HIGH COURT OF AUSTRALIA

GLEESON CJ,
GAUDRON, McHUGH, KIRBY AND CALLINAN JJ

ROSS GARFIELD BARWICK APPELLANT

AND

LAW SOCIETY OF
NEW SOUTH WALES & ORS RESPONDENTS

Barwick v Law Society of New South Wales [2000] HCA 2
3 February 2000
S25/1999

ORDER

1. *Appeal allowed.*

2. *Set aside the declarations and order made by the Court of Appeal of New South Wales on 16 July 1998 and, in place thereof, order that the second respondent be prohibited from proceeding with a hearing of the allegations particularised in the Information filed on 30 September 1996 and the Amended Information filed on 24 July 1997 in Proceedings 38 of 1996.*

3. *Application for special leave to cross-appeal dismissed.*

4. *First respondent to pay the costs of the appellant in this Court and in the Court of Appeal.*

On appeal from the Supreme Court of New South Wales

Representation:

P L G Brereton SC with D W Phillips for the appellant (instructed by Eakin McCaffery Cox)

G C Lindsay SC for the first respondent (instructed by Raymond John Collins)

No appearance for the second and third respondents

CATCHWORDS

Barwick v Law Society of New South Wales

Legal practitioners – Disciplinary proceedings – Requirement for investigation of complaints – Institution of proceedings by filing of informations – Jurisdiction and powers of Legal Services Tribunal – Complaints initiated outside statutory period – Power of Legal Services Tribunal to vary informations to include conduct occurring outside statutory period.

Statutes – Construction – Mandatory versus directory – Legislative purpose – Course of enactment of legislation – Successive drafts of Bill – Whether permissible to consider.

Words and phrases – "complaints" – "made" – "initiated".

Legal Profession Act 1987 (NSW), ss 134-138, 148-150, 152, 154-156, 167, 167A.

1 GLEESON CJ, GAUDRON AND McHUGH JJ. This appeal raises a number of issues concerning the procedures to be adopted under Pt 10 of the *Legal Profession Act* 1987 (NSW) ("the Act") for dealing with complaints against legal practitioners, and the consequences of failure to observe those procedures.

2 The appellant, and his former partner the third respondent (who has not taken an active part in the appeal), are the subject of complaints which resulted in proceedings before the Legal Services Tribunal. Following certain preliminary rulings by the Tribunal, the appellant made an application for declaratory and other relief, including prohibition, to the Court of Appeal of the Supreme Court of New South Wales. He was partially successful. The Court of Appeal made a number of declarations, and refused an order of prohibition. The appellant has appealed to this Court in relation to the issues on which he failed, and the first respondent, the Law Society of New South Wales ("the Law Society"), has sought special leave to cross-appeal in relation to an issue on which the appellant succeeded.

3 In the meantime, the Legal Services Tribunal, which was the second respondent, has been abolished, and its jurisdiction has been transferred to the Administrative Decisions Tribunal, which has been substituted as second respondent before this Court. The argument has proceeded upon the assumption that this will not affect any relief to which the appellant might be entitled. It is convenient to continue to refer to the Legal Services Tribunal ("the Tribunal"), because it was the body referred to in the legislation at the material times. There have been other legislative changes as well, but, save to the extent to which they are material to the issues in this appeal, it is unnecessary to refer to them in detail.

The background to the complaints

4 The declarations made by the Court of Appeal turned upon questions of the construction of the legislation. It is sufficient to refer to the factual basis of the complaints briefly, and only to the extent necessary for an understanding of how the complaints arose, and how they were treated by the Law Society and the Tribunal.

5 The appellant was the executor of the will of the late Everil May Wilkinson, who died in 1988. It is alleged that, in March 1992, the estate made a loan of $38,000 to the appellant's sister, Mrs Roberts. At the same time, other clients of the appellant, Mr Mottram, and the trustees of the estate of the late Lubomyr Slepkowycz, made loans to Mrs Roberts. The total amount she borrowed was $85,000. The loans were all secured by a contributory mortgage over real estate owned by Mrs Roberts.

6 During a routine trust account inspection carried out by an officer of the Law Society in August 1992, it appeared to the inspector that the transactions were irregular, in that the will of the late Everil May Wilkinson did not provide for such an investment of estate money, and no proper authority was obtained from Mr Mottram. This resulted in requests for further information, and correspondence between the appellant and the Law Society over a lengthy period. It was alleged that the money borrowed by Mrs Roberts was on-lent by her to the appellant. The Law Society formed the view that there were breaches by the appellant of his fiduciary duties to his clients, and breaches of trust account regulations. Much later, upon further examination of the dealings between the appellant and his sister, the Law Society also formed the view that he was in breach of fiduciary duties to her. It was alleged that he was guilty of professional misconduct.

7 It is not material to consider the appellant's answers to these allegations. We are not, in this appeal, concerned with the merits of the charges against him, and neither the Tribunal nor any court has made any findings against him.

The legislation, the complaints and the Tribunal proceedings

8 On a number of occasions between September 1994 and July 1997, a Professional Conduct Committee of the Law Society, the Society's Professional Conduct Committees meeting jointly, and the Council of the Law Society, considered the appellant's conduct. Submissions from the appellant were considered.

9 In order to explain the manner in which the Law Society dealt with the matter, it is necessary to refer to certain changes in the legislation governing complaints against solicitors which occurred over the period during which the appellant's conduct was under scrutiny.

10 The Act included Pt 10, dealing with professional misconduct and unsatisfactory professional conduct. It suffices for present purposes to say that the former expression included conduct which would justify a finding that a practitioner was not a fit and proper person to remain on the roll, and the latter expression related to lack of competence or diligence.

11 Until 1 July 1994, when there were substantial changes to Pt 10, there were a number of bodies which, depending upon the nature and seriousness of a matter, might become involved in dealing with an allegation against a practitioner. Members of the public were entitled to make a complaint against a practitioner to the appropriate Council (s 130). In the case of barristers, the appropriate Council was the Bar Council, and in the case of solicitors, the appropriate Council was the Council of the Law Society (s 123). The Councils

were empowered to delegate their functions to committees (s 136). A Council could dismiss a complaint summarily, but if it did not do so it was obliged to conduct an investigation into each complaint, and make a decision about it, recording the reasons for the decision (s 133). One possible course for a Council to take, following investigation, was to refer a complaint to the Legal Profession Standards Board (which dealt with complaints of unsatisfactory professional conduct) or to the Legal Profession Disciplinary Tribunal (which dealt with complaints of professional misconduct) (ss 134, 143 and 157). The Board or the Tribunal, as the case may be, would then conduct a hearing into the complaint.

12 A Council had the power, of its own motion, to make a complaint to the Board or the Tribunal against a legal practitioner (s 135). This, if it occurred, would follow some information-gathering process, but not an investigation conducted following a complaint by a member of the public.

13 The statutory scheme was substantially amended as from 1 July 1994. The relevant provisions of the new Pt 10 are set out below. A Legal Services Tribunal was substituted for the Board and the earlier Tribunal. There was introduced into the scheme a Legal Services Commissioner, who had an important role in respect of complaints. The complaints system was altered in some ways and, in particular, a time limit on complaints was imposed, subject to a discretionary power in the Commissioner to accept a complaint after such time had expired.

14 These changes occurred after the Law Society had commenced examining the appellant's conduct, but before it had taken any decision as to what, if any, action might be taken against him.

15 There were transitional regulations which affected complaints which were pending as at 1 July 1994 but which had not yet been dealt with. They were considered by the Court of Appeal of New South Wales in *Council of the Law Society of New South Wales v Nutt*[1]. It has not been suggested that they are relevant to the present appeal, presumably because, as at 1 July 1994, there was no existing complaint against the appellant, either by a member of the public, or by the Law Society Council.

16 In brief, the position as at 1 July 1994 was as follows. Following the routine trust account inspection in August 1992, the inspector made a report. In late 1992 and again in early 1993 the Law Society asked the appellant for certain explanations. He responded in February 1993. In April 1993 there was a further

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1 Unreported, 24 August 1995.

request for information from the Law Society which was answered in May 1993. In May 1993 there was a further inspection of the appellant's records, and on 30 June 1993 a further request for information. That was answered in July 1993. In September 1993 there was a further exchange of correspondence. In March 1994 the Law Society made enquiries of the appellant's clients who were affected by the transaction in question. It appears that, between March and September 1994, information was obtained from the clients.

17 As at 1 July 1994, no complaint had been made against the appellant under the old Pt 10. When the new Pt 10 came into force, it provided for complaints by a member of the public, or by a Council, or by the Legal Services Commissioner. As will appear, the appellant first became the subject of a complaint in June 1995.

18 On 29 September 1994, a Professional Conduct Committee, having considered material relating to the appellant, including representations made by him, resolved that he be informed of questions of professional misconduct "involved in the complaint", that submissions from him be invited and that, subject to any submissions, the Committee was of the opinion that there was a reasonable likelihood that he would be found guilty of professional misconduct. It was further resolved that proceedings be instituted "with respect to the complaint" pursuant to s 155(2). Notwithstanding the references to "the complaint", up to that time there had been no resolution that the Council should initiate a complaint against the appellant, and there was no such resolution on 29 September 1994. It was not argued that what occurred on that day should be treated as the initiation of a complaint. There was evidence from an officer of the Law Society to the effect that, until the decisions of the Tribunal and the Law Society in the case of *Nutt* referred to above, there had been some view within the Law Society that a current enquiry into a solicitor's affairs was, relevantly, a complaint. No attempt was made, either in the Court of Appeal or in this Court, to support that view.

19 There was further communication with the appellant and his solicitors.

20 On 23 February 1995, a Professional Conduct Committee again met to consider the matter, considered a further report, and again resolved that the Committee was satisfied there was a reasonable likelihood that the appellant would be found guilty of professional misconduct, and that proceedings should be instituted in the Tribunal.

21 There was then a request from the appellant for an opportunity to make further submissions, and for a reconsideration of the earlier decisions. That request was granted.

22 The reconsideration occurred on 8 June 1995. On that day the Law Society's Professional Conduct Committees, in joint meeting, acting under delegation from the Council, passed two successive resolutions. The first resolution was that a complaint be initiated against the appellant pursuant to s 135(1) of the Act in relation to professional misconduct involving misleading the Law Society, misapplying assets of the Wilkinson estate, and improperly investing money of Mr Mottram and the Slepkowycz estate. Having passed that resolution, the Committees then, within about a minute, further resolved that they were satisfied that there was a reasonable likelihood that the appellant would be found guilty by the Tribunal of professional misconduct and that proceedings be instituted in the Tribunal pursuant to s 155(2) of the Act. The appellant was notified. So also was the Legal Services Commissioner. Resolutions relating to proceedings against the third respondent were passed at the same time.

23 Informations against the appellant and the third respondent were not filed until 30 September 1996. Between June 1995 and September 1996 there were attempts by the third respondent, who went into bankruptcy, to persuade the Law Society to alter its view of his conduct. The information against the appellant did not precisely conform to the complaint summarised above. However, it is not necessary to undertake a detailed comparison of the complaint and the information.

24 In March, and again in May, 1997, the appellant filed statutory declarations, by way of evidence in the Tribunal, which allegedly contained misrepresentations. In June 1997, further material concerning the dealings between the appellant and his sister was examined by the Law Society.

25 On 17 July 1997, a Professional Conduct Committee considered further allegations of misleading the Law Society, and the Tribunal, and of breach of fiduciary duty owed to Mrs Roberts. The Committee made certain recommendations to the Council of the Law Society. These were adopted. The Council resolved that a complaint against the appellant be initiated pursuant to s 135 of the Act in relation to the further allegations. It then immediately resolved that the Council was satisfied that there was a reasonable likelihood that the appellant would be found guilty by the Tribunal of professional misconduct and that proceedings be instituted in the Tribunal pursuant to s 155(2) of the Act. The Legal Services Commissioner was notified.

26 On 24 July 1997, the Law Society filed an Amended Information adding the allegations the subject of the 17 July 1997 resolutions. On 1 August 1997, the Tribunal gave leave to amend the Information accordingly.

27 When the matter came on for hearing in the Tribunal on 17 November 1997, counsel for the appellant raised the issues referred to below. On 19 November 1997, proceedings were commenced in the Court of Appeal.

The issues

28 There were three principal areas of dispute arising out of the procedure outlined above, and its relationship to the requirements of Pt 10 of the Act.

29 The first concerns what is said to have been a failure on the part of the Law Society to comply with the requirements of the Act in relation to the conduct of an investigation between the initiation of a complaint and the institution of proceedings before the Tribunal. As appears from the history recited above, on both 8 June 1995 and 17 July 1997, a resolution to initiate a complaint was followed immediately by a resolution to institute proceedings in the Tribunal. The appellant contends that there was no investigation phase between complaint and Tribunal proceedings, and that, on this ground, the Tribunal proceedings should be prohibited.

30 The second area of dispute relates to a time limit upon complaints imposed by s 138 of the Act. Some of the conduct the subject of both complaints, and of the Information and Amended Information, occurred more than three years before the relevant complaint. The appellant argued that such conduct could not be the subject of Tribunal proceedings. The Court of Appeal held that the time limit did not apply to complaints initiated by the Law Society Council.

31 The third area of dispute relates to the power to amend informations given by s 167A of the Act. The appellant argued that, assuming the time limit applied in the present case, the power of amendment could not be used to add to an information allegations of conduct occurring more than three years before the relevant complaint.

The legislative scheme after 1 July 1994

32 A new Pt 10 of the Act was introduced by the *Legal Profession Reform Act* 1993 (NSW). It commenced on 1 July 1994. One of its objects was stated, by s 125, to be to ensure that the rules of natural justice (being rules for procedural fairness) are applied to any disciplinary proceedings taken against legal practitioners.

33 Section 129 provided for the appointment of a Legal Services Commissioner. The Commissioner's functions include receiving complaints of professional misconduct, or unsatisfactory professional conduct, against legal practitioners, initiating complaints, investigating complaints, and monitoring

investigations undertaken by professional associations including the Council of the Law Society (s 131).

34 Division 3 of Pt 10, dealing with complaints about legal practitioners, included ss 134 to 138 and s 140, in the following terms:

"134 (1) Any person may make a complaint to the Commissioner about the conduct of a legal practitioner or interstate legal practitioner.

(2) Any such complaint that is duly made is to be dealt with in accordance with this Part.

(3) This section does not affect any other right of a person to complain about the conduct of a legal practitioner or interstate legal practitioner.

135 (1) A Council may initiate a complaint against any legal practitioner or interstate legal practitioner under this Part.

(2) A copy of any such complaint is to be forwarded immediately to the Commissioner.

(3) A complaint that is made to a Council instead of to the Commissioner is to be forwarded immediately to the Commissioner by the Council.

136 (1) The Commissioner may initiate a complaint against any legal practitioner or interstate legal practitioner under this Part.

(2) Any such complaint is, for the purposes of this Part, taken to have been made to the Commissioner.

137 A complaint:

(a) must be in writing, and

(b) must identify the complainant and the legal practitioner against whom the complaint is made, and

(c) must give particulars of the alleged conduct of the legal practitioner that is the subject of the complaint.

138 (1) A complaint may only be made within 3 years after the conduct is alleged to have occurred.

(2) However, the Commissioner may accept a complaint made after that time if:

(a) the Commissioner is satisfied that it is just and fair to do so having regard to the delay and the reason for the delay, or

(b) the Commissioner is satisfied that the complaint concerns an allegation of professional misconduct and that it is necessary in the public interest to investigate the complaint.

…

140 (1) The Commissioner:

(a) may require further particulars of a complaint to be given, and

(b) may require the complaint, or any further particulars, to be verified by statutory declaration.

(2) The requirement is to be notified in writing to the complainant and is to specify a reasonable time for compliance."

35 Division 5, dealing with investigation of complaints, is of importance to the first area of dispute noted above. Under s 148 a Council must conduct an investigation into each complaint referred to it by the Commissioner or initiated by the Council. The section does not apply if a complaint is taken over by the Commissioner (s 148(3)). Section 149 provides that the Commissioner is to monitor investigations by a Council into complaints, and a Council investigating a complaint is to report on progress to the Commissioner if required to do so. The Commissioner may give the Council directions on the handling of a complaint being investigated (s 150). Under s 152, a Council, for the purposes of investigating a complaint, has certain powers to compel the provision of information. An investigation is to be conducted as expeditiously as possible (s 154).

36 Section 155 provides:

"(1) After a Council or the Commissioner has completed an investigation into a complaint against a legal practitioner or interstate legal practitioner, the complaint is to be dealt with in accordance with this section.

(2) The Council or the Commissioner must institute proceedings in the Tribunal with respect to the complaint against the legal practitioner or interstate legal practitioner if satisfied that there is a reasonable likelihood that the legal practitioner or interstate legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct.

(3) However, if the Council or the Commissioner is satisfied that there is a reasonable likelihood that the legal practitioner or interstate legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct (but not professional misconduct), the Council or the Commissioner may instead:

(a) reprimand the legal practitioner or interstate legal practitioner if the legal practitioner or interstate legal practitioner consents to the reprimand, or

(b) dismiss the complaint if satisfied that the legal practitioner or interstate legal practitioner is generally competent and diligent and that no other material complaints have been made against the legal practitioner or interstate legal practitioner.

(4) The Council or the Commissioner is to dismiss the complaint against the legal practitioner or interstate legal practitioner if satisfied that there is no reasonable likelihood that the legal practitioner or interstate legal practitioner will be found guilty by the Tribunal of either unsatisfactory professional conduct or professional misconduct.

(5) If a Council or the Commissioner decides to dismiss a complaint or to reprimand a legal practitioner or interstate legal practitioner under subsection (3) and the complainant requested a compensation order in connection with the complaint, the Council or the Commissioner may require the payment of compensation by the legal practitioner or interstate legal practitioner or the successful mediation of the consumer dispute before the decision takes effect."

37 Section 156 requires a Council to cause a record of its decision with respect to a complaint, together with the reasons for the decision, to be kept in respect of each investigation conducted under Div 5. Division 6 provides for a review of certain decisions of a Council. For example, a complainant may apply to the Commissioner for a review of a Council's decision to dismiss a complaint (s 158(1)).

38 The appellant contends that, in the present case, the procedures required by Div 5 of Pt 10 were bypassed.

39 Division 7 established the Tribunal.

40 Division 8 deals with hearings and determinations by the Tribunal. Section 167 provides that proceedings may be instituted in the Tribunal with respect to a complaint against a legal practitioner by an information laid in accordance with Pt 10. The Tribunal is to conduct a hearing. Until April 1997, this was said to be a hearing into "each such complaint", but by amending legislation that was altered to a hearing into "each allegation particularised in the information"[2].

41 Section 167A provides:

> "(1) The Tribunal may, on the application of a Council or the Commissioner who laid an information, vary the information laid so as to omit allegations or to include additional allegations if the Tribunal is satisfied, having regard to all the circumstances, that it is reasonable to do so.
>
> (2) Without limiting subsection (1), when considering whether or not it is reasonable to vary an information, the Tribunal is to have regard to whether varying the information will affect the fairness of the proceedings."

42 Division 8 goes on to deal with various aspects of proceedings before the Tribunal.

43 It may also be noted that s 171M of the Act provides that nothing in Pt 10 affects the inherent power or jurisdiction of the Supreme Court of New South Wales with respect to the discipline of legal practitioners. In the case of the appellant, that jurisdiction has not, so far, been invoked, although the possibility has been foreshadowed.

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2 *Legal Profession Amendment Act* 1996 (NSW), s 3.

The argument based upon Division 5

44 The appellant submitted in the Court of Appeal, and in this Court, that the manner in which the complaints against the appellant were handled involved a substantial failure to comply with the provisions of Div 5 of Pt 10 and that, as a result, there was no information laid in accordance with Pt 10 so as to found the jurisdiction of the Tribunal under s 167. Unlike the argument that succeeded in *Murray v Legal Services Commissioner*[3], the appellant's argument does not involve a claim that he was denied procedural fairness by not having a proper opportunity to understand the charges against him and respond to them. However, it is submitted that, whilst an important object of Div 5 is to ensure fairness to a practitioner against whom there is a complaint, the Division has other objects as well, and these were disregarded in the procedure that was adopted.

45 The first question to be considered is whether a failure to follow the procedures prescribed by Div 5, in the absence of any complaint of denial of procedural fairness, affects the jurisdiction of the Tribunal under Div 8. If the answer to that question were in the negative, as the first respondent submits, then it would be unnecessary to pursue this issue further.

46 Section 167 states that proceedings may be instituted in the Tribunal "with respect to a complaint against a legal practitioner" by an information laid "in accordance with this Part". The relationship between the complaints procedure and the jurisdiction of the Tribunal was referred to by this Court in *Walsh v Law Society of New South Wales*[4], although the amendment to s 167 made in 1997 was not relevant to that case. The expression "in accordance with this Part" must, in the context, be a reference to s 155(2).

47 The scheme of Pt 10 involves successive stages of complaint and Tribunal hearing, although, of course, a complaint will not always result in the laying of an information. The provisions of Div 5 establish procedures for consultation and cooperation between the Law Society Council and the Bar Council (s 148). They empower the Commissioner to supervise investigations by a Council (ss 149 and 150). They require the Council or the Commissioner, in the course of deciding whether to institute proceedings in the Tribunal, to address certain questions, including the seriousness of the charge against the practitioner, the likelihood of an adverse finding, and, in certain cases, the possibility of dealing

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3 (1999) 46 NSWLR 224.

4 (1999) 73 ALJR 1138; 164 ALR 405.

with the matter by way of reprimand (s 155). They oblige the Council or the Commissioner to make a record of decisions, and reasons for decisions, with respect to complaints (s 156).

48 In *Carver v Law Society of New South Wales*[5], Powell JA, considering an argument that the provisions of Div 3 of Pt 10 were directory rather than mandatory, and that the time bar imposed by s 138 was irrelevant to the jurisdiction of the Tribunal, said that:

> "[T]he jurisdiction of the Tribunal to entertain, and the duty of the Tribunal to conduct a hearing into, a complaint depends, not on compliance with the provisions of Div 3 of Pt 10 of the Act – in which Division the provisions of (inter alia) s 135 and s 138 of the Act may be found – but upon an information being laid with the Tribunal following the passing by the Council of the relevant professional body of a resolution of the type contemplated by s 155(2) of the Act."

His Honour did not deal with the question whether compliance with Div 5, of which s 155(2) forms part, was necessary. In *Council of the Law Society of New South Wales v Nutt*[6], Mahoney AP expressed the view that the relevant provisions were directory rather than mandatory.

49 This Court, in the more recent decision of *Project Blue Sky Inc v Australian Broadcasting Authority*[7], rejected the distinction between mandatory and directory provisions as the test for resolving an issue such as arises in the present case. Such a classification, it was held, records the result of a process of determining legislative purpose. It is "the end of the inquiry, not the beginning"[8].

50 The jurisdiction of the Tribunal, conferred by s 167, relates to "[p]roceedings ... instituted … with respect to a complaint against a legal practitioner ... by an information laid ... in accordance with [Pt 10]". Leaving to one side the dispute as to whether s 138 applies to complaints initiated under s 135, and leaving aside also the dispute as to the power of variation conferred by s 167A, (both of which disputes will be considered below), it is difficult to accept

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5 (1998) 43 NSWLR 71 at 98.

6 Unreported, Court of Appeal of New South Wales, 24 August 1995 at 13-14.

7 (1998) 194 CLR 355.

8 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390.

that it is consistent with the purpose of the legislation that a time-barred complaint could become the subject of a Tribunal hearing. Section 138(2) refers to the power of the Commissioner to accept (or, by implication, to decline to accept) such a complaint. The corollary appears to be that, if not accepted, such a complaint can go nowhere.

51 The jurisdiction of the Tribunal to deal with proceedings is correlative with the duty of the Council or the Commissioner to institute proceedings, in certain circumstances, following a complaint, and what s 155 refers to as the completion of an investigation. That relationship arises from the concluding words of s 167(1).

52 An important aspect of Div 5 of Pt 10 is the duty imposed upon the Commissioner, under s 149, to monitor investigations by a Council. One evident purpose of this provision is to enable the Commissioner to supervise the way in which a Council deals with a complaint, and to ensure, for example, that the conduct of a practitioner is treated with appropriate seriousness.

53 Not every departure from the procedures laid down by Pt 10, and, in particular, Div 5, will result in a lack of jurisdiction under s 167. However, one of the purposes of the legislation is to bring about the result that, before a matter comes to the Tribunal, it will have been the subject of a complaint which was the subject of an investigation monitored by the Commissioner and considered and dealt with by a Council or the Commissioner under s 155.

54 This raises the question of the extent of compliance with Div 5 in the present case. As the history of the matter summarised above shows, the facts are somewhat complicated, because the Law Society's enquiries into the appellant began in 1992, extended over 1 July 1994, when Pt 10 came into operation, and continued at least until July 1997. Over that period the Law Society was in contact with the appellant or his solicitors, from time to time, and was receiving and considering information from him, and others. However, it was not until 8 June 1995 (in relation to the first complaint), and 17 July 1997 (in relation to the second complaint), that there was a resolution that a complaint be initiated, and in each case this was followed immediately by a resolution that an information be laid.

55 Some of the argument in the Court of Appeal, and in this Court, was directed to a false issue. The focus of attention was whether, consistently with the scheme of Pt 10, there could be investigation before or after the Div 5 stage of the progress of a matter.

56 The Court of Appeal made the following declaration:

> "The Information is defective, if it was laid before the conduct of the Council's investigation into the complaint, pursuant to s 148(1) of the Act, was completed within the meaning of s 155(1) and should, unless the claimant waives the defect, be struck out".

57 The conditional nature of that declaration gives rise to a question as to its appropriateness, but it is unnecessary to pursue that question.

58 Sheller JA, (with whom Mason P and Priestley JA agreed), said:

> "I read s 155 as giving the legal practitioner important protection after the investigation has been completed. If the Council or the Commissioner is satisfied that there is no reasonable likelihood that the legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct, the complaint must be dismissed. This protection would be undermined to a significant degree if, before the investigation were completed, proceedings were instituted in the Tribunal with respect to the complaint."

59 His Honour rejected the appellant's further argument by saying:

> "However, I do not read the sections as requiring that the investigation be begun after the complaint has been initiated. This would involve a degree of inflexibility which was not intended. Ordinarily one would expect the investigation to be begun before the complaint was initiated and no doubt in many cases completed. It would be quite absurd to read the Act as intending that after the complaint has been initiated another investigation be undertaken. Even if this were a mere formality, it would be a triumph of form over substance. I think the legal practitioner is entitled to have an investigation and have it completed before proceedings are instituted in the Tribunal, but that investigation can be begun and can be completed before any complaint is initiated. No doubt, the Council's investigation into a complaint referred to it by the Commissioner would not begin until after the reference but in the case of a complaint initiated by the Council there is no reason why that should be so."

60 A Council's obligation under s 148 is to conduct an investigation into each complaint referred to it by the Commissioner or initiated by the Council. A complaint referred to the Council by the Commissioner might be one made under s 134 or initiated under s 136. As the facts of the present case illustrate, a complaint initiated by the Council, under s 135, could be initiated after, perhaps long after, the Council first began enquiring into the conduct of a practitioner.

What went on before the initiation of the complaint might, in ordinary parlance, be referred to as an investigation. Furthermore, in some cases, it may well be that, after an information is laid in the Tribunal, a Council might wish to make further enquiries into the subject matter of a complaint because, for example, additional witnesses have come forward. It is difficult to accept that the making of such enquiries would necessarily be improper, or would be inconsistent with the scheme of Pt 10, even though s 155(2) refers to the completion of an investigation. The problem is that, in its ordinary meaning, the term "investigation" is wide enough to cover some activities that might, in the normal course of events, occur both before and after the investigative stage required by Div 5.

61 The proper focus of attention should not be whether enquiries were made by the Council before the initiation of the complaint, or after the laying of the information. The focus of attention should be whether, in the events that happened, there was an investigative stage which permitted the requirements of Div 5 to be satisfied, and the legislative purpose of the Division to be fulfilled. In some cases, that stage might be brief, and might not necessarily involve the gathering of information not already in the possession of the Council. It must, however, be such as to permit monitoring of the investigation by the Commissioner, and, at the conclusion of the stage, (referred to in s 155 as the completion of the investigation), the Council must address the issues raised for consideration by s 155, and record its decision and its reasons for the decision. The capacity of the Commissioner to monitor an investigation is not an empty formality. In a given case, the Commissioner might consider that a complaint is not being treated seriously enough, or has been misunderstood, or has been inadequately investigated. Questions might in turn arise as to the accountability of the Commissioner.

62 In the present case the Law Society Council does not appear to have directed its attention to the need for initiation of a complaint, and for compliance with Div 5, until late in the course of its enquiries, and then, in the relevant resolutions, the procedures of initiating a complaint and making decisions under s 155 were telescoped. In the result, in the case of both complaints, there was nothing that can be described as the investigative stage required by Div 5.

63 It would be inconsistent with the legislative purpose to conclude that the Tribunal has jurisdiction to deal with a matter brought before it in circumstances where the procedures established by Div 5 have been substantially bypassed. No doubt, at least in the case of the first complaint, the reason that occurred was related to the legislative changes during the course of the Law Society's consideration of the matter, although it is difficult to see how that could explain the manner in which the second complaint was dealt with. However that may be,

there was such a departure from the requirements of Div 5 as to deprive the Tribunal of jurisdiction.

64 The appellant has made good his contention that the jurisdiction of the Tribunal was not regularly invoked under s 167 and he is entitled to an order for prohibition on that ground.

The argument based on s 138

65 Most, although not all, of the conduct the subject of the two complaints initiated under s 135 of the Act occurred more than three years before the dates, in June 1995, and July 1997, when the respective resolutions to initiate the complaints were passed. The appellant argues that such conduct could not lawfully be made the subject of an information laid under s 167. It is also contended that it was not within the power of the Tribunal to vary the information under s 167A to embrace such conduct. The latter contention is the subject of the third issue to be considered below. As to the former contention, the relationship between s 138 and s 167 has already been considered.

66 The Court of Appeal rejected the appellant's argument upon the ground that s 138 does not apply to a complaint initiated under s 135, and made a declaration accordingly.

67 The question is one of statutory construction. As Sheller JA observed, the statutory provisions are far from consistent in their expression. References were made in argument to some aspects of the legislative history, but these are equivocal. It is the language and scheme of Pt 10, and in particular of Div 3, which is controlling.

68 The term "complaint" is defined in s 126 to mean a complaint made under Div 3. A number of the provisions to which the definition applies are clearly intended to cover complaints under s 135. Nevertheless, the first respondent submits that Div 3 distinguishes between complaints "made" (under s 134) and complaints "initiated" (under s 135 or s 136). Thus, it is argued, s 138 only applies to complaints under s 134. This argument was accepted by the Court of Appeal.

69 The statutory context of s 138 is significant. It follows a provision, s 137, which applies generally to all complaints, whether under s 134, s 135, or s 136. It precedes provisions (ss 140, 141 and 142) which also apply generally to all complaints, although some of them might be thought, in practice, to have more relevance to complaints by a member of the public than complaints by a Council.

70 The definition of "complaint", in s 126, treats all complaints as complaints "made". Similarly, in s 171J, in Div 9 of Pt 10, the expression "legal practitioner against whom the complaint was made" is used regardless of whether the complaint was under s 134, s 135 or s 136.

71 The purpose of s 138 is to set a time limit on complaints, whilst allowing the Commissioner an overriding discretion, to be exercised upon specified grounds, to accept complaints that would otherwise be out of time. That discretion protects the public interest. It has not been exercised in this case. It is not apparent why that legislative purpose would not embrace complaints under s 135 as well as complaints under s 134. The practitioner's need for protection against stale complaints is the same. There is nothing in the Act to suggest that the Council was intended to have the same power as the Commissioner to override any need for such protection. There are no statutory constraints governing the exercise by the Council of any such power, of the kind that apply to the Commissioner.

72 The appellant is entitled to succeed on this issue although, if it stood alone, such success would not justify all the relief he seeks.

The argument as to s 167A

73 Although the arguments of the parties ranged more widely, ultimately the Court was told that the appellant's point was "that the out-of-time grounds cannot be saved by adding them under s 167A". It is unnecessary to consider broader questions as to the relationship between s 167A and ss 155 and 167.

74 In a case to which s 138 applies, and where there has been no exercise of discretion by the Commissioner under s 138(2), the clear intent of the statute is that the procedures of Pt 10 of the Act cannot be invoked after the period of three years referred to in s 138 has elapsed. A complaint which is not accepted by the Commissioner under s 138(2) has no statutory effect. The consequences of s 138 cannot be negated by an exercise by the Tribunal of its power of variation of an information under s 167A. The matters to be considered by the Commissioner in deciding whether to exercise the discretion under s 138(2) are not repeated in s 167A, which simply applies a test of reasonableness. What is there involved is a discretion of a different character.

75 Section 167A is not intended to subvert the protection given by s 138.

76 The appellant is entitled to succeed on this issue.

Orders

77 There was no argument in this Court as to what, if anything, including invoking the inherent jurisdiction of the Supreme Court of New South Wales, seeking at this stage an exercise of the s 138(2) discretion, or initiating fresh complaints, might be done to pursue the matters further in compliance with the Act. The following orders are not intended to foreclose any such issues.

78 The appeal should be allowed. The application for special leave to cross-appeal should be dismissed. (One declaration favourable to the appellant will be set aside, but this will be subsumed in the order for prohibition.) The declarations and orders made by the Court of Appeal should be set aside. In place thereof there should be an order prohibiting the second respondent from proceeding with a hearing of the allegations particularised in the Information filed on 30 September 1996 and the Amended Information filed on 24 July 1997 in proceedings 38 of 1996. The first respondent should pay the appellant's costs of the proceedings in this Court and in the Court of Appeal.

79 KIRBY J. This appeal[9] concerns professional misconduct alleged against two legal practitioners in New South Wales. One of the legal practitioners, Mr Ross Barwick (the appellant), is accused of having first acted in a way that amounted to professional misconduct as long ago as early 1990. His conduct originally came to the notice of the Law Society of New South Wales (the first respondent) in August 1992 as a result of a routine audit of Mr Barwick's trust account.

80 Jurisdiction over the professional conduct and competence of legal practitioners exists for the fundamental purpose of protecting the public. In such circumstances the serious delays in disposing of the allegations against Mr Barwick (and the other legal practitioner involved) must occasion grave concern. The interests of the public, of complainants and of the legal practitioners themselves require that such matters be dealt with lawfully and fairly but also with more efficiency and expedition than has been the case here. The handling of the allegations involving Mr Barwick has been complicated by the supervening discovery of further and later acts which are alleged to constitute additional instances of professional misconduct; the intervening changes in the applicable legislation and of the institutions responsible for deciding such matters; and the delays attendant on this litigation[10]. But the proceedings do not represent an exemplary model of their kind. Unhappily, the recent experience of this Court[11] suggests that such delays may represent the norm, not an exception.

Facts and statutory provisions

81 The facts, the history of the changes to the legislation and the statutory provisions necessary for my reasons are set out in the opinion of Gleeson CJ, Gaudron and McHugh JJ. So are the questions which arise in this appeal concerning the application to the events that have occurred of the *Legal Profession Act* 1987 (NSW) ("the Act"). The proceedings brought against Mr Barwick by the Council of the Law Society of New South Wales were commenced in the Legal Services Tribunal. They were adjourned when the challenges to the jurisdiction of the Tribunal which are now before this Court

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9 From the Court of Appeal of the Supreme Court of New South Wales. See *Barwick v Law Society of New South Wales* unreported, 16 July 1998 per Sheller JA, Mason P and Priestley JA concurring ("Court of Appeal judgment").

10 The proceedings before the Tribunal commenced by information filed on 30 September 1996. The hearing was not commenced until 17 November 1997. Only on that day was the objection first raised to the jurisdiction of the Tribunal. Mr Barwick took the matter to the Court of Appeal on 19 November 1997.

11 *Walsh v Law Society of New South Wales* (1999) 73 ALJR 1138; 164 ALR 405.

were mounted at the last minute on behalf of Mr Barwick. As Gleeson CJ, Gaudron and McHugh JJ explain, in the intervening period, the relevant jurisdiction under the Act has been transferred to the Administrative Decisions Tribunal. Nothing turns on this. It is convenient to refer to the body appointed to determine complaints as "the Tribunal".

82 By s 167 of the Act[12], it is provided, relevantly, that "[p]roceedings may be instituted in the Tribunal with respect to a complaint against a legal practitioner … by an information laid by the appropriate Council … in accordance with this Part". Mr Barwick argues that, in three respects, the proceedings commenced in the Tribunal with respect to "complaints" against him, although purportedly instituted by an information laid by the appropriate Council, were not instituted in accordance with Pt 10 of the Act. Accordingly, it is contended, the Tribunal had no jurisdiction (in the sense of legal power) to conduct a hearing into the allegations particularised in the information[13], to vary the information[14] or to determine the matter[15]. The importance of the lawful institution of proceedings leading to orders and determinations affecting the legal rights and obligations of individuals may be illustrated in many cases, including recent ones before this Court[16]. Mr Barwick is therefore entitled to have his objections determined in accordance with law.

The issues

83 Mr Barwick's objections were, relevantly:

1. That the "complaints" with respect to which the information against him had been instituted in the Tribunal were time-barred by s 138(1) of the Act and, although made outside the time limitation period, had not been accepted by the Legal Services Commissioner appointed under the Act ("the Commissioner") in accordance with s 138(2) of the Act.

2. That additional allegations unrelated to the initial complaint against him had been impermissibly included in the proceedings in purported reliance

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12 Introduced by the *Legal Profession Reform Act* 1993 (NSW), s 3, Sched 2.

13 The Act, s 167(2).

14 The Act, s 167A. This section was introduced into the Act by the *Legal Profession Amendment Act* 1996 (NSW), s 3, Sched 1.

15 The Act, s 171C.

16 eg *Byrnes v The Queen* (1999) 73 ALJR 1292 at 1299-1300, 1310; 164 ALR 520 at 531-532, 545-546.

upon s 167A of the Act. This provision permitted the addition of "additional allegations" to vary the initial information. It did not, so it was argued, permit the addition of new complaints which would themselves be statute-barred by s 138(1) without the exercise by the Commissioner of the discretion under s 138(2) to accept such complaints.

3. That the scheme of Pt 10 of the Act required the formulation of a "complaint", and investigation of that "complaint", leading to a decision under s 155 of the Act. At least in respect of the second complaint but arguably for both complaints, the decisions to initiate the "complaint" under s 135 and to institute proceedings in the Tribunal under s 155 were made at the same time thereby affording no possibility of an "investigation" as contemplated by the Part.

84 The New South Wales Court of Appeal dismissed each of the foregoing objections to the jurisdiction of the Tribunal. By special leave, Mr Barwick now appeals to this Court. He repeats his objections which failed below. They therefore present the issues which must be decided by this Court.

The time limitation on complaints about misconduct

85 It is beyond contest that the Act exhibits defects of drafting. They are bound to give rise to differences of opinion as to its meaning. It is convenient to deal first with the time limitation point. I agree with Gleeson CJ, Gaudron and McHugh JJ that the notion that a valid "information" before the Tribunal could be based upon a contested time-barred complaint, so as to give rise to a lawful hearing by the Tribunal, is difficult to reconcile with the scheme of Pt 10 of the Act.

86 Unfortunately, because of the ambiguities of the legislation, the answer to the question, which should be straightforward, is somewhat unclear. This is demonstrated by the reasons which Sheller JA gave, to the effect that the time limitation in s 138 applies only to complaints "made" by a person under s 134(1) of the Act and not to a complaint "initiated" by a Council or by the Commissioner[17]. The complaint(s) against Mr Barwick having been initiated by the relevant Council (of the Law Society), if this is the correct construction of the Act there was no time-bar operating against the Council and the first point fails.

87 A number of arguments, based on the language of the Act, lend support to the Court of Appeal's conclusion, the correctness of which the Law Society defended in this Court. The governing provision in s 138(1) is expressed to require that a complaint may only be "made" within three years after the conduct

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17 Court of Appeal judgment at 14-15.

giving rise to the complaint is alleged to have occurred. This is also the heading applicable to the section ("When complaint made"). A study of ss 134, 135 and 136 suggests, by juxtaposition, a difference between the "making" of complaints and the "initiation" of complaints. The verb "make" is used in s 134 in relation to the complaint of "any person". But in s 135, in respect of a Council, and s 136, in respect of the Commissioner, the verb used is "initiate". The differentiation appears to be deliberate. At least, it does not appear to be accidental. So far as the complaints "initiated" by the Commissioner are concerned, s 136(2) deems them, for the purposes of the Act, to have been "made" to the Commissioner. There is no similar provision in respect of a complaint "initiated" by a Council, as was the complaint against Mr Barwick.

88 The Law Society submitted that a number of considerations of policy supported the construction of the Act adopted by the Court of Appeal. Thus, it was said, the very fact that a complaint was initiated by a Council or the Commissioner was sufficient to ensure that it was properly brought, notwithstanding any delay of more than three years after the conduct alleged to give rise to it. It was suggested that this view was harmonious with the power assigned to the Commissioner in "consumer" complaints under s 134[18] to accept a complaint made more than three years after the conduct complained about. The notion of the Commissioner's accepting his or her own complaint was said to be an unlikely construction of s 138(2). Moreover, according to the Law Society, the power to "accept" (and hence necessarily to reject) a complaint initiated by a Council would concentrate more power in the hands of the Commissioner than was desirable or than appeared to be the purpose of the Act. The Law Society referred to the longstanding role which professional bodies, such as the Councils, had exercised in relation to initiating proceedings in respect of professional misconduct. It was of the nature of many such proceedings that they would arise out of misconduct only discovered (as in this case) years after the conduct giving rise to them. Whereas a screening process was appropriate to complaints made by "any person", it was not needed if the initiation of the complaint was by a Council or the Commissioner. Those bodies could be trusted to take into account, in deciding whether or not to "initiate" such a complaint, considerations of fairness to the legal practitioner, to complainants and to the public. An additional filter in the form of the Commissioner was therefore not required or provided in that case.

89 These arguments persuaded the Court of Appeal. I acknowledge that there is force in them. However, in my view they do not represent the preferable construction of the Act.

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18 When this section is read with s 138(2).

90 First, the provision of a statutory limitation on the time within which a complaint might be made was a novel feature of the legislation which introduced s 138. It was part of a general reform of procedures for the handling of complaints against legal practitioners outside the inherent jurisdiction of the Supreme Court. The object of that reform was to secure greater transparency in the determination of complaints and to establish new institutions for the process but with balancing provisions designed to afford procedural and other safeguards for the practitioner involved[19]. These safeguards should not be narrowly construed. In its comment on the approach to a new system for handling complaints against legal practitioners, the New South Wales Law Reform Commission[20] remarked that:

> "Lawyers should never be subjected to procedures which arbitrarily or unfairly do harm to their reputations or qualify or remove their practising rights. The Commission makes a number of recommendations … aimed at improving the level of procedural fairness for a lawyer who is the subject of a complaint. For example, the Commission proposes that there be a limitation period on complaints (of six years, with discretion in the Legal Services Tribunal to consider claims out of time) …"

91 The reforms to the Act which introduced s 138 were designed, in general terms, to respond to the Commission's report[21]. The exposure draft version of the Legal Profession Reform Bill 1993 (to introduce Pt 10 into the Act) provided in cl 139(1) that a complaint might "only be made within 6 years after the unsatisfactory professional conduct or professional misconduct is alleged to have occurred". The eventual form of s 138 of the Act reduced this period to three years. Explaining this reduction, the Attorney-General (Mr J P Hannaford) justified it by the fact that[22]:

> "[I]t has been provided that the commissioner may allow a complaint out of time where it is just and fair to do so having regard to the delay, or where the matter concerns professional misconduct and the commissioner believes it to be in the public interest to investigate the complaint."

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19 cf *Walsh v Law Society of New South Wales* (1999) 73 ALJR 1138 at 1150; 164 ALR 405 at 422.

20 New South Wales Law Reform Commission, *Scrutiny of the Legal Profession: Complaints Against Lawyers*, Report No 70, (1993) at 81.

21 eg Legal Profession Reform Bill 1993 (NSW), cl 139. See Court of Appeal judgment at 16.

22 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 September 1993 at 3274.

No differentiation was made with respect to the identity of the complainant.

92 Secondly, it is instructive to examine the language of the Act to test whether the differentiation between complaints "made" and "initiated" was designed to confine the time limit in s 138(1) to complaints "made" under s 134. In s 126 of the Act the word "complaint" is defined for the purpose of Pt 10 as "a complaint made under Division 3". However, that Division includes not only complaints made to the Commissioner[23] but also complaints initiated by, or made to, Councils[24] and those initiated by the Commissioner[25]. There is no special difficulty in requiring that all complaints, whether made by a "consumer" (ie "any person"), a Council or the Commissioner, should have to conform to the time requirement. If it had been intended to exempt a Council or the Commissioner from the time requirement, it might have been expected that this would have been explicitly provided for. On the face of things, s 138(1) is a provision of general application. Its generality is reinforced by the definition of "complaint", the word used in the sub-section.

93 Nor is there any particular difficulty in requiring that, where the Commissioner initiates a complaint concerning conduct alleged to have occurred more than three years earlier, he or she must, as the donee of the power under s 138(2) of the Act, decide whether to accept such complaint after that time by reference to the stated criteria. It is true that, in the Commissioner's case, it is a little awkward. However, it is not the first time that the repository of legal powers has been obliged to exercise, in turn, different functions: making separate and lawful decisions at succeeding times[26].

94 Thirdly, additional textual considerations support this reading of the Act. The headings to each of the sections, which contain the power respectively for a Council[27] and the Commissioner[28] to initiate a complaint, appear in the form of "Complaints made by or to Councils" and "Complaints made by Commissioner". Similarly, each of the headings to the two succeeding sections contains the verb "made". Although such headings are not, as such, part of the Act, they need not

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23 The Act, s 134.

24 The Act, s 135.

25 The Act, s 136.

26 cf *Calvin v Carr* [1979] 1 NSWLR 1 at 8; [1980] AC 574 at 589.

27 The Act, s 135.

28 The Act, s 136.

be ignored in elucidating the purpose of Parliament where there is doubt[29]. It is also instructive to have regard to the history of the legislation and the amendments to it between the original "exposure draft" and the Bill's enactment. Initially, the clause which became s 138, as well as providing for the six-year limitation set out above, contained an explicit exemption which was subsequently deleted. Clause 139(2) of the exposure draft Bill read:

> "This section does not apply to a complaint about professional misconduct made by the Commissioner or a Council."

95 The deletion of this provision following earlier consideration of the exposure draft Bill, and the substitution of the general power in the Commissioner to accept a complaint made after three years following the conduct complained of, indicate clearly enough a changed purpose to which effect should be given. By reference to a number of old authorities[30] Sheller JA expressed doubt that a court should, or would, pay regard to such a consideration[31]. However, with respect, paying such regard does not involve calling into question the internal proceedings of a Parliament; simply deriving instruction from the course of law-making. It does not involve the use of illicit materials; solely public records readily available and referred to in the parliamentary debates[32]. Formerly courts were unconcerned with pre-legislative materials or debates in Parliament or explanations there of the suggested purposes of legislation. However, the tendency both of general legislative provisions[33] and of the common law itself[34] has, in recent years, been to receive relevant pre-legislative and legislative materials to an extent that was previously

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29 *Interpretation Act* 1987 (NSW), s 34(2)(a); *Laemthong International Lines Co Ltd v BPS Shipping Ltd* (1997) 190 CLR 181 at 201; cf *Katsuno v The Queen* (1999) 73 ALJR 1458 at 1485; 166 ALR 159 at 195.

30 *Millar v Taylor* (1769) 4 Burr 2303 at 2332 [98 ER 201 at 217]; *R v Hertford College* (1878) 3 QBD 693 at 707.

31 Court of Appeal judgment at 16-17.

32 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 16 September 1993 at 3269-3270.

33 *Acts Interpretation Act* 1901 (Cth), s 15AA; *Interpretation Act*, ss 33, 34.

34 *Federal Commissioner of Taxation v Ryan* [2000] HCA 4 at [79-81] and cases there cited; cf *Regional Director of Education v International Grammar School Sydney Ltd* (1986) 7 NSWLR 302 at 314.

forbidden[35]. This tendency is part of a contemporary endeavour by the courts to avoid the excessively literalist construction of statutes, to prevent the misfiring of the parliamentary purpose and to promote a purposive interpretation of the legislative text[36]. The consideration of an obviously relevant change to a proposed Bill or its amendment during its passage through Parliament, which helps to resolve an ambiguity or to explain Parliament's purpose more clearly, is consonant with such developments. It is not forbidden by law. In the present case, when regard is had to the alteration to the draft clause which became s 138 (cl 139 of the exposure draft Bill), it speaks powerfully against the construction adopted by the Court of Appeal.

96 Fourthly, it is difficult to see why, as a matter of policy, the time provision enacted in s 138 should not apply as much to complaints initiated by a Council or the Commissioner as to complaints made by any other person. The potential for injustice and oppression in the case of delayed complaints is the same wherever they may originate. The statutory facility to accept the complaint out of time, before it is placed before the Tribunal, is always there and is most ample. It is to be exercised by an independent statutory office-holder with appropriate expertise who can develop consistent practices applicable to complaints across the board. The construction urged by Mr Barwick furthers the attainment of the overall balance enacted by Parliament. That preferred by the Court of Appeal gives a privileged exemption to a Council and the Commissioner which Parliament held back from enacting and (as we now know) specifically refrained from enacting.

97 The point in issue is real and not theoretical. Grounds 1 to 4 of the information filed on 30 September 1996 and pertaining to the first complaint (initiated by the Council against Mr Barwick on 8 June 1995 in relation to alleged professional misconduct) all related to conduct alleged to have occurred substantially or exclusively more than three years before the complaint was initiated (ie before 8 June 1992). No steps had been taken in accordance with s 138(2) of the Act to have the Commissioner consider whether to accept the complaint although outside that time. Accordingly, the proceedings instituted in the Tribunal against Mr Barwick by the information (laid by the appropriate Council) were not, to that extent, in accordance with Pt 10 of the Act. The variance is not an immaterial or a purely procedural one. It goes to the admissibility of the complaint at the threshold. Denial of an insistence upon consideration by the Commissioner of the discretions reposed in that office-holder by s 138(2) is not only an impermissible attempt to bypass the

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35 This has also extended to other materials, for example the use of the Constitutional Convention Debates: *Cole v Whitfield* (1988) 165 CLR 360 at 385-392.

36 *Bropho v Western Australia* (1990) 171 CLR 1 at 20 approving *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 421-424.

Commissioner's responsibilities under the Act. It also deprives Mr Barwick of provisions enacted by Parliament for the protection of legal practitioners. This is a serious departure from the scheme and requirements of the Act. The defects complained of therefore concern the power or jurisdiction of the Tribunal to hear and determine the complaint otherwise than in accordance with Pt 10 of the Act. Accordingly, Mr Barwick is entitled to relief on his first objection.

Amendment of the information

98 The application for amendment of the information was filed by the Law Society, and communicated to Mr Barwick by letter, on 24 July 1997. Leave to amend was granted by the Tribunal on 1 August 1997. As a result, procedural amendments were made to the particulars of ground 4 and a second part was added to the particulars of ground 5 of the information. The latter concerned conduct alleged to have occurred in about March and May 1997. As well, ground 6 was added. This reflected allegations distinct from those which had been the subject of the earlier investigation. They concerned an alleged breach of fiduciary duty owed by Mr Barwick to another client, his sister (Mrs Roberts). When the amendments to the allegations against Mr Barwick were raised at the Tribunal proceedings, on 1 August 1997, he did not oppose them, subject to having the benefit of an adjournment, which he was duly granted. Only when the adjourned hearing on the information as so amended commenced on 17 November 1997 did he challenge the admissibility of the amendment by reference to the provisions of the Act.

99 The Tribunal described what happened in these terms[37]:

> "On 1 August 1997 counsel for the Law Society sought the leave of the Tribunal to file an amended information which included the additional allegations referred to in the resolutions of the Council of the Law Society of 17 July 1997. *By the consent of counsel* for Mr Barwick, the Tribunal granted leave to the Law Society to file this amended information. This application by the Law Society was clearly an application that was brought under section 167A of the Act." (Emphasis added)

100 The power of the Tribunal to vary an information pursuant to s 167A, so as to include additional allegations, arises where an information is lawfully before the Tribunal, an application is made for that purpose and the Tribunal is satisfied that it is reasonable to do so having regard to criteria of fairness. The only express limitation in s 167A, preventing the inclusion of "additional allegations", is stated by reference to the satisfaction of the Tribunal, "having regard to all the

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37 *Re Dechnicz and Barwick* unreported, Legal Services Tribunal, 18 November 1997 at 2-3.

circumstances, that it is reasonable to do so". However, s 167A, which was added to the Act after Pt 10 was introduced to afford a measure of flexibility to proceedings before the Tribunal, has to be read in its statutory context. That context includes a distinct procedure for the receipt of complaints, their investigation and the institution of proceedings with respect to them. Furthermore, there is a limitation of general application upon the making of complaints in relation to conduct beyond a three-year period after the conduct is alleged to have occurred. In this context it is obvious that no construction of s 167A could be adopted which permitted the Tribunal to vary an information in a way that would undermine the general scheme for the handling of complaints under Pt 10 of the Act. Nor could it defy the specific limitation on the kinds of complaints which alone could give rise (without the exceptional decision of the Commissioner[38]) to the formal procedure of an information in the Tribunal envisaged by the Act.

101 The Tribunal in its decision pointed out that when on 24 October 1996 the Attorney-General (by this time, Mr J W Shaw) had proposed the insertion of s 167A[39] into the Act he had explained its purpose in these terms:

> "It was also suggested by the tribunal that the Act be amended to allow the Legal Services Tribunal to amend a complaint so as to enable the formal complaint to be varied or *a fresh matter to be added* having regard to developments in the course of a hearing. An example where such a power would be desirable would be in cases in which evidence before the tribunal raises the suggestion that the respondent practitioner may have misled the investigating council, the commissioner, or the tribunal itself. Proposed new section 167A deals with this issue." (Emphasis added)

102 The facility of s 167A was therefore meant to allow the repair of the kind of problem which this Court drew to attention in *Smith v NSW Bar Association*[40]. It would be undesirable in principle, and apparently contrary to the express legislative purpose in enacting s 167A as elaborated by the Attorney-General's remarks, to narrow the operation of the power of amendment and to force undue rigidity on the Tribunal. Especially would this be so where an amendment of an information has been allowed by consent of the legal practitioner concerned in proceedings in which he is competently represented.

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38 The Act, s 138(2).

39 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 October 1996 at 5317 cited in Court of Appeal judgment at 25-26.

40 (1992) 176 CLR 256.

103 The Court of Appeal concluded that the allegations of conduct which grounded an application for amending of the information could not "extend beyond those the subject of the complaint"[41]. It went on[42]:

> "[T]o the extent that the Information is based upon allegations of conduct neither included in the complaint with respect to which the Information is laid nor added to the Information pursuant to an application for variation under s 167A, the Tribunal should vary the Information to omit those allegations pursuant to that section or add them nunc pro tunc, if it is satisfied that it is reasonable to do so having regard to whether such variation will affect the fairness of the proceedings."

104 The Court of Appeal decided that it should not itself investigate whether or not the information filed before the investigation of the complaint was complete or whether or not the allegations of conduct on which the information was based extended beyond the allegations of conduct in the complaint or added pursuant to a variation under s 167A. The Court considered that it was sufficient that it should declare that "the Tribunal is to conduct a hearing only into such allegations particularised in the Information as were contained in the complaint initiated by the Council on 8 June 1995 as varied by any decision of the Tribunal made under s 167A of the Act"[43].

105 Mr Barwick now complains (as stated in his written submissions) that the Court of Appeal's decision amounts to endorsing the variation of the original information to "include additional allegations unrelated to the complaint, notwithstanding that they could not have been the subject of a valid complaint because they would have been out of time, or that they have never been the subject of investigation or decision".

106 The reasons of the Court of Appeal on this point are not entirely clear. But I do not take them to endorse the admissibility, over objection, of an amendment of the original information to permit a new "complaint" out of time or one which contradicted the procedural protections contained in the Act. Certainly, the declaration formulated by the Court of Appeal in this regard (par 1(c))[44] does not suggest acquiescence in such a result. However, it would be a serious mistake to impose on the deliberately broad language of s 167A a limitation or an inflexibility that would forbid the variation of an information which was

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41 Court of Appeal judgment at 25 per Sheller JA.

42 Court of Appeal judgment at 26 per Sheller JA.

43 Court of Appeal judgment at 27-28 per Sheller JA.

44 Court of Appeal judgment at 27-28.

consented to by a legal practitioner. There could be many reasons, in the interests of such a practitioner, of complainants and of the public, to facilitate disposal of all allegations in respect of the legal practitioner in the one hearing, on the one information, if this is consented to and causes no relevant unfairness.

107 There are four textual indications which suggest that this is a permissible approach under the scheme adopted by the Act. The first is the trouble that Parliament took to add s 167A to the powers of the Tribunal as originally provided. The second is the large discretion to vary an information to include additional allegations where it is "reasonable to do so". The third is the fact that s 167(1) of the Act makes it plain that the jurisdiction of the Tribunal, invoked by "an information laid by the appropriate Council or the Commissioner", is not solely based on a complaint but is "with respect to a complaint against a legal practitioner". The phrase is one of broad connection. It should not be narrowed. The fourth is the fact that the power of amendment is granted to a statutory tribunal independent of the parties.

108 The time for Mr Barwick to have made objection to the procedural step of varying the information was when the application was made to the Tribunal to that end. I entirely agree that, in the face of objection, no variation of the information under s 167A which would have the effect of subverting other provisions of the Act (including the time limitation in s 138(1)) could be allowed. But that objection to the variation was not raised. The variation was made on the application of an authorised party (a Council), in circumstances that were apparently "with respect to" the complaint as initially made against Mr Barwick and in a case where it was deemed "reasonable to do so". I therefore see no jurisdictional error on the part of the Tribunal which required the intervention of the Court of Appeal on this ground.

109 It would therefore be inappropriate in the circumstances for this Court to provide relief on the second ground. Waiver of the procedural rigidities of the Act in the interests of finality and expedition is to be encouraged, not forbidden. The history of this and other recent cases demonstrates the price that is paid by the legal practitioner, the relevant statutory and professional bodies and the public where strict inflexibility is imposed which the parties may agree to curtail or circumvent. Mr Barwick is therefore not entitled to relief on his second objection.

The process of investigation of a complaint

110 The foregoing conclusions require the provision of a measure of relief to Mr Barwick but only in respect of the information so far as it concerned the complaint as originally framed and involved conduct which was alleged to have

occurred more than three years before that complaint was made. It would leave standing the allegations added to the information, as varied by the Tribunal, with the consent of Mr Barwick, under s 167A. However, whilst endorsing the opinion of the Court of Appeal that s 155 of the Act gave the legal practitioner "important protection after the investigation has been completed"[45], Mr Barwick disputed the conclusion as to when such investigation could begin. Sheller JA, in the passage cited in the reasons of Gleeson CJ, Gaudron and McHugh JJ[46], considered that this approach to the scheme of Pt 10 was unduly inflexible. Indeed, Sheller JA was of opinion that, ordinarily, it could be expected that the investigation would be commenced, and in some cases completed, before a complaint was initiated. He considered that it would be absurd to require, after the complaint had been initiated, that another investigation be undertaken *de novo*.

111 Initially I was attracted to this view. It seemed a sensible description of what should happen in the operation of a disciplinary procedure which moved in a logical fashion. The procedure commences with accusations or "allegation[s]"[47], proceeds to a "complaint"[48], which may have to be further particularised[49], and which, unless summarily dismissed[50] or determined that it will not be "investigated"[51], is then to be investigated[52]. If not referred for mediation[53], an investigation is to be conducted either by the Commissioner[54] or by the Council[55]. In exceptional cases, the Commissioner is empowered to give the Council directions on the handling of a complaint being investigated by the

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45 Court of Appeal judgment at 22.

46 Reasons of Gleeson CJ, Gaudron and McHugh JJ at [58-59].

47 The Act, s 167(2).

48 Which must be investigated under the Act, s 148 (subject to that section).

49 The Act, s 140.

50 The Act, s 141.

51 The Act, s 142(1) – whereupon the Commissioner may refer the complaint to the appropriate Council.

52 The Act, ss 147A(1), 148.

53 The Act, ss 142(2), 144.

54 The Act, s 147A.

55 The Act, s 148.

Council[56] or, upon the request of the appropriate Council, to arrange for a complaint to be investigated by an independent investigator[57]. Only after the completion of such "investigation"[58] must the decision be made to institute proceedings in the Tribunal, something that is done "with respect to the complaint"[59], by an "information"[60]. This in turn will lead to a hearing[61] and eventually a determination[62].

112 On the face of things, with such a procedure, one would hardly expect in the ordinary case that an investigation, at least one into accusations or allegations, would remain in suspension, frozen into passivity by the statute, until a "complaint" was made or instituted. On the contrary, investigations of some kind would ordinarily occur immediately upon the relevant authorities (a Council or the Commissioner) becoming aware of a substantive contention (to use a neutral word) alleged against a legal practitioner. Delay in investigation could in some cases prove fatal to a proper and effective attention to the allegations and protection of the public.

113 Yet the operation of the Act is not necessarily logical. Certainly, as this case shows, it does not appear to lend itself to expedition. Since the Court of Appeal decided the present case, it has delivered its decision in *Murray v Legal Services Commissioner*[63]. In that case, the Court held that s 155 of the Act required that, before the Commissioner "completed an investigation into a complaint against a legal practitioner" and decided how the "complaint" was to be dealt with, the legal practitioner was to be given a copy of the complaint and an opportunity to answer it. That decision, which is the subject of an as yet undetermined application for special leave to appeal to this Court, is difficult or impossible to reconcile with the theory of s 155 expounded by Sheller JA in this case. It is inappropriate at this stage to consider the correctness of *Murray*.

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56 The Act, s 150.

57 The Act, s 151.

58 The Act, s 155(1).

59 The Act, s 155(2).

60 The Act, s 167(1).

61 The Act, ss 167(2), 169, 170.

62 The Act, s 171C.

63 (1999) 46 NSWLR 224.

114 In this case, unlike *Murray*, it was accepted that Mr Barwick had no complaint of any departure from the rules of natural justice (procedural fairness). His only complaint was that the scheme of Pt 10, Div 5 had not been complied with. In essence, he submitted that that scheme, including in the way in which it envisaged that the Commissioner would have functions to "monitor" investigations into complaints by a Council[64], could not operate if a Council were to proceed directly from the determination of a "complaint" to a decision to institute proceedings in the Tribunal[65]. It was submitted that this course of conduct impermissibly telescoped the completion of the "investigation" as envisaged by s 155 of the Act.

115 It is hard to be certain about the legislative purpose of these ill-expressed provisions. Some of the uncertainty arises from the use of the word "complaint" in two senses – being (1) the accusation or allegation made against a legal practitioner at the very outset of the statutory process; and (2) the formal "complaint" which triggers consequences further down the statutory track. However, in so far as both the original and subsequent resolutions of the Council of the Law Society proceeded directly from the institution of a "complaint" against Mr Barwick to a decision that proceedings be instituted in the Tribunal, no "investigation into each complaint … initiated by the Council", as required by the Act, could take place[66]. No monitoring by the Commissioner of the conduct of such investigation by the Council could occur[67]. Thus, although the remarks of Sheller JA about form and substance and practicalities are immediately attractive, they are impossible to reconcile with the language of the provisions in Pt 10, Div 5 of the Act. They also appear difficult to reconcile with the later decision of the Court of Appeal in *Murray*; but that is not before us. Mr Barwick is entitled to relief on his third objection.

Consequences of the breaches of the Act: invalidity

116 In this way I come to a conclusion on the first and third arguments with which I have dealt similar to that reached by Gleeson CJ, Gaudron and McHugh JJ. The difference in relation to the second does not affect the orders which must be made. Whatever differential orders might have been appropriate if Mr Barwick had failed on the third point, his success on that point strikes fundamentally at the consideration of the "complaint" and amended "complaint" initiated against him by the Council of the Law Society. It was impermissible for

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64 The Act, s 149.

65 The Act, s 155(2).

66 As contemplated by the Act, s 148.

67 As contemplated by the Act, s 149.

the Council to proceed directly from the decision to initiate a complaint to the decision to institute proceedings in the Tribunal. The Act contemplates the interposition of an "investigation" of the "complaint" which has to be completed[68]. The fact that investigations of various kinds were going on before that time is beside the point. Within the scheme of the Act, such investigation was into a contention, allegation or accusation. It was not into "a complaint", a formal step in this statutory scheme. And no investigation at all was possible between the instantaneous decisions to initiate the "complaint" and to institute proceedings by information in the Tribunal.

117 The departure from the scheme of the Act cannot in this case be described as immaterial or insignificant. Although the elusive distinction between directory and mandatory requirements[69] has outlived its usefulness[70], these were important failures to conform to provisions of the legislation which in earlier times would have been classified as mandatory. Having regard to the "language of the relevant provision and the scope and object of the whole statute"[71] the acts done by the Council in breach of the provisions of the Act are invalid. They could not sustain the lawful institution in the Tribunal of proceedings against Mr Barwick[72]. The power of amendment of such lawful proceedings could not therefore arise. Accordingly, Mr Barwick is entitled to an order in the nature of prohibition to forbid the Tribunal from proceeding with a hearing on the information that is presently before it.

118 It will be necessary for the consideration of the allegations against Mr Barwick to be returned to the point at which a decision is made on whether or not to initiate a "complaint" against him. It would not be surprising in these circumstances if, in this and perhaps other cases, attempts were made (if they be lawful) to invoke the inherent jurisdiction of the Supreme Court bypassing the needless uncertainties and complexities of this unsatisfactory Part of the Act[73].

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68 The Act, s 155(1).

69 *Woodward v Sarsons* (1875) LR 10 CP 733 at 746; *Howard v Bodington* (1877) 2 PD 203 at 211; *Tasker v Fullwood* [1978] 1 NSWLR 20 at 23-24.

70 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

71 *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-391 applying *Tasker v Fullwood* [1978] 1 NSWLR 20 at 24.

72 In accordance with the Act, s 167(1).

73 The inherent jurisdiction of the Supreme Court is preserved by the Act, s 171M(1); cf *Walsh v Law Society of New South Wales* (1999) 73 ALJR 1138 at 1152; 164 ALR 405 at 425.

Orders

119 I agree in the orders proposed by Gleeson CJ, Gaudron and McHugh JJ.

120 CALLINAN J. In order to decide this appeal it is necessary to construe the provisions of the *Legal Profession Act* 1987 (NSW) ("the Act") governing the conduct of disciplinary procedures against legal practitioners, in this case, a person practising as a solicitor.

Factual background

121 On 1 July 1994 a new Pt 10 was introduced into the Act to establish a different regime for the treatment of complaints against legal practitioners. This significant legislative change occurred at a time when the appellant's conduct was under consideration by the first respondent and, as Gleeson CJ, Gaudron and McHugh JJ explain in their reasons, the occurrence of that change may go some way to explain the somewhat unusual course that the proceedings took.

122 The appellant practises as a solicitor in New South Wales. On 8 June 1995, a joint sitting of the Professional Conduct Committees of the Law Society of that State (as the delegate of the Law Society Council[74]) resolved to initiate a complaint against the appellant to the Legal Services Tribunal alleging professional misconduct, or alternatively, unsatisfactory conduct as a legal practitioner. The reasons for judgment of Gleeson CJ, Gaudron and McHugh JJ discuss to the extent necessary the facts leading up to the initiation of that complaint and the reason for the substitution of the Administrative Decisions Tribunal as second respondent. Of the four grounds in that complaint, three were substantially or exclusively about conduct which occurred more than three years before the complaint was initiated. The terms of the resolution were communicated by letter to the appellant. The letter also recorded that the Committee was satisfied, and had resolved that there was a reasonable likelihood that the appellant would be found guilty of professional misconduct. The author of the letter concluded by saying that it would be some months before he would be in a position to file proceedings in the Tribunal. An information was not laid in the Tribunal until 30 September 1996. There is little direct correspondence between the numbering and language of the complaint and those of the information which stated five grounds:

> "1. The Solicitor, Mr Barwick, was guilty of neglect, delay and incompetence in the administration of the estate of the late Everil May Wilkinson ('the Deceased').
>
> 2. The Solicitor preferred his own interests over the interests of Rosaline Margaret Fulton ('Mrs Fulton'), to whom (as the executor and trustee of the estate of the Deceased and a solicitor acting in the administration of the estate) he owed fiduciary obligations.

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74 The Act, s 157.

3. The Solicitor misled Mrs Fulton about the application of assets of the estate of the Deceased for his own benefit.

4. In permitting his sister to borrow moneys from clients of the firm of solicitors of which he was a partner (including the estate of the Deceased) the Solicitor:

   (a) failed to comply with clause 27(2) of the Legal Profession Regulation 1987.

   (b) failed first to obtain from Mrs Fulton, and from Mr Mottram and Messrs Kolomyjec and Figol (lenders to his sister), an authority in writing as required by clause 32(1) of the Legal Profession (Trust Accounts and Controlled Money) Regulation 1988.

   (c) by his failure to comply with clause 32(1) of the Legal Profession (Trust Accounts and Controlled Money) Regulation 1988, wilfully contravened section 61(1)(b) of the Legal Profession Act 1987.

   (d) failed to comply with clause 33 of the Legal Profession (Trust Accounts and Controlled Money) Regulation 1988 (which provided for the preparation, issue and recording of a prescribed form of epitome of mortgage).

   (e) by his failure to comply with clause 33 of the Legal Profession (Trust Accounts and Controlled Money) Regulation 1988, wilfully contravened section 62 of the Legal Profession Act 1987.

5. The Solicitor made representations to the Law Society of New South Wales which were misleading."

123 Three of the grounds appear to have been raised fully or substantially in the complaint, and four of the grounds concerned conduct which occurred more than three years before the complaint was initiated. Ground 1 was never the subject of complaint and concerned conduct which occurred more than three years before it was raised in the information for the first time. Ground 2 was raised by the complaint, but concerned conduct occurring more than three years before the complaint was initiated. Ground 3 was in part only the subject of the first complaint and otherwise it related to conduct occurring more than three years before it was made. Grounds 4 and 5 were raised in the first complaint and ground 4 was about conduct occurring more than three years before it.

124 In July 1997 a further complaint was initiated against the appellant by the Law Society, again, in respect of conduct occurring more than three years before the making of that complaint. Proceedings were instituted in respect of that

complaint also, by the filing (with leave) in the Legal Services Tribunal (which has now been abolished and its jurisdiction transferred to the Administrative Decisions Tribunal of New South Wales[75]) of an amended information. The amended information contained an additional ground and an addition to ground 5.

125 The material additions (which are shown in italics) were as follows:

"5. The Solicitor made representations to the Law Society of New South Wales which were misleading *and attempted thereby to mislead each of the Law Society and the Tribunal*.

6. *The Solicitor preferred his own interests over the interests of Mrs Roberts, to whom he owed fiduciary obligations, in using her property and credit for his own personal dealings without her fully informed, or fairly obtained, consent*."

126 There was also a substantial addition to the particulars relating to ground 5:

"(e) By the statutory declaration made by him in these proceedings on 7 March 1997 ('the First Statutory Declaration') the Solicitor made misleading representations to the Law Society in that:

(i) by paragraph 14 of the First Statutory Declaration, the Solicitor represented that there was no agreement between himself and his partner, Mr Dechnicz, to equalise their capital contributions to the partnership. However, by paragraphs 2, 3 and 15 of an undated letter written by the Solicitor to Mrs Roberts and delivered to her by him in or about February or March 1993 the Solicitor stated that he and Mr Dechnicz were 'equal partners', after he 'bought into' Mr Dechnicz's work in progress, and he borrowed funds 'to enable [him] to equalise the practice with [Mr Dechnicz]'.

(ii) By paragraph 19 of the First Statutory Declaration, the Solicitor represented that his own personal financial position at the time moneys were borrowed on the security of Mrs Roberts' property at Mosman in or about March 1992 was not such that he had any need to borrow moneys. By paragraph 21 of the Declaration he also represented that he obtained no personal benefit whatsoever from the advance of funds from the Wilkinson Estate to Mr Dechnicz (on the security of Mrs Roberts' Mosman property)

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75 *Administrative Decisions Legislation Amendment Act* 1997 (NSW), s 3 and Sched 3.

in or about March 1992. However, by paragraph 4 of his undated letter to Mrs Roberts the Solicitor stated that the partnership between Mr Dechnicz and himself had been 'starved of working capital since inception' (November 1991); and by that letter generally he stated that he had a continuing need to borrow money to finance the practice of the partnership and his interest in the partnership.

(f) By the Statutory Declaration made by him in these proceedings on 2 May 1997 ('the Second Statutory Declaration') the Solicitor made misleading representations to the Law Society in that, by paragraphs 55 and 56 of the Second Statutory Declaration, he represented that he was not aware in the latter part of March 1992 (when discussing with Mrs Roberts and Mr Dechnicz the availability of her Mosman property as security for borrowings by Mr Dechnicz and himself) that the property was subject to a first mortgage. However, the first mortgage (in favour of the National Australia Bank) had been negotiated with the Bank by the Solicitor in or about January 1991 in order to raise moneys for Mrs Roberts when the Solicitor was unable to account to her for moneys due to her from Mundroola Pty Ltd but used by him."

127 Ground 6 generally repeated the second ground of the second complaint.

128 The matters came on for hearing in the Tribunal in November 1997. The appellant immediately sought to have the proceedings stayed as an abuse of process. The Tribunal announced that it intended making the order as sought by the appellant, but, before delivering reasons, and on the application of the Council to have the order set aside, ruled that the appellant's application for a stay be dismissed without any changes to, or deletions from the amended information.

129 The appellant commenced proceedings in the Court of Appeal seeking an order prohibiting, or otherwise restraining the Society and the Tribunal from proceeding with the hearing of allegations against him on the grounds that there had been a failure to observe a number of the provisions of the Act on the part of the respondents. The appellant was partly successful in the Court of Appeal. He appeals to this Court seeking a declaration that the decisions of the Society to institute all of the proceedings are void and orders that the Tribunal be restrained from further proceeding with the hearing. The Law Society seeks special leave to cross-appeal in relation to an issue on which the appellant was successful in the Court of Appeal.

130 It is convenient to deal with the reasons and decision of the Court of Appeal in discussing the argument presented on behalf of the appellant in this Court.

The appeal to this Court

131 In substance the appellant argues that three conditions must be satisfied before the Tribunal may entertain the proceedings against him: that the conduct the subject of complaint must have occurred within a period of three years before the making of the complaint unless the Commissioner extends the time after applying his or her mind to certain stated matters; that any information laid pursuant to a complaint must be closely confined to the substance of the complaint and may not be enlarged by amendment pursuant to s 167A to embrace complaints occurring more than three years ago or of a different kind from the substance of the complaint; and that no information may be laid with respect to conduct which has not been the subject of investigation and an appropriate decision after consideration by the Council to lay an information specific as to either professional misconduct or unsatisfactory professional conduct.

132 The Act was enacted in 1987 and has been amended materially in the years 1992, 1994 and 1996. It is relevant to notice some of the definitions in the Act. "Commissioner" is defined as the Legal Services Commissioner appointed under Pt 10 of the Act. "Council" is defined to mean the Bar Council or the Law Society Council. "Law Society Council" means the Council of the Law Society. "Tribunal" means the Legal Services Tribunal constituted under Pt 10 of the Act[76]. Section 54(1)(a) provides that in addition to its other functions the Law Society Council ("the Council") may take such steps as may be necessary or proper with respect to the investigation in accordance with the Act of any question "as to the conduct of a solicitor" and s 55 empowers the Law Society by instrument signed by its President or two members of the Council to appoint trust account inspectors and an investigator to investigate the accounts and affairs of solicitors. Sub-section (3) obliges a solicitor to give access to all relevant accounts and information to a duly appointed inspector.

133 Part 10 is concerned with complaints and discipline. The objects of the Part generally are stated in s 123 to be the redressing of complaints by consumers and users, compliance by practitioners with necessary standards, and the maintenance of ethical and practice standards by the profession as a whole.

134 Section 124 restates in detailed terms the general objects set out in s 123. Section 125 includes as an object, ensuring that the rules of natural justice (being rules for procedural fairness) are applied to any disciplinary proceedings taken against legal practitioners.

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76 See now *Administrative Decisions Tribunal Act* 1997 (NSW), Sched 5, item 6. The function of the Legal Services Tribunal has been transferred to the Legal Services Division of the ADT.

135 Section 126 contains a number of definitions including the following:

"***complaint*** means a complaint made under Division 3.

information means an information laid in the Tribunal in relation to a complaint against a legal practitioner.

investigation means an investigation under this Part by a Council or the Commissioner into a complaint, and includes an independent investigation under section 151."

136 Section 127 draws a distinction between varying degrees of seriousness of misconduct as a practitioner. It needs no further reference except to point out that because of the likely different punitive consequences, and the different rules applying to the reception of evidence, any information should make clear, and any practitioner ought to be entitled to be informed, as to which, of professional misconduct or unsatisfactory professional conduct, is alleged against him or her.

137 Division 2 (ss 129-133) is concerned with the appointment, functions and staff of the Commissioner.

138 In summary, the functions of the Commissioner pursuant to s 131 include the initiation of a complaint, the taking over of the investigation of a complaint if appropriate, the reference of complaints to a Council, the monitoring of investigations and the giving of directions with respect to them, the reviewing of the dismissal of complaints by a Council, the administering of reprimands to legal practitioners, and the institution of proceedings in the Tribunal against practitioners[77].

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77 "**131 Functions of Commissioner**

(1) The Commissioner has, in accordance with this Act, the following functions:

(a) to receive complaints about professional misconduct or unsatisfactory professional conduct of legal practitioners and interstate legal practitioners,

(b) to assist and advise complainants and potential complainants in making and pursuing complaints (including assisting complainants to clarify their complaints and to put their complaints in writing),

(c) to initiate a complaint against a legal practitioner or interstate legal practitioner,

(Footnote continues on next page)

139 Division 3 is entitled "Complaints about legal practitioners". Section 134 provides that any person may make a complaint to the Commissioner about a practitioner's conduct. Such a complaint "duly made" is to be dealt with in accordance with Pt 10 and the section is stated as not affecting any other right of a person to complain about a practitioner's conduct.

140 Section 135 provides that a Council may initiate a complaint but if it does, it must forward a copy of any such complaint to the Commissioner. The same

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(d) to investigate, or take over the investigation of, a complaint if the Commissioner considers it appropriate,

(e) to refer complaints to the appropriate Council for investigation or mediation in appropriate cases,

(f) to monitor investigations and give directions and assistance to Councils in connection with the investigation of complaints,

(g) to review the decisions of Councils to dismiss complaints or to reprimand legal practitioners and interstate legal practitioners in connection with complaints,

(h) to take over investigations or to institute proceedings in the Tribunal against legal practitioners and interstate legal practitioners following a review by the Commissioner,

(i) to assist the Councils to promote community education about the regulation and discipline of the legal profession,

(j) to assist the Councils in the enhancement of professional ethics and standards, for example, through liaison with legal educators or directly through research, publications or educational seminars,

(k) to conduct regular surveys of, and report on, the views and levels of satisfaction of complainants and respondent legal practitioners and interstate legal practitioners with the complaints handling and disciplinary system,

(l) to report on the Commissioner's activities under this Act.

(2) The Commissioner has such other functions as are conferred or imposed on the Commissioner by or under this or any other Act."

section provides that if a complaint is made to a Council it too must be forwarded to the Commissioner.

141 Section 136 is in the following form:

"**Complaints made by Commissioner**

(1) The Commissioner may initiate a complaint against any legal practitioner or interstate legal practitioner under this Part.

(2) Any such complaint is, for the purposes of this Part, taken to have been made to the Commissioner."

142 During argument attention was drawn by the first respondent to the significance, if any, to be attached to the differential use of the words "make" and "made" in s 134 and s 138, and "initiate" in ss 135 and 136, and, by the appellant, to the heading to each section which uses the word "made" and not "initiate". It was the first respondent's contention that in empowering the Council or the Commissioner to initiate a complaint, it was the intention of the legislature to treat complaints from those sources differently from complaints made by any other person, and, by implication to relieve the Council or the Commissioner from any obligation to undertake an investigation in respect of a complaint which either had initiated, or to comply with the time limit of three years referred to in s 138: in short to equate the Council's rights and obligations with those of the Commissioner and to distinguish them from any other person. The first respondent's contention was accepted by the Court of Appeal.

143 The legislation is ambiguously drafted. There is certainly an arguable basis for the first respondent's contention and the reasoning of the Court of Appeal in accepting it. However I have formed a different view. I do not think that any particular significance should be attached to the different usages of "made" and "initiate". The point of each is to make it clear that in order for a power or function of laying an information, or of making an investigation of a complaint to be enlivened, it is not necessary that its source be a person other than the Commissioner or the Council. It can be initiated or made by either the Council, the Commissioner or anyone else. It is true that the legislature reverted to the word "made" in s 138 but that reversion in my view does not disclose a legislative intention that there is to be any differential treatment, so far as a limitation period or otherwise is concerned, according to whether complaint is made by the Council or otherwise. That in respect of complaints made by the Council the same conditions with respect to the time of commencement should be fulfilled, can be discerned from the requirement of s 135 that all complaints are to be put into the hands of the Commissioner. The reason for this is to keep the Commissioner informed and to enable him or her to perform the functions set out in s 131.

144 Section 138 provides as follows:

"**When complaint made**

(1) A complaint may only be made within 3 years after the conduct is alleged to have occurred.

(2) However, the Commissioner may accept a complaint made after that time if:

(a) the Commissioner is satisfied that it is just and fair to do so having regard to the delay and the reason for the delay, or

(b) the Commissioner is satisfied that the complaint concerns an allegation of professional misconduct and that it is necessary in the public interest to investigate the complaint."

145 The argument of the first respondent, which was accepted by the Court of Appeal, was that no occasion would arise for the Commissioner to "accept" a complaint initiated by himself or herself and that the Commissioner should not be bound, in the case of a complaint made by him or her or the Council, to be satisfied of the matters to which sub-s (2) refers: that s 138 simply had no application.

146 Section 141 confers upon the Commissioner a power to dismiss a complaint without referring it to the relevant Council if it is lacking in particularity, or is vexatious, misconceived, frivolous or lacking in substance.

147 Section 137 prescribes the minimum requirements of a complaint: that it be in writing; that it identify the complainant and the legal practitioner; and, that it give particulars of the conduct the subject of the complaint. Once a complaint has been duly made it then becomes subject to the control, either actual or potential, of the Commissioner no matter who has made or initiated it.

148 Section 147A provides that the Commissioner *may* either investigate a complaint, or refer it to the relevant Council for investigation. The Council must assist the Commissioner in carrying out any investigation. The section does not say that the Commissioner must investigate a Commissioner's complaint.

149 The need for particularity of any complaint (to whomsoever made) as required by s 137 is reinforced by s 148(2) which empowers a Council to dismiss a complaint if it still lacks particularity after a request for particulars has been made. But s 148(1), by contrast with s 147A which imposes no such express obligation upon the Commissioner, obliges a Council to conduct an investigation "into each complaint referred to it by the Commissioner or initiated by the Council". That the Commissioner has a discretion whether to investigate or not

pursuant to s 147A further appears from s 151 which makes provision for what may happen "if the Commissioner decides not to conduct the investigation … under section 147A".

150 The function of the Commissioner to monitor investigations for which s 131(1)(f) makes provision is restated in s 149 which further provides that if a Council is investigating the complaint it must respond by report to any request in that regard by the Commissioner. Section 150 enhances the power of the Commissioner to direct and control an investigation and to take it over in certain circumstances.

151 But s 155 makes no distinction between a Council's or the Commissioner's investigation (if the latter makes one) and any proceedings consequent thereon:

"**155 Decision after investigation of complaint**

(1) After a Council or the Commissioner has completed an investigation into a complaint against a legal practitioner or interstate legal practitioner, the complaint is to be dealt with in accordance with this section.

(2) The Council or the Commissioner must institute proceedings in the Tribunal with respect to the complaint against the legal practitioner or interstate legal practitioner if satisfied that there is a reasonable likelihood that the legal practitioner or interstate legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct or professional misconduct.

(3) However, if the Council or the Commissioner is satisfied that there is a reasonable likelihood that the legal practitioner or interstate legal practitioner will be found guilty by the Tribunal of unsatisfactory professional conduct (but not professional misconduct), the Council or the Commissioner may instead:

(a) reprimand the legal practitioner or interstate legal practitioner if the legal practitioner or interstate legal practitioner consents to the reprimand, or

(b) dismiss the complaint if satisfied that the legal practitioner or interstate legal practitioner is generally competent and diligent and that no other material complaints have been made against the legal practitioner or interstate legal practitioner.

(4) The Council or the Commissioner is to dismiss the complaint against the legal practitioner or interstate legal practitioner if satisfied that there is no reasonable likelihood that the legal practitioner or interstate

legal practitioner will be found guilty by the Tribunal of either unsatisfactory professional conduct or professional misconduct.

(5) If a Council or the Commissioner decides to dismiss a complaint or to reprimand a legal practitioner or interstate legal practitioner under subsection (3) and the complainant requested a compensation order in connection with the complaint, the Council or the Commissioner may require the payment of compensation by the legal practitioner or interstate legal practitioner or the successful mediation of the consumer dispute before the decision takes effect."

152 Sub-section (1) does presuppose that there will be an investigation into a complaint against a practitioner before a decision as to the way in which the complaint is to be dealt with is made. It uses neither the word "initiated" nor "made". Sub-sections (2), (3) and (4) of s 155 require that the Council or the Commissioner – the reference to both of them is undiscriminatingly made – turn their minds to the results of an investigation and reach a state of satisfaction that there either is, or is not, a reasonable likelihood that the Tribunal will find the practitioner guilty of unsatisfactory professional conduct or professional misconduct. The importance of the decision-making process on a complaint whether, and how to proceed, is again emphasised by s 156 which requires that a decision, of either the Council or the Commissioner with respect to a complaint, be recorded.

153 The Commissioner's overarching supervisory powers in relation to complaints generally appear also from s 158 which entitles a complainant to seek a review from the Commissioner of relevant decisions made by a Council. The application for such a review must be in writing and made within a time limit of two months of notification of a decision by the Council. The balance of ss 158, 159, 160 and 161 deals with the manner and form of a review and its consequences.

154 Division 7 (ss 162-166) constitutes the Legal Services Tribunal and includes in s 166 a provision enabling designated members of the Tribunal to make rules "governing the practice and procedure of the Tribunal".

155 Section 167 uses the word "instituted" in sub-s (1). Section 167 provides as follows:

"**Institution of proceedings and hearings**

(1) Proceedings may be instituted in the Tribunal with respect to a complaint against a legal practitioner or interstate legal practitioner by an information laid by the appropriate Council or the Commissioner in accordance with this Part.

(2) The Tribunal is to conduct a hearing into each allegation particularised in the information.

(3) Before the commencement of the hearing, the legal practitioner or interstate legal practitioner must file a reply to the allegations in the information in accordance with the rules of the Tribunal and the directions of the Registrar of the Tribunal.

(4) The Tribunal may, subject to its rules and the rules of procedural fairness, order the joinder of any 2 informations against the same or different legal practitioners or interstate legal practitioners.

(5) This includes the power to order, if it is in the interests of justice to do so, the joinder of:

(a) more than one information against the same solicitor or barrister, or

(b) an information against one or more barristers and an information against one or more solicitors if all informations are founded on the same, or closely related, acts or omissions."

156 It is important to keep in mind that the proceedings are to be "with respect to a complaint … by an information laid by the … Council or the Commissioner in accordance with this Part". Again no distinction is drawn between an information laid by the Council or the Commissioner. There can be discerned in the Act an intention that there be a relationship between the conduct the subject of complaint, any information laid in respect of it and the allegations in the information of the conduct. Another way of putting it is to say that the allegations in the information must be reasonably related to, and be of the conduct the subject of the complaint. This is because proceedings must be with respect to the complaint, which is to say that the *information* must be with respect to the complaint and sub-s (2) provides that the Tribunal is to conduct a hearing into each allegation particularised in the information. The need for proper process in connexion with proceedings by way of information may be inferred from sub-s (3) which obliges the practitioner to file a reply to the allegations in the information.

157 The submissions of the parties are very much in conflict on the ambit of s 167A which provides as follows:

"**Tribunal may vary an information**

(1) The Tribunal may, on the application of a Council or the Commissioner who laid an information, vary the information laid so as to omit allegations or to include additional allegations if the Tribunal is

satisfied, having regard to all the circumstances, that it is reasonable to do so.

(2) Without limiting subsection (1), when considering whether or not it is reasonable to vary an information, the Tribunal is to have regard to whether varying the information will affect the fairness of the proceedings."

158 In relation to that section the first respondent referred to the second reading speech on its introduction by the Attorney-General to support an argument as to the breadth of the section[78]:

"The difficulty identified by the tribunal was that the Act would currently appear to constrain a professional council or the commissioner to refer the actual complaint made in its original form. In particular, section 167(2) of the Act currently provides that the tribunal is to conduct a hearing into the 'complaint'. The problem with this is that the original complaint, which will normally take the form of the initial letter from the complainant, may raise a large number of issues, only some of which justify referral to the tribunal, or may omit other issues arising from the same transaction that should be brought to attention. As the council concerned, or the commissioner, has the responsibility to present and argue the complaint before the tribunal, it is considered that those bodies should have the flexibility to particularise the allegations of professional misconduct or unsatisfactory professional conduct being relied on.

Amendments to section 160 of the Act will ensure that a complainant has a right of review against a decision by a council to omit part of a complaint when bringing it before the tribunal. It was also suggested by the tribunal that the Act be amended to allow the Legal Services Tribunal to amend a complaint so as to enable the formal complaint to be varied or a fresh matter to be added having regard to developments in the course of a hearing. An example where such a power would be desirable would be in cases in which evidence before the tribunal raises the suggestion that the respondent practitioner may have misled the investigating council, the commissioner, or the tribunal itself. Proposed new section 167A deals with this issue. The power to vary the complaint will be at the application of the commissioner or relevant council, and proposed new section 167A(2) will require the tribunal to have regard to issues of fairness when determining whether to allow the variation.

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78 New South Wales, Legislative Council, *Parliamentary Debates* (Hansard), 24 October 1996 at 5317.

> The tribunal has wide powers to control its own proceedings, and this should enable it to ensure that the addition of further matters does not result in procedural unfairness, for example by allowing, if necessary, for adjournments or the re-examination of witnesses, or for the leading of additional evidence by the respondent. Amendments to part 10 division 4 of the principal Act relate to the sort of complaints that may be referred to mediation. The Act currently only allows for referral to mediation of a consumer dispute, which is defined as a dispute between a client and a legal practitioner in which the client seeks redress or a remedy. It has become apparent that the definition may be too limiting in that it would seem to require a solicitor-client relationship."

159 There are, in my opinion and with respect to the Attorney-General, some difficulties in inviting a Tribunal to decide not only what I will describe as the original and substantive issues in a matter, that is, whether the practitioner has been guilty of misconduct as a practitioner in carrying on a practice, but also, whether, in dealing with those issues, either at the investigative stage or more particularly during the proceedings in the Tribunal itself, he or she has been guilty, in effect, of perjury or a lack of necessary candour. Pursuant to s 168 the Tribunal is only bound to observe the rules of law governing the admission of evidence if there is a question of professional misconduct involved. True it may be that the rule in *Briginshaw v Briginshaw*[79] whether as restated or explained in *Rejfek v McElroy*[80] and *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd*[81] does not involve a different standard of proof from the civil standard in cases of fraud and other serious misconduct, and that in civil cases there may be a range of seriousness of the various issues to be decided, but because the state of satisfaction of the mind required for, say, a finding of unsatisfactory conduct, might in practice be quite different from that required for a finding of conduct tantamount to, or of perjury, it is obviously preferable that they be the subject of separate proceedings if possible. So too, the view might be taken that the deliberate misleading of the Tribunal in relation to conduct falling short of professional misconduct might itself constitute professional misconduct. The former would not, but the latter might attract, pursuant to s 168 the rules of law governing the admission of evidence.

160 In both ordinary civil and criminal proceedings a court usually has no power to make definitive findings of misleading conduct (unless that is the or an issue) during the proceedings and to impose a sanction on any party in those

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79 (1938) 60 CLR 336 at 361-362 per Dixon J.

80 (1965) 112 CLR 517 at 521.

81 (1992) 67 ALJR 170 at 171; 110 ALR 449 at 450.

proceedings (other than an adverse decision or verdict on a matter in issue). Dishonest conduct in relation to the proceedings themselves will rightly be the subject of quite separate proceedings, which a different court may be expected to approach with an open mind after due notice has been given to the person against whom the dishonest conduct is alleged.

161 Notwithstanding what I consider to be grave difficulties in the way of joining fresh allegations of the kind referred to by the Attorney-General with those the subject of the original complaint there is no doubt that if the legislature so wished it could legislate to achieve that result. It is doubtful whether this Act achieves that result because the necessary nexus to which I have referred is unlikely to be present but I need not express any concluded view on that matter in this case.

162 But as to the question whether s 167A permits the addition of allegations of conduct that is out of time, that is conduct occurring more than three years before the laying of an information and not the subject of a decision to enlarge the time, the answer must be in the negative. Such allegations would not be allegations in the information with respect to conduct the subject of a relevant complaint within time.

163 There are some further provisions which should be noticed. By s 171F provision is made for an appeal by any party to a hearing conducted by the Tribunal, to the Supreme Court. Section 171J imposes upon a Council or the Commissioner an obligation to cause the decision with respect to a complaint, together with the reasons of the decision to be notified in writing to the complainant and the practitioner.

164 Section 171M is an important provision which preserves the inherent power or jurisdiction of the Supreme Court with respect to the disciplining of legal practitioners.

165 In the Court of Appeal Sheller JA (with whom Mason P and Priestley JA agreed) expressed the view that the language of Pt 10 is not always precise. His Honour said:

> "This is demonstrated by a consideration of the word 'complaint', which, in this context, usually means an accusation or charge or statement of injury or grievance laid before a tribunal or other body for the purpose of prosecution or redress. Div 3 of Part 10 contemplates three sources of complaint about legal practitioners. These are a complaint by 'any person' (s 134(1)), a complaint by a Council (s 135(1)), and a complaint by the Commissioner (s 136(1)). Those three subsections draw a distinction between, on the one hand, the making [of] a complaint to either the Commissioner (s 134(1)) or the Council (s 135(3)) and, on the other, the initiating of a complaint by the Council or the Commissioner, though the second is, for the purposes of

> Pt 10, taken to have been made to the Commissioner (s 136(2)). Section 171J(3) refers to the complaint 'made by the Commissioner or a Council.'"

166 Their Honours went on to hold that s 138(1) should be read as referring only to a complaint "made", that is by a person (other than the Commissioner or a Council) under s 134(1) and not to a complaint "initiated" by a Council or by the Commissioner. Sheller JA thought this sensible and explicable because of "a need to prevent stale complaints except to the extent that they are initiated by a Council, by the Commissioner or accepted by the Commissioner if the Commissioner is satisfied that it is just and fair to do so".

167 For the reasons which I have already foreshadowed I am unable to agree with this view of s 138(1). I acknowledge that there is no entirely satisfactory way of construing this legislation in an harmonious way. There are, however, as I have mentioned, several instances in the legislation in which reference is made undiscriminatingly to complaint by whomsoever made, or initiated. Furthermore, the legislation treats the making of a complaint as a formal and substantive matter calling for a deliberative decision as to further formal process in relation to it or otherwise, and the notification and recording of that decision, whether the complaint is initiated or made, and no matter by whom it is initiated or made.

168 One reason, it was argued, why a stale complaint might be regarded as having more validity for processing because it has been initiated by either the Council or the Commissioner is that the Commissioner or the Council might effectively be the only persons who might become aware (because of the special powers conferred on them and their informed position generally) of circumstances calling for the making of a complaint. These might be circumstances of which a lay person might not be aware or the significance of which might not occur to lay people. Against this however is the compelling indication provided by the definition of complaint which is, simply, of a complaint made under Div 3. This is not a case in my opinion of the definition distorting the intended meaning of s 138 or the other relevant sections. Whilst it is true that the use of the word "accept" in s 138(2) probably means that complaints made by the Commissioner should be differently treated from other complaints, no such implication is made with respect to the Council.

169 The Court of Appeal held that ss 138 to 142 of the Act, sensibly understood, could only be dealing with complaints made by a person other than the Commissioner or the Council. This view again depends in part at least upon relevantly equating the Council with the Commissioner simply because the word "initiate" is used in reference to a Council's and a Commissioner's complaint, a proposition with which I have already largely dealt. And the language of ss 139 to 142 does not, in my opinion, lead to any different conclusion. Section 139 is concerned with a complainant who has suffered loss because of the conduct complained of and the remedies of compensation to which he or she might be

entitled. The fact that the Act affords a special remedy to one class of complainants under a particular section does not mean that the Council, as a complainant may not be bound by other sections. The same may be said of ss 140 and 141, these being merely sections directed to those cases in which the complaint emanates from a person other than the Commissioner.

170 In principle there is no reason why the Commissioner should not be bound to turn his mind to the matters referred to in sub-s (2) of s 138 in those cases in which the Council is the complainant, in the same way as those matters must be considered if the complaint originates from some other person. Further, there is no reason for the denial to the practitioner of justice and fairness, or the requirement of regard to a public interest in the investigation of the complaint, because its maker is the Council and not somebody else.

171 In my opinion therefore s 138 applies to complaints made by the Council.

172 The next question which arises is whether the Tribunal was entitled to allow the variations which it did on the application of the complainant Council, a submission to which I have already given some attention. The appellant argues that the amendments should not have been allowed, for three reasons: first because the allegations which were added were not "with respect to [the] complaint"[82]; secondly, because the additional allegations had not been investigated and processed in the manner contemplated by the Act; and thirdly, as recently discussed in *Murray v Legal Services Commissioner*[83], that the solicitor must be given an opportunity, according to the rules of natural justice, of answering the complaint, before the investigation is complete and before it is decided how the complaint is to be dealt with.

173 The starting point for the first proposition is s 167(1) which provides that proceedings may be instituted in the Tribunal "with respect to a complaint … by an information laid … in accordance with this Part". The argument goes that the information must be confined to conduct with respect to, that is to say, the subject of a complaint: if the allegations sought to be added go beyond the conduct the subject of the complaint then the information would have to be regarded as being impermissibly enlarged so as to cease to be with respect to a complaint, that is, the subject matter of the complaint.

174 "With respect to" is a phrase capable of having a very wide import[84]. However as I have said, there must be a reasonable relationship between conduct

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82 The Act, s 167(1).

83 (1999) 46 NSWLR 224.

84 *Bank of NSW v The Commonwealth* (1948) 76 CLR 1 at 186 per Latham CJ.

the subject of the complaint and the variations in the allegations sought to be made. So too, allegations of conduct occurring more than three years before may not be introduced because to do so would be to defeat the intended operation of s 138.

175 The appellant contends that the scheme of the Act requires an investigation by the Council or the Commissioner of any additional allegations before they may be made the subject of an information and determined by the Tribunal.

176 The Court of Appeal did accept that the process of investigation which would ordinarily precede the making of a decision to institute proceedings in the Tribunal was an important protection for a practitioner. Nonetheless, their Honours said, such an investigation could be commenced and even concluded before a complaint was actually made or initiated.

177 It is important to have regard to these matters in considering the view expressed by the Court of Appeal. Section 148(1) does not direct that an investigation be into relevant conduct but "into each complaint". There cannot be an investigation into something which does not yet exist. The appellant points out that in this case the decisions to initiate the complaint under s 135 and to institute proceedings in the Tribunal under s 155 were made at the same time and by immediately consecutive resolutions, and therefore without any possibility of a proper investigation. The submission by the first respondent (which was the subject of an application for leave to cross-appeal) that the primary purpose of s 155 is to ensure that an administrative decision to dismiss a complaint by a "lay complainant" can be the subject of review under Div 6 of Pt 10 of the Act, must be rejected. Even if that be a purpose of s 155 there is another important purpose of that section and that is to ensure that the Council or the Commissioner turn its or his or her mind to the reasonable likelihood or otherwise, of a guilty finding by the Tribunal against the practitioner and reach a state of satisfaction of mind in that regard. In so doing they must also have regard to the distinction between professional misconduct and unsatisfactory professional conduct.

178 It is unnecessary for me to deal with the appellant's third proposition that in reaching a level of satisfaction of mind, the Council or the Commissioner is obliged to provide the practitioner with a copy of the complaint and to give the practitioner an opportunity of answering it before completing the investigation. This obligation arises, the appellant submits, from a duty to accord procedural fairness[85]. He argues that the level of satisfaction of mind required by the Act cannot be reached without taking into account defences and answers which the practitioner is likely to advance in his favour in response to the matters of

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85 See *Murray v Legal Services Commissioner* (1999) 46 NSWLR 224.

complaint. It is unnecessary, however to decide this point because of the matters I have already stated.

179 My conclusions in relation to this aspect of the appeal are these. An investigation must be made of a complaint initiated or made by the Council. The Council or the Commissioner must then turn their minds to that investigation to consider its adequacy or otherwise, and if satisfied that it is adequate, may adopt it as the investigation contemplated by s 155 and then consider the requirements of that section to decide what further steps (if any) should be taken by way of institution of proceedings or otherwise. The adoption of an earlier investigation should not be treated as a mere formality. The presence of ss 155 and 156 operates to deny this. Real consideration should be given to what has already been done and whether any further investigation is required.

180 Whilst it may be accepted that there will undoubtedly be occasions upon which the Commissioner or the Council will wish to act urgently in respect of misconduct by a practitioner, the Council is armed with powers under other sections and the general law to move quickly to prevent, or bring to an end misconduct, and to take remedial steps in respect of it[86].

181 It follows that the first complaint in respect of grounds 2.1 to 2.6, 3.1 to 3.5, 3.7 and 4.1 to 4.8 is not a valid complaint because it was not made within three years of the conduct the subject of the complaint, and the Commissioner has not been asked to and has not turned his mind to the matters to which he should, and cannot have satisfied himself as he must, of the matters referred to in s 138. The balance of the first complaint must also fail because the initiation of the complaint, and the decision to institute the proceedings were made in virtually simultaneous resolutions at the same meeting and without any intervening consideration of the adequacy of such investigation as may have occurred, and whether there should be any further investigation. Nor could there have been any recording as required by s 156 of any decision on the complaint before the decision to lay the information. The decision of the Council on 17 July 1997 to institute proceedings with respect to the second complaint suffers from similar defects. Ground (b) of it was in respect of conduct that had occurred more than three years before that date. There was no investigation of the second complaint and again the decision to institute the proceedings was made in, and as part of the same or successive resolutions as initiated the second complaint. The power of amendment conferred by s 167A did not permit the introduction of allegations of conduct that had occurred more than three years earlier.

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86 The Act, ss 37-38B, 55(1)(a) and (b), 92, 167, 171M.

182 I would allow the appeal and dismiss the application for leave to cross-appeal. I agree with the orders proposed by Gleeson CJ, Gaudron and McHugh JJ.