REASONS FOR DECISION

FROM: Bar Council

DATE: 26 October 2018

RE: **Charles Robert Campbell Newlinds SC,** complaint by Mr James Whittaker on behalf of Mr David Ipp AO QC

Date of admission:	3 August 1990
Date of practice:	3 August 1990
Date of taking silk:	1 October 2003

Part 1: The Complaint

1. By letter dated 25 May 2017, the Legal Services Commissioner referred a complaint (the **Complaint**) against Charles 'Robert' Campbell Newlinds SC (**Newlinds**) to the Director, Professional Conduct, to be dealt with in accordance with Chapter 5 of the *Legal Profession Uniform Law (NSW)* (the **LPUL**).

2. The Complaint was made by Mr James Whittaker, a partner at Corrs Chambers Westgarth Lawyers, on behalf of Mr David Ipp AO QC (**Mr Ipp**) on 22 May 2017 and concerned Newlinds' conduct in relation to NSW Supreme Court proceedings 2015/201089 *Edward Moses Obeid & Ors v David Andrew Ipp & Ors* (the **Proceedings**), in which he appeared for Edward Moses Obeid Snr, Moses Edward Obeid, Paul Edward Obeid and Edward Joseph Obeid Jnr (**plaintiffs**). The defendants included Mr Ipp (who at the relevant time was the Commissioner of the Independent Commission Against Corruption (**ICAC**)) and Geoffrey Watson SC (counsel assisting the ICAC).

3. The Complaint primarily concerns allegations made by the plaintiffs in pleadings approved by Newlinds and ventilated by him in pre-trial hearings, which were abandoned a few weeks before the hearing, and which Mr Whittaker says were hopeless, not supported by the evidence, and should never have been made. No explanation was given for the abandonment of those pleadings. They were described by Hammerschlag J as "unmaintainable and irresponsibly made": *Edward Moses Obeid Snr v David Andrew Ipp* [2017] NSWSC 271 at [19]. Further, Mr Whittaker says that a further pleading in

relation to Mr Ipp left in the further amended statement of claim was also hopeless and should never have been made.

4. The defendants were ultimately successful in the proceedings: *Edward Moses Obeid Snr v David Andrew Ipp* [2016] NSWSC 1376 (the **Judgment**), and Hammerschlag J subsequently ordered the plaintiffs to pay Mr Ipp's costs of the proceedings on an indemnity basis (and on an ordinary basis for the second to sixth defendants): *Edward Moses Obeid Snr v David Andrew Ipp* [2017] NSWSC 271 (the **Costs Judgment**).

Part 2: The Investigation

5. Accompanying the Complaint were documents, including the Statement of Claim filed 9 July 2015 (**SOC**); the Amended Statement of Claim filed 11 December 2015 (**ASOC**); transcripts of various pre-trial hearings before Davies J and Hammerschlag J; various media articles; the Judgment and the Costs Judgment; and the submission filed by the Mr Ipp in relation to costs in the Proceedings.

6. On 8 June 2017, the Deputy Director, Professional Conduct (**DDPC**) wrote to Mr Whittaker requesting him to clarify which particular Bar Rules were allegedly to have been breached and the particular acts said to constitute those breaches.

7. On 29 June 2017, Mr Whittaker replied confirming that the complaint is made on behalf of Mr Ipp and providing a table identifying the relevant Bar Rules and reasons why those Rules had been breached (with cross-references to the Complaint). The Bar Rules identified were:

> **Rule 8:** A barrister must not engage in conduct which is:
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> (a) dishonest or otherwise discreditable to a barrister;
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> (b) prejudicial to the administration of justice, or
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> (c) likely to diminish public confidence in the legal profession or the administration of justice or otherwise bring the legal profession into disrepute.
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> **Rule 61:** A barrister must take care to ensure that decisions by the barrister to make allegations or suggestions under privilege against any person:
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> (a) are reasonably justified by the material then available to the barrister;

> (b) are appropriate for the robust advancement of the client's case on its merits; and
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> (c) are not made principally in order to harass or embarrass a person.
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> **Rule 64:** A barrister must not allege any matter of fact in:
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> (a) any court document settled by the barrister;
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> (b) any submission during any hearing;
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> (c) the course of an opening address; or
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> (d) the course of a closing address or submission on the evidence
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> unless the barrister believes on reasonable grounds that the factual material already available provides a proper basis to do so.
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> **Rule 65:** A barrister must not allege any matter of fact amounting to criminality, fraud or other serious misconduct against any person unless the barrister believes on reasonable grounds that:
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> (a) available material by which the allegation could be supported provides a proper basis for it; and
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> (b) the client wishes the allegation to be made, after having been advised of the seriousness of the allegation and of the possible consequences for the client and the case if it is not made out.

8. On 31 July 2017, the DDPC wrote to Newlinds and provided him with a copy of the Complaint and the Supporting Documents.

9. On 31 August 2017, Newlinds responded to the Complaint (the **First Response**). Attached to his Response was the plaintiffs' outline of closing submissions in the Proceedings.

10. On 18 September 2017, the DDPC wrote to Newlinds enclosing a notice pursuant to section 371(1) of the LPUL requiring him to provide information, being the privileged communications referred to the First Response.

11. On 30 October 2017, Newlinds responded to that letter and summarised the privileged information he referred to in his First Response (**PI Response** – disclosing privileged information).

12. On 12 October 2017, Mr Whittaker provided the DDPC with a USB containing a video recording of Paul Obeid in the ICAC Inquiry; a copy of the outlines of evidence of Arthur Coorey and Michael Bowe; statements in answer to interrogatories filed in the Proceedings; Mr Ipp's outline of closing submissions in the Proceedings; and an affidavit of Mr David Deutsch sworn 2 December 2015.

13. On 12 October 2017, the First Response and attachments were provided to Mr Whittaker for his comment. On 18 October 2017, Mr Whittaker responded to the First Response (**Complaint Response**).

14. On 30 October 2017, Newlinds wrote to the DDPC and attached a copy of his notes for closing submissions in reply.

15. On 2 February 2018, the DDPC provided Newlinds with a copy of the Complaint Response and invited his comments.

16. By letter on 5 March 2018, Newlinds responded to the Complaint Response (the **Second Response**).

17. On 23 May 2018, a copy of the draft report dated 21 May 2018 was provided to Newlinds.

18. On 18 June 2018, lawyers for Newlinds, Moray & Agnew, wrote to the DDPC and requested an extension of time to respond to the draft report. That extension was granted by the DDPC on 19 June 2018.

19. On 12 July 2018, Moray & Agnew wrote to the DDPC responding to the draft report in some detail (**Third Response**). It concluded by saying that the Bar Council ought to close the complaint. It said that alternatively, if the Bar Council was minded to conclude against Newlinds (later stated to be "[if] *the PCC proposes to recommend to the Bar Council that the matter be referred to the Tribunal*"), then the Bar Council ought to provide him with an opportunity to address Bar Council. At paragraph 68 of the Third Response, this opportunity was sought "*to enable him to explain in greater detail than this letter permits, his decision-making process*". It also stated that in any

event the Bar Council ought to have before it copies of all Newlinds' submissions on the complaint, including the Third Response.

20. On 18 July 2018, the DDPC wrote to Moray & Agnew in response to paragraph 68 of the Third Response, noting that the letter indicated that Newlinds wished to explain his decision-making process in greater detail to the Bar Council, and inviting Moray & Agnew to provide any further explanation by Thursday, 2 August 2018.

21. On 2 August 2018 Moray & Agnew responded, pressing Newlinds' request to address Bar Council in person, while stating that Newlinds and Moray & Agnew do not consider further written material would assist.

22. What follows is a consideration of the above material, including in relation to the Third Response, where appropriate, references to the privileged material provided by Newlinds in his PI Response.

Part 3: Background

<u>Overview: Operation Jasper</u>

23. The proceedings commenced by the plaintiffs followed an ICAC inquiry into the circumstances surrounding a decision made in 2008 by the then Minister for Primary Industries and Minister for Mineral Resources, the then Hon Ian Macdonald MLC (**Mr Macdonald**), to grant a coal exploration license, referred to as the Mount Penny tenement, located in the Bylong Valley, including whether that decision was influenced by the then Hon Edward Obeid MLC (**Mr Obeid Snr**), or members of his family. The ICAC inquiry was known as Operation Jasper.

24. ICAC compulsorily examined each of the plaintiffs privately and publicly.

25. In July 2013, Mr Ipp presented the Commission's Report (the **Report**) on Operation Jasper to Parliament.

26. The ICAC found that each of Messrs Macdonald, Obeid Snr and Moses Obeid had engaged in corrupt conduct. A key finding made by the ICAC was that Mr Macdonald provided the Obeid family with confidential information, which, relevantly, included two confidential government maps dated 9 May and 30 May 2008, which had been created at the instance of Mr Macdonald (the **Maps**): see [2016] NSWSC 1376 at [13].

The Proceedings

27. The proceedings were commenced by statement of claim filed 9 July 2015 (**SOC**), prior to Newlinds being briefed. On 11 December 2015, the plaintiffs filed an amended statement of claim (**ASOC**), which was settled by Newlinds.

28. In the ASOC serious allegations were made against Mr Ipp, including that he had acted in excess of his powers and functions, was motivated by actual bias, engaged in bad faith and for an improper purpose, intended to cause damage, reputational and financial harm to the plaintiffs and denied the plaintiffs procedural fairness.

29. Many of those allegations were subsequently withdrawn in July 2016 when the plaintiffs served a further amended statement of claim (**FASOC**). The FASOC was subsequently filed during the trial in August 2016: see [2.3] of the Complaint.

30. Before the allegations were abandoned, they were aired in court at various directions hearings, in the presence of media who subsequently reported the allegations, which is part of the complaint. It is alleged that this reporting wreaked significant impact on Mr Ipp and his family: see [5.1]-[5.3] of the Complaint.

31. Following, each of the abandoned allegations that are the subject of the Complaint are identified, grouped by topics.

Part 4: The abandoned allegations

The "Maps" allegations

32. The first set of allegations that are the subject of the complaint concern the insufficiency of evidence to support a finding in the Report that the Maps were found during the execution of a search warrant of premises occupied by an Obeid family company, Locaway Pty Ltd, in a business centre (commonly referred to as Birkenhead Point) at Drummoyne, Sydney (the **Premises**).

33. The Report found that the Maps were in a manila folder, which was itself inside a large envelope seized from the Premises and that this supported a conclusion that Mr Macdonald had given confidential information to a member of the Obeid family.

34. The ASOC asserts that Mr Ipp should have known that there was no evidence capable of showing that the Maps had been seized from the Premises (at [151][152][153]), and

despite knowing this, Mr Ipp made various findings, including that the Maps were found at the Premises (at [153]). In doing so, it was alleged that Mr Ipp:

a. denied procedural fairness to the plaintiffs;

b. acted in excess of his powers and Mr Ipp knew this;

c. was actually biased or motivated by actual bias;

d. exercised his powers of inquiry in bad faith and for an improper purpose; and

e. intended to cause damage, reputational and financial harm to the Plaintiffs (or knowing that damage could result) (see [154], [196] of the ASOC).

35. The ASOC further asserts that Mr Ipp permitted witnesses to be misled in evidence concerning the Maps. It was pleaded that Geoffrey Watson SC put to Paul Obeid misleading assertions to the effect that the Maps were found at the Premises, that ICAC was in a position to call the person who picked up that folder at the Premises in which the Maps were contained, and that the seizure of the Maps had been filmed. Further, Paul Obeid was not allowed to see the video: [243]-[244]. It is asserted that Mr Ipp knew that these were false and misleading statements put to Mr Obeid but did not correct Mr Watson (at [205]-[209][240][246][251]). It was also asserted that other witnesses – Gardner Brook, Obeid Snr and Moses Obeid – were similarly misled. For example, it was alleged that in various examinations:

a. Moses Obeid was told that there was a video proving that the Maps were seized from the Premises ([224])

b. Moses Obeid was told that Gardner Brook had given evidence that during a meeting with Moses, Paul and Gerard Obeid the Maps were shown to him [230][324];

c. Obeid Snr was asked to assume that the Maps were found in Paul Obeid's office [234];

and that, again, Mr Ipp knew those statements to be untrue [227][233][240], but did not intervene.

36. Again, as a result of those matters it was alleged that Mr Ipp:

a. denied procedural fairness to the plaintiffs;

b. acted in excess of his powers and Mr Ipp knew this;

c. was actually biased;

d. exercised his powers of inquiry in bad faith and for an improper purpose; and

e. intended to cause damage, reputational and financial harm to the Plaintiffs (or knowing that damage could result) (see [221][253] of the ASOC).

The Brook Allegations

37. It was alleged in the ASOC that Mr Ipp knew that the ICAC had entered into a contract, agreement or understanding with a witness, Gardner Brook (**Mr Brook**), which included that if Mr Brook gave evidence that "assisted ICAC in making findings of corruption against one or more of the Obeid family that the ICAC would not make any adverse finding against Gardner Brook" ([284], [285]).

38. Further, it was alleged that the ICAC failed to pursue inquiries in the investigation because the ICAC had entered into a secret deal with Mr Brook as a result of which unknown ICAC officers "intended to manipulate and did manipulate evidence in order to achieve a predetermined outcome, namely corruption findings against the Plaintiffs, or one or more of them" ([291] and that this involved the exercise by Mr Ipp of his powers to investigate and inquire in bad faith and for an improper purpose ([292]);

39. Further, that Mr Ipp knew that Mr Brook had been induced to give evidence against the Plaintiffs so as to escape any adverse findings against himself and that Mr Brook was not a reliable witness, yet Mr Ipp relied on Mr Brook's evidence and failed to disclose those matters to the Plaintiffs: [296]a, [309], [310], [314].

40. As a result of the above matters, it was again alleged that Mr Ipp (see [292] [315]):

a. denied procedural fairness to the plaintiffs;

b. acted in excess of his powers and Mr Ipp knew this;

c. was actually biased;

d. exercised his powers of investigation and inquiry in bad faith and for an improper purpose; and

e. intended to cause damage, reputational and financial harm to the Plaintiffs (or knowing that damage could result).

41. It was also alleged that Mr Ipp made:

a. no findings of corrupt conduct against Mr Brook and others pursuant to the undisclosed agreement with Mr Brook and thereby acted in bad faith, with bias, knowingly in excess of powers, and intending to cause damage or knowing that damage would result ([333], [336]); and

b. a suppression order over part of a witness statement in furtherance of the undisclosed deal with Mr Brook in order to "hide from the public that Gardner Brook's evidence was unreliable" ([350]), and thereby acted in bad faith, with bias, knowingly in excess of powers, and intending to cause damage or knowing that damage would result ([358]).

<u>The Tunks allegations</u>

42. The ASOC alleged that evidence was given by a Peter Tunks during the Inquiry that Mr Ipp knew to be false, but no officer of ICAC informed the public inquiry that the evidence of Mr Tunks was false ([255][356]). As a result, it was again alleged that Mr Ipp ([358]):

a. denied procedural fairness to the plaintiffs;

b. acted in excess of his powers and Mr Ipp knew this;

c. was actually biased;

d. exercised his powers to inquire, report and make findings in bad faith and for an improper purpose; and

e. intended to cause damage, reputational and financial harm to the Plaintiffs (or knowing that damage could result).

<u>General allegations of bad faith</u>

43. Based on the Maps, Brook and Tunks allegations, more general allegations of bad faith were pleaded in the ASOC. It was pleaded that by reason of the preceding matters, Mr Ipp, in conducting and reporting on Operation Jasper, was motivated by improper purposes being "an intention to" (at [362]):

a. harm one or more of the Plaintiffs;

b. publicly humiliate one or more of the Plaintiffs;

c. find the Plaintiffs corrupt "regardless of any exculpatory evidence"; and

d. cause the Plaintiffs injury, reputation and financial harm.

44. Further, that by reason of the above matters, Mr Ipp knew that he was acting beyond power and that his conduct was likely to harm the plaintiffs ([363][364]).

The Suppression allegation

45. During the execution of a search warrant, a document dated 4 November 2010 entitled "Heads of Agreement – Australian Water" (the **Heads of Agreement**) was discovered and videoed by ICAC officers: [2016] NSWSC 1376 at [51].

46. On 1 February 2013, during the Inquiry, counsel assisting showed Moses Obeid an unredacted copy of the Heads of Agreement and made a redacted copy available to the Commissioner. Mr Watson informed the inquiry that a portion of it had been blacked out for security purposes. After examining Moses Obeid about the transaction, he sought a suppression order in respect of the unredacted copy, which the Commissioner granted. The suppression order pertained to cl 3 of the Heads of Agreement: [2016] NSWSC 1376 at [56].

47. In the ASOC and maintained in the FASOC, the plaintiffs made a claim of misfeasance against Mr Ipp, being that he made the suppression order with respect to the Heads of Agreement knowing that he had no power to do so, and reckless as to the possibility that by doing so the plaintiffs would suffer damage. The Complaint alleges that such allegations also contravened the Bar Rules.

48. Relevantly, Justice Hammerschlag held that the claim entailed the following propositions (at [265]):

> (1) the Commissioner failed to exercise the power because he did not consider whether there was any basis upon which he could find the requirements of s 112(1A) to be satisfied. This is to be inferred from the facts that he did not ask Watson about the reason for the suppression order, did not ask for a copy of the unredacted version and on a reading of the redacted section, it is clear that there is no logical or rational basis on which it could be concluded that those parts could prejudice any ongoing investigations;
>
> (2) the Commissioner knew the limits of his powers;
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> (3) the Commissioner must have realised that the redacted section was relevant to the character of the Heads of Agreement because Watson had made the whole of the agreement

available to Moses Obeid, but did not consider at all whether there was any basis upon which the requirements of s 112(1A) were satisfied, and must have turned his mind to the possibility that in making the order he was acting in excess of his powers, but nevertheless went ahead and made the order;

(4) the Commissioner knew or was reckless as to the fact that the making of the suppression order would cause the plaintiffs, and particularly Moses Obeid, harm because having witnessed the examination of Moses Obeid, he must have known that Moses Obeid was denying an equity interest in the company and that the redacted version of the agreement contradicted that denial. He must also have known that the redacted version of the Heads of Agreement on its face contradicted that evidence, and therefore, given the publicity surrounding the hearing, that the press would report that Moses Obeid's evidence was contradicted by the redacted version, as in fact occurred the following day; and

(5) the suppression order caused the plaintiffs damage: such damage is to be inferred from the reporting of Moses Obeid's evidence in the Sydney Morning Herald caused the plaintiffs some reputational damage; a person reading the article would be left with the clear impression that there was no doubt that the "secret shareholding" was proved by the Heads of Agreement; that impression could not have been conveyed by any responsible journalist with access to the unredacted version of the Heads of Agreement; while there possibly would have been some sort of article in any event, that article would have almost certainly been different; and it ought to be inferred that the press would have sought accurately to report the events of the day, including the fact that there were clauses in the Heads of Agreement consistent with Moses Obeid's evidence to the effect that there was a loan and not a holding of shares.

49. Hammerschlag J held that the suppression allegation was without merit (at [269]). His Honour held that there was nothing to support a finding other than that Mr Ipp purported to exercise a power that he considered he had. His Honour held that it bordered "on the eccentric" to suggest that the Court should infer that Mr Ipp made the suppression order where he knew or was recklessly indifferent as to whether he had no power (at [277]). Hammerschlag J also rejected the submissions about the effect and consequences of the suppression order on the ordinary reading of the Heads of Agreement (see [278]-[283]).

Part 5: Reasons justifying the allegations

50. Before considering the specific allegations, in his First Response, Newlinds made preliminary observations, which he said were to be kept in mind when considering the Complaint, including that:

    a. counsel for the defendants, including Mr Walker SC, never suggested to him that the claims being propounded by him at any particular time constituted a breach of the Bar Rules;

    b. no personal costs order was sought against him;

    c. the Complaint draws on the indemnity costs arguments made by Mr Ipp; the Complaint therefore is directed to a different legal test, and is generally conclusory, lacks facts and particulars and fails to deal with what information was actually available to Newlinds from time to time;

    d. he was at all times acutely aware of the relevant ethical rules and was aware that he might be put under pressure to make arguments for which he might consider improper purposes;

    e. he considered this case one of the most difficult in his 27 years as a barrister, particularly given his "lack of access to the full story"; he considered that he was entitled to assume that documents unfavourable to ICAC had not been disclosed. Newlinds referred in that regard to the history of various applications to obtain documents, provide particulars and answer interrogatories;

    f. he has returned his brief and therefore his First Response is made without the benefit of considering the documents;

    g. undue reliance should not be placed on the costs judgment, given, *inter alia*, Newlinds did not appear on that application, and therefore did not have the opportunity to review the submissions made;

    h. he understood that he was acting for extremely unpopular people who nevertheless are still entitled to robust representation if the arguments are properly available.

51. In the Third Response, the following matters were emphasised:

a. Newlinds considered himself to have a proper basis to make the allegations;

b. Newlinds gave extensive and careful deliberation to the allegations before raising them in Court;

c. Newlinds gave careful thought, and discussed the allegations with his colleagues, before concluding the allegations were not improper and that his conduct would not constitute an abuse of the court process; and

d. The combination of factual matters in the allegations provided a further basis to support the inferences made by Newlinds in the allegations.

52. Moray & Agnew further submitted that the question of any breach of Bar Rule 65 turns on the belief of the barrister in question and the reasonableness of that belief, and that only if no barrister acting reasonably could have concluded that it was permissible to make the allegation can a pleading can be criticised as improper.

53. What follows in respect of each category of allegation is a summary of Newlinds' reasons justifying the making of the allegations, Mr Whittaker's responses and Newlinds Second Response, Third Response and a conclusion.

<u>The Maps allegations</u>

54. In pleading that there was insufficient evidence capable of supporting a finding that the Maps had been seized from the Obeid's offices, the pleadings rely on various factual matters including that the video of the execution of the search warrant did not show the Maps being found, or the manila folder in which they were allegedly found, that no evidence from ICAC officers acknowledged seeing or identifying the Maps in the seized material identified, that there was a 6 day gap in the chain of custody of the Maps, and that witnesses were misled because they were told in examination that the Maps had been found in the seized manila folder when the evidence did not establish this.

55. All of these matters were said to have been known by Mr Ipp and resulted in him engaging in, variously, biased, improper and dishonest conduct.

First Response

56. *Note: This paragraph has been redacted as it contains privileged information.*

57. In his First Response Newlinds states that the Maps allegations were reasonably arguable on the following grounds:

a. The defence to the original statement of claim of the third to tenth defendants pleaded that Ms Lisa Stockley (an ICAC employee) found the Maps in a manila folder on 28 February 2012. This date was some three months after the large envelope said to contain the manila folder which contained the Maps had been allegedly seized from the Premises. Further, chain of custody records indicated that the manila folder had been out of the ICAC custody for 6 days – with no evidence as to where the folder had been for those days.

b. No statement from Ms Stockley was tendered before the ICAC. Newlinds says that Exhibit J181 before the ICAC contained the various witness statements relevant to the Maps, but this exhibit did not include any statement from Ms Stockley. Further, this exhibit included no reference by any witnesses to the Maps being found upon execution of the search warrant in February.

c. The video of the execution of the search warrant did not show the manila folder being seized which was said to contain the Maps.

d. ICAC's document register did not refer to the Maps.

e. The conduct and tone of the cross-examination of Paul Obeid by both Messrs Watson and Ipp on the topic of the Maps suggested a "consciousness of guilt" on the part of both Mr Ipp and Mr Watson as to this issue.

f. The statement of the person who found the envelope enclosing the manila folder taken from the Premises – Katherine Kyriakopoulos – did not say that she ever saw the Maps. Indeed, there was evidence that she advised ICAC's chief investigating officer that she did not recall seeing two old looking maps amongst the materials: see Judgment at [16].

g. That when Mr Watson tendered Ms Kyriakopoulos' statement, he said that the person who found the Maps was in New York and was not available – indicating that he referred to Ms Kyriakopoulos. However, Newlinds considered on the information available to him that this was untrue, as Ms Kyriakopoulos had given no evidence that she had found the Maps.

h. Newlinds had a statement from a solicitor attending the examination of Paul Obeid who gave evidence concerning what was put by Mr Ipp to Paul Obeid concerning the Maps was inconsistent with what the transcript of that examination recorded. Newlinds abandoned this allegation once the audio-visual recording of that day in ICAC was provided to the plaintiffs.

i. *Note: This paragraph has been redacted as it contains privileged information.*

58. Newlinds said that it was upon the above primary facts that the pleadings in relation to the Maps were drafted. Newlinds said that an important premise of those pleadings was that Mr Ipp had read the evidence tendered before him and further, that Mr Ipp was aware or could have been expected to have been aware of the gaps in relation to the chain of custody. Newlinds said he was entitled to assume that there would be a clear chain of command within ICAC, and that Ms Stockley would be required to report to those above her in the hierarchy, and that this information would ultimately have made its way to Mr Ipp.

59. Newlinds considered that if the above facts and inferences were open to be pleaded, then it was not unreasonable for a consequence of those facts being proved for there to be the findings made as sought in the ASOC, including that Mr Ipp was actually biased, had engaged in bad faith, or that he was aware of a decision to deliberately hold back evidence which was potentially exculpatory of the Obeids, or that he intended to cause injury, reputational and financial harm to the plaintiffs.

60. Newlinds said that he only received the original Exhibit J181 very close to the hearing, and at that point saw that the exhibit did in fact contain a statement from Ms Stockley, in which she deposes to finding the Maps in the manila folder. He subsequently received a statement from an ICAC officer who explained that it was her job to upload Ms Stockley's statement onto the computer records of ICAC and that she had made a mistake, which meant that it had not been added to Exhibit J181. It appears that the Obeids and their lawyers were not given a copy of the Stockley Statement at the time that Exhibit J181 was tendered in the ICAC.

61. Newlinds said that he abandoned the Maps allegations when receiving this new information as he considered it highly unlikely that the court would conclude anything other than an administrative error had been made within ICAC. Newlinds said that he then thought it was best to approach the case on the basis that the various evidentiary failures by ICAC amounted to a breach of procedural fairness.

62. In the Third Response, his solicitors emphasise that vital to the Maps allegations was the very significant efforts made by the ICAC investigators to obtain statements confirming the derivation of the Maps, and the failure of those statements to do so.

Complaint Response

63. In the Complaint Response, Mr Whittaker said that Newlinds' First Response ignores the fact that:

    a. Mr Brook gave sworn evidence in the Inquiry that he had been shown the Maps by Moses Obeid and Paul Obeid and that this evidence was not challenged in cross-examination by any of the plaintiffs.

    b. All of the plaintiffs had available a copy of Exhibit J181 [while not noted in the Complaint Response it would seem that was without the Stockley statement], and none of the plaintiffs submitted that ICAC should not find that the Maps were located at the Premises. Submissions for Mr Ipp in the proceedings stated that Moses Obeid filed no submissions at all in the Inquiry and Mr Obeid Snr made no submissions on this point (submissions at [51](e)).

    c. In closing submissions before the Inquiry, Graham Turnbull SC, for Paul Obeid, made submissions that specifically agreed with counsel assisting's contention that the Maps had been found at the Obeids' offices (submissions at [51](g)).

64. From Mr Ipp's submissions in the proceedings before Hammerschlag J, and the Judgment, other relevant matters include:

    a. On 1 February 2013, Mr Watson tendered the manila folder with the Maps in it, and stated that it was found in a substantial envelope and described the folder with the Maps and two other documents as the state of the folder when it was found by the ICAC at the Obeids' offices. The folder in that condition (containing the Maps) was admitted into evidence as Exhibit J108 and no challenge was made to the tender of those documents on the basis described by Mr Watson (submissions [64](a)).

    b. Moses Obeid made various admissions in his own evidence to the effect that he had received confidential information relating to the Mount Penny tenement: (submissions [51](j)]). Further, during his evidence on 1 February

2013, Moses Obeid did not deny that he had seen the Maps (submissions [64](b)).

c. Similarly, during his evidence on 6 February 2013, Paul Obeid did not deny that the Maps were found in his office and admitted that the envelope was seized from his office. On Paul Obeid's evidence, the only question was whether he knew that the Maps were inside the envelope (submissions [64](c)). (The video of Mr Paul Obeid's examination by counsel assisting provided by Newlinds records his evidence: he said he knew that the large envelope was in his office, but that he had never opened it, and was "quite shocked" to learn that maps were inside it. He commented on the fact that the ICAC records documenting the seized materials did not specifically identify the Maps, but also said that he was "not making any point re the seizure record" (video at 43:47).)

d. Mr Ipp requested the parties to advise him if anyone who had given a statement concerning the search warrant would be required for cross-examination. None of the plaintiffs advised the ICAC that he required ICAC officers who had given statements which became part of Exhibit J181 to be questioned as to the provenance of the Maps (submissions [64](d)-(f)).

e. The plaintiffs led evidence from Mr Turnbull SC that he adopted a strategy of passivity before ICAC, choosing not to cross-examine, so as to not expose any avenues for further consideration by ICAC and thereby be in the best position in any subsequent criminal proceedings. The plaintiffs did not lead any evidence from Lionel Robberds QC or Stuart Littlemore QC, who acted for Moses Obeid and Mr Obeid Snr.

f. Ultimately, there was no resistance in the Inquiry to the proposition, clearly put by counsel assisting (see closing submissions set out by Hammerschlag J at [136]), that the ICAC should find that the Maps were found inside the envelope which had been seized from Paul Obeid's office. In fact, by the conclusion of the submissions, the question whether the version of Exhibit J181 that was available to the parties, or any other evidence, sustained a finding that the Maps were seized from the Premises was not in issue (submissions [65]).

g. Hammerschlag J stated that none of the plaintiffs sought to lead any evidence at the inquiry, and that a "noticeable omission" was that they did not call anyone from their solicitors at the time, who had sent the envelope (in which it appears that the Maps were allegedly contained) to say was in it: at [139].

h. In the above context, where the plaintiffs conducted themselves so as to lead to the inference that the provenance of the Maps was admitted or not in issue, Mr Ipp was entitled to treat that fact as proved (submissions [66]), particularly keeping in mind that that the ICAC is not bound by the rules of evidence (submissions [67]).

Conclusion: Maps

65. Taken at its highest, it can probably be accepted that the matters outlined by Newlinds in his First Response and in his PI Response raised questions (prior to discovering the Stockley Statement) as to whether there had been sufficient evidence to prove before the ICAC that the Maps had been seized from the Premises. The apparent absence of a statement saying the Maps had been found in the manila folder raised perhaps a question as to whether the Maps had been proven to have been seized with the material taken during the execution of the search warrant at the Premises. However, impermissible speculation and guess-work was then used to fill the gaps between that material and the serious allegations made against Mr Ipp.

66. There was no reasonable basis to allege, as Newlinds did, that, from the assumption that Mr Ipp had read all the evidence tendered before him pertaining to the Maps, Mr Ipp was aware of the problems with the ICAC's evidence, and that accordingly, he was actually biased, had engaged in bad faith, was acting in excess of powers, or that he intended to cause injury, reputational and financial harm to the plaintiffs.

67. This is particularly so when it appears that because of forensic and strategic decisions made by the plaintiffs during the course of the Inquiry (due to the potential for subsequent criminal proceedings), any problems with ICAC's evidence in relation to the Maps were not brought to ICAC's attention by the plaintiffs' counsel. Justice Hammerschlag's view that in all the circumstances, Mr Ipp was entitled to treat the fact that the Maps were found at the Premises as proved, keeping in mind that ICAC is not bound by the rules of evidence, which is of relevance here.

68. An examination of the video of Mr Watson's examination of Paul Obeid about the Maps does not lead to a different conclusion. It records occasions during Mr Obeid's examination when Mr Turnbull (Mr Obeid's counsel) objected to questions put by Mr Watson or, for example, to Mr Ipp's direction to Mr Obeid to answer a question as a "yes or no", on the basis of fairness, and those objections were ruled on by Mr Ipp (see e.g., at 35:30; 1:00-1:06). At its highest some of the statements by Mr Ipp suggest that Mr Ipp was having difficulty believing some aspects of Mr Obeid's evidence, but they are not of a nature that could reasonably give rise to a basis to conclude that Mr Ipp was approaching the evidence with obvious bias, prejudice or with some collateral motive or purpose.

<u>The Brook allegation</u>

First Response

69. The "secret deal" case was run at final hearing, but not against Mr Ipp. Newlinds identified the following matters as justifying the allegations made against Mr Ipp in the ASOC:

    a. A comparison between the private compulsory examination of Mr Brook by counsel assisting in the presence of Mr Ipp and his public examination by counsel assisting, also in the presence of Mr Ipp. In the private compulsory examination, Mr Brook was heavily and aggressively cross-examined upon the basis that he was a fraudster and a liar who had engaged in conduct such as falsely holding himself out to be a solicitor, having a serious substance abuse problem and other matters extremely adverse to his credit.

    b. That private compulsory examination transcript was not provided at any time to those representing any interested persons during the ICAC enquiry despite requests that it be disclosed. It was, however, tendered before Hammerschlag J. It is not clear to what extent any of the information in this private examination was made available or already known to the Obeids during or after the inquiry.

    c. Immediately after his private examination there was what Newlinds described as a very strange and out of order meeting between Mr Brook and two ICAC officers at the Sheraton on the Park Hotel in Sydney, where it is pleaded that the conduct of the investigating officers "was for the purpose of prompting Mr

Brook into giving evidence that was adverse to the plaintiffs" (see [305]). This was said to be because that there was an interval in the meeting for an ICAC officer to "nip" across the road to get a piece of paper which lasted from 1:13pm until 3.21pm, wherein nothing was recorded about what was said to Mr Brook in the interval.

d. When Mr Brook was called in public, his examination by Mr Watson was extremely friendly with no criticism being made of his credit. Mr Brook gave "luke warm evidence" against the Obeids.

e. Newlinds had instructions that Mr Watson had, during the course of another public enquiry, offered another witness what appeared to be an inappropriate arrangement or at least an arrangement that would be inappropriate if not disclosed to interested parties in the enquiry – this is the agreement recorded in file note of Mr Mangioni, Solicitor (Ex A) before Hammerschlag J.

f. Whilst Hammerschlag J rejected the factual basis of the secret deal argument, Newlinds considered it was open to be run.

70. Newlinds explained briefly that he withdrew the allegations for tactical forensic reasons and also due to Mr Ipp's denial of any such deal in his statement, which was provided close to the hearing (and after the ASOC).

Complaint response

71. Mr Whittaker referred to the reasons identified in Mr Ipp's closing submissions as providing a response to the Brook allegations and demonstrating that they were baseless. Those submissions included, *inter alia*:

a. It is not a secret that the Commission can decide not to recommend the prosecution of witnesses who have been involved in corrupt conduct but who have told the truth immediately (Submissions at [96]-[97]);

b. This practice was alluded to in the submissions of counsel assisting and Mr Brook (at [98]), and indeed counsel assisting squarely raised the question of whether Mr Brook should be given favourable treatment because of his cooperation and assistance (at [99]). Mr Brook in his submissions also invited the ICAC to act in accordance with this practice (at [100]).

c. The plaintiffs did not have Mr Brook recalled for cross-examination to put to him any secret deal with ICAC (at [101]).

d. In relation to the non-disclosure of parts of Mr Brook's compulsory examination transcript concerning credibility, authorities are clear that the ICAC is not required to disclose this evidence to affected persons (at [105]-[107]).

72. Mr Whittaker said that even if the court accepted that a deal was made between ICAC and Mr Brook, there was no basis for the further allegation that Mr Ipp "sought to achieve a predetermined outcome, that he manipulated evidence to achieve that outcome, or that Mr Ipp was biased or motivated by bad faith or a desire to harm the plaintiffs".

73. Mr Whittaker stated that Mr Brook had given sworn evidence that he had been shown the maps by Moses Obeid and Paul Obeid and that this had not been changed in cross-examination by any of the plaintiffs.

Conclusion: the Brook allegations

74. Even accepting each of the facts alleged by Newlinds, they do not justify the serious allegations against Mr Ipp.

75. Even if a deal had been made between ICAC and Mr Brook, to the effect that if he gave truthful evidence ICAC would not recommend prosecution, that does not explain how allegations could reasonably be made that any such deal was intended to manipulate evidence and to achieve a predetermined outcome, namely corruption findings against the plaintiffs, and that Mr Ipp knew about this.

76. Further, it is relevant that the plaintiffs did not have Mr Brook recalled for cross-examination on any secret deal with ICAC.

77. The available evidence did not reasonably support a conclusion that Mr Ipp had by allowing Mr Brook to give evidence in public session and by not releasing the transcript of the private hearing, acted in excess of his powers, was actually biased, had acted in bad faith and for an improper purpose, and had intended to cause damage, reputational and financial harm to the plaintiffs.

The Tunks allegations

First Response

78. Newlinds considered that the Tunks Allegations were supported by statements of evidence from two witnesses served on Mr Ipp's representatives.

79. Newlinds explained that he withdrew the allegations after new material came to light, namely that the ICAC had provided an unredacted version of the affidavit that had been filed in support of the application to issue the relevant search warrant. This affidavit demonstrated that Mr Tunks was not the informant (as Newlinds had previously thought).

Complaint Response

80. Mr Whittaker stated that the two witness statements referred to by Newlinds in the Response were:

    a. An unsigned outline of evidence from Arthur Coorey, which, relevantly, provided that during a meeting between Mr Coorey and Mr Tunks in January 2011, Mr Tunks said he wanted the Obeid family to help him recover $2 million, and if he did not receive this money he would provide ICAC with confidential information that he had obtained from Mr Brook; and

    b. An unsigned outline of evidence from Michael Bowe, which stated that the version of the "Selby Statement" provided to him by Paul or Moses Obeid was different to the version of the Selby statement which was tendered during the public enquiry.

81. Mr Whittaker stated that it is not clear from those two outlines how they provided a proper basis for Newlinds to make the allegation that Mr Ipp knew that evidence given by Mr Tunks was false. Further, it is not clear how the unredacted version of the affidavit referred to by Newlinds is relevant to the withdrawal of the Tunks Allegations, as it does not bear on the Tunks Allegations (the unredacted affidavit being relevant to a different part of the ASOC, about which Mr Ipp is not complaining).

Conclusion: The Tunks allegations

82. Again, none of the matters that Newlinds has identified in relation to the Tunks allegations justified the serious allegations made against Mr Ipp in the ASOC. *Note: the*

following part of this paragraph has been redacted as it may contain privileged information.

83. Having regard to the matters identified in the Complaint Response, the available evidence did not reasonably support pleadings that Mr Ipp had acted in excess of his powers, was actually biased, had acted in bad faith and for an improper purpose, and had intended to cause damage, reputational and financial harm to the plaintiffs.

Suppression of parts of heads of agreement

<u>First Response</u>

84. Newlinds maintained the position that what was argued in the FASOC was reasonably arguable. Newlinds stated that "numerous applications for production of documents, answers to interrogatories and requests for particulars seeking information as to the so-called "security reason" were resisted by ICAC and never divulged. To this day I do not believe that there was any security reason".

85. Further, Newlinds said that Mr Ipp in his statement did not turn his mind to the question about the proper basis for the suppression order and relied on what Mr Watson told him. Neither Mr Ipp nor Mr Watson gave evidence. In the absence of any explanation, Newlinds thought that the Court could infer that there was no rational explanation so as to conclude that the order was knowingly beyond power.

Complaint Response

86. Mr Whittaker stated that contrary to the Response, the plaintiffs had not served any requests for particulars to ICAC or Mr Ipp or served any draft interrogatories on any party, or sought discovery from any party, at all or prior to the ASOC. Further neither Mr Ipp nor Mr Watson served their statements until 2 June 2016. Thus, Mr Whittaker says it is not apparent how Newlinds had *any* basis to make the allegations.

87. Mr Whittaker said that Mr Ipp did turn his mind to the basis for the suppression order, and pointed to, *inter alia*, relevant parts of Mr Ipp's statement where he explains his reasons for making the suppression order.

88. Finally, Mr Whittaker pointed to evidence tendered at the trial which proved that as at the date of the suppression order, Mr Ipp was aware of the ICAC investigation into

Australian Water, and that one of the matters under investigation was the nature of the Obeids' interest in Australian Water.

Conclusion: the Suppression allegations

89. Again, none of the matters that Newlinds has identified justify the serious allegations against Mr Ipp about the suppression orders made to the Heads of Agreement in the FASOC.

90. The remarks from Hammerschlag J set out above are relevant, and are consistent with a view that there was no available evidence which reasonably supported the allegations against Mr Ipp being made.

The bad faith allegations

91. It follows from the above that that the general allegations of bad faith made against Mr Ipp could not reasonably have been made in the ASOC.

Part 5: Questions for the Bar Council

92. The question for the Bar Council is whether or not Newlinds has engaged in unsatisfactory professional conduct and/or professional misconduct in the manner articulated in the complaint.

93. Two procedural questions also arise:

    a. whether Bar Council ought to have before it all of the Newlinds' responses; and

    b. whether Bar Council ought to grant Newlinds' request to address Bar Council before it determines the complaint.

Part 6: Relevant law

Level of satisfaction required to make allegations

94. Clause 2(1) of Schedule 2 of the Legal Profession Uniform Law Application Act 2014 (NSW) (**LPUL Application Act**), titled *Costs in civil claims where no reasonable prospects of success* provides:

> A law practice must not provide legal services on a claim or defence of a claim for damages unless a legal practitioner associate responsible for the provision of the services concerned reasonably

> believes on the basis of provable facts and a reasonably arguable view of the law that the claim or the defence (as appropriate) has reasonable prospects of success.

95. Clause 4(1) provides:

> The provision of legal services by a law practice without reasonable prospects of success does not constitute an offence but is capable of being unsatisfactory professional conduct or professional misconduct by a legal practitioner associate of the practice who is responsible for the provision of the service or by a principal of the practice.

96. When pleading serious allegations such as fraud and dishonesty arguably a higher standard must be met, or at least the obligation will be strictly applied. Certainly there must be material capable of proving the allegation. Hill J in *Allstate Life Insurance Co v Australian and New Zealand Banking Group Ltd* (1995) 57 FCR 360 stated at 372:

> At the initial stages of pleading a claim there will always be evidence which points in one way and the other. An allegation of fraud is indeed a serious matter and should be the subject of anxious concern. … But the pleader is not obliged to conduct in his or her mind a mini-trial to reach a conclusion that the allegation must, or indeed would on the balance of probabilities, succeed. It is sufficient if the material known, which can include not only documentary material but also oral statements of witnesses and matters of instructions, provides a reasonable basis for the allegation if nothing else were to be proved. The mere fact that a possible defence is open does not make it improper to allege fraud unless, on all the materials available, that defence is such that it must necessarily succeed.

97. In *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [2004] VSC 105, Habersberger J referred with approval to Neuberger J in *Brown v Bennett (No 2)* [2002] 1 WLR 713:

> … whether there is sufficient evidence to satisfy the barrister that he can properly plead a claim of dishonesty, will sometimes be a matter of judgment, on which reasonable lawyers could differ. Accordingly, it would only be if the view reached by counsel that he could plead dishonesty was unreasonable or reckless that it could be improper. In other words, as I see it, it would only be if the lawyer's conclusion that he could plead a claim for dishonesty was one which no reasonable lawyer, properly considering matters, could have reached, that it can be criticised as being improper.

98. The issue is not determined merely by considering whether the barrister honestly held the belief that there was a proper basis to make the allegations. As Rules 64 and 65 state, such a belief needs to be held *on reasonable grounds*. The Third Response is

correct to submit that the mere fact that another barrister may have taken a different view is not sufficient to find any wrongdoing. Misconduct however can arise, despite the barrister holding an honest belief that it was proper to make the allegations, if objectively there were no reasonable grounds to hold that belief.

Definitions of unsatisfactory professional conduct and professional misconduct

99. Section 297 of the LPUL defines "unsatisfactory professional conduct" to include "conduct of a lawyer occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer".

100. The common law concept of professional misconduct includes conduct which would reasonably be regarded as disgraceful or dishonourable by professional colleagues of good repute and competency: *The Council of the New South Wales Bar Association v Sahade* [2007] NSWCA 145 at [54] (per Basten JA).

101. McClellan CJ at CL in *Bechara v Legal Services Commissioner* [2010] NSWCA 369 at [44] identified conduct that has been held to amount to professional misconduct:

> As Clyne [*Clyne v NSW Bar Association* (1960) 104 CLR 186] made plain, there are no fixed categories of professional misconduct. Much depends on whether the conduct falls outside "generally accepted standard[s] of common decency and common fairness". Previous examples of professional misconduct have included: wilfully misleading the court (*New South Wales Bar Assn v Livesey* [1982] 2 NSWLR 231); removing documents in contravention of a court order(*Howes v Law Society of the Australian Capital Territory* (Supreme Court of ACT, Gallop ACJ, Higgins and Crispin JJ, 23 July 1998, Unreported); permitting conflicts of interest to arise (*Law Society of New South Wales v Moulton* [1981] 2 NSWLR 736); failing to account for money received (*Re Walker; Ex parte Kemp* (1887) 3 WN (NSW) 123); misleading a client (*Hoshott v Council of the Law Society of New South Wales* (Supreme Court of NSW, Meagher, Sheller and Stein JJA, 17 December 1997, Unreported); gross neglect and delay (*Legal Practitioners Conduct Board v Hay* [2001] SASC 322; (2001) 83 SASR 454); failing to adequately supervise an unqualified clerk (*Law Society of New South Wales v Foreman* (1991) 24 NSWLR 238); breaching an undertaking given to another lawyer (*Wade v Licardy* (1993) 33 NSWLR 1); and, in certain situations, criminal and/or personal misconduct (*Ziems v Prothonotary of the Supreme Court of New South Wales* (1957) 97 CLR 279).

102. In addition to the common law concept of professional misconduct, s 297 of the LPUL provides that “professional misconduct” includes:

> (a) unsatisfactory professional conduct of a lawyer, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and
>
> (b) conduct of a lawyer whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the lawyer is not a fit and proper person to engage in legal practice.

103. The word “substantial” in the phrase “substantial or consistent” was considered by the Administrative Decisions Tribunal, constituted by S Norton SC, RJ Wright SC and C Bennett in *NSW Bar Association v Asuzu* [2011] NSWADT 209. The Bench noted that in *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331 Deane J considered the word "substantial" in the phrase "substantial loss or damage" at 348:

> The word "substantial" is not only susceptible of ambiguity: it is a word calculated to conceal a lack of precision. In the phrase "substantial loss or damage", it can, in an appropriate context, mean real or of substance as distinct from ephemeral or nominal. It can also mean large, weighty or big. It can be used in a relative sense or can indicate an absolute significance, quantity or size. The difficulties and uncertainties which the use of the word is liable to cause are well illustrated by the guidance given by Viscount Simon in *Palser v. Grinling* (1948) AC 291 where, after holding that, in the context there under consideration, the meaning of the word was equivalent to "considerable, solid or big", he said: "Applying the word in this sense, it must be left to the discretion of the judge of fact to decide as best he can according to the circumstances of each case . . . " (1948) AC, at p 317 . (See also *A.E. Terry's Motors Ltd. v. Rinder* (1948) SASR 167, at p 180 and *Granada Theatres Ltd. v. Freehold Investment (Leytonstone) Ltd.* (1958) 1 WLR 845, at p 848).

104. The Bench noted the decision of French J in *Stirling Harbour Services Pty Ltd v Bunbury Port Authority* (2000) ATPR 41-752 in relation to the phrase "substantial lessening of competition" at [114], where his Honour said:

> In my opinion the phrase sets a standard for judicial intervention in respect of the classes of anti competitive conduct to which it applies. It requires, before that intervention can be invoked, that there be a

> purpose, effect or likely effect of the impugned conduct on competition which is substantial in the sense of meaningful or relevant to the competitive process. There is, of course, a certain circularity in these attempts at exposition. It could be said that a substantial lessening of competition describes a purpose or outcome of conduct which is deserving of the intervention of the Court in the protection of the competitive process according to law. So to say, is to identify the functional character of the statutory standard.

105. The Bench in *Asuzu* concluded at [40]:

> Applying such an approach in the context of the LPA, it appears to us that "substantial" in s 497(1)(a) should be taken as referring to a failure to meet the requisite standard in a way that is meaningful or relevant to the legal practitioner's ability to practise law.

Part 7: Consideration

106. In the Third Response, Moray & Agnew submit that Newlinds gave the pleadings careful thought and, having done so, he held a belief that there was available material which provided a proper basis for each allegation. As noted above, more is required than an honestly held belief – there must objectively be reasonable grounds for that belief.

107. As explained above, Newlinds did not have reasonable grounds to make the very serious allegations the subject of the complaint. Whatever allegations the evidence available to Newlinds might have supported, without the addition of impermissible speculation, they could not reasonably support the allegations of the type made against Mr Ipp.

108. Such conduct was contrary to Clause 2(1), Schedule 2 of the LPUL Application Act.

109. It also constituted conduct that was contrary to the Bar Rules. Having regard to the matters outlined above, it was conduct that:

   a. amounted to a failure to ensure that allegations made under privilege were reasonably justified by the material available to Newlinds, contrary to Bar Rule 61;

   b. involved the making of allegations of fact in a court document settled by Newlinds, and in submissions made in preliminary hearings, in circumstances where Newlinds should have known he did not have reasonable grounds to conclude that the factual material already available provided a proper basis to do so, contrary to Bar Rule 64;

c. involved the making of allegations of serious misconduct against Mr Ipp in circumstances where Newlinds did not have reasonable grounds to conclude that on the material available to him the allegations could be supported, contrary to Bar Rule 65. That Newlinds might have subjectively thought he had reasonable grounds to make the allegations is not sufficient;

d. and more generally was likely to diminish public confidence in the administration of justice, contrary to Bar Rule 8.

110. The following factors are relevant to determining the seriousness of Newlinds' conduct:

a. Newlinds' standing in the legal profession as a senior counsel;

b. the absence (to date) of any contrition or recognition by Newlinds that he had no reasonable basis to bring the allegations;

c. that Newlinds asserts that he gave serious and considered thought to the ASOC and the FASOC, before proceeding to settle and bring those claims;

d. Newlinds believed that he had a reasonable basis to make the allegations in the ASOC and the FASOC;

e. that Newlinds knew, or should have known, when he ventilated the claims in the ASOC at the pre-trial hearings that there would media present; and

f. that most of the allegations, whilst ultimately withdrawn, were maintained for several months and through a number of directions hearings.

111. The factors at (a), (c), (d) and (f) might be considered both mitigating and aggravating factors.

112. For the reasons stated above, Newlinds conduct in relation to the allegations made in the ASOC and the FASOC, ventilated in public, falls significantly short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.

Part 8: Orders that can be made

113. Section 299(1) of the LPUL provides that if a finding of unsatisfactory professional conduct is made the Bar Council may make any of the following orders:

(a) an order cautioning the respondent or a legal practitioner associate of the respondent law practice;

(b) an order reprimanding the respondent or a legal practitioner associate of the respondent law practice;

(c) an order requiring an apology from the respondent or a legal practitioner associate of the respondent law practice;

(d) an order requiring the respondent or a legal practitioner associate of the respondent law practice to redo the work that is the subject of the complaint at no cost or to waive or reduce the fees for the work;

(e) an order requiring--

(i) the respondent lawyer; or

(ii) the respondent law practice to arrange for a legal practitioner associate of the law practice--

to undertake training, education or counselling or be supervised;

(f) an order requiring the respondent or a legal practitioner associate of the respondent law practice to pay a fine of a specified amount (not exceeding $25 000) to the fund referred to in section 456;

(g) an order recommending the imposition of a specified condition on the Australian practising certificate or Australian registration certificate of the respondent lawyer or a legal practitioner associate of the respondent law practice.

114. Alternatively, the Bar Council may, under s 300(1):

(1) … initiate and prosecute proceedings against a respondent lawyer in the designated tribunal if the designated local regulatory authority is of the opinion that--

(a) the alleged conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the designated tribunal; or

(b) the alleged conduct may amount to professional misconduct.

115. The language of s 300 does not require a positive finding that the alleged conduct does amount to unsatisfactory professional conduct or professional misconduct. The Bar Council can initiate and prosecute proceedings in the Tribunal if it determines that the conduct "*may*" amount to such conduct.

116. However, where the Bar Council determines that the conduct *may* amount to professional misconduct it retains a discretion to instead exercise its powers pursuant to s 299 where it determines that the barrister has engaged in conduct that constitutes unsatisfactory professional conduct.

117. Further, where the Bar Council determines that the conduct may amount to unsatisfactory professional conduct that would be more appropriately dealt with by the Tribunal, it has a discretion to initiate and prosecute proceedings in the Tribunal rather than proceed to determine for itself if there was unsatisfactory professional conduct and exercise the powers available to it pursuant to s 299.

Part 9 Determinations

118. The Third Response addressed the issue of whether the conduct could amount to professional misconduct. Citing *Asuzu*, it submitted the alleged failure was not one that could be said to be "*meaningful or relevant to the legal practitioner's ability to practise law*". The Third Response then submitted that: *"There can be no suggestion that Mr Newlinds' conduct suggests a lack of ability to practise law, or that his conduct is so demonstrative of lack of judgment that it otherwise meets the definition of 'substantial', as discussed by the Tribunal in* Asuzu*."*. It further submitted that the question cannot turn on the seriousness of the allegations made in the pleading, since if that were the test then any breach of Bar Rule 65 would necessarily mean a referral to the Tribunal.

119. Notwithstanding those matters, it is considered that the conduct of making the very serious allegations without a reasonable basis might be conduct capable of being found to be a <u>*substantial*</u> *failure to maintain a reasonable standard of competence and*

diligence within the meaning of s297(1)(a) of the LPUL, and as such conduct that *may* amount to professional misconduct.

120. It was, however, conduct that fell short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer, and so constituted unsatisfactory professional conduct.

121. As noted in Part 8 above, having made those determinations a discretion arises as to whether to determine this matter by initiating and prosecuting proceedings in the Tribunal pursuant to s300 or by exercising the powers granted pursuant to s299.

122. In exercising that discretion regard is had to the nature and seriousness of the conduct, as discussed at 108 to 113 above.

123. For the following reasons, Bar Council is of the view that this matter should be determined by exercising the powers granted pursuant to s299:

   a. there is no likelihood that the conduct would be found to justify a finding that that barrister "is not a fit and proper person to engage in legal practice";

   b. it is unlikely that any different penalty would be imposed than that which is available under s 299 of the LPUL, having regard to all the circumstances, including;

      i. the absence of evidence of any like conduct;

      ii. that Newlinds was mindful of his obligations and believed (albeit without reasonable grounds) that the allegations could be made;

      iii. while the conduct continued for some time, ultimately all bar one of the allegations were withdrawn; and

      iv. the conduct was not of a nature that would be likely to cause harm that was incapable of being cured in the course of the proceedings (as occurred by the findings in favour of Mr Ipp QC in both the primary judgment and the costs decision).

   c. to initiate, prosecute and conclude proceedings before the Tribunal would take considerable time and give rise to significant costs for the Bar Association and Mr Ipp, as well as Mr Newlinds;

   d. there are no issues of credibility which require a hearing to resolve;

e. a hearing would cause the repetition of the (withdrawn) allegations in a public forum, which would be likely to cause further harm and distress to Mr Ipp; and

f. having regard to the matters at (b) above, the conduct is not of such a sufficiently serious nature that it requires that it be dealt with by making an application for a finding that it amounted to professional misconduct, nor is there a risk that public confidence in the legal profession might be diminished by a determination that the conduct amounts to unsatisfactory professional conduct without such a determination being made in an open forum.

124. Having so determined, the question of what orders ought to be made pursuant to s 299 of the LPUL falls for consideration.

125. A caution would not reflect the seriousness of the failure. A reprimand is accordingly an appropriate order.

126. The making of the allegations and their repetition at interlocutory stages were heavily reported. While the subsequent decisions of Hammerschlag J were also reported, Mr Ipp was nevertheless, for some time, the subject of well-reported serious allegations made without reasonable grounds. Given that they arose directly from the unsatisfactory professional conduct, it is appropriate that Newlinds also be ordered to apologise to Mr Ipp, including for the making of allegations which were subsequently withdrawn. The Bar Council is of the view that the apology be provided by Newlinds to Mr Ipp within seven days of being notified of the Bar Council's determination.

Part 10 Procedural questions

127. The Third Response asks that two procedural steps be taken: first, that the Bar Council be provided with each of Newlinds' responses in full to consider alongside this report, and second, that Newlinds be permitted to address the Bar Council before it makes a decision.

128. There is an obligation on the Bar Council to provide procedural fairness. That obligation is ordinarily met by a process by which a Professional Conduct Committee considers the submissions made and prepares a draft report to Bar Council which conveys those submissions. In addition, where the Bar Council proposes to make a finding of unsatisfactory professional conduct or misconduct, the Council's report and

proposed sanctions are first provided to the practitioner and complainant with an opportunity to comment and to make any further submissions.

129. The requested steps are unusual. There would need to be a reason why such a different approach should be taken in this case. No such reason is apparent. There is nothing that separates this case procedurally from others that come before the Bar Council, beyond the fact that such procedural steps have been requested.

130. As to the first request, that Bar Council be provided with Newlinds' written responses in full, that would require Bar Council to have before it a further 89 pages of material, including attachments. It is not considered necessary or appropriate for such material to be provided to Bar Council given the content of this report.

131. As to the second request, that Newlinds be permitted to address Bar Council, this is sought "*to enable him to explain in greater detail than this letter permits, his decision-making process*". When invited to provide the greater detail in writing Moray & Agnew said: "*He, and we, have done our best to set out the process in our prior correspondence with the Bar and do not consider further written material would assist*." On that basis, Newlinds declined the request to provide further written submissions, but repeated his request to address the Bar Council in person.

132. The request was put on two different bases. In the *Introduction* to the Third Response it is sought "*if the Bar Council was minded to conclude against Newlinds*". Later, under the heading *Characterisation of the Conduct* at paragraph [68] it is sought on the narrower basis of "[if] *the PCC proposes to recommend to the Bar Council that the matter be referred to the Tribunal*".

133. Notwithstanding the recommended resolutions in this report, it is open to Bar Council to consider referring the matter to the Tribunal (noting this was the draft recommended resolution in the draft report of 21 May 2018 to which the Third Response responded). Accordingly, the request is one that falls to be considered even on the narrower basis on which it was made.

134. There does not appear to be anything unusual about this matter which would lead the Bar Council to depart from its usual practice and accede to the requests.

135. At its meeting on 6 September 2018 the Bar Council considered the procedural issues set out in this Part of the report and resolved as follows**:**

RESOLVED to deny the request made on behalf of Charles Robert Campbell Newlinds in the letter from Moray & Agnew of 12 July 2018 that Bar Council determine his complaint only after:

(a) it is provided with copies of each of Newlinds' submissions; and
(b) Newlinds has been given an opportunity to address Bar Council.

136. The Bar Council otherwise resolved to stand over further consideration of the matter.

137. By letter dated 15 October 2018 Newlinds was provided with a draft of the Professional Conduct Committee report of the same date, including proposed resolutions, and was invited to provide submissions. Submissions were received from Newlinds' solicitors on 25 October 2018.

138. At its meeting on 25 October 2018, having considered the matters raised on Newlinds' behalf, the Bar Council confirmed its decision to determine the matter in the way proposed.

Resolutions

RESOLVED, pursuant to section 299 (1) of the *Legal Profession Uniform Law (NSW),* to find that Charles Robert Campbell Newlinds SC has engaged in unsatisfactory professional conduct in relation to a disciplinary matter, being the complaint made against Newlinds SC by Mr James Whittaker on behalf of Mr David Ipp AO QC dated 22 May 2017.

FURTHER RESOLVED, pursuant to section 299 (1)(b) and (c) of the *Legal Profession Uniform Law (NSW),* to determine the disciplinary matter by making the following orders:

(i) an order reprimanding Newlinds SC; and
(ii) an order requiring Newlinds SC to apologise to Mr David Ipp AO QC, in relation to the conduct which is the subject of the complaint, including the making of allegations by Newlinds SC against Mr David Ipp AO QC which were subsequently withdrawn, such apology to be provided within seven days of Newlinds SC being notified of the Bar Council's determination.