

2022 Property Law Afternoon

Property law decisions 2021:
An ethics update

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Property law decisions 2021

An ethics update.

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Speaker.



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Agenda.

- 2020/21 complaints statistics
- ACT
 - Council
 - ACAT
- Qld
- NSW



Complaints made in 2020/21



Areas of law – complaints 2020/21.

Area	2020/21
Civil litigation	27
Family law	24
Property law	17
Compensation (personal injury, medical negligence, workers compensation)	13
Criminal law	7
Estate matters	6
Employment	5
Other	3
Migration	2



2019/20 and 2020/21.

Area	2019/20	2020/21
Family law	21	24
Property law	15	17
Compensation (personal injury, medical negligence, workers compensation)	13	13
Civil litigation	12	27
Estate matters	7	6
Other	7	7
Criminal law	4	7
Employment	2	5
Migration	2	2



Conduct – complaints 2020/21.

The main types of conduct complained about were communication and services, i.e.

- Failure to carry out instructions or acting without instructions
- Bullying
- Delay
- Discourtesy
- Lack of competence or diligence
- Lack of communication
- Personal conduct (i.e. negligence, misleading behaviour, conflict of interest)
- Costs



Common property law complaints

- Costs
- Supervision
- Undertakings



Outcome of complaints made in 2020/21

Relevant legislation

- *Legal Profession Act 2006 (ACT)*
- *Legal Profession Regulation 2007 (ACT)*
- *Legal Profession (Solicitors) Conduct Rules 2015 (ACT)*

- Common law



Unsatisfactory professional conduct (UPC)

"unsatisfactory professional conduct" includes conduct of an Australian legal practitioner happening in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.



Professional misconduct (PM)

- "professional misconduct" includes—
- (a) unsatisfactory professional conduct of an Australian legal practitioner, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
 - (b) conduct of an Australian legal practitioner whether happening in connection with the practice of law or happening otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.



Common law

- Conduct which would be reasonably regarded as disgraceful or dishonourable by professional brethren of good repute and competency



Outcome of complaints

- Summary dismissal – the complaint is vexatious, misconceived, frivolous or lacking in substance (s 399).
- Dismissal following an investigation – not UPC or PM or public interest grounds to dismiss (s 412).
- Summary conclusion – UPC (s 413).
- Tribunal – PM or cannot adequately deal with (s 419).
- Withdrawal by complainant.

Outcome of complaints 2020/21

- 26 complaints were summarily dismissed without requiring an investigation.
- 36 complaints were dismissed following an investigation.
- 13 matters were summarily concluded.
- 8 complaints were referred to the ACAT.
- 4 complaints were withdrawn by the complainants.



2021 Council decision



S 413 outcome 1

- Two practitioners were emailing about a conveyance.
- Practitioner A emailed practitioner B and forgot to include an attachment.
- Practitioner B emailed back and said "*Attachment might help...*".
- Practitioner A responded:
 - "I love all your emails.*
 - Especially the naked ones.*
 - With nothing on*
 - I mean with no attachments.*
 - I will try to behave today.*
 - But with you, it is very, very hard."*
- The email was unwelcome and caused offence.



Rule 42

42 ANTI-DISCRIMINATION AND HARRASSMENT

42.1 A solicitor must not in the course of practice, engage in conduct which constitutes:

42.1.1 discrimination;

42.1.2 sexual harassment; or

42.1.3 workplace bullying.

'sexual harassment'
Sex Discrimination Act 1984 (Cth)



A person sexually harasses another person if:

- (a) the person makes an **unwelcome sexual advance**, or an **unwelcome request for sexual favours**, to the person harassed; or
- (b) engages in other **unwelcome conduct of a sexual nature** in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.



The circumstances to be taken into account include, but are not limited to, the following:

- (a) the sex, age, sexual orientation, gender identity, intersex status, marital or relationship status, religious belief, race, colour, or national or ethnic origin, of the person harassed;
- (b) the relationship between the person harassed and the person who made the advance or request or who engaged in the conduct;
- (c) any disability of the person harassed;
- (d) any other relevant circumstance.



Conduct of a sexual nature

"The sexual conduct of the employer can vary, on the one hand, from attempts at sexual intercourse or some other overt sexual connection, through the whole range of sexual contact, including kissing, touching or pinching, and can include purely verbal approaches such as sexual propositions, or gender based insults or taunting."

O'Callaghan v Loder [1983] 3 NSWLR 89, 103
(Mathews DCJ)



Outcome

- Breach of Rule 42
- Also breach of Rules 4 and 5
- Unsatisfactory professional conduct
- Fine of \$1,500



Further emails

- 'You can do No wrong in my book. The sun shines out of your #\$\$%^&*@*'
- 'Mr slack bum got off his bum...Thanks for the reminder. I need people like you to keep me on track. Don't change. Ever.'
- 'Hello gorgeous. Only an angel like you would put up with me...Attached for your beautiful eyes only:...'
- 'Excellent work 99. I knew I could count on you. I got smart. Got you to look after me. Saved my bacon again. You are a legend I will always agree with everything you say. You can do no wrong.'
- 'Good morning beautiful...'
- 'To the most beautiful person in all of LEGAL PRACTICE.'



S 413 outcome 2

- Solicitor of less than 12 months experience being "supervised" by a conveyancer and a solicitor of about 2 years experience.
- Supervising solicitor rarely present at office.
- Husband proposed sale of matrimonial home in NSW held by Husband and Wife.
- Husband attended a conference with Solicitor. Said Wife was sick and would take documents to her.
- Contracts exchanged with Wife's signature unwitnessed.
- Husband produced drivers licences, Medicare cards, rates notice, strata notice and a joint bank statement for purposes of identification.
- Received signed Client Authorisation Forms.
- Solicitor did not meet Wife. All instructions were provided by Husband.



Supervision of legal services

37.1 A solicitor with designated responsibility for a matter must exercise reasonable supervision over solicitors and all other employees engaged in the provision of the legal services for that matter.



Outcome

- Breach of Rule 37
- Unsatisfactory professional conduct
- Public reprimand
- Fine of \$1,500



2021 ACAT decision

Council of the Law Society of the ACT v LP 202103 [2021] ACAT 105

- Between 2011 and 2018 the respondent made 64 advances to two associates to assist with their business and, later, for daily needs. Three of those advances were documented as loan agreements.
- Between 2015 and 2018 the associates made repayments totalling \$18,200.
- The respondent accepted instructions to act for the associates motor vehicle accident matter.
- The respondent settled one of the claims for \$30,000 without providing any advice as to whether that was a reasonable settlement.
- The respondent rendered a tax invoice in the sum of \$4,200 but did not send the invoice prior to transferring funds from trust to office.



Property law issues

- Trust account supervisor.
- In eight conveyancing matters between April 2019 and January 2020 the respondent issued tax invoices to clients for conveyancing matters that did not include any notification of client's rights as required by the provisions of section 291 of the Act.
- In six conveyancing matters the respondent withdrew trust money for the payment of his conveyancing fees where he was not authorised to do so because he:
 - was not directed by each client;
 - did not give properly written notice of the payment; and/or
 - did not make a request for payment or issue an invoice or wait for 7 days before withdrawal as required by regulation 62 of the Regulations.



Outcome

- Professional misconduct
- Unsatisfactory professional conduct
- Fine of \$12,000
- Public reprimand
- Courses approved by the Law Society of the ACT in ethics, costs and trusts accounting
- Costs



291 Notification of client's rights

- (1) A bill must include or be accompanied by a written statement setting out—
- (a) the following avenues that are open to the client if there is a dispute in relation to legal costs:
 - (i) costs assessment under division 3.2.7;
 - (ii) the setting aside of a costs agreement under section 288 (Setting aside costs agreements); and
 - (b) any time limits that apply to the taking of any action mentioned in paragraph (a).

Note These matters will already have been disclosed under s 269 (1) (Disclosure of costs to clients).

(2) Subsection (1) does not apply in relation to a sophisticated client.

(3) A law practice may provide the written statement mentioned in subsection (1) in a form approved by the law society council under section 587 and if it does so the practice is taken to have complied with this section in relation to the statement.



223 Holding, disbursing and accounting for trust money

- (1) A law practice must—
- (a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received; and
 - (b) disburse the trust money only in accordance with a direction given by the person.

(2) Subsection (1) applies subject to an order of a court of competent jurisdiction or as authorised by law.

(3) The law practice must account for the trust money as required by regulation.

(4) If a law practice that is an Australian legal practitioner who is a sole practitioner, or an incorporated legal practice, contravenes subsection (1) or (3), the practitioner or practice commits an offence.
Maximum penalty: 50 penalty units.

(5) If a law practice that is a law firm, or a multidisciplinary partnership, contravenes subsection (1) or (3), each principal of the practice commits an offence.
Maximum penalty: 50 penalty units.

Note For this part, a reference to a **law practice** includes the principals of the law practice (see s 218 (Liability of principals of law practices under pt 3.1)).

(6) An offence against subsection (4) or (5) is a strict liability offence.



229 Dealing with trust money—legal costs and unclaimed money

(1) A law practice may do any of the following, in relation to trust money held in a general trust account or controlled money account of the practice for a person:

- (a) exercise a lien, including a general retaining lien, for the amount of legal costs reasonably owing by the person to the practice;
- (b) withdraw money for payment to the practice's account for legal costs owing to the practice if any relevant provision of this Act is complied with;
- (c) after deducting any legal costs properly owing to the practice, deal with the balance as unclaimed money under section 259 (Unclaimed trust money).

(2) Subsection (1) applies despite any other provision of this part but has effect subject to part 3.2 (Costs disclosure and assessment).



62 Withdrawing trust money for legal costs—Act, s 229 (1)(b)

- Procedures under reg 62:
 1. withdrawn in accordance with compliant Costs Agreement; **OR**
 2. the money is withdrawn in accordance with instructions; **OR**
 3. the money is owed to the practice by way of reimbursement of money already paid by the practice

AND if, before effecting the withdrawal, the practice gives or sends to the person:

 - a. a request for payment, referring to the proposed withdrawal; **OR**
 - b. written notice of the proposed withdrawal and when it will occur.

OR

 1. give the person a bill; and
 2. the person has not objected to withdrawal of the money not later than 7 days after being given the bill or the person has objected not later than 7 days after being given the bill but has not applied for a review of the legal costs not later than 60 days after being given the bill.



2021 QCAT decision

Legal Services Commissioner v Pene [2021] QCAT 299

- Failing to submit external examiner's reports by the required dates
- Engaging in legal practice when not entitled
 - PC expired on 30 June 2019
 - 1 July 2019 letter
 - 23 July 2019 letter
 - 23 July 2019 Pene response "confused"
 - 29 July 2019 advice to apply for certificate
 - 31 July 2019 Pene said would close practice when two conveyancing files settled
 - 5 August 2019 advice to cease practice
 - 5 August 2019 discussion
 - 15 August 2019 Receiver appointed

Outcome

- Employee practising certificate not be granted until after 1 July 2022.
- Principal practising certificate not be granted for a further two years after being granted an employee level practising certificate.
- Complete Queensland Law Society's remedial trust account and ethics courses
- Costs



2021 NCAT decisions



NSW Legal Services Commissioner v Cullen [2021] NSWCATOD 130

- Ms Cullen made a declaration which formed part of an Office of State Revenue Purchaser/Transferee Declaration for a client of the law practice who we shall refer to as.
- The declaration served to confirm that the declarant had witnessed the making of a statutory declaration by the purchaser or transferee of the land for which duty was to be assessed.
- At the time of its execution she:
 - had not seen the face of the client;
 - was not present when the client had purportedly executed the declaration; and
 - she had not identified the client as the person purportedly making the declaration by having known him for at least 12 months.



Outcome

- Professional misconduct
- Public reprimand
- Fine of \$2,500
- Costs



Council of the Law Society of New South Wales v Kekatos
[2021] NSWCATOD 90; [2021] NSWCATOD 196

- The Council sought a professional misconduct finding alleging that the solicitor misled the NSW Land and Property Information when requesting the removal of two caveats registered on a property located in Sydney.
- He attached a judgment handed down on 7 August 2015 that did not relate to the property but the caveats were still removed a month later.
- The Council alleged that the solicitor “knew or ought to have known the orders did not refer or relate” to the property.
- The solicitor contended that he had made a mistake and, from the first moment he was made aware of it, continued to always admit that he had made an error in the request.



Outcome

- Unsatisfactory professional conduct
- Public reprimand
- Costs



Council of the Law Society of NSW v Hunter [2021] NSWCATOD 22

- Solicitor acted for vendor to sell Lot 9 in a neighbourhood plan which was under neighbourhood title under the *Community Land Management Act 1989* (NSW).
- Solicitor gave a written undertaking in an email to the solicitor for the purchasers
 - “I confirm that you have my undertaking that I will not disburse funds in my trust account to my client until the issue of payment to community is resolved.”
- The purchasers’ solicitor understood that undertaking and previous discussions with Mr Hunter to reflect an agreement by Mr Hunter that \$60,000 was to be retained in trust to cover the purchasers’ liability to the neighbourhood association for strata levies.
- Mr Hunter disbursed \$57,999.60 from his trust account




Outcome

- Professional misconduct
- Public reprimand
- Fine
- Costs

Questions?

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Conduct generally



Council of the New South Wales Bar Association v Raphael [2021] NSWCATOD 44 (16 April 2021)

- Mr Raphael (a barrister, 78 years old) and Ms X (a junior solicitor) were each representing a party in a directions hearing in Supreme Court proceedings.
- A Registrar directed Ms X to obtain further information from her supervising solicitor about the delay in prosecuting their client's case.
- Mr Raphael and Ms X first met in the Court room.
- Ms X was sitting in a conference room alone with the door closed while she obtained that information. Mr Raphael entered the conference room and, after referring to Ms X's wedding ring, said words to the effect:

"Won't your husband get jealous because we are spending so much time together? He will think something is going on."
- Ms X's voice became shaky and she started to cry.
- Mr Raphael placed his arm on Ms X's shoulder for between 10 and 20 seconds and kissed the top of her head. He then said *"Don't worry you poor thing."*



Parties' position

- Mr Raphael admitted that placing his arm on Ms X's shoulder for between 10 and 20 seconds and kissing the top of her head, in the context of the comments he made was sexual harassment and constituted unsatisfactory professional conduct.
- The Council submitted that:
 - Mr Raphael's conduct "undermined the work of a very young and inexperienced solicitor, when she was extremely upset and vulnerable"
 - the public hold the legal profession to a high standard and expect that barristers will comply with community expectations and norms.
- The Council sought:
 - reprimand
 - counselling
- Mr Raphael sought:
 - caution
 - being counselled for one hour

Outcome

- Sexual harassment
 - the conduct was “in the course of practice” because it was done in the course of Mr Raphael conducting his practice as a barrister
 - conduct was of a sexual nature
 - conduct was unwelcome
 - a reasonable person, having regard to all the circumstances, would have anticipated that Ms X would be offended, humiliated or intimidated
- Workplace bullying
- Disreputable conduct
 - Mr Raphael’s conduct, while not dishonest, is “otherwise discreditable to a barrister” and is “likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.”
- Unsatisfactory professional conduct
- Sanction
 - reprimand
 - education and counselling for at least eight hours

Council of the New South Wales Bar Association v EFA [2021] NSWCA 339

- Dinner marking the conclusion of a conference of barristers’ clerks.
- At about 11pm, the barrister:
 - performed a greeting ritual with a friend in which oral sex was parodied, which was witnessed by the people sitting at the friend’s table;
 - placed his left hand on the back of an assistant clerk’s head and moved the clerk’s head away from his body; and
 - said to the assistant clerk ‘suck my dick’.
- It was alleged but not found that the barrister lightly pushed the back of the assistant clerk’s head to and from his crotch when he said ‘suck my dick’
- The complainant said she felt angry, humiliated and embarrassed.



Rule 5

5 DISHONEST AND DISREPUTABLE CONDUCT

5.1 A solicitor must not engage in conduct, in the course of practice or otherwise, which demonstrates that the solicitor is not a fit and proper person to practise law, or which is likely to a material degree to:

5.1.1 be prejudicial to, or diminish the public confidence in, the administration of justice; or

5.1.2 bring the profession into disrepute.



Council sought

- Finding of professional misconduct
- Fine
- Behaviour counselling



Tribunal held

- The ritualised greeting constituted 'inappropriate sexual conduct', it had the potential to offend onlookers but nobody was, in fact, offended
- The conduct towards the assistant clerk was 'sexually inappropriate conduct' and unwelcome conduct of a sexual nature but not an 'a sexually inappropriate advance'.
- The conduct was poorly judged, vulgar and inappropriate.
- Breach of the equivalent to rule 5
 - conduct which is discreditable to a barrister
 - conduct which is likely to bring the legal profession into disrepute
- While the dinner had a connection with the Bar, it could not be said to have 'some real and substantial connection with professional practice' in the relevant sense
- Unsatisfactory professional conduct
- Reprimand
- Costs



Court of appeal held

- Tribunal erred in not finding that the conduct occurred in connection with the practice of law, which was admitted by EFA
- Upheld Tribunal decision
- Non-publication order