IN THE MATTER OF

HENRY DI SUVERO v NSW BAR ASSOCIATION

FOREWORD

The New South Wales Council of Civil Liberties submits:

First, that it should be granted standing as *amicus curiae* to make written submissions in the appeal of *NSW Bar Association v Henry di Suvero* [2000] NSW ADT No. 9824 and;

Secondly, that the precedent set by the di Suvero decision represents an unreasonable expansion of the category of Unsatisfactory Professional Conduct in its application to criminal defence counsel. The precedent set can impact on the justice afforded to an accused by the criminal justice system by affecting the ability of counsel to perform their role in court. As such, the appeal should not follow the decision of the Tribunal below.

SUBMISSION; *AMICUS CURIAE*:

The New South Wales Council of Civil Liberties seeks leave of the Administrative Appeals Tribunal to present written submissions as *amicus curiae* in the appeal of *NSW Bar Association v Henry di Suvero* [2000] NSW ADT No. 9824.

Question, standing:

(I) Should the NSW Council of Civil Liberties be heard by the Tribunal as *amicus curiae* in the appeal of *NSW Bar Association v di Suvero*?

Summary of Argument:

The Council of Civil Liberties should be granted leave as:

(1) These proceedings provide an important opportunity to review the factual and legal boundaries of advocacy in New South Wales;

(2) The New South Wales Council of Civil Liberties, as an active representative of civil liberties, rights and freedoms, is well suited to the role of *amicus curiae***;**

(3) The New South Wales Council of Civil Liberties, as a representative of the public interest, will submit arguments that might otherwise go unheard;

ARGUMENT

The Council of Civil Liberties should be granted leave to present written submissions as *amicus curiae* in the appeal of *NSW Bar Association v Henry di Suvero*, as:

> (1) **These proceedings provide an important opportunity to review the factual and legal boundaries of advocacy in New South Wales.**

(a) Section 127 (Unsatisfactory Professional Conduct) of the Legal Profession Act 1987 has not, in any reported decision, previously been applied to limit the counsel's duty to defend their clients' rigorously. Thus

the extended application of Section 127 (Unsatisfactory Professional Conduct) in this case, represents a novel development in the law and therefore is considered to be a test case.

(b) The outcome of this case will affect the defence counsel's ability to defend their client's rights rigorously. Thus further limitation on the counsel's defence will have a deleterious effect on the community and may result in serious miscarriages of justice.

(2) The New South Wales Council of Civil Liberties, as a representative of the public interest, will submit arguments that might otherwise go unheard.

(a) While the appellant of course has a personal and vested interest in the outcome of the appeal, the NSW Council of Civil Liberties will offer submissions of the nature in the interest of the "public good".

(b) In the interests of arriving at the correct determination of the case and the precedential value of this case, the NSW Council of Civil Liberties will focus on broader questions of public policy regarding limiting the sanctioned conduct of the defence counsel. In particular, the Council of Civil Liberties will focus on the effect on accused persons to proper legal representation and further, its effect on the role of the defence counsel to "check" the power of the state to deprive individuals of their liberty.

(d) The tribunal may wish to assess the submission of standing by consideration of the submission as a whole, assessing the question of standing in concurrence with the substantive submission (See Section 2 of this submission).

(e) The Council for Civil Liberties does not seek standing as a party pursuant to s.67(4) of the *Administrative Decisions Tribunal Act* NSW 1997. According to s.67(4), an application for review can be made by any person whose interest's are affected, or are likely to be affected by the original decision. Or alternatively, the tribunal may, in its discretion, order a person to be party to the proceedings.

Further, s. 68 of the *Administrative Decisions Tribunal Act* NSW 1997 states that the "[t]ribunal may decide persons whose interests are affected by

a decision". According to the public law principles set in *Boyce v Paddington Borough Council*[1] that limits s.67(4) to an interference with private interests and *Onus v Alcoa of Australia*[2] that limits s.67(4) to situations where an individual suffers special damage peculiar to him or herself, the Council for Civil Liberties falls outside the criteria set in s.67 (4).

(f) Whilst the Council for Civil Liberties could not successfully apply to be heard as a party to the appeal under the *Administrative Decisions Tribunal Act* (NSW) 1997 (see above at [2](e)) the Council instead seeks to make written submissions as *amicus curiae* as an impartial friend of the Tribunal.

(3) The Council of Civil Liberties is particularly suited to represent the public interest as amicus curiae in the hearing of this appeal:

(a) The New South Wales Council of Civil Liberties has a history of interest and action in upholding the rights of individuals. Importantly the Council plays a crucial role as a check on the exercise of government power. Particularly where that power infringes rights of individuals.

(b) Importantly, the Council, in exercising this role, is manifestly independent of government and the parties to the action. This independence is crucial if a body is attempting to act in this manner.

(4) Other precedential cases indicate that the court should exercise its discretion and allow the New South Wales Council of Civil Liberties to be heard as *amicus curiae.*

(a) The tribunal exercises a prerogative discretion to allow submissions of *amicus curiae*. The Administrative Decisions Tribunal is yet to refer to *amicus curiae* in their judgements[3]. However, it is submitted that other tribunals analogous to the Administrative Decision Tribunal, in particular the Commonwealth Administrative Appeals Tribunal, have exercised this

1 *Boyce v Paddington Borough Council* (1903) 1 Ch 109.

2 *Onus v Alcoa of Australia* (1981) 149 CLR 27.

3 Source: AustLII search of all decisions of the tribunal.

discretion[4] and accordingly the New South Wales Administrative Decisions Tribunal should be seen to have such power.

(b) In *Commonwealth v Tasmania*[5], known as the "Tasman Dam" case, the High Court allowed submissions to be made by the Tasmanian Wilderness Society acting as *Amicus Curiae*. The submission by the Council of Civil Liberties in this case is analogous to the Tasmanian Wilderness Society in *Commonwealth v Tasmania*, that is the submission is made by an "interested" community organization, acting as an advisor to the court: the issue being civil liberties, freedoms and rights.

(c) In *U.S. Tobacco v Minister for Consumer Affairs*[6], a case involving a decision to name "smokeless cigarettes" "unsafe goods" under the *Trade Practices Act*, the Full Federal Court in *obiter* considered that it would allow amicus submissions (under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)):

> for example where the interests of a disadvantaged person are otherwise insufficiently protected or where the court would otherwise be without submissions on what appears to be an important question of law which arises in the proceedings.[7]

It is submitted that the submissions of CCL are novel (see [5]) and as such are useful to the Tribunal in assessing the substantive question on appeal.

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4 See *Re: Mark Aussie Toa v Department of Immigration and Multicultural Affairs*, 6/4/98, AAT Decision 12777.

5 *Commonwealth v Tasmania* (1983) 158 CLR 1.

6 *U.S. Tobacco v Minister for Consumer Affairs* (1988) 20 FCR 250.

7 Note 4 at 538

(d) In *Lange v Australian Broadcasting Corporation*[8] (which was analogous by its nature as a case in the public interest) Kirby J commented that he:

> would have allowed the Council for Civil Liberties and other relevant bodies to make brief submissions on the... controversy. Such submissions would be restricted to the same limits and conditions as applied to other interveners and *amici*. If necessary, the relevant bodies could have been restricted to written submissions.

The Council of Civil Liberties seek only to make written submissions in this appeal.

8 *Lang v Australian Broadcasting Authority* (1997) 145 ALR 96.

SUBMISSION ON UNSATISFACTORY PROFESSIONAL CONDUCT:

Statement of case:

The Council of Civil Liberties does not offer a restatement of the facts of the case on the assumption that the tribunal will rely upon the parties' presentation of the facts; the Council does so in the interest of brevity and also because the arguments presented herein are presented in abstract.

Opinion Below:

The Tribunal made a finding of unsatisfactory professional conduct against Mr di Suvero. In doing so the Tribunal formulated the following rules for application to the categories of conduct under question:

> We are of the opinion that in New South Wales the following matters would be regarded as unsatisfactory professional conduct:
> 1. The making of unsubstantiated allegations of dishonesty against another legal practitioner,
> 2. The making of insults directed to another legal practitioner or the judge, unsubstantiated allegations of bias on the part of the judge,
> 3. The unjustified attribution of bad motive to another legal practitioner in the conduct of a trial and,
> 4. Conduct which aims without justification to procure a discharge of a jury.[9]

Questions; Unsatisfactory Professional Conduct:

(A) Are the limits on defence counsel's conduct, which are set as precedent, justified when compared with the detrimental effect on the right of an accused to a fair trial?

(B) Should the category of Unsatisfactory Professional Conduct be expanded beyond the consumer oriented application for which it has commonly been used to overlap with contempt of court?

(C) If the precedent is taken to infringe upon individual rights, then is the precedent set consistent with the judicial practice of narrowly reading statutes which infringe rights?

(D) If Unsatisfactory Professional Conduct should be expanded to these novel categories, then is the sanction set as precedent appropriate for the gravity of the type of conduct in question?

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9 *NSW Bar Association v di Suvero* [2000] NSWADT No. 9824, at 11.

Summary of Argument:

(I) The decision of the Tribunal below should not be followed because it imposes limits on criminal defence counsel's conduct. These limits impact upon defence counsel's special role in a criminal trial; and because of the forseeable, detrimental effect which limits on counsel's ability to represent their client rigorously would have on the natural justice offered to a criminal accused these limits are not justified:

(1) The right to a fair trial is entrenched in Australian law;

(2) The right to a fair trial is guaranteed by international law, which should be considered in interpreting the scope of a statutes application.

(3) The right to a fair trial includes, amongst others, rights to: a rigorous defence, if counsel is retained; a public trial; an independent or non-political trial and further a right to a non partisan prosecutor;

(4) A criminal defence counsel's ability to make representations to a court on the above issues has an impact on the fairness of a trial, and as such infringes an individual's right to a fair trial;

(5) The discrete rule set by the Tribunal's earlier decision will act as a deterrent against counsel making submissions on any question of whether a trial is fair; Such effect will be broader than conduct which would attract sanction under the rule;

(II) The decision of the Tribunal below should not be followed because Unsatisfactory Professional Conduct was intended, in its inception, to act as a means of maintaining the standards of lawyers for the benefit of the consumers of their services and not as a limit on counsel's ability to make representations which are in their clients favour:

1) The categories of conduct in question in this matter are categories of conduct are consistent with the rigorous defence of a criminal accused and are in effect in the favour of the client;

2) Unsatisfactory Professional Conduct was originally intended to apply to conduct which adversely affected the interests of a lawyer's client and should not by extended by the Tribunal to conduct in the client's interest:

(III) The application of Unsatisfactory Professional Conduct should not be expanded to apply to conduct within the categories to which contempt applies.

Whilst s210 *Legal Profession Act* allows a charge of contempt to be raised on facts which give rise to a finding of Unsatisfactory Professional Conduct;

1) It is inappropriate to extend Unsatisfactory Professional Conduct into categories to which contempt applies where that conduct is consistent with the rigorous defence of a criminal accused;

2) To expand the categories to which UPC applies into the realm of contempt would be to effectively lower the threshold for contemptuous conduct, merely applying a different type of sanction.

(IV) The liberal interpretation of the statute in the Tribunal below is inconsistent with normal judicial method in that it reads a section broadly that infringes upon existing individual rights:

(1) The interpretation is novel and liberal in broadening the categories to which UPC applies;

(2) The interpretation of the statute infringes on the existing right to a fair trial; (see I):

(3) The interpretation on the LPA is incorrect in that it impinges upon a fundamental right where there is no manifest intention for such a right to be impinged upon in the legislation.

(V) In the alternative, if the Tribunal sees that UPC should be expanded to the novel categories outlined in the Tribunal's rule, then the precedential relationship of sanction to conduct is not appropriate where such conduct is consistent with the rigorous defence of a criminal accused.

1) If UPC is to be applied to conduct which would attract sanction under a charge of contempt then the precedent set for penalty should be analogous to the penalties for contempt;

2) In making a finding of UPC, the tribunal analogises from criteria for contempt; the Tribunal should also analogise in their decision on penalty;

3) Specifically, the precedent set for sanctions in cases similar in factual circumstance to the instance case should should be analogous to the minimal sanction for contempt.

ARGUMENT

(I) The decision of the Tribunal below should not be followed because it imposes limits on criminal defence counsel's conduct. These limits impact upon defence counsel's special role in a criminal trial; and because of the foreseeable, detrimental effect which limits on counsel's ability to represent their client rigorously would have on the natural justice offered to a criminal accused these limits are not justified:

(1) The right to a fair trial is entrenched in Australian law:

(a) The basis of the ideal of a right to a fair trial is that "the right to personal liberty cannot be impaired or taken away without lawful authority and then only to the extent and for the time which the law prescribes"[10]. In *Jago*, Mason CJ recognised that a broad right to a fair trial existed in addition to existing rules of evidence and procedure:

> [The right to a fair trial] is more commonly manifested in rules of law and of practise designed to regulate the course of the trial…But there is no reason why the right should not extend to the whole course of the criminal process and it is inconceivable that a trial which could not fairly proceed should be compelled to take place on the grounds that such a course did not constitute an abuse of process.[11]

The majority in *Dietrich* agreed that the right to a fair trial was entrenched in the common law, as expressed by Deane J:

> it is desirable that the requirement of fairness be separately identified since it transcends the content of more particularised legal rules and principles and provides the ultimate rationale and touchstone of the rules and practices which the common law requires to be observed in the administration of the substantive criminal law.[12]

(2) The right to a fair trial is guaranteed by international law, which should be considered in interpreting the scope of a statutes application:

10 *Williams v R* (1986) 28 A Crim R 1 at 11, per Mason and Brennan JJ.
11 *Jago v District Court of New South Wales*, (1989) 168 CLR 23 at 29, per Mason CJ.
12 *Dietrich v R* (1992) 177 CLR 292 at 326.

(a) The right to a fair trial is codified in two important international human rights treaties to which Australia is a party. That is: a right to a "fair and public hearing" by an "independent and impartial tribunal".[13]

Article 14(1) of the *International Convention on Civil and Political Rights*:

> "…In the determination of any criminal charge against him...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law";

Article 10 of the *Universal Declaration of Human Rights*:

> "Everyone is entitled in full equality to a fair and public hearing"

(b) Such international treaties should be considered in the development of Australian common law and in interpretation of existing statutes; Brennan J in *Mabo v Queensland (No 2):*

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[14]

In *Minister for Immigration and Ethnic Affairs v Teoh*[15], it was established that an international treaty to which Australia is a party does not form part of domestic law unless incorporated by statute.[16]

However, such treaties can be a legitimate guide to developing the common law, whether or not they have been incorporated by local legislation.[17] International treaties to which Australia is a party will be significant in interpreting legislation:

> If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.[18]

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13 *Universal Declaration of Human Rights*, Article 10; and *International Covenant on Civil and Political Rights*, Article 14.

14 (1992) 175 CLR 1, at 42.

15 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273; (1995) 128 ALR 353.

16 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 128 ALR at 361-2 per Mason CJ and Deane J, 370 per Toohey J, 375 per Gaudron J.

17 This will depend upon "the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law". (*Minister for Immigration and Ethnic Affairs v Teoh*. (1995) 183 CLR 273; (1995) 128 ALR 353, per Mason CJ and Deane J. pg as above)

18 *Minister for Immigration and Ethnic Affairs v Teoh*. (1995) 183 CLR 273; (1995) 128 ALR 353, per Mason CJ and Deane J (pg as above). See also Hansard, SLCRC, 16 May 1995 p379, per the Hon. E. Evatt: the principle of a fair trial

(3) The right to a fair trial includes, amongst others, rights to: a rigorous defence, if counsel is retained; a public trial; an independent or non-political trial and, further, a right to a non partisan prosecutor:

Whilst there exists no right to legal representation in Australia[19];

(a) If counsel is retained, a party, particularly a criminal accused can expect a rigorous defence to be undertaken. The special role of defence counsel within a criminal trial is central to the construction of the criminal justice system. The rigorous defence, as presented by defence counsel, where it is not inconsistent with counsel's supervening duty to court, represents a crucial check on the states power to incarcerate. As such, a right to a rigorous defence is an important part of a right to a fair trial

(b) The right to a public trial is entrenched in international law (see above at I.2.a) and in common law. It has been held by the Supreme Court of NSW that a court should only depart from the principle of open justice [a public trial] when necessary for the administration of justice[20]. As such, *prima facie* a right to a public trial exists. Further, a right to a public trial is considered to be part of a fair trial.

(c) The right to an independent, or non-political trial is entrenched in international law (see above at I.2.a) and provides a check on the administration of public power. As such, it represents an important part of a fair trial.

(d) The execution of criminal prosecution counsel's duties in a non-adversarial manner is crucial to a fair trial. Prosecution counsel is required to act in a certain manner by regulation[21]; primarily a criminal prosecutor should be acting to ensure the justice is done[22]. Their role is not to aim

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is so widely accepted as to be customary international law, and thus significant in influencing common law. Furthermore, Kirby refers to the growing willingness of High Court to see Australia's constitutional and legal principles in relation to international human rights development: Michael Kirby, Through the World's Eye, The Federation Press, Sydney, 2000, p124.

19 See for example *Dietrich v R* (1992) 177 CLR 292

20 *John Fairfax & Sons Pty Ltd v Police Tribunal of NSW* (1986) 5 NSWLR 131; Confirmed in: *Marsden v Amalgamated Television Services Pty Ltd* [1999] NSWSC 1099.

21 Rules 62 - 71 of the NSW Barrister's Rules (made under s57.A of the *Legal Profession Act* 1987 (NSW))

22 See: *R v Callaghan* [1994] 2 Qd R 300; *R v Penich* (1991) 55 ACrimR 464.

merely for convictions but also if the situation arises to draw defence counsel's attention to evidence of innocence if it is available to them[23].

(4) A criminal defence counsel's ability to make representations to a court on the above issues has an impact on the fairness of a trial, and as such infringes an individual's right to a fair trial:

(a) The rule of the Tribunal below represents, unquestionably, a limit on the conduct of defence counsel. It is not submitted that limits on conduct of counsel are generally inappropriate or mistaken, however;

(b) The limits proposed as precedent by the application of the Tribunal's rules[24] to the facts in this case operate as a narrow limit on defence counsel's ability to make representations on important issues pertaining to the fairness of a trial in which they are appearing.

(c) Limits on counsel's ability to comment on the fairness of a trial can result in a trial remaining unfair to the represented party and can ultimately result in miscarriages of justice. The question of counsel's ability to comment was addressed by the High Court in *Lewis v Ogden*, a case of a barrister tried for contempt:

> The freedom and the responsibility which counsel has to present his client's case are so important to the administration of justice, that a court should be slow to hold the remarks made during the course of counsel's address to the jury amount to a wilful insult to a judge, when the remarks may be seen to be relevant to the case which counsel is presenting to the jury on behalf of his client.[25]

Depending on the trial circumstances, an advocate may therefore be permitted to cast doubt upon the propriety of the judge and the court, in order to argue his or her client's case "fearlessly and vigorously".[26]

(d) It follows that the limits proposed by the tribunal below infringe upon a criminal accused's right to a fair trial and the decision should not be followed.

23 *R v Glover* (1987) 46 SASR 310.
24 *NSW Bar Association v di Suvero* [2000] NSWADT No. 9824, at 11.
25 Lewis v Ogden (1984) 153 CLR 682 at 693.
26 Michael Chesterman and Pauline Kearney, "Lawyers in Contempt", Law Society Journal June 1988. p45.

(5) The discrete rule set by the Tribunal's decision below will act as a deterrent against counsel making submissions on any question of whether a trial is fair; Such effect will be broader than conduct which would attract sanction under the rule:

(a) In addition to the above criticisms of the Tribunal's rule, it is also submitted that the effect of the rule will extend beyond the limit of the rule as precedent. The effect extends to conduct of counsel where, due to threat of sanction, counsel will be deterred from making submissions on the fairness of a trial even if such submissions are partly or wholly substantiated.

(II) The decision of the Tribunal below should not be followed because Unsatisfactory Professional Conduct was intended, in its inception, to act as a means of maintaining the standards of lawyers for the benefit of the consumers of their services and not as a limit on counsel's ability to make representations which are in their clients favour:

1) The categories of conduct in question in this matter are categories of conduct are consistent with the rigorous defence of a criminal accused and are in effect in the favour of the client:

(a) The categories of conduct which attract sanction under the rule of the tribunal below consist of comment by defence counsel on the public nature of the trial, the politicisation or non-independence of the trial and the performance of prosecution counsel's special duties to the court. Comment on all of these areas is consistent with the rigorous defence of a criminal accused. Any comment made on these topics would be in the interests of the accused. Further, omitting to comment on any of these issues arose would be counter to the duty of defence counsel to their client.

2) Unsatisfactory Professional Conduct was originally intended to apply to conduct which adversely affected the interests of a lawyer's client and should not by extended by the Tribunal to conduct in the clients interest:

(a) UPC is fundamentally directed towards lawyers whose inefficient conduct has substantially disadvantaged their client, and not toward lawyers whose representations are too vigorously directed toward their clients interests. The process of development of s127 of the Legal Profession Act is important to understanding parliament's intention in defining UPC:

(b) The category of UPC was largely based on the suggestions of the NSWLRC in its 1982 Reports on the Legal Profession. The second report identified the need for the extension of the disciplinary systems of the legal profession to conduct less serious than that showing an unfitness to practice, what the report called 'unsatisfactory conduct' (which included bad professional work, (Outline to the 2nd Report p.7)). The new category consisting of something 'falling short of serious professional conduct'[27] or 'for cases where the conduct falls short of a reasonable standard'[28].

(c) Unsatisfactory Professional Conduct was intended by Parliament to cover professional failures the type of which the common law had traditionally not considered serious enough to warrant disciplinary action against. The new category would enable action to be taken 'in cases of minor delay or negligence'[29].

(d) The definition of 'unsatisfactory professional conduct', in s127(2) of the LPA, requires that the standards to which the legal practitioner is to be compared, are to be ascertained by determining what a member of the public is entitled to expect of a reasonably competent and diligent legal practitioner. As explained by Frank Riley, President of the Bar Association, this means:

> 'The relevant standards are therefore those which should be professed by reasonably competent legal practitioners *in their dealings with the public*. Those standards will thus be determined by reference to the practice and opinions of reasonably competent legal practitioners *having regard to the interests of the clients* they undertake to serve.'[30] [emphasis added].

(e) UPC clearly has a 'consumer focus'. It is intended to cover cases where lawyers have fallen short of reasonable standards in the performance of their duties to their clients. The bulk of the cases revolve around issues of unreasonable delay and inefficient management[31].

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27 NSW Parliamentary Debates (Hansard); 1987 p.10579.
28 NSW Parliamentary Debates (Hansard); 1987 p.16276.
29 NSW Parliamentary Debates (Hansard); 1987 p.16276.
30 Riley, Frank: "Unsatisfactory Professional Conduct" *Law Society Journal* 36(5) June 1998 at 65.
31 See: MacDougal, Rosemary "Unsatisfactory Professional Conduct: What is it?" *Law Society Journal* 29(2) March 1991: 42; and Collins, Ray "What Kind of Conduct Deserves a Reprimand?" *Law Society Journal* 38(3) April 200: 44)

(f) Thus, it is submitted that UPC was intended to be directed towards lawyers whose inefficient or negligent conduct has substantially disadvantaged their client, and should not be directed toward lawyers whose conduct has been in their client's interest. Such a limit on the application of UPC is particularly important in criminal matters given defence counsel's special position within the criminal justice system.

(III) The application of Unsatisfactory Professional Conduct should not be expanded to apply to conduct within the categories to which contempt applies:

> Whilst s210 *Legal Profession Act* allows a charge of contempt to be raised on facts which give rise to a finding of Unsatisfactory Professional Conduct;
>
> **1) It is inappropriate to extend Unsatisfactory Professional Conduct into categories to which contempt applies where that conduct is consistent with the rigorous defence of a criminal accused:**

(a) Given that a sanction already exists for the categories of conduct in question, the tribunal should not expand the scope of s127 LPA to cover the conduct in question. To do so would be inconsistent with the notion of a rigorous defence which is central to the fairness of a fair criminal trial.

> **2) To expand the categories to which UPC applies into the realm of contempt would be to effectively lower the threshold for contemptuous conduct; this expansion merely applies a different type of sanction.**

(IV) The liberal interpretation of the statute in the Tribunal below is inconsistent with normal judicial method in that it reads a section broadly that infringes upon existing individual rights:

> **(1) The interpretation is novel and liberal in broadening the categories to which UPC applies;**

(a) Given the past applications of s127 LPA[32] the expansion of the category is novel and liberally expands the category of UPC. As such it is a novel interpretation of the statute and should follow judicial method in expansion of a category

(2) The interpretation of the statute infringes on the existing right to a fair trial; (see I):

(a) The interpretation of the statute, in imposing a novel limit on the conduct of counsel in commenting on issues involved in the fairness of a trial is limiting the right of an accused to a fair trial (see argument above at (I)).

(3) The interpretation on the LPA is incorrect in that it impinges upon a fundamental right where there is no manifest intention for such a right to be impinged upon in the legislation.

(a) If it is accepted that the interpretation infringes on a fundamental right, then the interpretation of the statute in this manner is inconsistent with judicial method; the statute would properly have been read narrowly as it impinges upon an preexisting legal right: As the majority (Mason CJ., Brennan, Gaudron, McHugh JJ) in *Coco v The Queen*[33]. stated:

> The insistence on express authorisation of an abrogation or curtailment of a fundamental right, freedom or immunity must be understood as a requirement for some manifestation or indication that the legislature has not only directed its attention to the question of the abrogation or curtailment of such basic rights, freedoms, or immunities but has also determined upon abrogation or curtailment of them. The courts should not impute to the legislature an intention to interfere with fundamental rights. Such an intention should be clearly manifested by unmistakable and unambiguous language.[34]

The *Legal Profession Act* does not have a clearly manifested intention of curtailing an individual's right to a fair trial. However, the effect of the interpretation by the tribunal below is one of causing an abrogation of an accused's right to a fair trial by limiting counsel's ability to rigorously defend their client. As such, the decision of the tribunal below is in error, and should not be followed.

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32 See: MacDougal, Rosemary "Unsatisfactory Professional Conduct: What is it?" *Law Society Journal* 29(2) March 1991: 42; and Collins, Ray "What Kind of Conduct Deserves a Reprimand?" *Law Society Journal* 38(3) April 200: 44)
33 *Coco v The Queen* (1994) 179 CLR 427.
34 *Coco v The Queen* (1994) 179 CLR 427,.at 436.

(V) In the alternative, if the Tribunal sees that UPC should be expanded to the novel categories outlined in the Tribunal's rule, then the precedential relationship of sanction to conduct is not appropriate where such conduct is consistent with the rigorous defence of a criminal accused.

(1) In making a finding of UPC, the tribunal considers contempt in assessing the conduct in question[35].

(a) The Tribunal considered that "conduct which is not sufficiently serious to be regarded as a contempt of court could still amount to unsatisfactory professional conduct".[36] This necessarily presupposes that the conduct in question is conduct which could be sanctionable by contempt.

(2) If UPC is to be applied to conduct which would attract sanction under a charge of contempt then the precedent set for penalty should be analogous to the penalties for contempt;

(a) If unsatisfactory professional conduct is to be applied to contempt category cases, however, the sanction should be determined by analogy to contempt penalties. In the instance case, the precedent set is a far harsher penalty than would have been if the facts had been assessed in a trial for contempt.[37] It is entirely illogical to impose harsher penalties for lesser crimes: If no penalty would have been given in contempt, then it makes no sense to impose a harsher penalty for unsatisfactory professional conduct.

35 see for example p 11 *NSW Bar Association v di Suvero* [2000] NSWADT No. 9824.
36 *NSW Bar Association v di Suvero* [2000] NSWADT No. 9824 at 11.
37 For standards of contempt sentencing, see the *District Court Act* 1973 (NSW) s199: contempt is punishable by a fine of no more than 20 penalty units, or imprisonment of no more than 28 days. In situations such as the current one the fine would have been more likely to have been imposed.

(3) Specifically, the precedent set for sanctions in cases similar in factual circumstance to the instance case should be analogous to the minimal sanction for contempt.

(a) If a finding of unsatisfactory professional conduct is upheld and the categories of conduct to which UPC applies expended, standards for penalty in contempt should be taken into account: The precedential sanction for the type of conduct in question should be analogous to the minimum sanctions for contempt of court. That is, a warning given or a fine imposed. It is submitted that such a precedent would be a more appropriate decision than the decision below, and would represent a relatively consistent and responsible development of the law of Unsatisfactory Professional Conduct.

Dated 10 October 2000

David Bernie
Barrister
Committee Member
NSW Council for Civil Liberties

Phone: 9233 7266
DX 600 Sydney.