dated 18 August 2011, which was false and misleading as to the repayment made by the Practitioner and Clark to the Clark Radin Lawyers Trust Account.	174 - 175
Particulars		
	7.1. Mr Lambert complained on 2 May 2011 to the Professional Standards staff of the Society about the	

	appropriation of $25,000.00 of his MVA settlement funds.	
7.2.	Clark Radin Lawyers ceased operations on 10 June 2011, and the Practitioner and Clark each opened their own separate practices the following week. The Practitioner commenced trading as "Radin Legal" and Clark as "Clark Lawyers" from the same address at which Clark Radin Lawyers had operated.	
7.3.	The Society staff carried out an inspection of the Clark Radin Lawyers Trust Account on 7 July and 28 July 2011 and examined the handling of the Lambert trust money.	
7.4.	At some point in or about July 2011, Clark instructed the Practitioner to "act for him" in dealing with Mr Lambert and with the Society concerning Mr Lambert's Trust money. The Practitioner agreed to do so.	
7.5.	By letter dated 8 August 2011, the Director of Professional Standards at the Society, Ms Rosalind Burke, wrote to the Practitioner and Clark and required that the firm immediately reinstate the sum of $25,000.00 to Mr Lambert's MVA Trust Account Ledger *"as a matter of urgency and in any event by 19 August 2011 at the latest."*	
7.6.	The Practitioner wrote and sent a letter to Ms Burke dated 18 August 2011, which he signed both on his own behalf and on behalf of Clark.	174 - 175

7.7.	The Practitioner's letter to Ms Burke of 18 August 2011 included the following statement: *"...we attach herewith documentary evidence of a reinstatement made into the MVA account of Mr Lambert as required by you... we regret to advise that an amount of only $23,315.14 has been reinstated to date."*	174 - 175
7.8.	The bank statements of the Clark Radin Trust Account show that no reinstatement of any of the funds appropriated had been made as at 18 August 2011.	
7.9.	The "*documentary evidence*" of the alleged reinstatement of funds sent to Ms Burke and Mr Lambert by the Practitioner consisted of a photocopy of the Trust Account ledger of the Lambert MVA matter produced by the firm's trust accounting software program, to which had been added in handwriting: *Credit Balance* *19/8/2011 Reinstatement of Trust Funds from* *AMR + SMC as per Law Society letter* *Dated 8/8/2011* *Ref: KZ:RMB: Clark Radin" $20 000.00" $23 315.14*	182
7.10.	The Practitioner's letter to the Society asserted that the sum of $23,315.14 had been repaid to the Trust Account to the credit of Mr Lambert's MVA matter ledger, which was false and misleading.	175

7.11. Further the Trust Account Ledger card enclosed with the letter in fact suggested an amount of only $20,000 had been repaid on 19 August 2011, giving a then balance of $23,315.14. Each factual assertion concerning repayment was incorrect.	182
7.12. The Practitioner knew or ought reasonably to have known that no reinstatement of any funds had been made to the Lambert Trust Account Ledger as at either 18 or 19 August 2011.	141 - 142
7.13. The Practitioner did not correct the misrepresentations as to the reinstatement of funds made in the letter of 18 August 2011 to Ms Burke at any time.	
Count 2	
8. The Practitioner mislead Mr Lambert in that he signed and sent him a letter dated 18 August 2011, which was misleading as to the repayment made by the Practitioner and Clark to the Clark Radin Lawyers Trust Account.	183 - 184
Particulars	
8.1. The Particulars set out at Count 1 at paragraphs 1.1, 1.2, 1.3, 1.4, 1.8, 1.9, 1.11 and 1.12 are hereby repeated.	
8.2. The letter to Mr Lambert which was drafted and signed by the Practitioner included the following statement:	183

	"We have as at the date of this letter, and in accordance with the direction of the Professional Standards Section, reinstated a sum of $23,315.14 to this account which is now payable to you within 5 working days... We attach documentary evidence of the reinstatement of the said sum to your account.".	
8.3.	The relevant bank statements of the Clark Radin Trust Account show that no reinstatement of any of the funds appropriated had been made as at 18 August 2011.	
8.4.	The "*documentary evidence*" of the alleged reinstatement of funds sent to Mr Lambert consisted of a photocopy of the Trust Account Ledger of the Lambert MVA matter produced by the firm's trust accounting software program, to which had been added in handwriting: *Credit Balance* *19/8/2011 Reinstatement of Trust Funds from* *AMR + SMC as per Law Society letter* *Dated 8/8/2011* *Ref: KZ:RMB: Clark Radin" $20 000.00" $23 315.14*	182
8.5.	The said letter to Mr Lambert asserted the sum of $23,315.14 had been repaid to the Trust Account to the credit of Mr Lambert's MVA matter ledger, which assertion was false and misleading.	183
8.6.	Further the Trust Account Ledger card enclosed with the letter in fact asserted an amount of only $20,000	182

	had been repaid on 19 August 2011, giving a then balance of $23,315.14. Each factual assertion concerning repayment was untrue and misleading.	
8.7.	The Practitioner knew or ought reasonably to have known that no reinstatement of any funds had been made to the Lambert Trust Account Ledger as at 18 or 19 August 2011.	141 - 142
8.8.	The Practitioner and Clark reinstated only the sum of $18,488.00 to the Lambert Trust Account Ledger on 31 August 2011.	141
8.9.	The balance of the funds misappropriated on 28 March 2011 was never reinstated to the Lambert Trust ledger account.	141
8.10.	The Practitioner did not correct the misrepresentations as to the reinstatement of funds made in his letter of 18 August 2011 to Mr Lambert at any time.	
Count 3		
9.	The Practitioner spoke to Ms Kim Zuvela, then a Trust Account Regulatory Officer and Senior Legal Officer of the Professional Standards section of the Society on 29 August 2011 and in the course of that conversation he misled Ms Zuvela.	168 - 169
Particulars		
9.1.	Mr Lambert had contacted Ms Zuvela and spoken to her by telephone on the morning of 29 August 2011,	168

	asking for help in obtaining his settlement money from the MVA matter from the Practitioner and Clark.	
9.2.	The same morning Ms Zuvela telephoned the Practitioner who was not available. When the Practitioner returned her call at 4.25pm that day, Ms Zuvela discussed with the Practitioner the urgent need to reinstate money to the Trust Account in order to pay to Mr Lambert his settlement money.	168 - 169
9.3.	Ms Zuvela asked the Practitioner if he had deposited funds into the Trust Account of Mr Lambert or whether the alleged deposit was in fact just a credit entry on the Trust Account ledger of Mr Lambert. The Practitioner advised the funds had actually been paid into the Trust Account. That statement was false.	169, paragraph 2
9.4.	Ms Zuvela made a contemporaneous note of her conversation with the Practitioner. At page 2 of Ms Zuvela's File Note it says, inter alia, the following: *"I asked whether the $20,000 has been actually deposited into trust account, not just credited to Trevor's ledger account, and I asked him to provide me with a copy of the bank statement confirming the same. He confirmed that the funds have been deposited into the trust account..."*	169, paragraph 2
9.5.	The Practitioner knew or should reasonably have known that as at 29 August 2011, no sum of $20,000, or any other amount had been deposited into the Trust	141

Account for the reinstatement of Mr Lambert's MVA matter settlement funds.	

55. Count 1 alleged, in summary, that the Practitioner misled the Society in August 2011 in that he signed and sent to the Professional Standards Section of the Law Society ("**the Society**") a letter dated 18 August 2011 which was false and misleading as to the repayments made by the Practitioner and Clark to the Trust Account.
56. Count 2 alleged, in summary, that the Practitioner misled Mr Lambert in that he signed and sent to him a letter dated 18 August 2011 which was misleading as to the repayment made by the Practitioner and Clark to the Trust Account.
57. Count 3 alleged, in summary, that the Practitioner spoke with Ms Zuvela, then a Trust Account Regulatory Officer and a senior legal officer of the Professional Standards Section of the Society, on 29 August 2011 and in the course of that conversation, he misled Ms Zuvela.
58. The Practitioner, despite numerous opportunities to do so, has not filed any response in action No. 6 of 2020.

Evidence on Counts 1 and 2 - Misleading the Society and Mr Lambert

59. We will consider these matters together in that the alleged misleading behaviour related to similar, if not, identical assertions.
60. The Practitioner substantially agreed to the factual substratum of the charges however in his evidence before the Tribunal[4] he deposed to a number of matters including:

[4] Transcript pp 69-74.

a) The file principal was Clark.

b) They were business partners but ran separate files.

c) The Practitioner relied upon Clark and what he was informed by Clark.

d) The Practitioner mediated between the client and Clark with a view to resolving the issue.

e) The Practitioner had nothing to do with the agreement between Clark and the client.

f) The Practitioner believed that a general trust transfer authority was sufficient. Such an authority was in place. Whilst he queried the transfer of monies from the MVA matter to the Estate matter with Clark, in the end he went along with it.

g) Clark was finding it difficult to cope with the practice and his role as, effectively, the CEO.

h) The Practitioner assisted Clark as best he could although he was not experienced in that role.

i) The practice was experiencing some financial stress with respect to its overdraft and loan facilities.

j) The Practitioner assisted Clark in his dealings with the Society and with Mr Lambert.

k) Mr Lambert was unhappy with the transfer of the MVA settlement funds to the Estate matter and complained to the Society. The complaint was made against Clark.

l) Clark requested the Practitioner to act for him and represent him in the context of the complaint.

m) By that stage, the Practitioner and Clark had separate practices, which they conducted for a time from the same premises.

n) In the course of the investigation against Clark, the Society determined that the Practitioner should also be the subject of the investigation as he was, at all relevant times, a director and co-principal of the practice and had equal responsibility for its trust account.

61. The Practitioner gave evidence[5] that it was the responsibility of Clark, within the practice, to make the decision concerning the way in which the practice appropriated monies ex trust to satisfy their account for fees. Clark did however consult with the Practitioner. The Practitioner stated – *"... and I, as innocence, went along with it."*

62. The Practitioner stated that he did not suggest that in saying that he was suggesting that Clark was doing something wrong. Advice had been received that the Act did not at that time necessarily stipulate that a specific form of trust account authority was necessary in order to undertake the type of transaction that was undertaken. A general form of authority would suffice.

63. The Practitioner, in answer to a question from the Presiding Member gave evidence that he did have an understanding at that time, of what his duties and responsibilities were as a director of the practice, in particular in relation to conduct of the Trust Account.

64. On the 28 March 2011 $25,000 was transferred from the Trust Account in the MVA matter to the Clark Radin office account and applied to the outstanding fees in the Estate matter. Following an inspection of the firm's trust account, the

[5] Transcript p73.

Society wrote to the Practitioner and Clark on 8 August 2011[6] requiring them to reinstate the $25,000 withdrawn by them from Trust on 28 March 2011 back into the MVA client Trust ledger by 19 August 2011 at the latest. The letter confirmed that the Practitioner and Clark were both personally liable to reinstate the funds from their personal funds. The letter went on to say that within a further period of 5 working days Mr Lambert was to be repaid his settlement moneys.

65. By letter of 18 August 2011 sent to Ms Burke, Director of Professional Standards, signed by the Practitioner on his own behalf and on behalf of Clark, the Practitioner stated:

> *"We attach herewith documentary evidence of reinstatement made into the MVA account of Mr Lambert as required by you... We regret to advise that an amount of only $20,000 has been reinstated to date."*[7]

66. The bank statements of the Trust Account show that notwithstanding that statement no reinstatement had been made to the trust account as at that date. The Bank statements indicate that $18,488 was withdrawn from the Steven M Clark Pty Ltd account on 31 August 2011 titled "Lambert reinstatement". That amount was deposited to the Trust Account the same day. On 1 September 2011 a withdrawal of $21,803.14 was made from the Trust Account with the handwritten notation "Payment to Lambert".

67. The documentary evidence produced with the Practitioner's letter of 18 August 2011 included a copy of the trust account ledger of the Lambert MVA matter with a handwritten notation recording a reinstatement on 19 August 2011 of

[6] Exhibit 3 pp186-191.
[7] Exhibit 3 pp125-126.

$20,000 and further recording the then balance in that trust account as $23,315.14.[8]

68. The balance of $3,315.14 was in fact the carried forward balance remaining in the MVA Trust ledger following the transfers made for the costs of the MVA and Estate matters. It was not an amount reinstated by the Practitioner and Clark.

69. As the above sequence of events indicates, as at the date of the 18 August 2011 letter no money had been reinstated much less the $20,000 indicated on the Trust ledger nor indeed the $25,000 the Practitioner and Clark had been directed by the Society to reinstate.

70. At the time of the payment to Lambert on 1 September 2011 only $18,488 had been reinstated by the Practitioner and Clark.

71. The Practitioner in his evidence, attempted to provide an explanation for what was a clearly misleading communication to Ms Burke.

72. The Practitioner gave evidence[9] that he and Clark had experienced difficulties with the NAB who were exerting pressure because of the poor financial circumstances of the practice, and they had lost their Accounts Manager. In early 2011, Mr Stephen Wigzell had stepped into the breach. He was apparently the financial adviser for the Practitioner and who the Practitioner termed "his best friend" until he passed away at the age of 58.

73. The Practitioner asserted that Mr Wigzell made a number of mistakes, one of his mistakes being the management of the process of the reimbursement of the account of Mr Lambert.

[8] Exhibit 3 p182.
[9] Transcript pp76.

74. In answer to questions from the Tribunal, the Practitioner reaffirmed that it was Mr Wigzell's mistake, an arithmetical mistake. The mistake being that Mr Wigzell did not ensure that the directions that were given to him (presumably by the Practitioner or Clark) were carried out properly and at the one time.

75. The Practitioner acknowledged[10] that the direction that $25,000 be reimbursed to the Trust Account had its origins in the Society. It was further conceded that the transfer of $25,000 from the MVA matter to the Estate matter was not made as a result of a mistake by Mr Wigzell. The instruction had clearly been given by Clark in consultation with the Practitioner.

76. The $25,000 which had been transferred from the MVA matter to the office account on account of the outstanding fees in the Estate matter would need to be reimbursed to the Trust Account from an external source, ie. from the office account or some other source personal to Clark or the Practitioner.

77. The Westpac account in the name of Steven M Clark Pty Ltd recorded monies credited to that account being funds transferred Lang & Lomas fees on 31 August $18, 488 and a payment "Lambert Reinstatement" made the same day in the same amount and credited to the Clark Radin Trust Account.[11]

78. The Practitioner conceded that if the instruction to Mr Wigzell had been to transfer $25,000, it could not have been actioned by him because there were insufficient funds available to enable that to be done.[12]

79. In the end result, following questions from the Tribunal, the Practitioner was forced to concede that in essence, if there was never the money available for

[10] Transcript p78.
[11] Exhibit 3 p 266-267.
[12] Transcript p82.

Mr Wigzell to satisfy any instruction to transfer $25,000, it was not a mistake of Mr Wigzell but rather he was not able to fulfil the instruction.

80. The attempt by the Practitioner to ascribe the blame to his best friend, who had passed away, demonstrates a lack of insight into his conduct and capacity to acknowledge responsibility for his actions.

81. To make matters worse the Practitioner then changed his position in that he said in that circumstance, Mr Wigzell's mistake was that he did not communicate that (presumably that there were insufficient monies to transfer $25,000) to the Practitioner and Clark.

82. The Practitioner conceded it was his obligation to check that the monies were there to transfer. The Practitioner further conceded that although he was aware of the general responsibilities that he had as a co-director of the practice, particularly with a view to its trust account, he did not follow through as intently or as closely in ensuring that the instruction that Mr Wigzell was aware of, that is *"...we have got to get $25,000 back to this bloke, we're told to do that..."* was actually carried out appropriately.[13]

83. The Practitioner ultimately conceded, with some reluctance that the failure was his. Not only did he, the Practitioner, not check that what was happening complied with the directions of the Society but over and above that, he communicated with both the Society and Mr Lambert and made assertions that were clearly misleading and untrue. The Practitioner insisted there was no deliberateness nor ill intent, he did not wish to deceive anybody, that he

[13] Transcript p 83.

blundered.[14] The propensity of the Practitioner to seek to minimize his own conduct was again plainly demonstrated.

84. The Practitioner conceded that he did not follow up Mr Wigzell either with respect to transferring the full amount required to the Trust Account nor ensuring that the correct trust entry was recorded.

85. The Practitioner, whilst acknowledging it was not an excuse, somewhat astonishingly painted himself as almost a victim of circumstances.[15]

Evidence on Count 3 - The discussion with Ms Zuvela.

86. The Practitioner conceded that in the circumstances, not having properly checked in any event, *"... it is apparent that I misled her with the information I provided and there is nowhere to hide in relation to that. We did have that conversation."* His evidence was to the effect that there was not a deliberate attempt to deceive Ms Zuvela, rather the Practitioner should just have done his job better.[16]

87. The inescapable conclusion is that the Practitioner must have informed Ms Zuvela that $20,000 had actually been deposited to the Trust Account and was not merely a ledger entry without checking at all and with complete disregard to the veracity of what he was saying.

Findings on Counts 1 and 2 – Misleading the Law Society and Mr Lambert

88. With respect to the letters of 18 August 2011 to each of the Society and Mr Lambert, the information provided in those letters about monies which had had been reimbursed to the Lambert Trust Ledger was incorrect and misleading.

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[14] Transcript p 84.
[15] Transcript p 87.
[16] Transcript p 89.

89. The evidence of the Practitioner to which we have referred is very clear that he did not check the ledger nor the Trust Account.

90. It is particularly concerning that the Practitioner, in addition to trying to distance himself from the transaction by ascribing responsibility to Clark, sought also to ascribe blame to Mr Wigzell.

91. When pressed about these matters as to what specifically was said to Mr Wigzell about transferring $25,000, the source of funds for the payment of the $25,000 and the entries on the Trust Account, the Practitioner was ultimately forced to concede that he could not directly recollect such matters and that it was a long time ago.

92. The requisite standard of proof with respect to the allegations against the Practitioner is, on the balance of probabilities, bearing in mind the seriousness of the allegation in accordance with the principles enunciated in *Briginshaw & Briginshaw.*[17]

93. We are satisfied that on 18 August 2011, the Practitioner was aware that the money had not been reinstated.

94. If we are wrong in that regard, we are satisfied that the Practitioner's conduct in not carefully checking the Trust Account ledger and more particularly, the Trust Account bank statements, to inform himself with surety and clarity that first, monies were reinstated into the Trust Account sufficient to enable the adjustment to be made to the MVA Trust Account ledger and secondly, to ensure and satisfy himself that the monies had in fact been disbursed from the Trust Account to Mr Lambert.

[17] *Briginshaw & Briginshaw* (1938) 60 CLR 338.

95. We accept that the Practitioner was recklessly careless and that his conduct can be characterised in any event as wilful misconduct in accordance with the principles enunciated in *Re Mayes & The Legal Practitioners Act ("Re Mayes").*[18]

96. We also accept that in accordance with the principles in *Re Mayes,* that the Practitioner, being a principal and director in a small incorporated legal practice, being on notice that there might have been a problem with the Trust Account, had a duty to actively examine the account and supervise the actions of the other principal and accounts employee, regardless of which of them normally did that within the practice and however much there was a relationship and trust between them.

97. We are satisfied that the Practitioner's conduct with respect to the letters of 18 August 2011 to both the Law Society and Mr Lambert constituted unprofessional conduct on the part of the Practitioner as it involved a substantial failure to meet the standard of conduct observed by competent legal practitioners of good repute.

Findings on Count 3 – Misleading Ms Zuvela of the Society

98. The Practitioner, as we have referred to above, did not contest the conversation asserted by Ms Zuvela.

99. Ms Zuvela asked whether the sum of $20,000 had actually been deposited into the Trust Account or just credited to Mr Lambert on the Trust Account ledger. The Practitioner confirmed that the sum of $20,000 had in fact been deposited into the Trust Account bank account.[19] At the time of the conversation no monies

[18] *Re Mayes & the Legal Practitioners Act* (1974) NSWLR 19.
[19] Exhibit 3 p169.

had been paid into the Trust Account, only the sum of $18,488 was paid later from Steven M Clark Pty Ltd on 31 August 2011.

100. In addition, the Practitioner told Ms Zuvela that his letter to Mr Lambert of 18 August 2011 was simply to inform him of their requirements to pay his settlement monies as directed by the Director of Professional Standards.[20]

101. That was misleading as the letter in fact stated – "*We have at the date of this letter and in accordance with the directions of the Professional Standards section, reinstated a sum of $23,315.14 to this account which is now payable to you within 5 working days.*"[21]

102. We accept that the Practitioner's conduct in positively misleading Ms Zuvela constituted unprofessional conduct as it involved a substantial and recurrent failure to meet the standard of conduct observed by competent legal practitioners of good repute. It was a recurrent failure given the Practitioner's conduct in relation to the matters alleged in Counts 1 and 2 of this action.

Action No.2 of 2021 – Tax and Superannuation

103. As with the previous actions, Counsel for the Commissioner helpfully provided an annotated version of the charge (Exhibit P7) which cross references the facts alleged to the relevant documents in Exhibit 4. We set out this annotated charge in full below.

[20] Exhibit 3 p168.
[21] Exhibit 3 p 183.

CHARGE		Page Reference to Book of Documents
Recitals		
A.	At all relevant times from June 2011 onwards the Practitioner was the sole director and principal of Radin Legal Pty Ltd which traded as "Radin Legal" from offices at Gawler.	153
B.	In the course of carrying on that legal practice the Practitioner employed a number of solicitors and administrative staff from time to time.	
C.	The solicitors in the practice were employed by Radin Legal Pty Ltd.	
D.	The administrative staff were employed by Radtra Pty Ltd, which was the trustee of a service trust pursuant to a Service Agreement between the two companies dated 1 July 2011.	216
E.	The Practitioner's wife Jennie Trampeva-Radin was the sole director of Radtra Pty Ltd. However the company was operated by the Practitioner, who was a shadow director of it.	226
F.	Radin Legal Pty Ltd and Radtra Pty Ltd were both placed in liquidation by order of the Federal Court on 19 September 2017.	236
G.	The Federal Court appointed Mr Tim Mableson and Mr Martin Lewis, both formerly of Ferrier Hodgson but later	238-9

of KPMG, as liquidators of each company (the **liquidators**).	
Count 1	
1. The Practitioner failed to fulfil his financial and professional obligations in that he did not ensure that each of the two companies, Radin Legal Pty Ltd and Radtra Pty Ltd, paid the amounts required under the *Superannuation Guarantee (Administration) Act 1992* for each of its employees.	170 at point 7.
Particulars	
1.1. Following the order placing Radin Legal Pty Ltd into liquidation on 19 September 2017, the Australian Taxation Office (**ATO**) filed a proof of debt with the liquidators of the company for $16,743.01 for the unpaid Superannuation Guarantee Charge in relation to its employees.	170 at point 7
1.2. Following the order placing Radtra Pty Ltd into liquidation on 19 September 2017, the ATO filed a proof of debt with the liquidators of the company for $33,027.83 for the unpaid Superannuation Guarantee Charge in relation to its employees.	170 at point 7
Count 2	
2. The Practitioner failed to fulfil his financial and professional obligations in that he did not ensure that each of the two companies paid the amounts required of them for Pay-As-	242 at point 17

You-Go tax (**PAYG**) and Goods and Services Tax (**GST**) from time to time.	
Particulars	
2.1. The companies were each liable to pay GST pursuant to *"A New Tax System (Goods and Services Tax Imposition – General) Act" 1999.*	
2.2. The companies were each liable to pay PAYG tax pursuant to the *Taxation Administration Act 1953* as amended by *A New Tax System (Pay As You Go) Act 1999.*	
2.3. Following the order placing Radin Legal Pty Ltd into liquidation on 19 September 2017, the ATO filed a proof of debt in relation to Radin Legal Pty Ltd for outstanding PAYG and GST taxes of $142,211.04.	
2.4. Following the order placing Radtra Pty Ltd into liquidation on 19 September 2017, the ATO filed a proof of debt in relation to Radtra Pty Ltd for outstanding PAYG and GST taxes of $185,147.20.	170 at point 7
Count 3	
3. The Practitioner submitted to the Law Society of South Australia (the **LSSA**) in late September 2016 a "Statement Regarding Receipt or Holding of Trust Money for Period 1 July 2015 to 30 June 2016" pursuant to Regulation 48 of the *Legal Practitioners Regulations 2014* (the **Statement**)	50 – 60

	in relation to Radin Legal Pty Ltd. The Practitioner knowingly caused to be included in the Statement information that was false and misleading in a material particular in breach of Regulation 48(5), and he signed and certified it as "complete and correct".	61
Particulars		
3.1.	In Part B of the Statement at section 18, entitled "*Assessing Risks to the Law Practice*", there are 9 questions to be answered by the Practitioner.	59
3.2.	Question 4 said: *"Are taxes and superannuation up to date? (if not provide details including amount(s) owing, relative periods due and any payment arrangement(s))"*	59
3.3.	On the right-hand side of question 4 there are two boxes marked "YES" and "NO". The box marked "YES" has an "X" inserted in it.	59
3.4.	On the page following question 4, at section 19 it says: *"Name of certifying principal: Atanas Michael Radin* *I certify that to the best of my knowledge and belief:*	60

	(a) The details provided in Part B of the Statement are complete and correct; and *(b) …* *Signed:* [Practitioner's signature]	
3.5.	The Practitioner knew when he gave directions to his staff for the completion of the Statement and when he certified it as complete and correct, that it was not correct because the correct answer to Question 4 was No.	61
3.6.	The Practitioner did not provide with the Statement the details which the question required.	
3.7.	The Practitioner employed Ms Satu Walsh (**Ms Walsh**) as Accounts Administrator at all relevant times.	61
3.8.	On Monday 26 September 2016 at 2.42 pm Ms Walsh sent the Practitioner an email with the Subject heading: "Trust Audit Report". In that email Ms Walsh wrote, among other things: "*Please provide your response to the following questions TODAY so I can finalise the report tomorrow when I am in.* '4. Are taxes and superannuation up to date?' *They have requested details – MICHAEL, DO YOU WANT ME TO PROVIDE DETAILS (ie.*	61

	**ICA $123,216.99 & **SG $11,898.82) OR JUST TICK "YES"?"* *ICA = Integrated Client Account **SG = Superannuation Guarantee	
3.9.	In response the Practitioner circled "YES" with a red pen on a hard copy of the email. He hand-wrote several comments on other aspects of the email in red pen and then gave it back to Ms Walsh or placed it on her desk.	61
3.10.	As a result of the direction by the Practitioner to Ms Walsh on the email, the Practitioner knowingly arranged for information to be given to the LSSA and to his firm's external examiner (auditor) in the Statement which was false or misleading in a material particular, in breach of regulation 48(5) of the Regulations.	50 - 60
3.11.	The Practitioner certified the information in the Statement as "complete and correct" when he knew that it was not.	60 - 61
3.12.	The Practitioner did not provide any details of any "payment arrangements" he had, or was attempting to negotiate, with the ATO as required by question 4.	

104. Counts 1 and 2 relate to the alleged failure of the Practitioner to ensure that required payments were made to the Australian Taxation Office ("**ATO**") in

respect of, firstly, the Superannuation Guarantee Charge ("**SGC**") (Count 1) and, secondly, PAYG and GST (Count 2). Count 3 relates to the Practitioner's formal communications with the Society, in part concerning the alleged failure to make tax and superannuation payments as required. It is convenient to deal with Counts 1 and 2 together, and then deal with Count 3.

105. The presentation of the Commissioner's case on Counts 1 and 2 was initially founded in selected documents that had been compiled into a Book of Documents, which had been tendered and admitted into evidence as Exhibit 4. Although this was not an Agreed Book of Documents, the Practitioner expressed no objection to any of the documents.[22]

106. Based on those documents, the evidence goes to establish that the employees of the Practitioner's legal practice had not been paid superannuation entitlements. In the case of solicitor employees, the relevant employer was Radin Legal Pty Ltd and in the case of administrative employees, the relevant employer was Radtra Pty Ltd. The Practitioner effectively controlled both entities. Both companies were placed in liquidation on 19 September 2017.

107. Failure to pay SGC created a liability to the ATO. The documentary evidence, in the form of a letter from the liquidators to the Commissioner dated 3 September 2019, asserts that the ATO had filed proofs of debts in relation to both companies on account of the unpaid SGC.[23]

108. In similar fashion and relying upon the same documentary evidence, the Commissioner asserted that the companies had failed to make PAYG and GST payments, proofs of debt again having been filed with the liquidator.

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[22] Transcript, p 6, lines 13-16.
[23] Exhibit 4, p 170, #7.

109. In his evidence, the Practitioner did not dispute that the payments had not been made and did not dispute the indebtedness to the ATO. For example, he stated in his evidence:

> *There's no basis for me to necessarily dispute the accuracy of the figures that are provided. I'm aware of the fact that there was a debt owed to the tax office ... I admit that there was a debt owed to the ATO and that's clear. And there's no getting away from that ... What I've been doing so far in my evidence, is to talk to you about the failure to pay super, the failure to pay tax generally ... what I'm trying to suggest to you is that it would be ridiculous for me to indicate to you that there wasn't a debt owed in relation to super and tax. I mean the documents are fairly clear.*[24]

110. Cross-examination of the Practitioner elicited much the same in the way of acknowledgment of the indebtedness to the ATO, with the Practitioner stating that he had no reason to dispute the specific sums stated to be owing in the document included at p 170 of Exhibit 4.[25] The Practitioner confirmed that he was aware at the relevant times that the companies he controlled were not honouring their tax and superannuation obligations.[26]

111. The primary thrust of the Practitioner's evidence in response to Counts 1 and 2 referenced the significant financial difficulties and cash flow problems his legal practice was experiencing over a substantial period of time. In this "persistently stressed financial situation",[27] as the Practitioner referred to it, he asserted that "in terms of ensuring that primacy was given to payment of staff, be they professional and/or administrative, and other important operational expenses to enable the practice to function, we found it difficult at times to meet our tax obligations."[28]

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[24] Transcript, p 98, line 21 – p 99, line 10.
[25] See Transcript, pp 199-200.
[26] Transcript, p 200, lines 14-18.
[27] Transcript, p 97, line 21.
[28] Transcript, p 96, lines 19-24.

112. The Practitioner testified that these financial difficulties had resulted in a number of instances in which "payment arrangements" were entered into with the ATO, leading to the negotiation and re-negotiation of a number of payment plans to deal with the practice's tax and superannuation liabilities. The Practitioner testified that he "responsibly attempted to address the situation remedially by doing a number of things, and one is negotiating payment arrangements for the tax office".[29]

113. According to the Practitioner, the ATO had been "extremely accommodating"[30] over several years. However, "it was a completely different ballgame after 2016".[31] This ATO policy change that removed the leeway to which the practice had been accustomed added to the practice's financial difficulties.

114. In response to questioning from the Tribunal, the Practitioner took the position that notwithstanding the evident existence of the tax and superannuation liabilities, which he readily acknowledged, the practice's financial difficulties and his "responsible" attempts to deal with them by negotiating and re-negotiating payment arrangements meant that the situation was "nuanced" and "not black and white", such that it would not be correct to conclude that he had been delinquent in meeting his financial and professional obligations.[32] These matters of negotiation and entering into payment arrangements, the Practitioner asserted, meant that "the offence is not completed".[33]

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[29] Transcript, p 99. Lines 18-20.
[30] Transcript, p 97, line 26.
[31] Transcript, p 99, lines 23-24.
[32] Transcript, p 102, lines 16-24.
[33] Transcript, p 109, line 38; and see, generally, pp 109-110.

115. A further matter relevant to the non-payment of superannuation and tax concerned the state of the practice employees' awareness of the practice's financial situation and the payment of their superannuation entitlements.

116. The Practitioner testified:

> *I told them that they wouldn't be paid on time because of the pressing nature of the cashflow problems that we had. So I shared that information. They were aware of the fact that their entitlements weren't necessarily being met strictly in accordance with obligations and each and every one of them was aware that that was the case because I found it very important to keep them abreast of those sorts of issues.*[34]

117. The Practitioner maintained this position under cross-examination.

118. Also, during cross-examination, the situation of one solicitor-employee, Mr Ben Williams, was raised. The Practitioner asserted Mr Williams knew about the financial problems of the practice and that these were creating issues in relation to paying his entitlements. The Practitioner asserted that he had had discussions with Mr Williams during which Mr Williams would have gained this knowledge.[35] He gave evidence that he and Mr Williams:

> *...worked hand-in-glove together to ensure our productivity could be increased and our profitability ultimately could – could be increased and he certainly understood that if we were able to increase those figures, that I'd indicated to him that we would make good anything that was outstanding in that respect. He was certainly aware of that and indeed, for the most part, he was extremely understanding.*[36]

119. Upon being pressed in cross-examination, the Practitioner was unable to specify exact or approximate dates when he told Mr Williams that his superannuation was not being paid.[37] He stated, however, that he spoke to Mr Williams about it "on a very regular basis."[38]

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[34] Transcript, p 101, lines 18-25.
[35] Transcript, pp 202-204.
[36] Transcript, p 204, lines 10-18.
[37] Transcript, p 205.
[38] Transcript, p 205, line 13.

120. Responding to questions from the Tribunal, the Practitioner made reference to formal meetings with the staff of the practice being held regularly, on at least a fortnightly basis, and that these meetings would have been a source of information to the employees about the practice's financial situation and the impact upon payment of entitlements.[39]

121. The Commissioner sought and was granted leave to call Mr Williams in rebuttal. The leave restricted Counsel for the Commissioner to the topics concerning whether staff were informed about the generally poor financial position of the practice and whether they were informed about non-payment of superannuation.

122. Mr Williams gave evidence that a few months previous to the current hearing, he had done some investigation into his superannuation funds. His superannuation fund REST provided him with two bundles of documents that represented the "Transaction History" for Mr Williams' account during the period corresponding to his employment with Radin Legal, July 2015 to September 2017. Mr Williams discovered from this documentary evidence (Exhibit P11) that only one payment, in the amount of $354.54, was received by REST from Radin Legal on account of superannuation for Mr Williams during the term of his employment with Radin Legal. That payment was recorded as having been made on 19 August 2016.[40]

123. Mr Williams also gave evidence that he, along with all staff, were generally aware of the practice's cash flow problems. He stated that this awareness was

[39] Transcript, p 205.
[40] Transcript, pp 300-302.

gained from regular meetings of the staff, which occurred weekly,[41] as well as from discussions he had with the Practitioner.[42]

124. Mr Williams further testified that, although he could not recall the specifics, he believed that the subject of superannuation payments was raised during regular staff meetings. His recollection is that his understanding of the matter was that payments of superannuation were delayed.[43]

125. Mr Williams was cross-examined by the Practitioner. He confirmed that he understood from discussions with the Practitioner that the practice was "cash-strapped".[44] He stated that what would often transpire in conversations between the two was an indication by the Practitioner of the difficult financial situation of the practice and that, like wages, superannuation entitlements wouldn't be able to be paid on time but would eventually be paid. Mr Williams agreed that the Practitioner had stated that the practice would endeavour to meet all his entitlements in due course.[45]

126. It is the obligation of an employer under the *Superannuation Guarantee (Administration) Act 1992* to make SGC payments for all of its employees who are so entitled.

127. It is the obligation of an employer under the *Taxation Administration Act 1953* (as amended by *A New Tax System (Pay As You Go) Act 1999*) to remit to the ATO instalments of PAYG tax in respect of its employees. Further, it is the obligation of a provider of services under the *A New Tax System (Goods and*

[41] Transcript, p 295.
[42] Transcript, p 296, lines 3-5.
[43] Transcript, p 298. Lines 6-20.
[44] Transcript, p 309. Line 23; see also p 311, lines 5-12 and p 313, lines 13-17.
[45] Transcript, p 313, lines19-34.

Services Tax Imposition – General) Act 1999 to remit to the ATO payments received on account of GST.

128. The Commissioner has established that the Practitioner, as the sole director and principal of Radin Legal Pty Ltd, the employer of the solicitor employees of the Radin Legal practice, was the controlling person of that company and accordingly accountable for any failures to meet its superannuation and tax obligations.

129. Notwithstanding that it was the Practitioner's wife, Ms Trampeva-Radin, who was the sole director of Radtra Pty Ltd, the employer of the administrative employees of the Radin Legal Practice, the Commissioner has established that the Practitioner operated and was the shadow director of that company and, as such, accountable for any failures to meet its superannuation and tax obligations.

130. The Tribunal is satisfied that the Practitioner's obligation to ensure the two companies met their ATO debts in relation to superannuation (Count 1) and taxation (Count 2) were not met.

131. The Practitioner admitted the debts in each regard. In addition, the evidence of Mr Williams establishes, in his specific case, that over the course of more than two years of employment with Radin Legal, all but one of his superannuation payment entitlements were not made.

132. The fact that the practice's severe financial and cash flow difficulties may have underpinned the failures to make the payments cannot change this conclusion. Nor can the Practitioner's contention that he believed he had to give priority to meeting others of the practice's financial obligations in order to keep the practice afloat and give it an opportunity to trade out of its difficulties.

133. The case of *Council of the Law Society of New South Wales v Rogers*[46] is a recent decision of the Civil and Administrative Tribunal of NSW that examined the situation of a failure of practitioners to comply (or to cause incorporated legal practices for which they have responsibility to comply) with superannuation and tax obligations. The Tribunal there reviewed a long list of prior decisions of that nature. At [33], the Tribunal had this to say:

> *In all cases the delinquency was explicable, as was the case here, by financial difficulties or cash flow constraints affecting the relevant legal practice. In Council of the Law Society of New South Wales v Adams [2022] NSWADT 177, the Administrative Decisions Tribunal encapsulated the central concern, at [87]:*
>
> > *"... the Respondent's failure to comply with his legal obligations to pay the superannuation contributions was done ... for the purpose of preferring his desire to continue the conduct of his business. He preferred his own financial and other interests over the interest of his employees".*

134. Subsequently at [44], in considering the factors leading to its conclusion that the practitioner before it had engaged in conduct amounting to professional misconduct by failing to meet superannuation payment obligations, the NSW Tribunal included as a reason that:

> *The Respondent's failures were a conscious exercise in robbing Peter (in the persons of the Complainant and the Australian Taxation Office) to pay Paul (in those of the Law Practice's suppliers and other business creditors). The failures were deliberate and systematic, even though their motivation may have been to remedy the consequences of mismanagement, rather than direct personal gain.*

135. The Practitioner before this Tribunal stands in a similar position. Furthermore, the evidence as to negotiation and re-negotiation of payment arrangements with the ATO reinforces, rather than detracts from, the conclusion that the Practitioner had been remiss over a substantial period of time in meeting his

[46] [2021] NSWCATOD 124 (25 August 2021).

obligations, via the companies, to the practice's employees and to the ATO. To use the Practitioner's own term, the failure in obligation was "complete" regardless of how "accommodating" the ATO might have been for some period of time in providing some leeway to the Practitioner in terms of satisfying the practice's indebtedness. As he acknowledged the companies were no longer able to negotiate and adhere to any payment arrangements with the ATO by 2016 – 2017.

136. In its review of the many cases dealing with failure to comply with tax and superannuation obligations, the NSW Tribunal in Rogers noted, at [41], that the Practitioner's conduct amounted to professional misconduct in all of them but one. The exception was the case of *Law Society of New South Wales v Koffel*.[47] In that case:

> *…when his practice's financial difficulties became apparent, the solicitor met with his staff and sought their agreement to attempt to trade out of those difficulties. In doing so, he informed them that the practice might not be able to pay their superannuation contributions as and when they fell due, but they accepted his personal guarantee of their eventual payment.*

137. The evidence before it leads the Tribunal to conclude that the Practitioner did, via the regular staff meetings, make his law practice staff generally aware of the practice's financial and cash flow problems. Further, the staff were generally aware that their superannuation entitlements were not being paid as they should have been. This is the case for Mr Williams (for whom one-on-one discussions with the Practitioner were also a source of this information) and, at least by inference, the other employees of the Practice.

[47] [2010] NSWADT 177.

138. The evidence does not, however, go so far as to allow the Tribunal to conclude that either Mr Williams in particular or the staff in general knew with any significant degree of specificity the full extent of the practice's financial difficulties or the number and amount of superannuation payments not made. Indeed, accepting Mr Williams' evidence, he discovered the true and accurate state of his entitlements position only a few months before his testimony to the Tribunal in this case. There is no evidence before the Tribunal that the Practitioner regularly advised the employees that a given superannuation payment, of given amount, would not be paid as due. Nor was there suggestion that the Practitioner promised staff he would meet any outstanding entitlements personally.

139. Therefore, the Tribunal is unable to conclude that the position set out in *Koffel*, as described by the NSW Tribunal in *Rogers*, was in place at Radin Legal. The evidence, although more favourable to the Practitioner than the contention advanced by the Commissioner, does not support the conclusion that either Mr Williams or the employees generally had agreed that their superannuation entitlements could be diverted to other creditors in an effort to save the practice, or that they accepted the Practitioner's personal guarantee of eventual payment. They neither consented nor acquiesced to non-payment of entitlements. At best, they had some general awareness of the reality of the situation and were resigned to delays in payment. That is insufficient to ameliorate the position of the Practitioner that would otherwise follow from his conduct in not meeting the superannuation obligations.

140. Needless to say, perhaps, what the employees might have known in relation to superannuation, relevant to Count 1, has no bearing on the failure to meet the PAYG and GST obligations of the practice, which are the subject of Count 2.

141. Accordingly, the Tribunal concludes that the Commissioner has made out his case under Count 1 and Count 2. The failure of a legal practitioner to comply with statutory legal obligations in relation to tax and superannuation (including as in this matter via their control of corporations which are employers, and over an extended period of time) constitutes conduct that "involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence".

142. The Tribunal therefore finds that the Practitioner's conduct the subject of Count 1 amounts to professional misconduct and that the Practitioner's conduct the subject of Count 2 also amounts to professional misconduct.

143. Turning now to Count 3, the Commissioner relied upon a document contained in Exhibit 4, being 11 pages starting at p.50 and finishing at p.60. The document is a form entitled "Statement Regarding Receipt of Holding of Trust Money for Period 1 July 2015 to 30 June 2016" and is authorised by Regulation 48 of the *Legal Practitioners Regulations 2014.*

144. At p.10 of this document,[48] within what had been designated (see p.50) as Part B of the Statement, is a section headed "Assessing Risks to the Law Practice". There is a Question 4 which asks "Are taxes and superannuation up to date? (if not provide details including amount(s) owing, relative periods due and any payment arrangement(s))".

[48] Exhibit 4, p 59.

145. That question was answered "Yes" through an "X" inserted in the box marked "Yes" (with the box marked "No" left blank"). In the space on the form provided for details, none are entered.

146. On p.11 of this document,[49] in the section headed "Certification", the Practitioner is named as the "certifying practitioner". There then follows wording that commences "I certify that to the best of my knowledge and belief: (a) the details provided in Part B of the Statement are complete and correct ...". There follows a signature, a name printed "A. Michael Radin" and the date "22-9-16".

147. Under cross-examination, the Practitioner agreed that the signature on the document was his signature and that, by putting it there, he was certifying to the best of his knowledge and belief that the details provided were complete and correct.[50]

148. At several points in his evidence, the Practitioner acknowledged that answering "Yes" to the question was not correct. Perhaps most to the point is where he stated as follows:

> *I'm not suggesting for a moment that the proper and correct answer was provided to the Society. We weren't up-to-date and that was the simple fact of the matter ... I mean, clearly I erred and I've admitted as much there in my submission to the Commissioner some time ago back when I prepared the submission.*[51]

149. Further, upon cross-examination, the Practitioner agreed that the answer to Question 4 should have been "No".[52] He also agreed that details of the amounts owing in superannuation, which had been provided to him by Ms Satu Walsh, the practice's accounts administrator, in an email dated 26 September 2016,[53]

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[49] Exhibit 4, p 60.
[50] Transcript, p 210, lines 26-35.
[51] Transcript, p 117. lines 21-32.
[52] Transcript, p 212, lines 11-16.
[53] Exhibit 4, p 61.

should have been stated in the space provided for such details as part of Question 4.[54]

150. Further in respect of that email from Ms Walsh at p.61 of Exhibit 4, she specifically referred to the terms of Question 4 and asked the Practitioner "MICHAEL, DO YOU WANT ME TO PROVIDE DETAILS (ie. ICA $123,216.99 & SG $11,898.82) OR JUST TICK "YES"?". Relevantly, it is accepted that "SG" referred to Superannuation Guarantee.

151. The word "YES" was circled in red. The Practitioner did not at any point dispute that he had circled the word and he agreed that other writing in red on the document had been inserted by him.[55]

152. Noting that Ms Walsh's email was dated 26 September 2022 but the certification on the Statement was dated 22 September 2022, the Practitioner agreed that the most likely explanation for this is that he had attached his signature in certification before the Statement was finalised with the completion of Question 4, and that it was Ms Walsh who in fact completed Question 4 by answering YES, this having been done under the direction of the Practitioner through his circling in red the word "YES" on the email of 26 September 2022.[56]

153. The thrust of the Practitioner's contentions in regard to Count 3 was to reiterate what he previously stated in a submission to the Commissioner during the latter's investigations prior to laying the charge.[57] That is that, at or around the time that the Statement to the Law Society was being prepared, the Practitioner was in discussions with the ATO in an attempt to negotiate a new payment

[54] Transcript, p 212, lines 17-20.
[55] Transcript, pp 114-115.
[56] Transcript, pp 114, 211-212.
[57] Exhibit 4, p 137.

arrangement that would provide more time to satisfy the indebtedness to the ATO on account of superannuation and tax, and was in discussions with lenders that might bring money into the practice.[58]

154. In response to a question from the Tribunal, the Practitioner agreed that he expected or at least hoped that the superannuation obligations would be up to date shortly.[59] At a subsequent point in his evidence, also in response to questioning, he accepted that what he had been seeking was a further extension from the ATO, via a new payment arrangement, to satisfy the indebtedness.[60]

155. The Practitioner asserted that "there was no wilful deliberateness about [his] action."[61]

156. The Tribunal is of the view that the answer of "YES" given to Question 4 in the Statement Regarding Receipt of Holding of Trust Money for Period 1 July 2015 to 30 June 2016 was false. Not including in the space provided details of the true state of affairs was inaccurate and misleading. In particular, the Statement expressly asked for details of "payment arrangements" and on the Practitioner's own evidence, he was engaged in discussions seeking new payment arrangements. But these were not provided.

157. Whatever the Practitioner may have expected or hoped might happen in the near future through negotiations with the ATO and/or lenders is of no moment so far as his obligations with regard to truthfully completing the relevant portion of the Statement is concerned. What was asked at Question 4 admits of only a

[58] Transcript, p 115.
[59] Transcript, p 118, lines 5-11.
[60] Transcript, p 118, lines 24-30.
[61] Transcript p 118, lines 30-31.

simple Yes or No answer, not "Yes (with an explanation)" – which explanation was not, in any event, provided.

158. To the extent that this part of the Statement was physically completed by Ms Walsh, this was at the direction of the Practitioner and he is properly responsible for the inaccuracies and misleading omissions.

159. The Practitioner's certification by signature that "to the best of [his] knowledge and belief … the details provided … are complete and correct" was false.

160. As the Commissioner pointed out, the Statement was authorised by Regulation. It was mandatory for the Practitioner to truthfully complete and submit it to the Society. By s 3(1) of the *Legal Practitioners Act*, failure is an offence that carries a maximum penalty of $50,000 or imprisonment for one year.

161. Accordingly, the Practitioner's conduct as considered above manifests a serious departure from his professional and statutory obligations such that the Practitioner should be considered to be not a fit and proper person to practise the profession of the law. As such, the Practitioner's conduct constitutes professional misconduct.

162. The Tribunal will now list these three actions for a hearing on the appropriate disciplinary outcome(s) and as to costs. The Practitioner has already given oral evidence during the hearing which, in part, was relevant to the circumstances in which his conduct the subject of our findings occurred. He has foreshadowed leading additional evidence relevant to mitigation, and in particular medical evidence. We encourage the parties to cooperate in the presentation of that evidence in an efficient manner.

163. There are two other matters involving the Practitioner presently before differently constituted Tribunals; Action No. 4 of 2016 which would require an

extension of time before an inquiry proceeds, and Action No. 9 of 2019 which has been heard and the decision reserved. However, no party has suggested that the Tribunal should await the outcome in Action No. 9 of 2019 and we do not intend to do so.

DETERMINATION

The Tribunal Determines:

In Action No. 5 of 2020:

1. In the period between 7 August 2016 and 13 November 2017 by failing to pay the fees of five barristers the Practitioner is found to have engaged in five counts of professional misconduct. The balance of the charge (Count 4) is dismissed.

In Action No. 6 of 2020:

1. The Practitioner by engaging in false and misleading conduct on 18 August 2011 and 29 August 2011 is found to have engaged in three counts of unprofessional conduct.

In Action No.2 of 2021:

1. In failing to ensure that the two companies employing the staff of Radin Legal paid the required amounts of SGC, PAYG and GST, the Practitioner is found to have engaged in two counts of professional misconduct.
2. In submitting to the Law Society of South Australia in September 2016 a mandatory Statement Regarding Receipt of Holding of Trust Money for Period 1 July 2015 to 30 June 2016 that the Practitioner had certified to be complete and correct when it

was not, and known to the Practitioner to be incorrect, the Practitioner provided information that was false and misleading in a material particular and in breach of Regulation 48(5), and is therefore found to have engaged in one further count of professional misconduct.

5TH January 2023

DATED

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PROFESSOR G DAVIS

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MS M PYKE KC