THE SUPREME COURTS' SUPERVISORY JURISDICTIONS

The Supreme Court of Victoria has a constitutionally entrenched unlimited[1] subject matter jurisdiction:

- it could probably hear a claim between residents of different states within the Arctic Circle about a snowmobile accident in Canada governed by Taiwanese law, if the defendant could be served according to law, or submits to its jurisdiction;
- the jurisdiction cannot be altered by a Victorian statute unless by a special vote of parliament by a statute which expressly states the intention to do so: s. 85 of the *Constitution Act 1975* (Vic);
- but the jurisdiction can be abrogated by a Commonwealth statute.[2]

The Legal Profession Uniform Law does not purport to limit the Supreme Court's jurisdiction, two core aspects of which (within the Court's inherent jurisdiction)[3] are the supervision and discipline of all Victorian lawyers, who are officers of the Court, and supervision and moderation of the fees charged by its officers.[4] Indeed, it is partially expressly preserved by the uniform legislation.[5] By virtue of s. 85, no argument can arise, in Victoria at least, that that which is excluded from express preservation is impliedly abrogated or altered.

Section 25 of the Legal Profession Uniform Law makes all Australian lawyers (i.e. people who have practising certificates in any Australian jurisdiction, regardless of where they were admitted) officers of the Supreme Court of Victoria, which may extend the Court's supervisory jurisdiction.

Other states and territories do not have provisions cognate with s. 85,[6] and nor does the United Kingdom,[7] so authorities about the express and implied abrogation of their superior courts' jurisdiction must be treated with caution in Victoria. I suspect a failure to keep this in mind has contributed to a confusion or at least a lack of awareness in the profession and in parts of the judiciary about the supremity of the

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[1] The law was elegantly summarised recently in *Thomas v The a2 Milk Company Ltd [No 2]* [2022] VSC 725. As to 'unlimited': [28].

[2] As was found to have occurred in *James (a pseudonym) v Taussig Cherrie Fildes* [2022] VSC 559 in relation to costs in the Family Court in days gone by.

[3] See IH Jacob, 'The Inherent Jurisdiction of the Court' (1970) 23 *Current Legal Problems* 23 and Keith Mason, 'The Inherent Jurisdiction of the Court' (1983) 57(8) *Australian Law Journal* 449.

[4] *Woolf v Snipe* (1933) 48 CLR 677; *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666 at [1317], [1372], [1395]. The supervision of lawyers' fees jurisdiction dates back to the late Middle Ages in England: *Harrison v Tew* [1990] 2 AC 523 at 529D.

[5] Section 155, *Legal Profession Uniform Law Application Act 2014 (Vic)* (in relation to judicial review) and Legal Profession Uniform Law s. 264 ('The inherent jurisdiction and powers of the Supreme Court with respect to the control and discipline of Australian lawyers are not affected by anything in [Chapter 5 ('Dispute Resolution and Professional Discipline')], and extend to Australian legal practitioners whose home jurisdiction is this jurisdiction and to other Australian legal practitioners engaged in legal practice in this jurisdiction.')

[6] John Waugh, 'The Victorian Government and the Constitution of the Supreme Court' (1996) 19 UNSWLJ 409.

[7] For an examination of the inherent jurisdiction in the UK, see Stuart Sime, 'Inherent Jurisdiction and the Limits of Civil Procedure' in Assy and Higgins (eds), *Principles, Procedure and Justice, Essays in Honour of Adrian Zuckerman*, 2020, Oxford University Press.

Supreme Court in the supervision of lawyers and how unaffected it should be by statute.

Even in those jurisdictions where statutes may be taken impliedly to affect the Court's inherent supervisory jurisdiction, the courts will generally jealously guard their jurisdiction unless to exercise it would be positively inconsistent with a statutory provision.[8] So, in *Harrison v Tew* [1990] 2 AC 523 the House of Lords emphasised at 536 that an affirmative statutory provision setting up a legal right does not impliedly revoke or affect a similar common law right. But the court found that parliament had intended to legislate that in no case could a bill more than 12 months old be taxed, thereby abrogating the court's inherent jurisdiction to supervise lawyers' fees to that extent.

The erection of a statutory scheme which does not seek to alter the Court's inherent jurisdiction in accordance with s. 85, such as the Legal Profession Uniform Law, for the discipline of Victorian lawyers and for the assessment of legal costs as between solicitor and client, cannot affect the Court's inherent jurisdiction. The Court has many times re-asserted that statutory schemes for the regulation of lawyers are merely complementary to its inherent jurisdiction.[9]

The Supreme Courts can in their inherent supervisory jurisdiction fine and suspend[10] practitioners as well as strike them off the roll of practitioners, and the Court did, in effect, suspend a practitioner from practice, in an exercise of this jurisdiction, in the course of what is known in Victoria as the Banksia class action.[11]

Probably as a result of the passage in Victoria of the *Civil Procedure Act 2010* (another statute which does not attempt to affect the Supreme Court's inherent jurisdiction in accordance with s. 85) own motion orders of the Supreme Court of Victoria for lawyers to 'show cause', whether or not expressly so worded, seem to me to be increasingly common. At the same time, litigants in the Costs Court, a statutory court of limited jurisdiction[12] set up within the Trial Division of the Supreme Court, have begun to explore the possibilities of resort to the inherent jurisdiction. So too has the NSW Court of Appeal recently reasserted the breadth and vigour of the inherent jurisdiction in relation to supervision of lawyers' charges.[13]

The Legal Profession Uniform Law gives no right of costs assessment to commercial or government clients for example, and such a client of mine applied for taxation in the Court's inherent jurisdiction, but that case did not go to judgment.

Subsequently, a sophisticated client convinced the Costs Judge using similar arguments that even if it was out of time to seek taxation under the *Legal Profession Act 2004* (Vic) (which did give such clients a statutory right to taxation, but did not

[8] See Keith Mason 'The Inherent Jurisdiction of the Supreme Court' (1983) 57(8) *Australian Law Journal* 449 at 457 and the authorities cited at fn 8 on that page; *Hartnett v Bell* [2023] NSWCA 244 at [123(4)].

[9] See the cases cited in *Legal Services Commissioner v Rushford* (2010) 29 VR at fn 6, and *Re Jabe; Kennedy v Schwarcz* [2021] VSC 106 at [46]. To similar effect is *Pryles & Defteros (a firm) v Green* [1999] 20 WAR 541 at [22]ff.

[10] *In re Davis* (1947) 75 CLR 409, 414.

[11] *Re Zita* [2022] VSC 354.

[12] *Keybridge Capital Pty Ltd v Macpherson Kelley Pty Ltd* [2022] VSC 831 at [19]; *Owerhall v Bolton & Swan Pty Ltd* [2015] VSC 417 at [7]. The Costs Court is invested with the Supreme Court's inherent jurisdiction, however, by the route identified in *Keybridge* at [49].

[13] *Hartnett v Bell* [2023] NSWCA 244 at [123] per Bell CJ with whom the other judges agreed.

give them a right to seek an extension of time to do so), the Court could tax the costs (which were in respect of proceedings in the Supreme Court) in its inherent jurisdiction, which is discretionary. Then his Honour decided that it should exercise the discretion.[14]

The Costs Judge cited with approval the following passage from an earlier decision:

> While this inherent jurisdiction to reduce solicitor-own client costs has been applied in reported decisions that involve exorbitant demands or serious professional misconduct, that does not mean that the Court's inherent jurisdiction to deal with solicitor-own client costs is limited to such cases. The inherent power of a superior court cannot be restricted to defined and closed categories. The inherent jurisdiction of the Court to deal with a party's solicitor-own client costs does not require a threshold determination of a certain qualifying level of misconduct by their solicitors, it applies when the need arises to ensure that legal costs are 'fair and reasonable and no more.'[15]

1 EXAMPLES OF SHOW CAUSE COMMANDS

Let me provide some recent examples of show cause or like commands.[16]

Besim In a criminal appeal, the Victorian Court of Appeal convened a mention for the purpose of hearing from three practitioners who were also federal Ministers as to why they should not be dealt with for contempt for comments by them in a newspaper article published a few days after the hearing of an appeal by a Mr Besim, when judgment was reserved.[17]

Albert By way of a second example, the Supreme Court ordered a barrister and a solicitor to appear before it and provide any explanation and/or make any submission as to why it ought not consider whether certain correspondence to the Court's administrative staff constituted a contempt and whether they should be referred to the Victorian Legal Services Commissioner for investigation.[18]

There was no cross-examination or questioning of the solicitor or barrister directly by the Court (they appeared through counsel), and no contradictor, but the Court disbelieved some of the affidavit testimony,[19] and it seems in fact to have progressed to considering whether the correspondence amounted to a contempt, as opposed to considering whether it should consider that question.

In each of these first two examples, the practitioners were effectively to show cause why a procedure which might give rise to an adverse finding should not be initiated, though in the second case, the Court provided extensive particulars by letter of the

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[14] It is an unusual decision, because the Applicant did not expressly rely on the Court's inherent jurisdiction, but the Costs Judge seems either to have treated the statutory provision it did rely on (s. 17D(1)(a) of the *Supreme Court Act 1986* (Vic)) as a codification of an aspect of the Court's inherent jurisdiction, or to have invoked the inherent jurisdiction of his own volition.

[15] *Keybridge Capital Pty Ltd v Macpherson Kelley Pty Ltd* [2022] VSC 831 at [48], citing *Lissenden v Dellios* [2021] VSC 520 at [42].

[16] In New South Wales, see *Ibrahim v Nasr (No 2)* [2021] NSWSC 1481; *Sithakoul v Su* [2022] NSWSC 132; *Eden King Lawyers Pty Ltd v Makari (No 2)* [2022] NSWSC 479; *Odtojan v Condon (No 2)* [2023] NSWCA 149.

[17] *DPP (Cth) v Besim (No 2)* (2017) 52 VR 296.

[18] *Re Albert* [2021] VSC 297 at [20].

[19] Ibid at [48].

conduct and observed that it considered that there was 'a prima facie case that your conduct may have constituted' a contempt of court, unsatisfactory professional conduct, and a breach of the professional conduct rules.

Yara The third example occurred back in 2014, when the Victorian Court of Appeal invited the parties, without using the expression 'show cause', to make submissions 'directed to the question whether any of them had failed to meet their overarching obligation under the [*Civil Procedure Act 2010*] to use reasonable endeavours to ensure that the costs incurred in the appeal were reasonable and proportionate.'[20]

The parties' lawyers were not joined and they advanced argument about their own fees on behalf of their clients without criticism from the Court that they had a conflict of interest and duty in doing so.

Jabe The fourth example occurred after a testators family maintenance claim, in which the parties' solicitors charged their clients $50,000 and $46,270 respectively in a dispute about an estate worth about $325,000. The Court was asked to approve a settlement under which the claimant would receive $100,000 inclusive of his costs out of the estate.

Expressly in the exercise of its inherent supervisory jurisdiction over its officers, the Court raised concerns about the parties' costs and 'enquired whether' they would take the opportunity to make submissions in relation to specific matters, such as whether their solicitors' costs disclosures were void for non-disclosure. Each party did so through their solicitors. No criticism was advanced that the solicitors had a conflict of interest and duty.

Neither party had raised any concern as to the amount of their lawyers' fees and disbursements, and no one applied for any such hearing. Following submissions, the Court made findings that costs agreements were void and that solicitors (who were not joined to the proceedings) had breached the *Civil Procedure Act 2010*, and that fees were not fair and reasonable, and ordered that both solicitors' costs be taxed, as between solicitor and client, by the Costs Court (a division of the Supreme Court).[21] It made the taxation order pursuant to r. 63.65 of its civil procedure rules, which commences 'This Rule applies where the Court by order, whether or not made by or under any Act, refers a bill of costs to the Costs Court for taxation or directs that a bill of costs be taxed'.

In each of the third and fourth examples, the practitioners were effectively to show cause why an adverse finding should not be made, and why a procedure which might give rise to further adverse findings should not be initiated. In the fourth example, about the solicitors' fees, the Court's command was formally directed to the parties, rather than to their lawyers.

Banksia The fifth example is a substantial one, part of what would, but for the Nicola Gobbo affair, be well-described as the greatest Victorian legal scandal of recent times, the Banksia class action.

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[20] *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at [4].

[21] *Re Jabe; Kennedy v Schwarcz* [2021] VSC 106. Another, subsequent, example in the same realm of practice is *Lissenden v Dellios* [2021] VSC 520. Indeed, the Testators Family Maintenance List of the Court will not approve settlements until it has been notified of the costs payable to each party's own lawyers: cl 12, Practice Note SC CL 7: Testators Family Maintenance List. If those costs exceed 120% of the estimate required to be given before the first return date, further information is required.

In an application in those proceedings for approval of the plaintiff's costs and of the litigation funder's commission heard concurrently with the application to approve the settlement of the class action, the Court joined of its own motion an expert witness who was a costs lawyer (Peter Trimbos), and a solicitor associated with the plaintiff's litigation funder (Mark Elliott), to answer certain allegations of Court-appointed contradictors.[22] It did so after the close of evidence in those approval applications which proceeded as one of Victoria's biggest trials over many weeks. Others had been previously joined, including the principal of the lead plaintiff's solicitors (Tony Zita), and counsel (Norman O'Bryan KC and Michael Symons).

Those barristers gave up, mid-trial, their defence of allegations made against them by a Court-appointed contradictor and invited the Court to strike them off the roll, and the Court later did so in its judgment.

The sixth example occurred in the same case. Again of its own motion, as part of its judgment in the approval application, the Court ordered Zita and a second solicitor involved with the litigation funder (Mark's son Alex) to show cause whether they should be struck off on the basis of the reasons for judgment in the approval application,[23] expressly referring during argument to the Court of Appeal's show cause command in *Besim*, in explanation of this course.

Zita survived the show cause procedure, the Court accepting his submission that he should be suspended for a period which would allow for the possibility of resuming his practice, rather than being struck off, despite zealous argument to the contrary from counsel for the Court-appointed contradictor, the Victorian Legal Services Commissioner who accused him of 'depravity'.[24] Alex Elliott ultimately did not contest the show cause and was struck off.[25]

As an example of the procedural uncertainty associated with show cause procedures, the Court's documents were for a time headed 'In the matter of an application by [the solicitor]', though he had made no application, and the Court asked him to pay a setting down fee as the plaintiff before backing down when he protested.

Lennon The seventh example followed a preliminary hearing in a civil proceeding in the Supreme Court. The Court ordered a solicitor for some of the parties to show cause why he had not participated in his clients' breaches of the overarching obligations in the *Civil Procedure Act 2010* and so breached them himself, as alleged by one of the parties.

The Court then proposed to consider whether compensation under s. 29 of that Act should follow, having already made and published findings of fact in relation to that conduct, including the solicitor's involvement in it, and as to his state of mind, and having already referred the matter to the Victorian Legal Services Commissioner for investigation on the basis of those findings, which were made at a time when the solicitor was not a party to the proceedings.[26]

The solicitor was in fact never joined to the proceedings. The Court ultimately acceded to the solicitor's submission that, having already referred the matter to the

[22] *Bolitho v Banksia Securities Limited (No 10)* [2020] VSC 524.
[23] *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666.
[24] *Re Zita* [2022] VSC 354.
[25] *Lindholm v Elliott* [2023] VSC 442.
[26] *Garlick v Kerbaj* [2022] VSC 336 at [175].

Commissioner, and the solicitor having agreed to be jointly liable with his clients for costs orders already made against them such that there was no further relief to be granted under the *Civil Procedure Act 2010*, it was unnecessary and inappropriate for the Court to conduct the same inquiry as the Commissioner would, and it did not proceed with the hearing.[27]

The first reason was that the solicitor's involvement in the show cause hearing would put him at an unfair disadvantage vis-à-vis the Commissioner in any disciplinary investigation the Commissioner might conduct. The second reason was that the Court's enquiry would be bedevilled by questions of various privileges which the Commissioner's enquiry could cut through by virtue of their statutory abrogation for Commissioner investigation purposes.

County Court In the eighth example, I recently represented a solicitor who was ordered by a County Court judge in a civil case to show cause why he should not be referred to the Victorian Legal Services Commissioner for investigation of his involvement in an affidavit which the judge was anxious that the practitioner may have attempted to mislead the Court and the parties by silence. I appeared on his behalf and provided his explanation from the Bar table without the solicitor being required to go into evidence. Satisfied of the unlikelihood of conduct warranting the serious step of referral, the Court made no referral.

It seems to me that the Court may not in this instance have been exercising a power akin to the inherent supervisory jurisdiction of the Supreme Courts, but providing a natural justice opportunity to make submissions against a contemplated course, which the solicitor accepted. The inherent jurisdictions of courts are not confined to superior courts, according to Keith Mason's seminal article, but represent a suite of powers which a court has simply because it is a court of a particular description.[28] But the Supreme Courts' supervisory jurisdiction is said to be an incident of the power to admit practitioners, which is peculiar to them.

Courts should but do not always provide such a natural justice opportunity before making a referral, as a matter of natural justice.[29]

[27] *Garlick v Kerbaj,* unreported extempore but transcribed reasons, Matthews AsJ, 20 February 2023.
[28] Keith Mason 'The Inherent Jurisdiction of the Court' (1983) 57(8) *Australian Law Journal* 449 at 456B.
[29] In *Rafidi v Commonwealth Bank of Australia Ltd* [2017] NSWCA 96, the Court observed at [17] that 'It has also been thought necessary in such cases to give notice to the affected parties so that they may be heard in opposition to such a "referral".' In *Muriniti v Kalil* [2022] NSWSC 109 Brereton JA, with whom the other judges agreed, declared at [105]-[107] that a judge who had referred a practitioner to a legal regulator by a formal declaration in a published judgment had failed to accord procedural fairness to the practitioner, by failing to give him an opportunity to show cause why such a referral should not be made. See also fn 97 below.

2 NATURE OF THE COMMAND

The formulation of the commands to show cause in the above examples is diverse, but they have the common element of being on the courts' own motion. Some are directed to the practitioners notwithstanding that they are not parties, some are directed to practitioners who are joined to the proceedings, and some are formally directed to the parties, even though it is the lawyers' conduct which is in issue. Only some of them use the words 'show cause'.

A command to 'show cause' seems axiomatically to suggest that, unusually in our system of justice, the practitioner bears the burden of disproving a contention advanced by the Court, though it may be observed that the drafters of some of these orders resort to the semantic device of commanding the practitioner to 'show cause whether' they should face sanction, rather than to show cause why they should not face sanction, which is what these kinds of orders surely really mean and how they were traditionally framed. Others frame the order in terms of showing cause whether a procedure for considering adverse orders should be initiated, rather than whether the adverse orders themselves should be made.

Long ago, proceedings to strike lawyers off the roll for already established gross misconduct[30] were described as occasions on which the lawyer would show cause why they should not be struck off, but a prosecutor seems always to have been appointed.[31] The same is true of more recent statutory reflections of this old practice.[32] I suspect that the prosecutor always had the burden of proof,[33] and went first, so that there was nothing much to show for the name of the procedure.

It seems to me that a new inquisitorial procedure has been developed under the cover of the label given to a summary historical prosecution procedure reserved for clear cases, which was, despite its name, a relatively orthodox accusatorial procedure in which the court was an arbiter and not a prosecutor, with the unusual characteristic that the Court may sometimes have been the initiator of the process.

It also seems to me that much that has been written about lawyers' obligations when commanded to show cause has not grappled with the implications of the privilege against penalties which gained prominence in *Rich v ASIC*[34] and, in the sphere of the discipline of professionals, following *Towie v Medical Practitioners Board of Victoria*.[35] Nor has s. 128 of the *Evidence Act 2008* (Vic) necessarily been grappled with; it is as much about exposure to civil penalties as it is about self-incrimination, and disciplinary sanctions are often civil penalties.

Before the fashion to command practitioners to show cause took off, Justice Callinan observed that courts should be cautious about imposing a penalty in the same

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[30] *In re Blake* (1859) 30 Part 2 Law J Rep 32 per Crompton J.
[31] *Archbold's Practice* (11th ed, 1862) 149*; In re Blake* (1859) 30 Part 2 Law J Rep 32 and *In re Cooper* (1898) 67 Law J Rep 276.
[32] E.g. s. 2.4.42 of the *Legal Profession Act 2004* (Vic): *Legal Services Board v Bourozikas* [2009] VSC 382; *Legal Services Board v Williams* [2009] VSC 561; *Legal Services Board v McGrath* (2010) 29 VR 325, [2010] VSC 266 and *Legal Services Board v Forster* [2016] VSC 356.
[33] *Stanoevski v The Council of the Law Society of NSW* [2008] NSWCA 93 at [58].
[34] (2004) 209 ALR 271 (HCA).
[35] (2008) 29 VAR 252; [2008] VSCA 157.

proceeding for conduct during the proceeding, as opposed to conduct which was the subject of the proceeding.[36] His Honour's comments were made in the context lawyer discipline.

3 A LONELY, PRECARIOUS AND UNCERTAIN SITUATION FOR THE PRACTITIONER

Being called to show cause can be a lonely and unexpected occasion on which to have to ponder the questions in this article. Peter Trimbos, the expert costs lawyer witness joined, mid-trial, of the Court's own motion in *Banksia*, and Mark Elliott, the alter ego of the litigation funder each committed suicide violently during that proceeding, as we know from coronial inquests.

The timing of their deaths give rise to a strong inference that they were caused at least in substantial part by the stress of the proceedings. I know of another solicitor who committed suicide after a judgment of a different judge of the Supreme Court in a separate matter following an own motion investigation into their fees.

Candour The practitioner commanded to show cause is thrust into a world of confusing authorities which speak of lawyers' duty of candour to the Court.[37] There is pressure to, and a temptation to, adopt an acquiescent posture. Given that this duty is said to co-exist with an entitlement to invoke the penalties privilege discussed below,[38] that it is generally inappropriate to draw an adverse inference from the invocation of a privilege,[39] that there is no duty on a lawyer to give evidence in a disciplinary prosecution[40] or in a striking off proceeding[41] and that it will usually be inappropriate to draw inferences in an accusatorial proceeding from a failure to give evidence,[42] it is difficult for a practitioner to know what the content of the duty of candour is. In truth, it will probably ultimately transpire that the duty of candour has no content in an accusatorial proceeding.

As long ago as 2008, the NSW Court of Appeal emphasised the need to treat with caution sweeping duty of candour statements, in cases which pre-date or do not

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[36] *Barwick v Law Society of NSW* (2000) 169 ALR 236 (HCA) at [160]. The question of the appropriate disciplinary response to the mode of a professional's defence of serious allegations which are ultimately established (a different but related question to that considered by Callinan J) has received quite sophisticated treatment in the UK: *Misra v GMC* [2003] UKPC 7 at [17], a recent application of which is found in *Sawati v GMC* [2022] EWHC 283.

[37] *NSW Bar Association v Meakes* at [97] and [9] endorsed by *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540 at [148]-[149]. See also *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666 at [1388]ff.

[38] *Legal Services Commissioner v Spaulding* [2015] VCAT 292 at [19(5)] (Garde J); *Elliott v Lindholme* (2020) 62 VR 307.

[39] *Giannarelli v Wraith (No 2)* (1991) 171 CLR 592 at 605; *Clayton Utz v Dale* [2015] VSCA 186.

[40] *Stirling v Victorian Legal Services Commissioner* [2013] VSCA 374 at [155].

[41] *Council of the NSW Bar Association v Einfeld* (2009) 258 ALR 768 at [23] ('The fundamental common law right to the privilege against self-incrimination must be recognised.') per curiam.

[42] *Strbak v The Queen* (2020) 267 CLR 494.

grapple with *Rich v ASIC*.[43] The Victorian Court of Appeal has said that these questions are for another day.[44]

Insurance In some show cause scenarios, there is no apparent 'claim' for 'civil liability' to engage the practitioner's professional indemnity insurance. When some lawyers self-represent, the consequences can be ugly.[45] Victorian barristers might find themselves wishing they had purchased top-up insurance, which provides defence costs cover for any 'legal enquiry' arising out of the practitioner's practice in which the practitioner 'is legally required to participate by reason of the fact that the body conducting the enquiry has legal jurisdiction over' them. No such cover is readily available to Victorian solicitors, so far as I know.

Even the insuring clause in the top up cover may be inadequate, or arguably so, since a pure natural justice opportunity to be heard in opposition to a referral order (as I suggested the eighth example above to be) may not satisfy the requirement that the barrister be legally required to participate in it. (Indeed, if I were ordered to show cause why my conduct should not be referred to a regulator for investigation, I might well invite the Court to do so, and then calmly provide my side of the story within the privacy of the office of the regulator.)

Fraud Dishonesty and fraud are usually the same thing: conduct which ordinary people would consider to be dishonest, including statements made without caring whether they are true, where there are warning bells ringing in the ears of the speaker.[46]

Even when indemnity insurance does respond, fraud allegations may effectively cruel it. Victorian lawyers' professional indemnity insurance insures against liability for fraud, but where it is established, the insured must indemnify the insurer against the monies paid out to the victim and defence costs incurred.

The professional standards schemes for lawyers which cap liability at $2 million do not apply to the extent that fraud is established.[47]

In *Banksia*, the professional indemnity insurer took over the defence of the Contradictor's *Civil Procedure Act 2010* allegations against the solicitor Zita, but effectively denied indemnity and left him unrepresented shortly before trial when it decided that Zita's affidavits, settled by the insurer's own panel lawyers, contained admissions of fraud triggering an exclusion in the policy.

The insurer then sacked the panel lawyers and demanded that the solicitor repay forthwith more than $1.5 million in costs its solicitors had run up against a costs-inclusive limit of indemnity which the insurer said was $2 million.[48] Threatened with

[43] *Council of the NSW Bar Association v Power* (2008) 71 NSWLR 451at [26] per Hodgson JA with whom the other judges agreed.
[44] *Elliott v Lindholme* (2020) 62 VR 307.
[45] *Re Manlio (No 2)* [2010] VSC 130.
[46] *Bolitho v Banksia Securities (No 18)* [2021] VSC 666 at [1325] et seq.
[47] *Professional Standards Act 2003* (Vic), s. 5.
[48] *Re Zita* [2022] VSC 354 at [62].

a suit for indemnity, the insurer backflipped and re-appointed the panel solicitors, but said it would still pursue all of its lawyers' costs from its insured solicitor at the end of the case.

In the end, the Court having been advised of this extraordinary series of events by Zita's evidence in the show cause hearing, Dixon J was at pains to make clear that no findings of fraud had been made against the practitioner, and so far as I know, the insurer never pursued its alleged costs.[49]

The forensic constraints and reasons to refrain from alleging fraud in ordinary civil proceedings -- it is of course not always beneficial to private litigants to allege fraud --[50] are not present in the show cause context where it originates from the Court's own motion. Further, Supreme Court judges and court-appointed contradictors are simply less timid than most others in this regard, and have a duty proactively to root out breaches of the overarching obligations, including the obligation of honesty, in the ranks of the Court's officers.[51]

Accordingly, fraud allegations are in my impression comparatively more likely to crop up in show cause procedures. Several allegations of fraud were explicit, or lurked dangerously in the cases referred to in the above examples.

Whenever there is an allegation of breach of the overarching obligation not to mislead, the possibility that it will morph into an allegation of fraud must be carefully guarded against, especially in a procedural world generally free of pleadings; the overarching obligation not to mislead requires no proof of the practitioner's state of mind.[52] After all when fraud is established against a lawyer, the starting position is said to be that they should be struck off,[53] a rule, it must be said, honoured in the breach.[54]

Whenever there is an allegation of fraud (whether it is dressed down in mealy-mouthed language or not), the subject of a show cause command ought pluck up the courage to insist on proper particulars. Notice is at the heartland of procedural fairness and unsurprisingly, courts acting on their own motion must observe procedural fairness.[55] If, in the lawyers' disciplinary realm, prosecutors must fully particularise any state of mind which they intend to criticise,[56] then why should not a Court exercising its inherent disciplinary jurisdiction to command a practitioner to show cause whether they have been fraudulent not also give such particulars of the possible fraud in question.

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[49] *Bolitho v Banksia Securities Limited (No 18)* [2021] VSC 666 at [104]; Re *Zita* [2022] VSC 354 at [17].
[50] See my article 'The consequences of serious allegations without an adequate foundation' (2014) 121 *Precedent* 4, available on Austlii.
[51] *Yara Australia Pty Ltd v Oswal* (2013) 41 VR 302 at [27].
[52] *Bolitho v Banksia Securities Limited (No 18)* [2021] VSC 666 at [1333].
[53] *Bolton v Law Society* [1994] WLR at [14]; *Law Society of Ireland v Enright* [2016] IEHC 151 (though Enright was readmitted soon enough: [2018] IEHC 440).
[54] *Fraser v Council of the Law Society of NSW* [1992] NSWCA 72.
[55] *Elliott v Lindholme* (2020) 6 VR 307 at [111].
[56] *Legal Services Commissioner v Laylee* [2016] QCAT 237 at [78] – [92] (Justice Thomas)

The issue of particulars arose in *Banksia* but was not determined. As already mentioned, one of the solicitors associated with the litigation funder was joined of the Court's own motion after the close of evidence. He was told to give a full and frank explanation of his conduct which involved suggestions of fraud. He asked for particulars. The Court was initially disinclined to provide particulars, and said that any unwillingness in furnishing a full and frank explanation of his conduct might well tell against his fitness for practice. The allegations were adequately particularised, the trial judge was inclined to believe, in 'the trial record of the remitter, with guidance through that material from the Revised List of Issues and the opening addresses of counsel for the contradictor'. The Court later changed its mind, when the contradictors proposed that they should give particulars, such that the propriety of the Court's proposed course did not need to be tested. As the Court of Appeal commented, however, 'At the time, the trial record … included 1,013 pages of transcript and 4,396 exhibits which ran to more than 45,000 pages.'[57]

4 PROCEDURAL QUESTIONS

Joinder The Supreme Court of Victoria may move of its own motion in its inherent jurisdiction, under the *Civil Procedure Act 2010* (s. 29(2)(b)), and under its Rules (r. 1.14(2)(a)). At least where the Court moves under that Act, it is said to be not always necessary to join a practitioner before relief may be ordered against them, where they have already participated fully in the proceeding,[58] as is usually the case in personal costs applications. Of course the practitioner might apply to be joined, in order to have the rights of a party, which might be desirable.

Procedure more generally The jurisprudence which has arisen in relation to civil penalty proceedings[59] is likely to be useful by analogy, at least in illustrating the procedural implications of the penalties privilege, but the Court is free to fashion its own procedure in its inherent supervisory jurisdiction.[60]

The policy informing the common law privilege against penalties informs what are appropriate procedures, even in cases governed by the *Evidence Act 2008* (Vic) or other procedurally comprehensive statutes, such as the *Victorian Civil and Administrative Tribunal Act 1998* (Vic):

- In *Towie v Medical Practitioners Board of Victoria*,[61] the Victorian Court of Appeal reversed VCAT's decision in a proceeding in which the Tribunal had required the respondent in a disciplinary hearing to file and serve any witness statements to be relied on at trial before the close of the prosecutor's case, a practice which the Court deprecated and which the Legal Practice List thereafter ceased to engage in.[62]

[57] *Elliott v Lindholme* (2020) 6 VR 307 at [25]-[26].
[58] Ibid at [63]–[66].
[59] The law is summarised by Cam Truong KC and Matthew Peckham in 'Civil Penalty Proceedings: a Practitioner's Guide', available to Victorian barristers in the Victorian Bar's library of past CPDs. See also Kayis, Gluer and Walpole (eds) *The Law of Civil Penalties*, Federation Press, 2023.
[60] *Wentworth v NSW Bar Association* (1992) 176 CLR 239 at 246, 251–2.
[61] (2008) 29 VAR 252.
[62] The same principles apply in disciplinary prosecutions of lawyers: *Legal Services Commissioner v Spaulding* [2015] VCAT 292 (Garde J).

- In *Elliott v Lindholme*,[63] the Victorian Court of Appeal reversed the trial judge's direction to Alex Elliott, a solicitor associated with the litigation funder in the Banksia class action, whom he had commanded to give evidence to 'file and serve an affidavit deposing to a full and frank explanation of the circumstances pertaining to his involvement in' a period of those proceedings which spanned several years. The Court held that though the trial judge had the power to call a practitioner as a witness in an own motion investigation,[64] the order directing the practitioner to give particular evidence pre-empted his entitlement to claim the privilege against self-incrimination or the penalties privilege; the trial judge acted on the erroneous premise that the duty of candour justified such an order. [65]
- In *MH6 v Mental Health Review Board*, the Victorian Court of Appeal held that in a review of a decision in a proceeding for a penalty, the person against whom the penalty was sought at first instance ought often go second, even if they are the applicant in the review.[66]

It may be inappropriate for a judge who has made interlocutory findings which prompt a show cause order to hear the show cause proceeding because of ostensible bias by virtue of prior findings, especially of fraud or as to credit.[67] How the law will evolve in this regard in the case of own motion commands arising from adverse findings already made by judges remains very much to be worked out.

If a contradictor or prosecutor is not appointed, the judge who gave the show cause command can be embarrassed. When one of the *Banksia* lawyers, Zita, turned up to the trial of a show cause proceeding having filed his submissions and his evidence, the Court adjourned the trial at its commencement and appointed the Victorian Legal Services Commissioner as a contradictor so that the Court would not have to descend into the arena of argument with counsel for the only party to the proceeding, especially in relation to the issues discussed in the next section of this paper.[68]

5 EVIDENTIARY QUESTIONS

Show cause commands are often prompted by determinations arrived at in a proceeding. Sometimes the subject of the show cause command is a party to such determinations, having been joined along the way. Sometimes the determinations arise in completely separate proceedings, e.g. a criminal trial. Sometimes, the solicitor will have been involved as a party's lawyer but not as a party.

Questions arise as to whether the determination which prompts the show cause command is admissible, and if so, whether it is challengeable in the show cause proceeding.[69]

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[63] (2020) 6 VR 307.
[64] *Elliott v Lindholme* (2020) 62 VR 307 at [111].
[65] Ibid.
[66] (2009) 25 VR 382 at [26]
[67] See generally *British American Tobacco Australia Services Ltd v Laurie* (2011) 242 CLR 283 at [143]-[145]; *Elliott v Lindholme* (2020) 62 VR 307 at [91] et seq; *Boomerang Investments Pty Ltd v Padgett* [2021] FCA 1561.
[68] *Re Zita* [2022] VSC 354 at [21].
[69] For an extended analysis of the questions in this part of the article, see my post at the Australian Professional Liability Blog 'Disciplinary Prosecutions Arising out of Criminal and Civil Findings Against Professionals' at https://bit.ly/3FMNzD7.

The starting point is that reasons for decision are inadmissible to prove facts which were in issue in the proceeding in which they are given, by virtue of s. 91 *Evidence Act 2008* (Vic) and at common law the rule in *Hollington v F Hawthorn & Co Ltd*.[70] Reasons are also prima facie inadmissible as hearsay and opinion.[71] Even if reasons are relevant other than to prove the factual findings within them, they are not admissible for that purpose. There is an exception for criminal convictions, but even then the convict may in associated subsequent disciplinary proceedings require the party relying on the conviction in the civil proceeding to call the witnesses from the criminal trial: ss. 166-169, especially 166(g) and 167(b), *Evidence Act 2008* (Vic).

Section 91 does not affect the law of res judicata or issue estoppel: s. 93. But often the reasons which prompt a show cause command will be interlocutory and give rise to no res judicata or issue estoppel. Further, such litigation estoppels preclude parties to judgments from denying as against each other the final orders and critical supporting factual and legal findings. That cannot be a feature of a single party show cause proceeding. Parties to judgments are generally free to deny the correctness of judgments and reasons where they are not estopped from doing so.[72]

Nor will it necessarily be an abuse of process for a lawyer to collaterally attack in a disciplinary prosecution the findings giving rise to an earlier determination against her which prompted the prosecution, e.g. a criminal prosecution.[73] Some examples follow.

- A barrister named Ziems convicted of and imprisoned for manslaughter on the basis that he killed a motorcyclist whilst drink driving, convinced the High Court that he should not have been struck off because rather than being intoxicated, he may have been 'punch drunk' having got into a brawl with drunken seamen while intervening to save a young lady they were harassing outside a pub where he had been drinking, as he had claimed at trial. Some judges found that the criminal trial had been unfair, and reconsidered the evidence themselves and formed their own views.[74] The ratio is not easy to identify, however.[75]
- In *NSW Bar Association v Somosi*, the NSW Court of Appeal held that a barrister was entitled in an application for him to be struck off to call evidence to contradict an express finding critical to his criminal conviction for tax offences, namely that he had intended to avoid paying tax.[76]
- In *Sudath v Health Care Complaints Commission*, the NSW Court of Appeal overturned the first instance tribunal's order limiting the use to which Dr Sudath's evidence could be put.[77] Dr Sudath sought to establish that he did not engage in

[70] [1943] KB 587.
[71] Gans and Palmer, *Uniform Evidence* (2010) Oxford University Press, p. 178.
[72] Spencer Bower and Handley, *Res Judicata* (5ed, 2019) at [1.02].
[73] *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 at [83]; *Prothonotary v Gregory* [2017] NSWCA 101 at [30]; *Muriniti v Mercia Financial Solutions Pty Ltd* [2021] NSWCA 180 at [82], [86].
[74] *Ziems v Prothonotory, Supreme Court of NSW* (1957) 97 CLR 279.
[75] *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 474 at [40] et seq, though at [45] the Court observed that 'a majority of the court … accepted that it was permissible (and arguably essential where the underlying conduct constituted the basis of the complaint) to go behind a conviction in order to make findings as to the underlying conduct.'
[76] (2001) 48 ATR 562 at [35], [82].
[77] *Sudath v Health Care Complaints Commission* (2012) 84 NSWLR 47at [5].

the common assault which he had been convicted of.[78] The Court held that 'once the Commission tendered evidence upon which it sought to rely to establish the underlying conduct [i.e. the anal rape and common assault of which the doctor had been convicted, as opposed to the mere fact of the conviction itself], it could not seek to exclude the practitioner from calling evidence going to the same issues. From the point of view of the Commission, and for the purposes of these proceedings, the conviction and the findings upon which it must have been based, together with the further findings of the sentencing judge, were by no means sacrosanct.'[79] The Court concluded 'To prevent the practitioner from giving evidence as to his own conduct inconsistent with that proffered by the Commission would be procedurally unfair.'[80]

- *Muriniti v Mercia Financial Solutions Pty Ltd* records without criticism that the trial judge allowed the appellant to call fresh evidence in the personal costs application against him with a view to establishing the reasonableness of his conduct in making serious allegations of fraud on behalf of his client. That was so notwithstanding that the trial judge had found in the determination which prompted the personal costs application that the serious allegations of fraud were without any evidentiary foundation.[81]

There appears to be a tension between the NSW Court of Appeal's and the High Court's decisions and the Supreme Court of Victoria's decision in *Re Zita*, though the above aspects of *Ziems* were not treated in *Re Zita*.[82] As noted above, the Court commanded one of the *Banksia* lawyers to show cause 'whether' he should be struck off. That procedure occurred in a one-party proceeding with a different title and different proceeding number, after judgment in the principal proceeding, and in the absence of the other parties to the principal proceeding who were not invited to the show cause trial and played no part in the proceeding.

Orders in the show cause proceeding drafted by the judge who initiated it recorded that the originating process in the new proceeding was the show cause command in the Court's judgment in the underlying proceeding. No party in the original proceeding had suggested that Zita should be struck off.

The Court:

- Construed s. 91 of the *Evidence Act 2008* (Vic) as having application only to reasons in previous separate proceedings,[83] and must presumably have determined that the common law rule in *Hollington v F Hawthorn & Co Ltd,* which it might have thought to have applied in the absence of anything in the Act about admissibility of reasons in the same proceeding as they are given in, was displaced on the basis that s. 91 was a code intended to cover the field.

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[78] Ibid at [58].
[79] Ibid at [46].
[80] Ibid at [49].
[81] *Muriniti v Mercia Financial Solutions Pty Ltd* [2021] NSWCA 180 at [84]. That judgment at [9] et seq also reveals that NSW has statutory provision with no Victorian counterpart imposing a rebuttable presumption, in a personal costs application, as to certain factual findings in the decision prompting the personal costs application.
[82] The characterisation of *Sudath v Health Care Complaints Commission* (2012) NSWCA 180 by Dixon J may be found in *Bolitho v Banksia Securities Ltd (No 18)* [2021] VSC 666 at [38].
[83] The NSW Court of Appeal came to a similar conclusion in a relevantly different statutory context in *King v Muriniti* (2018) 97 NSWLR 991.

- Determined that as a matter of substance the new proceeding was the same proceeding as the underlying proceeding, so that the judgment in the underlying proceeding was admissible as evidence of the facts found, for the purposes of the show cause proceeding.[84]
- Struck out much of the evidence the practitioner sought to adduce in the course of showing cause. His Honour did so on the basis that though Zita indicated he did not wish to challenge the Court's judgment (which was that he be jointly liable with others to pay a sum of compensation for breaches of overarching obligations, plus costs), he did unequivocally set out to have the Court change its mind in relation to certain non-critical adverse findings and obiter dicta comments in the reasons supporting that money judgment. Dixon J held that to be impermissible because 'any collateral attack on my findings was impermissible and likely to constitute an abuse of process'.[85]
- Rejected Zita's argument that if the reasons for judgment in the underlying proceeding were not the end of the proceeding as far as the practitioner were concerned, they must have been reasons for orders which were interlocutory, vis-à-vis the orders to be made at the end of the show cause procedure, such that litigation estoppels including the rule against collateral attack of final orders could have no application.

Privileges Section 128 of the *Evidence Act 2008* (Vic) ('Privilege against self-incrimination in other proceedings') has operation where the Court considers that there are reasonable grounds for a natural person[86] to object to give particular evidence, or evidence on a particular matter, on the ground that the evidence may tend to prove that they committed a criminal offence or that they are liable to a civil penalty in another proceeding. It has no operation in a proceeding in which a civil penalty or criminal sanction is sought, because no one can be compelled to incriminate themselves or expose themselves to that penalty in such a proceeding.

'Civil penalty' refers to a class of orders broader, of course, than those designated by latter day statute as civil penalties. The High Court has spoken of the class as including orders imposing 'disability in the nature of a penalty,'[87] and the Court of Appeal has applied the common law privilege against penalties to a proceeding seeking involuntary mental health detention on clinical grounds, notwithstanding the protective purpose of such orders.[88] The Court of Appeal[89] and Garde J sitting in

[84] The Court reasoned that it had warned the lawyer parties during the trial that if the contradictors' allegations were established at trial, the Court may have to consider whether they remained fit and proper persons to remain on the roll, so that the commands it gave to two practitioners to show cause 'whether' they should be struck off, were but a continuation of an own motion investigation by the Court into those practitioners' conduct, so that they were two phases of the same proceeding for the purposes of s. 91 *Evidence Act 2008* (Vic). But if that is correct, it seems paradoxical that the underlying proceedings were characterised as proceedings in which a penalty was not sought (and could not be sought under the *Civil Procedure Act*), as the Court did characterise them even after having expressly taken account of that warning: *Bolitho v Lindholm (No 14)* [2020] VSC 703 at [20(e)], [53]. That is because if the strike offs were sought in the same proceedings, those proceedings were in part strike off proceedings, which are proceedings for a penalty.

[85] *Re Zita* [2022] VSC 354 at [20].

[86] Or, perhaps, an incorporated legal practice which cannot give the evidence or produce the document otherwise than through a sole director: *Meneses v Directed Electronics OE Pty Ltd* (2019) 373 ALR 624.

[87] *R v The Associated Northern Collieries* (1990) 11 CLR 738 at 744.

[88] *MH6 v Mental Health Review Board* (2009) 29 VR 382.

[89] *Towie v Medical Practitioners Board of Victoria* (2008) 29 VAR 252.

VCAT's Legal Practice List[90] have found that the privilege has operation in disciplinary prosecutions of doctors and lawyers respectively, in which fines are an archetypal kind of penal order which are commonly sought and granted, and a recommendation of striking off is always a possibility.[91]

Whether a proceeding is itself a proceeding for a penalty, so attracting the privilege against penalties globally *in limine*, must be determined on a case by case basis. Not all applications for relief under s. 29 of the *Civil Procedure Act 2010* are proceedings for a penalty, according to the Supreme Court of Victoria, despite the fact that ss. 28 and 29 'imbue the Court with broad disciplinary powers'[92] which have penal elements,[93] but some may be. There is no reason why a show cause order should not be regarded as giving rise to a proceeding for a penalty, if it is on the cards that the Court might exercise its supervisory disciplinary jurisdiction as the Court repeatedly did in *Banksia*, striking off two practitioners and suspending another during the course of a class action.[94]

Usually, however, admissions of misconduct (in the broad sense of the word) will tend to assist in establishing that disciplinary sanction should flow, whether in matters in the office of the Victorian Legal Services Commissioner for professional misconduct (in the statutory sense) or unsatisfactory professional conduct, or interference with the right to practice by the Victorian Legal Services Board.[95] It is well established that 'disciplinary penalties are civil penalties'.[96] Both bodies are entitled to (and do) move of their own motion on the basis of judgments published on the internet, referrals by the Court,[97] or reports of proceedings in mainstream media or specialist publications such as *Lawyerly* and *Lawyers Weekly,* even if one of the other

[90] *Legal Services Commissioner v Spaulding* [2015] VCAT 292 (Garde J).
[91] There are obvious parallels between a striking off order and the orders found to constitute penalties in *Rich v ASIC* (2004) 209 ALR 271 (preventing a company director from holding that office for a period) and in *Police Service Board v Morris* (1985) 156 CLR 397 (dismissal from the police force).
[92] *Yara v Oswal* (2013) 41 VR 245 at [16]-[22].
[93] *Hudspeth and Scholastic Cleaning and Consultancy Services (No 4)* [2013] VSC 14 at [5]-[7]; Ibid at [24]; *Bolitho v Banksia Securities Ltd (No 14)* [2020] VSC 703 at [59].
[94] *Bolitho v Banksia Securities Ltd (No 14)* [2020] VSC 703. The penalties privilege is well summarised at [43].
[95] The Court suggested in *Bolitho v Banksia Securities Ltd (No 14)* [2020] VSC 703 at [69] that breach of the overarching obligations 'with respect to minimising costs and delays, narrowing the issues in dispute, and/or using reasonable endeavours to resolve a dispute' would not realistically expose the practitioner concerned to disciplinary sanction, but I am not so sanguine, given that practitioners are regularly sanctioned for unsatisfactory professional conduct defined to mean conduct 'that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.' Such conduct is punishable by a fine of more than $25,000, administered in-house by the Victorian Legal Services Commissioner (s. 299(1)(f) *Legal Profession Uniform Law*) so analysis of 'realistic exposure' should not focus on the likelihood of a disciplinary prosecution.
[96] *Clayton Utz v Dale* (2015) 47 VR 48, 123-124; ibid at [60].
[97] See *Mohareb v Palmer (No. 4)* [2017] NSWDC 127 as to the nature of such referrals. Examples of referrals of lawyers to the Victorian Legal Services Commissioner or the DPP in the course of *Civil Procedure Act 2010* enquiries include *Bolitho v Banksia Securities (No 18)* [2021] VSC 666 at [7] and *Re Manlio (No 2)* [2016] VSC 130. Interestingly, the register of disciplinary action records no disciplinary sanction having been delivered to the practitioners referred by the latter decision in the last five years.

parties in the proceedings does not make a disciplinary complaint.[98] The path to discipline from the Costs Court is particularly clear, since it is required to refer possible professional misconduct or unsatisfactory professional conduct to the Victorian Legal Services Commissioner.[99]

Accordingly, own motion enquiries into lawyers' conduct in open court may often potentially involve evidence which would tend to expose the lawyer witness to a civil penalty.

Lawyers are expected to be able to look after themselves, and timidity in asserting the privilege against penalties may result in waiver of the privilege. In *Bolitho v Banksia Securities Ltd (No 14)*[100] a practitioner who had recently been joined to the Banksia class action mid-trial, Alex Elliott, consented to an order that he give discovery of certain classes of documents, but later applied by summons for orders excusing him from complying with the order on the basis that to do so would tend to expose him to a penalty. The Court found that he had waived his entitlement to rely on the privilege in a global fashion by consenting to the discovery orders, since discovery orders are antithetical to a proceeding for a penalty, but that he was still entitled to claim the privilege on a document by document basis. As already noted, however, having found that the proceeding was not one for a penalty, the Court later in the proceeding ordered him to show cause 'whether' he should be suffer the penalty of being struck off, and then struck him off.

The Court's obligation under s. 132 of the *Evidence Act 2008* (Vic) to warn parties and witnesses that they may be entitled to claim the s. 128 penalties privilege seems rarely to be extended to practitioners. Indeed, I do not recall ever hearing of a Court warning a practitioner of its availability by virtue of the possibility of disciplinary sequelae in another forum, though it is recorded in *Oldham v Law Institute of Victoria*,[101] that Forrest J went one better in the litigation which gave rise to that case, and excused the practitioner from being cross-examined on the basis that a referral of his conduct to the legal regulator was on the cards (and did in fact follow).

Then there are other privileges belonging to clients which lawyers have an obligation proactively to protect and assert,[102] and *Harman* undertakings to be considered. The latter yield to compulsion, as do the equitable, contractual and statutory obligations to maintain client confidences. But client legal privilege does not. Lawyers are generally entitled to respond to attacks on them by former clients because of the waiver imputed by law when the client puts the confidential client relationship in issue in this way. Why a lawyer called upon to show cause, absent any allegations made by the client, is entitled to disclose confidential communications in the course of their retainer, including but not limited to privileged communications, is presently unclear to me, if it is in fact the case. (In *Banksia* the problem did not arise because the lead plaintiff,

[98] Reporting of misconduct is increasingly encouraged. Following the report of the Royal Commission into the Management of Police Informants, the Victorian government is considering recommendation no 86 – that it be mandatory for lawyers to report other lawyers' 'suspected misconduct'.
[99] Section 202, *Legal Profession Uniform Law (Vic)*. Note that the Commissioner is in turn obliged to refer suspected serious criminal conduct to the police: s. 465.
[100] [2020] VSC 703.
[101] [2012] VCAT 571.
[102] *Spalding v Radio Canberra Pty Ltd* (2009) 166 ACTR 14 at [17], [53]; *Legal Services Commissioner v Shulsinger* [2010] VCAT 965.

the lawyer parties' former client, expressly waived his entitlement to confidentiality and privilege.)

One wonders what the outcome of *Banksia* might have been had all the lawyer parties involved invoked the privilege against penalties to maximum effect, either on the basis that it was on the cards that the Court would exercise its inherent disciplinary jurisdiction in a way which went beyond the relief sought on behalf of the debenture holders by the contradictors (as it did, by striking off two practitioners, and ordering two others to show cause 'whether' they should be struck off), or on the basis that divulging information would tend to expose them to civil penalties in the office of the Victorian Legal Services Commissioner or in VCAT's Legal Practice List, or on both bases. There was a very real practical problem with exercising the privilege on the first basis; by the time the warning was given during the trial that the Court might consider within the same proceedings whether certain lawyer parties were fit and proper persons to remain on the roll of practitioners, the parties had already produced the material which prompted that warning.[103]

6 COMPLEMENTARY STATUTORY JURISDICTIONS

Complications arise when statutory regulators seek to exercise their statutory powers while the Supreme Court is exercising its inherent jurisdiction, as in Zita's case, whom the Victorian Legal Services Board purported to suspend from practice for four years in the course of refusing his application for renewal of his practising certificate, while the Supreme Court was in the course of considering how to discipline him in the show cause procedure. He had to challenge that decision in VCAT and urgently obtain a stay pending the Supreme Court's decision in the show cause proceeding, which was unsurprisingly ultimately determinative of all issues, such that the VCAT proceeding never went to trial, because the Board ultimately fell into line with the far less draconian two year suspension imposed by Dixon J.[104]

Such regulators must take great care to ensure that they are not engaging in an abuse of process by conducting substantively the same enquiry as is already before a court.[105]

23 October 2023

Stephen Warne

Dawson Chambers

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[103] That raises another interesting issue. Material obtained under compulsion may only be used for the purpose it was compelled to be produced for, a principle broader than the implied obligation over discovered documents: *Johns v Australian Securities Commission* (1993) 178 CLR 408; *Apache Northwest Pty Ltd v Agostini* [2009] FCA 534. Where information is obtained through compulsion in the course of a civil proceeding (e.g. by a party for the purposes of a claim for compensation under the *Civil Procedure Act 2010* against another party), should the Court be in a better position than the party recipient of it to use that evidence, before it has been read at trial, in order to move of its own motion, e.g. to join the disclosing party to an own motion investigation in the Court's inherent disciplinary jurisdiction?

[104] *Zita v Victorian Legal Services Board* [2022] VCAT 174.

[105] *Victoria v Building Construction Employees' and Builders' Labourers' Federation* (1982) 152 CLR 25; *Watts v Hawke* [1976] VR 707 at 715; *Legal Services Commissioner v Brondolino* [2010] VCAT 51 at [52].

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