

Our Ref: RR: 71020575

12 July 2021

***Private & Confidential***

Mr P Horwath  
20 Sanctuary Lane  
BOORAL QLD 4655

**BY EMAIL: [peterhorwath03@gmail.com](mailto:peterhorwath03@gmail.com)**

Dear Mr Horwath

**COMPLAINT AGAINST SAMANTHA MACKAY**

I refer to the Commission's previous correspondence and advise that I have now had an opportunity to consider your complaint.

**Background**

Ms Samantha Mackay is the Legal Practitioner Director of Carswell & Company.

You retained Carswell & Company to represent you in an industrial relations matter against a former employee, Mr Kurt Yelds. Mr Yelds was represented by McDuff & Guilfoyle Lawyers Pty Ltd (formerly known as McDuff & Daniel Lawyers).

Mr Peter Ponti was assigned carriage of your matter.

As you are aware, Ms Rhonda Rouaen, Complaints Officer of this office was unable to complete an assessment of your complaint based on the information you provided. Ms Rouaen emailed you on 13 April 2021, pursuant to section 431 of the *Legal Profession Act 2007* (the Act) to obtain further and better particulars.

You sent Ms Rouaen a brief response on 20 April 2021 and provided three attachments.

Ms Rouaen responded to your email on 21 April 2021 and you were requested to outline the conduct you wish to complain about in relation to Ms Mackay's involvement in your matter. You were also requested to provide a copy of the letters that were referred in the attachments.

You replied to Ms Rouaen on 22 April 2021 and provided a voice recording between yourself and Ms Mackay as evidence that she was in control of the matter. You advised that Ms Mackay had a duty of care to her customers to provide a service in good faith and that included her staff. You also raised concerns that Mr Yelds had made several changes to his claim after you began communicating directly with Ms Mackay.

Ms Rouaen sent a further email to you on 27 April 2021, again requesting that you outline Ms Mackay's conduct and to provide a copy of Ms Mackay's letter which was emailed to you on 31 March 2021. Ms Rouaen was of the view that this letter may assist with the assessment of the complaint.



On 29 April 2021, you responded to Ms Rouaen and provided a copy of the firm's letter to you dated 27 March 2021 and another attachment. The correspondence was drafted by Mr Peter Ponti and sent to you by way of Ms Mackay's email address. The letter referred to correspondence received from Mr Sproule and payment of his fees.

You raised the issue again that Mr Yelds made four changes to his claim while you were communicating directly with Ms Mackay. You assert when you stopped sending information to Ms Mackay, no further changes were made by Mr Yelds.

Ms Rouaen sent an email to you on 29 April 2021 expressing concerns that she was unable to complete her assessment of the complaint. Ms Rouaen advised you that it would assist the Commission if you could specifically outline the conduct of Ms Mackay about which you are complaining.

You responded to Ms Rouaen on 29 April 2021, stating '*Okay, it seems that OFT or other may better deal with corporations/firms duty of care. I would have thought (not being a lawyer) an assessment of the litigation issue would have occurred, and in that meeting one of the first questions is to be is there a conflict of interest along with.... Peter.*'

Ms Rouaen sent an email to you on 25 May 2021, asking you to confirm whether Mr Yelds had made four changes to his claim prior to you submitting your defence material. You responded on 25 May 2021, to confirm that she was correct.

Please find below my consideration of your complaint.

### **Complaint**

Your complaint about Ms Mackay appears to be that you are dissatisfied with the service you received.

You also raise concerns that Ms Mackay released your confidential information to McDuff Guilfoyle Lawyers to your detriment as Mr Yelds made changes to his claim before you had submitted your defence material.

### **Jurisdiction**

Chapter 4 of the *Legal Profession Act 2007* (Act) enables my office to investigate complaints about legal practitioners, law practice employees or unlawful operators. In particular, I may investigate complaints of professional misconduct or unsatisfactory professional conduct as defined in the Act.

*Unsatisfactory professional conduct* is limited to conduct by a practitioner which occurs in connection with the practice of law. That is, conduct which occurs during the course of work usually undertaken by legal practitioners.

*Professional misconduct* is defined more broadly and may include personal conduct by a practitioner which does not occur in connection with the practice of law, but only if that conduct is so serious that it demonstrates the practitioner is not a fit and proper person to continue as a member of the legal profession.

The Act is the governing legislation and the *Australian Solicitors Conduct Rules 2012* (ASCR) forms part of the obligations on legal practitioners.

Conduct found to be in breach of the ASCR is *capable* of amounting to unsatisfactory professional conduct or professional misconduct as defined in the Act but it is not automatic<sup>[1]</sup>.

As you may appreciate, I have an obligation to make my decisions according to the provisions of the Act.

### **Analysis of Complaint**

#### *Quality of service*

You have provided the Commission with a voice recording of telephone conversation between yourself and Ms Mackay as evidence that she was in control of the matter. The date of the telephone call appears to be 25 February 2021. Ms Mackay's voice could not be heard in the conversation.

During the conversation, you expressed dissatisfaction at the service you received and requested that she provide you with the Settlement Deed. You indicated to Ms Mackay that you should have been provided the Deed when you obtained your file. You terminated the call with Ms Mackay and it was unclear what arrangements were made in relation to obtaining the Deed.

Ms Rouaen made enquiries with you as to whether Ms Mackay had agreed to provide you with the Deed. You advised Ms Rouaen that you received the Deed through another lawyer. I note that you retained DJ Hinton Lawyers to act on your behalf in a further claim made by Mr Yelds. I understand that Mr Yelds was claiming the balance of the debt owing pursuant to the Deed of Settlement & Release dated 27 May 2020 plus interest and costs.

In my view, the delay in obtaining the Settlement Deed from Ms Mackay is not of such magnitude that would warrant a disciplinary response.

You assert Ms Mackay as Principal of the firm had control over your matter. While Mr Ponti was assigned carriage of your matter, it is not uncommon for the Principal of a firm to become involved in a matter and to offer guidance and/or advice.

#### *Release of confidential information*

You believe that Ms Mackay released your confidential information to McDuff Guilfoyle Lawyers to your detriment as Mr Yelds made four changes to his claim before you had submitted your defence material. You state that if the intention to pass on your information was to favour you or to decrease the action, it failed on a least four occasions.

It is not within my jurisdiction to determine how a case is managed by a legal practitioner and whether the course of action engaged in is appropriate in the circumstances.

The role of a legal practitioner is to exercise their professional judgment in a manner which they believe is in the client's best interests. Ultimately the decision lies with the client as to whether to accept those advices.

While Mr Yelds may have made changes to his claim, you still had the opportunity to respond to the claim by way of your defence.

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<sup>[1]</sup> Section 420 of the Act

Generally, if a client is dissatisfied with the way in which their legal representative is progressing their matter, they are at liberty to withdraw their instructions, terminate the retainer and seek alternative advice.

The Commission's role, as noted above, is to investigate conduct that may amount to unsatisfactory professional conduct or professional misconduct as defined in the Act. That role, however, does not extend to micro-managing all of a lawyer's interactions with their client, or to dictating to a lawyer how they should or should not conduct a case.

While I accept that you were dissatisfied with the service received, I am not satisfied that there is sufficient evidence to show that the service provided was deficient to such a degree or extent that a disciplinary body would consider it to amount to unsatisfactory professional conduct under the Act.

### **Tests**

Section 432 (1) of the Act provides that a complaint may be dismissed for a number of reasons, including:

*"(b) the complaint does not disclose conduct that the commissioner considers may be—*

- (i) conduct to which this chapter applies; or*
- (ii) unsatisfactory professional conduct or professional misconduct of an Australian legal practitioner or misconduct of a law practice employee in relation to the relevant practice"*

### **Decision**

For the reasons outlined above, your complaint does not disclose any conduct that I consider may amount to unsatisfactory professional conduct or professional misconduct by Ms Mackay.

Accordingly, pursuant to section 432(1)(b)(ii) of the Act, I have decided to dismiss your complaint and will close the Commission's file accordingly.

If you would like to discuss this decision or this complaint further, please contact Ms Rouaen in writing.

Yours sincerely



Megan Mahon  
**Legal Services Commissioner**