

RESTRICTIONS ON LEGAL ADVERTISING: STATE-BY-STATE ROUND-UP

AUSTRALIAN CAPITAL TERRITORY By Gerald Santucci

LEGISLATION

Legal Profession Act 2006 (ACT)

Legal Profession (Solicitors) Rules 2007 (ACT)

RESTRICTIONS

LEGAL PROFESSION ACT 2006	There are no restrictions in the ACT similar to those contained in ss84–86 of the NSW legislation. Section 162 restricts the type of advertising that an Australian-registered foreign lawyer is required to comply with. Section 585 makes the <i>Legal Profession (Solicitors) Rules 2007</i> binding on legal practitioners to whom they apply, and failure to comply with the Rules can amount to unprofessional conduct or professional misconduct.
LEGAL PROFESSION (SOLICITORS) RULES 2007	Rule 38.2(a) provides that: 'A practitioner may advertise in connection with his or her practice provided that such advertising: i) is not false in any material particular; ii) is not misleading or deceptive or likely to mislead or deceive; iii) is not vulgar, sensational, or otherwise such as would bring or be likely to bring the practitioner or the legal profession into disrepute.' Rule 38.2(b) provides that '[t]he onus would be on any practitioner who claimed that he was a specialist or an expert in a particular field of practice to prove, if required, that his claim was not false, misleading or deceptive.' The balance of the rules deals with the definition of 'specialist'.

SANCTIONS

Chapter 4 of *Legal Profession Act 2006* deals with unprofessional conduct or professional misconduct.

NEW SOUTH WALES By Jnana Gumbert

LEGISLATION

Legal Profession Act 2004 (NSW), ss84–86

Legal Profession Regulation 2005 (NSW), regs 23–40

Workers' Compensation Regulation 2003 (NSW), regs 74–801.

RESTRICTIONS

LEGAL PROFESSION ACT 2004	Section 84 – a barrister or solicitor must not advertise in a way that is false, misleading or deceptive, or in contravention of the <i>Trade Practices Act 1974 (Cth)</i> or the <i>Fair Trading Act 1987</i> . Section 85 – the regulations may regulate or prohibit marketing of legal services. Section 86 – a barrister or solicitor must not advertise themselves as being a specialist unless they have appropriate expertise and experience or are accredited by the Bar Council or Law Society.
LEGAL PROFESSION REGULATION 2005	Reg 24 – a barrister or solicitor must not cause to be published an advertisement with any reference to personal injury, circumstances in which personal injury might occur, or a personal injury legal service. Reg 26 – a barrister or solicitor can advertise their specialty but only in a practitioner directory, a sign at their place of business, or on their website. Reg 27 – nothing prevents advertising to an existing client, to a person on the business premises (and certain other exceptions). Reg 34 – a person must not publish any personal injury advertisement referring to legal services or recovery of money for personal injuries. Reg 37 – exceptions to the restrictions include advertising by Legal Aid and for the sole purpose of legal education.
WORKERS' COMPENSATION REGULATION 2003	Reg 75 – a lawyer or agent must not advertise any services relating to work injuries. Reg 76 – a lawyer can advertise as being a specialist under similar conditions to reg 26 of the <i>Legal Profession Regulation</i> .

SANCTIONS

LEGAL PROFESSION ACT 2004

Section 84 – a breach of s84 is capable of being professional misconduct or unsatisfactory professional conduct.

Section 85 – a breach of s85 can attract a penalty of up to 200 penalty units. The Administrative Decisions Tribunal can issue a direction that the legal practitioner not engage in the prohibited conduct. A contravention of this direction can attract a penalty of up to 200 penalty units, and is capable of being professional misconduct.

Section 498 – a breach of s86 is capable of being unsatisfactory professional conduct or professional misconduct.

Section 562 – if the Administrative Decisions Tribunal determines that a practitioner is guilty of professional misconduct or unsatisfactory professional conduct, it can make a number of orders, including removing the practitioner's name from the roll, suspending, cancelling or placing conditions on the practitioner's practising certificate, or fining the practitioner. The fine against a practitioner must not exceed \$10,000 for unsatisfactory professional conduct or \$75,000 for professional misconduct.

LEGAL PROFESSION REGULATION 2005

Reg 24 – a contravention of this regulation attracts a penalty of up to 200 penalty units and is capable of being professional misconduct.

Reg 34 – a contravention of this regulation attracts a penalty of up to 200 penalty units.

Section 498 of the Act provides that a breach of the regulations is capable of being professional misconduct or unsatisfactory professional conduct.

WORKERS' COMPENSATION REGULATION 2003

Reg 75 – a contravention of this regulation attracts a penalty of up to 200 penalty units and can be professional misconduct.

CASES

LEGAL SERVICES COMMISSIONER V MALOUF [2007] NSWADT 215

Gerard Malouf was found guilty of professional misconduct for advertising personal injury services in breach of Pt 14 of the *Legal Profession Act 2002*, Pt 14 of the *Legal Profession Regulation 2002* (which contains similar provisions to the 2004 Act and 2005 Regulation) and Pt 18 of the *Workers' Compensation Regulation 2003*. He was publicly reprimanded and ordered to pay a fine of \$20,000. The Tribunal declined to order that Mr Malouf's name be removed from the roll on the basis that he was of previous good character and pleaded guilty to the allegations.

NORTHERN TERRITORY By Robert Perry

LEGISLATION

Legal Profession Act (NT), ss288–293

Legal Profession Regulations (NT), regs 79, 80

RESTRICTIONS

LEGAL PROFESSION ACT

Section 290 – a legal practitioner must not publish, or cause to be published, a statement (other than a complying statement) with the intention that a person make a personal injury claim or engage a legal practice named in the statement for making a claim.

Section 292 – a person must not tout for potential claimants in a personal injury matter.

Section 293 – a person must not reward another person for soliciting or inducing a potential claimant to make a claim or seek reward from another person for soliciting or inducing a potential claimant to make a claim.

Section 288 – the restrictions on advertising for personal injury claims do not apply in relation to:

- '(a) an advertisement or publication published by an Australian legal practitioner about making a claim or engaging an Australian legal practitioner for making a claim;
- (b) an advertisement or publication made for educating people about the content of the law or their rights, liabilities and duties under the law;
- (c) an advertisement or publication made for identifying people who are entitled to become parties to a class action specified in the advertisement or publication;
- (d) an advertisement or publication made under a statutory power or function;
- (e) an advertisement or publication made by the Northern Territory Legal Aid Commission in relation to the Contingency Legal Aid Fund established by section 44 of the *Legal Aid Act*;
- (f) an advertisement or publication made for confirming the existence of a contractual relationship between an Australian legal practitioner and another entity under which the practitioner is to provide legal services for personal injury claims;
- (g) an advertisement or publication prescribed by the regulations.'

	The restrictions on advertising in personal injury claims also do not apply to statements made by any of the following persons about making, or engaging an Australian legal practitioner for making, a claim: '(a) a person holding an office (whether in or outside the Territory) in the course of carrying out the functions of the office; or (b) a person prescribed by the regulations.'
LEGAL PROFESSION REGULATIONS	Reg 79 (referring to s288(1)(g) of the Act) – any advertisement or publication made by the Law Society, NT Legal Aid Commission or a community legal centre informing people about where they may obtain advice about the law relating to personal injuries or an advertisement or publication circulated within a firm of legal practitioners relating to legal services for personal injury claims is exempt from the advertising restrictions. Reg 80 (referring to section 288(2)(b) of the Act) prescribes the following persons: a) the Law Society; b) the NT Legal Aid Commission or a person acting for the Commission; c) a community legal centre or a supervising legal practitioner employed or engaged by the centre acting for the centre; d) the Commissioner of Consumer Affairs or a person acting for the Commissioner; e) an ambassador, consul or diplomat of a foreign country carrying out consular or diplomatic duties in the Territory.

SANCTIONS

LEGAL PROFESSION ACT	A breach of any of ss290, 292 or 293 is an offence and carries a maximum of 50 penalty units. Section 466 – a breach of ss290, 292 or 293 may also incur disciplinary proceedings under Chapter 4 of the Act for unsatisfactory professional conduct or professional misconduct.
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QUEENSLAND By Ashley Park

LEGISLATION

Legal Profession Act 2007 (QLD)

Legal Profession (Solicitors) Rule 2007 (QLD)

Personal Injuries Proceedings Act 2002 (QLD)

RESTRICTIONS

LEGAL PROFESSION ACT 2007	Section 25(1) states that a person must not advertise that they are entitled to engage in legal practice unless they are an Australian legal practitioner. Section 126 provides that any provision that deals with advertising by an Australian legal practitioner, under any Act, applies to an incorporated legal practice.
LEGAL PROFESSION (SOLICITORS) RULE 2007	Rule 36 – A solicitor must not advertise the solicitor's expertise or practice if that advertising is: • false (36.1); • misleading or deceptive (or likely to be) (36.2); and • vulgar, sensational, or would bring a court, solicitor or the legal profession into disrepute (or likely to) (36.3). Rule 36.4 deals with the use of the term 'Accredited Specialist': the term (or abbreviations for such) cannot be used by a practitioner unless they are an Accredited Specialist and must be used only in compliance with the Queensland Law Society's guidelines.
PERSONAL INJURIES PROCEEDINGS ACT 2002	Chapter 3, Part 1 deals with the restrictions on the advertising of personal injury services in Queensland. The main provisions are in ss64 to 66. Section 66(1) states that a practitioner or legal practice must not advertise personal injury services except by the publication of a statement that: • states only the name, contact details, and information regarding an area of practice or specialty; and • is published by an allowable publication method. It specifically states, by way of example, that the advertising of personal injury services on a 'no win no fee' basis would contravene the section. Section 66(2) allows advertising to an existing client, at the place of business, or under court order. It also allows practitioners to advertise on their website, so long as it is limited to statements about: • the operation of the law of negligence and a person's legal rights under that law; and • the conditions under which they are prepared to provide personal injury services.

Section 64(1) states that a practitioner or legal practice 'advertises personal injury services' if they publish a statement that is intended to or likely to induce a person to:

- make a claim for damages; or
- use the services of the practitioner or legal practice in connection with making such a claim.

Section 65(1) defines 'allowable publication method', listing various methods, including printed publications. Notably, it does not include television or radio as an allowable publication method. Also see s64(2) which defines 'published'.

SANCTIONS

LEGAL PROFESSION ACT 2007

Section 25(1) – a breach of s25(1) can attract up to 300 penalty units, or two years' imprisonment.

LEGAL PROFESSION (SOLICITORS) RULE 2007

Section 227(2) of the *Legal Profession Act 2007* provides that failure to comply with the legal professional rules is capable of constituting unsatisfactory professional conduct or professional misconduct.

PERSONAL INJURIES PROCEEDINGS ACT 2002

A practitioner who breaches s66 is liable to:

- prosecution in the courts under the Act, which can attract a penalty of up to 300 penalty units;
- come before the Legal Services Commission for unsatisfactory professional conduct or professional misconduct; or
- both.

SOUTH AUSTRALIA By Andrew Baillie

LEGISLATION

Legal Practitioners Act 1981 (SA)

RESTRICTIONS

There are no restrictions on personal injury-related advertising in SA similar to those found in ss84-86 of the NSW legislation.

RULES OF PROFESSIONAL CONDUCT & PRACTICE

These rules provide guidelines set out by the Law Society of SA as to the professional conduct of legal practitioners in this jurisdiction.

'36.1 Legal practitioners may advertise in connection with their practice if the advertising –

- (a) is not false;
- (b) is not misleading or deceptive, or likely to mislead or deceive;
- (c) is not in the opinion of the Society likely to bring a practitioner, the legal profession, or the legal system into disrepute;
- (d) is not defamatory of another practitioner.

36.2 There is an onus upon any practitioner advertising or otherwise claiming to be "expert" or "specialist" in a particular field to prove, if required, that such a claim is not false, misleading or deceptive.

The following factors relating to that field of practice will be taken into account:

- academic qualifications
- experience
- extent and recency of CLE attendance or involvement
- proportion of working time involved in that field
- level of success achieved
- significance of the matters in the field involving the practitioner
- any formal interstate accreditation in that field
- assessment by a number of peers to establish whether or not the practitioner is regarded as having special expertise in the field of practice
- such other matters as are relevant.'

SANCTIONS

The Law Society rules described above provide only guidelines as to the professional standards of legal practitioners and have no legislative force. However, a breach may constitute evidence of unprofessional or unsatisfactory conduct, which may be investigated and disciplined under Part 6 of the *Legal Practitioners Act 1981*.

New legislation restricting legal advertising in SA is currently being passed through parliament.

TASMANIA By Sandra Taglieri and Gary Bissland

LEGISLATION

Legal Profession Act 2007 – these presently are the substantive provisions and are referred to below.

Rules of Practice 1994

RESTRICTIONS

There are no restrictions on personal injury-related advertising in Tasmania similar to those contained in ss84-86 of the NSW legislation.

LEGAL PROFESSION ACT 2007

Section 126 states that any restriction imposed by or under this or any other Act, the regulations or the legal profession rules, in connection with advertising by Australian legal practitioners also applies to incorporated legal practices.

Section 6(a) defines an 'Australian legal practitioner' as an Australian lawyer who holds a current local practising certificate or a current interstate practising certificate.

Section 172(1) states that an Australian-registered foreign lawyer is required to comply with any advertising restrictions imposed by the domestic registration authority or by Tasmanian law.

Section 172(2) states that an Australian-registered foreign lawyer must not advertise (or use any description on the lawyer's letterhead or any other document to identify the lawyer) in any way that might reasonably be regarded as false, misleading or deceptive, or suggest that the foreign lawyer is an Australian legal practitioner.

Section 154 makes the *Rules of Practice 1994* binding on legal practitioners, partners and/or employees of a multi-disciplinary partnership.

Section 155(2) states that if a restriction is limited to persons who practise in a particular style of legal practice, the restrictions apply only to the extent that the incorporated legal practice carries on the business in that branch or style of legal practice.

RULES OF PRACTICE 1994

Section 7(1) is as follows:

'(1) A practitioner may advertise in connection with his or her practice if the advertisement:

- (a) does not contain a statement that the practitioner knows to be false; and
- (b) is not misleading or deceptive or likely to mislead or deceive; and
- (c) does not make or imply a comparison with another practitioner; and
- (d) is not vulgar, sensational or of a nature that, in the opinion of the Society, is likely to bring the practitioner, the legal profession or the legal system into disrepute.'

Section 7(2) places the onus upon the practitioner to illustrate that any claimed expertise is not false.

SANCTIONS

Breach of the advertising provisions may constitute unprofessional conduct and professional misconduct which are provided for by Chapter 4 of the *Legal Profession Act 2007*.

VICTORIA By Maarten Vlot

LEGISLATION

Legal Profession Act 2004 (Vic)

RESTRICTIONS

There are no restrictions on personal injury-related advertising in Victoria similar to those contained in ss84-86 of the NSW legislation.

**LEGAL PROFESSION ACT
2004**

Section 2.2.3 states:
 '(1) A person must not represent or advertise that the person is entitled to engage in legal practice unless the person is an Australian legal practitioner...
 (2) A director, officer, employee or agent of a body corporate must not represent or advertise that the body corporate is entitled to engage in legal practice unless the body corporate is an incorporated legal practice....'

These restrictions do not apply to those entitled to engage in legal practice of a kind referred to in s2.2.2(2) (such as Community Legal Centres).

Under s2.7.8 a corporation or its director, officer, employee or agent must not without a reasonable excuse represent or advertise that the corporation is an incorporated legal practice unless a notice has been given to the Legal Services Board under s2.7.7.

Australian-registered foreign lawyers must comply with any advertising restrictions made by the Board or existing under law: s2.8.11(1). Under s2.8.11(2), such lawyers must not advertise in any way that:
 '(a) might reasonably be regarded as—
 (i) false, misleading or deceptive; or
 (ii) suggesting that the Australian-registered foreign lawyer is an Australian legal practitioner; or
 (b) contravenes any requirements of the regulations.'

The restrictions under the Act apply to practitioners as well as to incorporated legal practices and multi-disciplinary partnerships: ss2.7.18, 2.7.47.

SANCTIONS

**LEGAL PROFESSION ACT
2004**

A breach of ss2.2.3(1) or (2) carries a maximum of 120 penalty units.
 A breach of ss2.2.8(1) or (2) carries a maximum of 60 penalty units.
 Additionally, a contravention of the Act is conduct capable of constituting unsatisfactory professional misconduct or professional misconduct: s4.4.4(a).

WESTERN AUSTRALIA By Stuart K Shepherd

LEGISLATION

- Legal Practice Act 2003 (WA)*
- Legal Profession Act 2008 (WA)*
- Civil Liability Act 2002 (WA)*

RESTRICTIONS

The *Legal Practice Act 2003* and the *Legal Profession Act 2008* (not yet in force) provide that restrictions on advertising that apply to individual practitioners and partnerships apply to incorporated legal practices and multi-disciplinary legal partnerships (see ss61 and 83 of the 2003 Act; ss114 and 142 of the 2008 Act).

Neither Act contains any specific restriction on advertising by practitioners.

Specific prohibitions on advertising and touting are to be found in Part 3 of the *Civil Liability Act 2002* and in the Law Society of Western Australia's professional conduct rules.

LEGAL PRACTICE ACT 2003

Section 116 – registered foreign lawyers may describe themselves and any partnership or body corporate with which they are associated only in one or more of the ways designated in s117.

Such practitioners must indicate, in any public document they issue, that they are registered foreign lawyers and are restricted to the practice of foreign law.

**CIVIL LIABILITY ACT 2002 –
PART 3**

Section 17 – a legal practitioner (or person acting for a legal practitioner) must not publish or cause to be published a statement that may reasonably be thought to be intended or likely to encourage or induce a person:
 '(a) to make a claim under any Act or law for compensation or damages for a personal injury; or
 (b) to use the services of the legal practitioner, or another named legal practitioner or a named firm of legal practitioners in connection with the making of a claim mentioned in paragraph (a).'

Section 18 – subject to an exception in respect of hospitals, the publication of a statement that states only the name of a legal practitioner or a firm of legal practitioners and the contact details of the legal practitioner or firm, with or without information as to any area of practice, specialty, or accreditation, of the legal practitioner or firm, is allowed if it is:

- (a) in a printed publication;
- (b) published on an internet website as an electronic version merely reproducing a statement in a printed publication that is published independently of a legal practitioner;
- (c) part of the publication on an internet website of the contents of a directory or database that is published or maintained independently of a legal practitioner; or
- (d) publicly exhibited in, on, over, or under, any building, vehicle, or place, or in the air, in view of persons in or on any street or public place;
- (e) in a printed document gratuitously sent or delivered to any person or thrown or left on premises occupied by any person or left on the vehicle; or
- (f) in a printed document provided to a person as a receipt or record relating to a transaction.'

Subsection 3 prohibits the publication of a statement by public exhibition in or on a hospital or in a printed document gratuitously sent or delivered to a hospital or left in a hospital or on a vehicle in the vicinity of a hospital.

Section 19 – a person attending at the scene of an incident in which a person allegedly suffered personal injury, or at a hospital after an incident in which a person allegedly suffered personal injury, must not solicit or induce a potential claimant involved in the incident to make a claim.

A person other than the person attending must not solicit or induce, in a way that would be unreasonable in the circumstances, a potential claimant involved an accident to make a claim.

Subsections (2) and (3) prohibit persons attending or involved in the treatment of a potential claimant to provide the name, address or telephone number of a particular legal practitioner, or firm of practitioners, or an employee or agent of the legal practitioner or firm.

Such information might be given by someone involved in the treatment of a potential claimant if the information is given in respect of at least three competing legal practitioners (employed by different firms) or firms or if the information is given on behalf of an association in order to help a person to make use of an arrangement that the association has, as a service to its members, made with a particular legal practitioner or firm of legal practitioners.

Section 20 – a person must not provide, or offer to provide or receive or seek to receive, a fee for soliciting or inducing a potential claimant to make a claim. Exceptions include:

- (a) an advertiser or publisher advertising legal services in the ordinary course of business; and
- (b) a payment to a legal practitioner acting for the potential claimant in the process of making a claim.

**LEGAL PROFESSION ACT
2008 (NOT YET IN FORCE)**

The Act prohibits a person from advertising that they are entitled to engage in legal practice when they are not.

Section 13 – a person must not represent or advertise that s/he is entitled to engage in legal practice unless s/he is an Australian legal practitioner. A director, officer, employee or agent of a body corporate must not represent or advertise that the body corporate is entitled to engage in legal practice unless the body corporate is an incorporated legal practice.

The prohibitions do not apply to a representation or advertisement about being entitled to engage in legal practice of a kind referred to in s12(3).

Section 103 – s102 requires a corporation to give the Legal Practice Board written notice of its intention to engage in legal practice. Section 103 provides that a corporation must not, without reasonable excuse, represent or advertise that it is an incorporated legal practice unless a notice in relation to the corporation has been given under s102.

Section 158 is in similar terms to s116 of the 2003 Act.

Section 159 – an Australian-registered foreign lawyer must comply with any advertising restrictions, imposed by the Board or by law on the legal practice engaged in by an Australian legal practitioner, that are relevant to the practice of law in this jurisdiction.

An Australian-registered foreign lawyer must not advertise (or use any description on the lawyer's letterhead or any other document used in this jurisdiction to identify them as a lawyer) in any way that:

- (a) might reasonably be regarded as –
 - (i) false, misleading or deceptive; or
 - (ii) suggesting that the Australian-registered foreign lawyer is an Australian legal practitioner; or
- (b) contravenes any requirement of the regulations.

**WA BAR ASSOCIATION
CONDUCT RULES**

Rule 58 prohibits a barrister from public comment in the media about a particular matter other than in limited, exceptional, circumstances.

**LAW SOCIETY OF WA
PROFESSIONAL CONDUCT
RULES**

Professional Conduct Rule 4 provides for advertising and publicity by Western Australian practitioners, subject to the guidelines set out in the third schedule to the rules and to the provisions of the *Civil Liability Act*.

Rule 4.1 provides that a practitioner may participate in any lecture, talk, public appearance, radio, television or other transmission or any written or printed publication.

Rule 4.2 provides that, if the subject matter of the publications referred to in rule 4.1 concerned the matter in relation to which the practitioner is or has been professionally engaged, a practitioner must not participate unless:

- (a) the client has given an informed consent; and
- (b) participation is not contrary to the interests of the client; and
- (c) the practitioner gives an objective account of the matter in a restrained manner consistent with the maintenance of the good reputation and standing of the legal profession.

Schedule 3 – the guidelines do not have the force of law. They are intended to assist lawyers and other providers of legal services to frame advertisements that best meet the needs of consumers and avoid any charge of being misleading and deceptive.

SANCTIONS

CIVIL LIABILITY ACT 2002

Section 17 – the maximum penalty for breaching s17 is \$10,000. Liability of a legal practitioner to the penalty does not prevent the legal practitioner from being charged with, and found guilty of, unprofessional conduct (subs (3)).

Section 19 – the maximum penalty for breaching s19 is \$10,000.

Section 20 – the maximum penalty for breaching s20 is \$10,000.

Section 21 – where a person convicted in respect of breaches of ss19 and 20 is a member of a profession that is regulated under an Act, the conduct resulting in the conviction might lead to the suspension or cancellation of any relevant approval to act in that profession.

LEGAL PROFESSION ACT 2008 (NOT YET IN FORCE)

Section 13 – the maximum penalty for breaching s13 is \$20,000.

Section 103 – the maximum penalty for breaching s103 is \$50,000. The maximum penalty for a director, officer, employee or agent of a corporation is \$10,000.

CASES

LEGAL PRACTITIONERS COMPLAINTS COMMITTEE v BROWNE [2006] WASAT 201

Stephen Browne, a solicitor, placed an advertisement in newspapers, in the *Yellow Pages* directory, and on television in 2003 and 2004. The advertisements offered assistance to people who had made claims for damages for personal injury.

The Tribunal concluded that the statements in the advertisements did not breach s17, because they were expressly directed to persons who had made a claim, so that they could not be said to have been intended to, or likely to, encourage a person to make a claim.

It concluded that, on the basis of the information before it, it could not be said that the words 'your first consultation is free' were misleading.

However, the words 'no compensation = no legal fees' were misleading, because a member of the public may be misled into thinking that, by using the practitioner's services, they would have no liability for any fees or costs rather than no liability only for the practitioner's own legal fees. It found that the placement of the advertisement amounted to unprofessional conduct.

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