

# LEGAL PRACTITIONERS DISCIPLINARY TRIBUNAL

## **BETWEEN:**

ROBERT E KENNEDY  
Appellant

## **AND**

LAW SOCIETY NORTHERN  
TERRITORY  
Respondent

## **REASONS FOR DECISION**

2 July 2008

When this matter was listed for hearing before the Tribunal on 16 May 2008 the parties were invited to make submissions concerning the jurisdiction that the Tribunal had to hear and determine this appeal.

On 18 June 2008 the Tribunal heard submissions from both the Law Society Northern Territory (LSNT) and Mr Kennedy. At the conclusion of those submissions the Tribunal found that it had no jurisdiction to hear and determine the appeal and that the appeal was thereby incompetent. The Tribunal indicated it would publish reasons for its decision.

Before considering the effect of the *Legal Profession Act (2006)* (LPA) upon the appeal it is necessary to have regard to some relevant dates and facts.

On 31 March 2006 Mr Kennedy made a complaint to the LSNT concerning the conduct of a practitioner.

Exactly 1 year later, on 31 March 2007, the LPA came into operation, repealing the previous *Legal Practitioners Act (1974)* (the previous Act).

On 17 April 2007 the complaint made by Mr Kennedy was determined by the LSNT.

On 23 April 2007 a notice of decision was sent by the LSNT to Mr Kennedy.

On 23 May 2007 Mr Kennedy sent a letter to the LSNT advising that he wished to appeal the determination and that the grounds of appeal would be provided in following correspondence.

On 25 May 2007, Mr Kennedy sent a letter to the LSNT setting out in more detail his grounds of appeal.

On 25 June 2007 a copy of the letter of 25 May 2007 addressed to the LSNT was filed at the Registry of the Supreme Court.

On 27 June 2007 the LPA was amended by adding regulation 96A.

The LPA directs in section 745 that where a complaint has been laid under the old Act (section 46<sup>1</sup>), and the investigation of the complaint is concluded after the commencement of the LPA and the repeal of the old Act, then the investigation is required to be completed as if the old Act had not been repealed.

#### **"745 Investigations into professional conduct**

(1) This section applies if:

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<sup>1</sup> "A person may complain, in writing, to the Law Society regarding the professional conduct of a legal practitioner or former legal practitioner."

(a) before the commencement date, the Law Society had started an investigation under section 46B<sup>2</sup> of the repealed Act in relation to the professional conduct of a legal practitioner or former legal practitioner; and

(b) immediately before the commencement date, the investigation had not been completed.

(2) The investigation must be completed under the repealed Act as if it had not been repealed.

(3) If a person would have been entitled to appeal against a decision of the Society on the investigation under section 49<sup>3</sup> of the repealed Act had that Act not been repealed, the person may appeal to the Supreme Court against the decision of the Society under section 513<sup>4</sup> as if it were a decision to take action under section 499(2)<sup>5</sup>."

Thus section 745 gives to a legal practitioner a right to appeal an investigation completed after the commencement of the LPA to the Supreme Court in respect of the suspension of the practitioner's practising certificate as if the decision to suspend were made under a section that only relates to fines and reprimands, and from which there is no appeal as of right to the Supreme Court.

This seems to be a drafting error and it is highly likely that the reference to section 499 (2) is actually a reference to section 502, where an appeal to the Supreme Court does lie in the case of the LSNT suspending a practising certificate.

Significantly for this matter, though, section 745 of the LPA limits the right of appeal against such a decision to one vesting in a person who might have appealed under section 49 of the old Act, and the only person who had that right was the legal practitioner complained of and not the complainant.

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<sup>2</sup> "The Law Society... shall, upon receipt of a complaint under section 46... investigate the professional conduct of a legal practitioner."

<sup>3</sup> The appeal is to the Complaints Committee.

<sup>4</sup> Only in respect of suspension of practicing certificate by LSNT.

<sup>5</sup> Reprimand and fine only.

As a consequence, Mr Kennedy has no right to appeal from the determination of the LSNT under section 745 of the LPA.

Section 50 of the old Act did provide a right of appeal to a complainant in subsection (1) but restricted the right of appeal to, in effect, charges of professional misconduct involving behaviour more culpable than the general obligations of a legal practitioner described in section 44 (1) of the old Act. The restriction of the ambit of the right of appeal by a complainant from a determination of the Law Society under section 46 of the old Act is of some relevance when considering the interrelation between the old Act and the LPA concerning complaints rights of appeal and the transition between the two Acts.

The LPA does not contain a traditional transitional section dealing with matters that may have been commenced under the previous Act and are to be continued under the LPA apart from section 745.

Instead it contains section 761 that is entitled "Transitional regulations" and directs that the regulations may make a provision to facilitate "the doing of anything to achieve the transition from the operation of the repealed Act to this Act"

#### **761 Transitional regulations**

(1) The regulations may make provision (a *transitional regulation*) about a matter for which:

(a) it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of the repealed Act to this Act; and

(b) this Act does not make provision or sufficient provision.

(2) A transitional regulation may have retrospective operation to a date not earlier than the date of assent to this Act.

(3) However, to the extent a transitional regulation has retrospective operation, it does not operate to the disadvantage of a person (other than the Territory or a Territory authority) by decreasing the person's rights or imposing liabilities on the person.

(4) This section expires 2 years after the commencement date.

By exercise of that power, regulation 96A was promulgated and that regulation says:

#### **96A Investigations into professional conduct**

(1) If, on completion of an investigation under section 745(2) of the Act, the Law Society would have been entitled to lay a charge of professional misconduct under the repealed Act, the Society must start proceedings in the Disciplinary Tribunal under Chapter 4.

(2) If, on completion of an investigation under section 745(2) of the Act, the Society decides to dismiss the complaint and the complainant would have been entitled to lay a charge of professional misconduct under the repealed Act, the complainant may appeal against the decision as if it were made under section 498.

This regulation preserves the right of the complainant to appeal an adverse determination by the Law Society under section 46 of the old Act, but only in circumstances in which the complainant might have laid a charge of professional misconduct, that is, in respect of conduct not described by section 44 (1) of the old Act. To that extent it is consistent with the right of appeal afforded by section 50 of the old Act.

If the Tribunal considered that regulation 96A applied to Mr Kennedy then it would have been required to consider whether the conduct complained of was simply contrary to section 44 (1) of the old Act or whether the conduct complained of would have amounted to professional misconduct. For reasons expressed below, the Tribunal was not required to enter into that consideration.

If the Tribunal was of the view that regulation 96A did preserve a right of appeal in Mr Kennedy that could be exercised by him then Mr Kennedy could have appealed in those circumstances contemplated by section 498 of the LPA. The relevant sections concerning a decision of the LSNT and the right of appeal of a complainant are set out below.

#### **498 Dismissal of complaint**

After completing an investigation of a complaint against an Australian legal practitioner, the Law Society may dismiss the complaint if satisfied:

- (a) it is frivolous or vexatious; or
- (b) there is no reasonable likelihood that the practitioner will be found guilty by the Disciplinary Tribunal of either unsatisfactory professional conduct or professional misconduct; or
- (c) it is in the public interest to do so.

#### **506 Appeals**

(1) An aggrieved person may appeal to the Disciplinary Tribunal against a decision of the Law Society to:

- (a) dismiss a complaint made about an Australian legal practitioner under section 498; or
- (b) take action against an Australian legal practitioner under section 499(2).

(2) An aggrieved person is:

- (a) for an appeal mentioned in subsection (1)(a) – the complainant; or
- (b) for an appeal mentioned in subsection (1)(b) – the Australian legal practitioner.

(3) The appeal must be started by filing notice of appeal with the Tribunal within 28 days after receiving the information notice for the decision.

(4) The notice of appeal must state the grounds of appeal.

As can be seen, if the Law Society had made a determination under section 498 of the LPA, section 506 of the LPA gives a right of appeal to a complainant and that right is exercised the complainant by filing a notice of appeal with the Tribunal within 28 days after receiving the information notice for the decision.

It should be noted that the right of appeal given to a complainant under section 506 LPA is not restricted to the conduct complained of as an appeal under section 50 of the old Act would have been and an appeal under section 506 LPA can be in respect of all conduct of a legal

practitioner and not conduct amounting to professional misconduct. This is limited by regulation 96A (2) which restricts the right of appeal to cases where the complainant could lay a charge of professional misconduct.

It turns now to consider whether regulation 96A has retrospective effect. Clearly, if that regulation does not have retrospective effect then no right of appeal vested in Mr Kennedy until the regulation came into effect. By that time, of course, the 28 day period for appeal had expired and that raises a further issue whether the Tribunal has power to extend the time for filing an appeal.

Regulation 96A does not refer to a date upon which it was to come into operation and the presumption is that it would act prospectively<sup>6</sup> unless there was sufficiently clear language to indicate that it was intended to come into operation on some other date<sup>7</sup>.

It seems clear that section 761 of the LPA evinced some intention in the Legislature to permit the retrospective operation of a regulation to facilitate the transition from the old Act to the LPA. Section 761 (2) directs that any retrospective operation of the regulation cannot precede the promulgation of the LPA, but does not direct that any such regulation made under section 761 of the LPA is deemed to operate from that date.

Neither does the regulation deal with the question of the extension of the time to commence an appeal. It must have been clear to the drafters that so much time had elapsed between the LPA and the commencement of regulation 96A that only appeals commenced 28 days before 27 June 2008 would have been filed in time to comply with section 506 LPA.

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<sup>6</sup> *Maxwell v Murphy* (1957) 96 CLR 261 at 267; *Fisher v Hebburn Ltd* (1960) 105 CLR 188 at 194

<sup>7</sup> *R v Kidman* (1915) 20 CLR 425 at 451

As a consequence there is an absence of clear intention that regulation 96A has retrospective effect.

The presumption against the retrospective effect of legislation only arises when the legislation would impinge on a person's rights or duties<sup>8</sup>.

Absent regulation 96A, the practitioner was immune from a number of adverse occurrences such as the appeal by the complainant under the LPA, becoming a party to the appeal by virtue of section 506 LPA, being subject to costs orders under the LPA and publication of the potential disciplinary action taken.

The same considerations remove regulation 96A from a merely procedural provision that could have retrospective effect as it affects the pre-existing substantive rights of the legal practitioner complained of<sup>9</sup>.

Section 761 (3) also deals with the possibility that a transitional regulation might affect the rights of any person and states that if (sic) a regulation enacted under its auspices does have retrospective effect it cannot operate to the disadvantage of any person and to that effect is self limiting in its own operation.

The view of the Tribunal is that regulation 96A does not have retrospective effect for the above reasons.

If regulation 96A does have retrospective effect then Mr Kennedy was required to file his notice of appeal with the Tribunal within 28 days of the information notice being received by him on or about 23 April 2007. He did not do so until 25 June 2007, well outside the relevant time limit.

There is no power contained in the LPA for the Tribunal to extend the time in which an appeal might be filed under section 506 of the LPA. The

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<sup>8</sup> *Carr v Finance Corp of Australia Ltd* (1982) 150 CLR 139 at 151

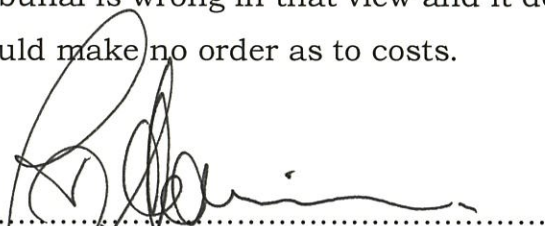
<sup>9</sup> *Victrawl Pty Ltd v Telstra Corp Ltd* (1995) 183 CLR 595 at 615



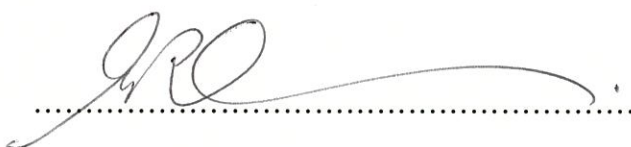
Tribunal is not a Court<sup>10</sup> and has no recourse to the Limitation Act (1981). There is no other power known to the Tribunal that would permit it to extend the time in which Mr Kennedy could have appealed under section 506 of the LPA.

Mr Kennedy has unfortunately fallen into a lacuna created by the interrelationship between the old Act and the LPA, in one sense, but it is still not clear that he would have had a right to appeal under the previous legislation in any event.

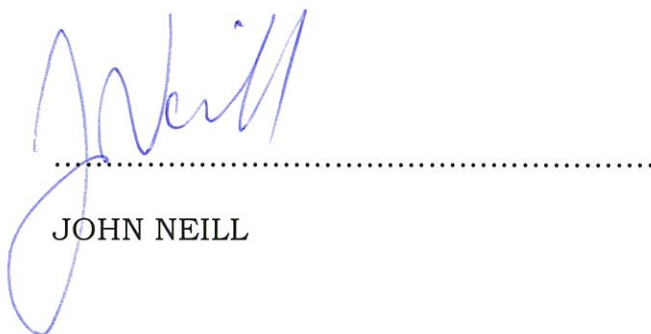
The Tribunal is of the view that as its jurisdiction to hear this appeal was not enlivened it has no power to award costs to either party. If the Tribunal is wrong in that view and it does have such discretion then it would make no order as to costs.



IAN MORRIS



EVE ROBINSON



JOHN NEILL

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<sup>10</sup> *Jones v TIO* 18 NTR 17