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MARCH MASTERY
a month of intensive cpd learning

Ethical Considerations that Shape Property Transactions and Disputes

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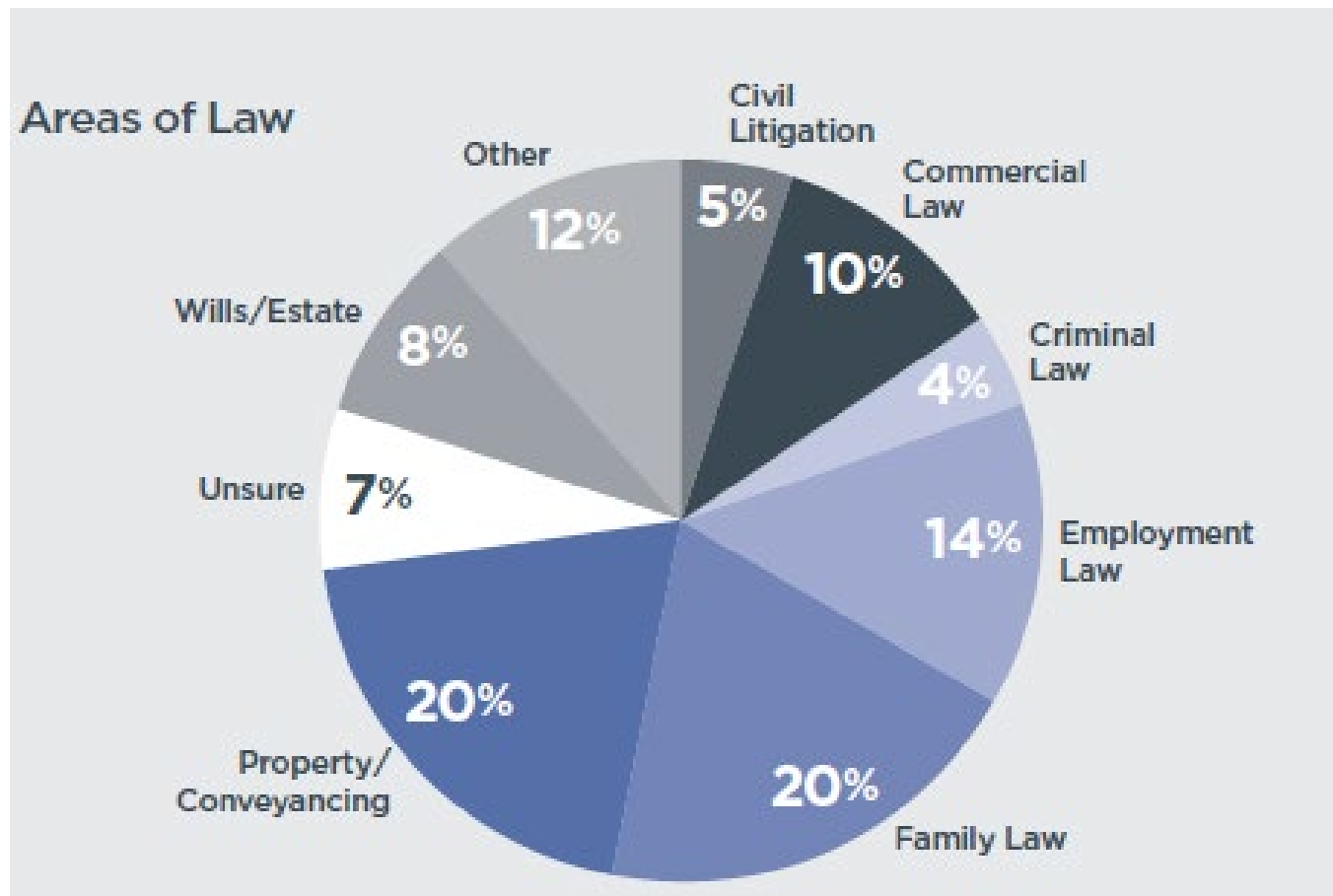
PROPERTY LAW INTENSIVE: WEDNESDAY 12 MARCH 2025



Overview

- Property law stats
- Professional discipline landscape
- Some ethical principles that apply to property law
 - Acting honestly
 - Communicating courteously / not communicating with another practitioner's client
 - Not acting in conflicts
 - Giving and adhering to undertakings / transfer of trust money
 - File maintenance
- Takeaways

Property law stats



ACT Law Society Annual Report 2023-24

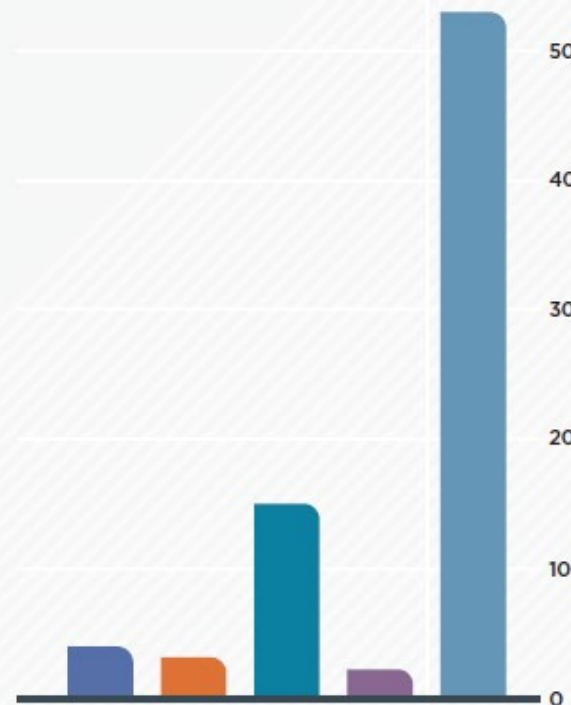
Types of complaints (%)



During the financial year, 77 complaints were finalised:

s.399 dismissal:	53
s.412 dismissal:	15
s.400 withdrawal:	2
s.413 - <i>Summary Conclusion</i> :	3
s.419 - <i>Referral to ACAT</i> :	4

Complaints finalised



Professional discipline landscape

Some terminology

- ***unsatisfactory professional conduct*** includes conduct occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent practitioner.
- ***professional misconduct*** includes—
 - unsatisfactory professional conduct, if the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
 - conduct whether occurring in connection with the practice of law or otherwise that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.

Professional discipline landscape

- **S 399 dismissal**
 - Frivolous or vexatious
 - Lacking in substance
 - Subject of previous complaint
- **S 412 dismissal**
 - No misconduct
 - Human error
- **S 413 summary conclusion**
 - Courtesy
 - Cost disclosure
 - Lack of competence and diligence
 - Failure to provide advice or follow instructions
 - Delay
 - Contacting another practitioner's client
- **S 419 referral to ACAT**
 - Repeated unsatisfactory professional conduct
 - Gross neglect and delay
 - Conflicts
 - Breach of confidentiality
 - Breach of undertaking
 - Trust account breaches
 - Bullying and harassment
 - Dishonesty

Amending documents

LP 202111 v Council of the Law Society of the ACT (Appeal) [2024] 70 and earlier decisions

- Solicitor amended directors' and guarantors' details of a corporate tenant on a commercial sublease without advising the landlord's solicitors and contrary to the landlord's solicitors' express request, making the guarantee difficult to enforce as the guarantors were individuals living overseas.
- Breach of rules 4.1.2, 4.1.3, 4.1.4, 5.1.1 and 5.1.2.
- The solicitor was also found to have misled the Law Society in responding to the complaint in breach of rule 43.

4 Other fundamental ethical duties

4.1 A solicitor must also—

- 4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client,
- 4.1.2 be honest and courteous in all dealings in the course of legal practice,
- 4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible,
- 4.1.4 avoid any compromise to their integrity and professional independence, and
- 4.1.5 comply with these Rules and the law.

5 Standard of conduct—dishonest or disreputable conduct

5.1 A solicitor must not engage in conduct, in the course of legal practice or otherwise, which—

5.1.1 demonstrates that the solicitor is not a fit and proper person to practise law, or

5.1.2 is likely to a material degree to—

(i) be prejudicial to, or diminish the public confidence in, the administration of justice, or

(ii) bring the profession into disrepute.

43 Dealing with the regulatory authority

43.1 Subject only to his or her duty to the client, a solicitor must be open and frank in his or her dealings with a regulatory authority.

43.2 A solicitor must respond within a reasonable time and in any event within 14 days (or such extended time as the regulatory authority may allow) to any requirement of the regulatory authority for comments or information in relation to the solicitor's conduct or professional behaviour in the course of the regulatory authority investigating conduct which may be unsatisfactory professional conduct or professional misconduct and in doing so the solicitor must furnish in writing a full and accurate account of his or her conduct in relation to the matter.

Characterisation: Professional misconduct

Sanctions:

- 12 month suspension of the solicitor's practising certificate
- Public reprimand
- Solicitor to undertake an approved course in ethics
- Costs of proceedings and appeal

Given the comments of Justice Mossop about “the temptations to be other than scrupulously honest are so great that this point has to be made expressly and often”, quoted by Chief Justice McCallum at the opening of the 2023 Legal Term, I repeat her Honour’s statement:

Next, and this should go without saying, the Court expects honesty. In a speech on the occasion of an admission ceremony last year, Justice Mossop said that the temptations to be other than scrupulously honest are so great that this point has to be made expressly and often. His Honour said:

“The operation of the legal system generally, and the court system in particular, is fundamentally dependent upon the honesty of lawyers. It is the fundamental value behind your appointment as an officer of the court. If there is nothing else you understand about being an officer of the court it is that you can be depended upon to be honest. Scrupulously honest.”

Justice Mossop concluded by commending “four words” you should understand about being a lawyer, “Be honest. Don’t lie”.

Council of the Law Society of New South Wales v Sideris [2024] NSWCATOD 3; *Council of the Law Society of New South Wales v Sideris (No 2)* [2024] NSWCATOD 121

- Son-in-law negotiating an aged care accommodation agreement with The Salvation Army (**TSA**).
- Held a practising certificate that only enabled him to act as a “corporate solicitor” and the legal firm on his letterhead did not exist.
- 46 emails sent directly to TSA.
- Contents of 54 emails included threats to commence legal action, profanities, offensive and otherwise inappropriate language.
- The solicitor for TSA on repeated occasions requested the solicitor to cease communicating directly with TSA.
- Breach of rules 4.1.2 and 33.

33 Communication with another solicitor's client

33.1 In representing a client, a solicitor shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another practitioner unless—

33.1.1 the other practitioner has previously consented,

33.1.2 the solicitor believes on reasonable grounds that—

(i) the circumstances are so urgent as to require the solicitor to do so, and

(ii) the communication would not be unfair to the opponent's client,

33.1.3 the communication is solely to enquire whether the other party or parties to a matter are represented and, if so, by whom, or

33.1.4 there is notice of the solicitor's intention to communicate with the other party or parties, but the other practitioner has failed, after a reasonable time, to reply and there is a reasonable basis for proceeding with the communication.

Characterisation: Professional misconduct

Sanctions:

- Name of the respondent be removed from the roll
- Costs

Di Giovanni v Council of the Law Society of New South Wales [2024] NSWCATOD 66

- Solicitor acted for both parties in a commercial property conveyance in Sydney.
- Vendor was a longstanding client of the solicitor and the purchaser was a company formed by members of the solicitor's family for the purpose of the purchase.
- No advice given to vendor about acting for both sides.
- Vendor wished to resile from sale and solicitor tried to negotiate a mutual rescission with vendor paying purchaser's costs.
- Gave advice to vendor that there were limited bases to resile and said it may be prudent to obtain independent advice.
- Settlement occurred (reluctantly).
- Breach of rule 11.

11 Conflict of duties concerning current clients

11.1 A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients.

11.2 If a solicitor or a law practice seeks to act for two or more clients in the same or related matters where the clients' interests are adverse and there is a conflict or potential conflict of the duties to act in the best interests of each client, the solicitor or law practice must not act, except where permitted by Rule 11.3.

11.3 Where a solicitor or law practice seeks to act in the circumstances specified in Rule 11.2, the solicitor or law practice may, subject always to each solicitor discharging their duty to act in the best interests of their client, only act if each client:

11.3.1 is aware that the solicitor or law practice is also acting for another client; and

11.3.2 has given informed consent to the solicitor or law practice so acting.

11.4 ...

11.5 If a solicitor or a law practice acts for more than one client in a matter and, during the course of the conduct of that matter, an actual conflict arises between the duties owed to two or more of those clients, the solicitor or law practice may only continue to act for one of the clients (or a group of clients between whom there is no conflict) provided the duty of confidentiality to other client(s) is not put at risk and the parties have given informed consent.

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- Characterisation: Unsatisfactory professional conduct
 - Sanctions:
 - Reprimand
 - Course in ethics
 - Further sanctions:
 - Further course to gain an understanding of the fundamental complications of acting for both parties in a commercial transaction.
 - Apologise to vendor

Council of the Law Society of the ACT v LP082023 (Occupational Discipline) [2023] ACAT 63

- Solicitor acted for husband on sale of property, which was the subject of a family law property dispute.
- Wife agreed to remove caveat she registered over the property on the basis that net proceeds of sale be held in the firm's trust account pending Court order or joint written instructions. Solicitor agreed.
- Upon request by client solicitor paid from the trust funds:
 - child support agency bill; and
 - electricity bill.
- Breach of section 223 of the Act and rule 6.1.

6 Undertakings in the course of legal practice

6.1 A solicitor who has given an undertaking in the course of legal practice must honour that undertaking and ensure the timely and effective performance of the undertaking, unless released by the recipient or by a court of competent jurisdiction.

6.2 A solicitor must not seek from another solicitor, or that solicitor's employee, associate, or agent, undertakings in respect of a matter, that would require the co-operation of a third party who is not party to the undertaking.

Holding, disbursing and accounting for trust money

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.

Characterisation: Professional misconduct

Sanctions:

- Public reprimand
- Fine of \$8,000
- Courses in ethics and trust accounting prior to applying for a practising certificate
- Costs fixed in the sum of \$3,000

***Council of the Law Society of New South Wales v Lee* [2024] NSWCATOD 108**

- Manager appointed to practice.
- Manager approved correspondence on two files but solicitor issued other correspondence.
- Declared that stamp duty had been paid when it had not to enable a settlement to occur.
- Failure to provide information to the regulator.
- Files stored at home in plastic container:
 - No matter register
 - Incomplete files – contracts, retainer/cost disclosure, invoices, advices, file notes, status of matter
 - Client names and contact details not recorded
- Practising when not entitled to do so.
- Engaged in legal practice without holding professional indemnity insurance.

Characterisation: Professional misconduct with respect to most grounds individually and globally

Sanctions:

- Reprimand
- Fine of \$10,000
- Course in practice management
- Cannot apply for a principal's practising certificate unless supervised for 5 years
- Costs fixed in the sum of \$10,000

Takeaways

Takeaways

- Specifically alert other side to proposed amendments in documents.
- Upload client communication to file.
- Respond to investigations fully and openly.
- “Be honest. Don’t lie”.
- Do not correspond with another practitioner’s client.
- Consider who is copied into emails.
- Ensure all correspondence is polite. Cautious use of work email address.
- If warned, may be something in it.

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- Consider if you really need to act for multiple parties.
 - Obtain fully informed consent if proposing to act for both parties.
 - File note important conversations.
 - Withdraw if conflict arises.
 - Undertakings can arise from an assurance without specifically giving an “undertaking”.
 - Trust money is “sacred”.
 - Poor file maintenance can be a conduct issue even if the files are otherwise being conducted appropriately.

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