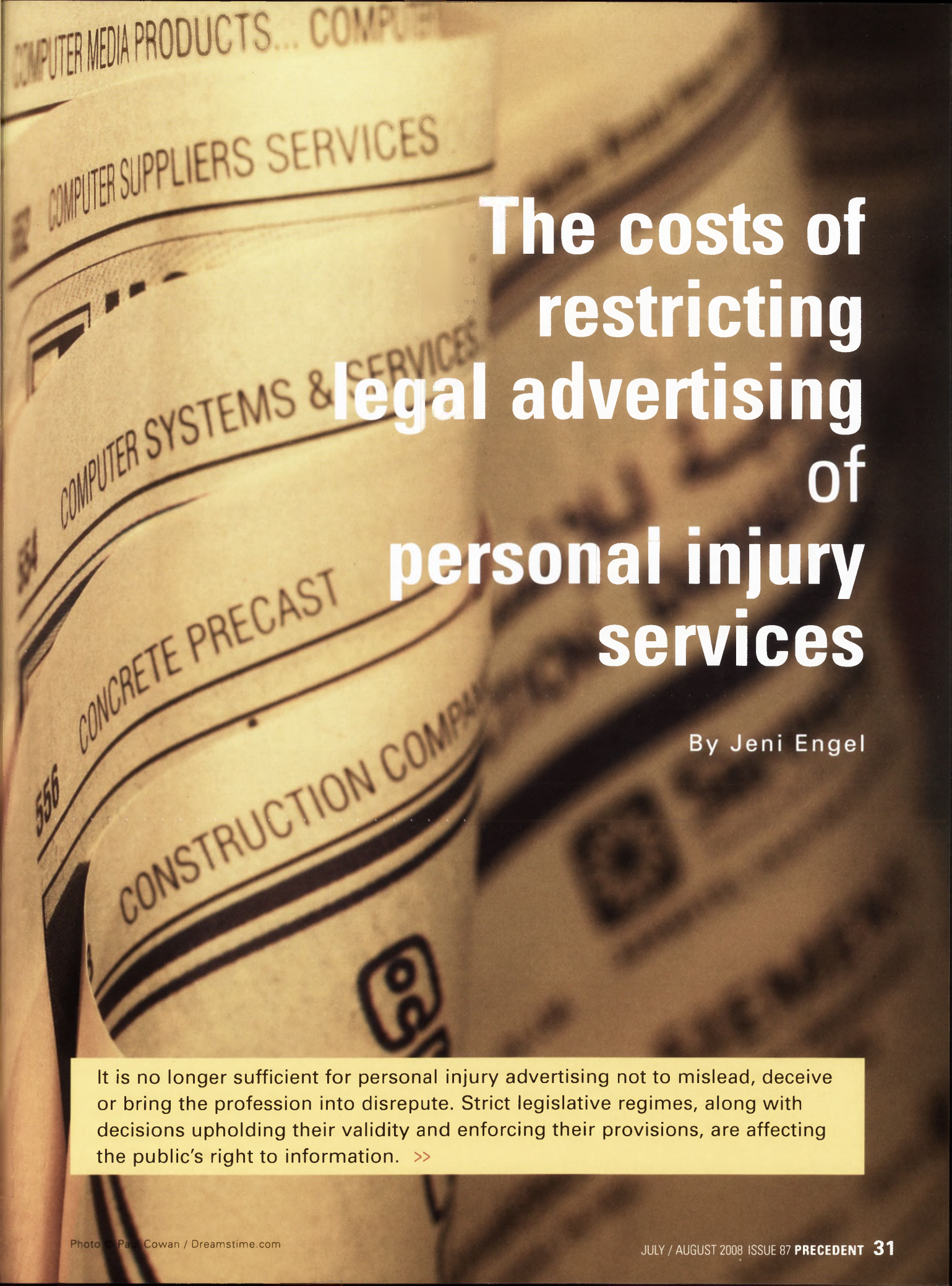

The costs of restricting legal advertising of personal injury services

By Jeni Engel

It is no longer sufficient for personal injury advertising not to mislead, deceive or bring the profession into disrepute. Strict legislative regimes, along with decisions upholding their validity and enforcing their provisions, are affecting the public's right to information. >>

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The move to reduce the amount of personal injury litigation in order to avert the so-called 'insurance crisis' began with the introduction of legislation into Australian parliaments. In NSW, in particular, this attack has included restrictions on personal injury services advertising. Consequently, full and free public access to relevant information has been markedly restricted. This curtailment was examined by the High Court in *APLA Ltd and Others v Legal Services Commissioner (NSW) and Another* (the *APLA* case).[1]

In a recent decision by the Administrative Decisions Tribunal (the Tribunal), a practitioner was fined for breaches of regulations governing the advertising of personal injury services.

In *Legal Services Commissioner v Malouf*[2] (*Malouf*), Gerard Malouf was found to have contravened advertising regulations in the *Legal Profession Regulation* 2002 (NSW) (the 2002 Regulation). Under clause 139(2) of the 2002 Regulation, the respondent's breaches of clause 139(1) were considered to be professional misconduct, and he was publicly reprimanded and fined $20,000.

With a similar matter having just been decided,[3] it is timely to review the regimes for regulating the advertising of personal injury services and the ends they do, and should, serve.

MALOUF

The complaints

The NSW Legal Services Commissioner (the Commissioner) presented five grounds of complaint to the Tribunal relating to various forms of advertising personal injury services. Each, it was argued, breached clause 139(1) of the 2002 Regulation, entitled 'Restriction on advertising personal injury services'. It reads:

'(1) A barrister or solicitor must not publish or cause or permit to be published an advertisement that promotes the availability or use of a barrister or solicitor to provide legal services if the advertisement includes any reference to or depiction of any of the following:

(a) personal injury,

(b) any circumstance in which personal injury might occur, or any activity, event or circumstance that suggests or could suggest any possibility of personal injury, or any connection to or association with personal injury or a cause of personal injury,

(c) a personal injury legal service (that is, any legal service that relates to recovery of money, or any entitlement to recover money, in respect of personal injury).

Maximum penalty: 200 penalty units.

(2) A contravention of this clause by a barrister or solicitor is declared to be professional misconduct.'

Clause 138 of the 2002 Regulation states that an 'advertisement means any communication of information (whether by means of writing, or any still or moving visual image or message or audible message, or any combination of them) that advertises or otherwise promotes a product or service, whether or not that is its purpose or only purpose and whether or not that is its only effect.'

> Traditionally, advertising legal services has been viewed as largely incompatible with the conservative, dignified image of the legal profession.

These are exceptionally far-reaching provisions.

The advertisements in this case were published in different forms and over differing periods of time: on the website of the respondent's law firm; in hard copy and internet telephone directories; in a local newspapers; and on signage outside the respondent's premises.

The advertisements included terms such as 'medical negligence', 'product liability' , and 'motor accident claims', which were considered clear infringements of the 2002 Regulation. In each instance, the respondent ultimately complied with the Commissioner's directions to remove or alter the offending advertisements.

Nonetheless, the Commissioner argued for the imposition of a fine on the grounds that the respondent profited from his persistent conduct; the conduct occurred in a variety of media; once made aware of the offending material, the respondent was slow to correct it; and compliance with clause 139 should not have posed interpretative difficulties, particularly for a lawyer.[4]

The respondent's case

In response to the Commissioner's call that a fine be imposed, the respondent's counsel submitted that his client had made timely admissions regarding his conduct and had endeavoured to alter the advertising to conform to the 2002 Regulation, both factors demonstrating remorse. In addition, there was no precedent on which the respondent could rely, since this was the first case in which the 2002 Regulation had been tested; and the respondent's breaches of the 2002 Regulation had not caused damage or loss. The respondent's counsel further argued that his client's appearance before the Tribunal and his public reprimand were already blemishes on the respondent's professional reputation, making any further deterrent in the form of a fine unnecessary. Finally, without leading any evidence as to whether breaches of the 2002 Regulation were commonplace or not in the profession, counsel for the respondent submitted that the Commissioner had failed to establish any basis for deterrence.[5]

The respondent had two key motivations in adhering to a style of advertising that risked infringing the 2002 Regulation. Firstly, he was concerned to maintain a financially viable practice. His evidence to the Tribunal, however, was that his returns were not higher in the period during which his advertising was alleged to have breached the 2002 Regulation. Nor did his business decline after he altered his advertising to conform to the 2002 Regulation.[6] It appears, then, at least in the respondent's case, that this worry was unfounded. By extension, there might be cause to wonder whether the role of advertising in terms of the profitability of personal injury legal practices is less influential than generally assumed. Of clear impact in reducing the number of personal injury matters, however, has been the introduction of the *Civil Liability Act* 2002 (NSW).

The respondent's second motivation was, in effect, to make a personal statement that he found the scope of the 2002 Regulation far too restrictive in relation to personal injury advertising.[7]

The decision

The Tribunal found the respondent remorseful, of good character and a credible witness. Although unable to rely on any precedent, his skills as a legal practitioner, as the Commissioner submitted, should have facilitated his interpretation of the legislation to ensure that his advertising was compliant. In addition, the Tribunal held that the respondent was aware of the risk he was taking and the possible consequences should the advertising be found to breach the 2002 Regulation. While the Tribunal agreed that it was highly unlikely that the respondent would reoffend, it said that '[m]embers of the profession must understand that breaches of the regulations will lead to findings of professional misconduct with the possibility of being removed from the roll, or otherwise dealt with severely.'[8]

BACKGROUND TO THE REGULATION

The *Legal Profession Amendment (Personal Injury Advertising) Regulation* 2003 (NSW), which introduced the 2002 Regulation, took effect on 23 May 2003. Subsequent to its introduction, the then premier, Bob Carr, when asked in parliament for an update about lawyers' advertising of personal injury services, replied:

> 'The grubby use of marketing strategies to line the pockets of plaintiff lawyers did nothing to promote the rights of injured people. It simply encouraged a more litigious society. ... Nothing has brought this noble profession into more disrepute than this sort of advertising for work, or ambulance chasing. For this reason our tort law reforms included a toughening of the rules relating to advertising by personal injury lawyers and agents, giving NSW the toughest restrictions in the country.'[9]

The generalised nature of these statements assumes that any personal injury lawyer will be unscrupulous in the way s/he advertises. In addition, they attribute a strong causal connection between advertising by personal injury lawyers and the so-called 'insurance crisis' that triggered the tort law reforms in NSW in 2002.

Ironically, it may be that the civil liability reforms, which have forced a decrease in the number of potential personal injury claims, have themselves inadvertently encouraged some practitioners to push the limits of what is acceptable advertising in order to attract some of the remaining business.

THE *APLA* CASE

During the period that Malouf was in breach of the 2002 Regulation, the High Court heard the *APLA* case.

Relevantly, what was at issue was whether the 2002 Regulation was valid.[10] In a 5:2 decision, the High Court held that the 2002 Regulation was valid, with the majority finding that it did not infringe the implied freedom of political communication recognised in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; nor did it prevent effective exercise of judicial power granted by Chapter III of the Constitution. The majority further held that the 2002 Regulation did not exceed the NSW Parliament's power to legislate; nor did it exceed the regulation-making power conferred under the *Legal Profession Act* 1987 (NSW) (the 1987 Act). In addition, the majority held that the 2002 Regulation did not contravene s92 of the Constitution, which states that ' ... intercourse >>

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among the States … shall be absolutely free'. Neither was it inconsistent with various federal laws, such as would activate s109 of the Constitution.

Gleeson CJ and Heydon J, in a joint judgment, made it clear that the issue for the court was not one of policy regarding the benefits and disadvantages of lawyers' advertising. Rather, the issue was a legal one that had to be answered 'as a matter of judgment upon a defined issue.'[11] In dissent, Kirby J interpreted the enactment of the 2002 Regulation as 'an attempt by the executive government of the state of NSW to prevent activities of the plaintiffs in such a way as to injure members of the public in the exercise or enjoyment of rights conferred by federal law and in the access of persons to federal courts and tribunals for the vindication of such rights'.[12] His Honour stated that the 2002 Regulation inappropriately inhibited rights and privileges granted under a variety of federal laws and that the 'exceptional ambit of the prohibition in the regulation cannot be gainsaid. The chilling effect of the regulation on communications by legal practitioners with potential clients and with civil society was correctly described in argument as extraordinary.'[13] Kirby J portrayed the 2002 Regulation as a piece of indiscriminate statutory drafting, which made no attempt, even after amendment, to avoid exceeding state legislative power.[14]

> Quite simply, the advertising of legal services in general, and personal injury services in particular, is a necessary component of a robust legal system.

Given that Kirby J's reasoning in the *APLA* decision seemed to support Mr Malouf's apparent motivations in continuing to advertise in a fashion that exposed him to potential breach of the 2002 Regulation, it is not surprising that counsel for Mr Malouf sought to rely on the dissenting judgment in argument. However, the Tribunal was unmoved. While the Tribunal acknowledged that the 2002 Regulation was a significant concern for a sector of the legal profession, it held that such 'disquiet does not excuse a practitioner from complying with the legislation once it has been proclaimed'.[15]

In the *APLA* case, the Combined Community Legal Centres Group (CCLCG) appeared as *amicus curiae*. In addressing the High Court, counsel for the CCLCG argued that a key concern with the 2002 Regulation was its impact on access to justice, as it would place excessively strict limits on providing information to members of the public when advising them of their legal rights, specifically with reference to personal injury.[16]

Without access to information, for example, through advertising, consumers may not be in a position to discover whether their rights have been infringed and, if so, what remedies they might pursue. While the High Court has pointed out that '[p]rofessional directories and telephone books inform the public of the availability of legal services',[17] the contemporary public, particularly in the information era, may expect that comprehensive information will be more readily available to them than this.

AMENDMENT OF THE REGULATION

Before the decision in the *APLA* case was handed down, the 2002 Regulation was modified by inserting clause139A, which took effect on 1 July 2005. It is entitled 'Exception for advertisements about domestic violence and discrimination – community legal centres'. It reads:

'This Division does not apply to the publication by or on behalf of a community legal centre … of an advertisement that would constitute a contravention of clause 139 by reason only that it advertises or promotes services provided by the community legal centre in connection with domestic violence or discrimination.'

The clause was re-enacted in clause 25 of the *Legal Profession Regulation* 2005 (NSW) (the 2005 Regulation), and has since been amended to include an exception from contravention of clause 24 (equivalent to clause 139 in the now repealed 2002 Regulation) for community legal centres which advertise or promote services in connection with sexual assault or victims of crime. The introduction of clause 139A into the 2002 Regulation, and the subsequent expansion of exceptions provided for in the 2005 Regulation, partially address the issue of access to justice for women and other disadvantaged or marginalised groups, who are overwhelmingly the victims of domestic violence, discrimination, sexual assault and other crimes.

ADVERTISING PERSONAL INJURY SERVICES IN AUSTRALIA

Bob Carr's claim that the NSW regulations curtailing the advertising of personal injury services are the most stringent in the country can be tested by evaluating the current arrangements for advertising personal injury services across Australia.

Not all jurisdictions regulate practitioners' advertising of personal injury services,[18] although all jurisdictions, except for the Northern Territory, do regulate practitioners' advertising in general.[19] This focuses on, but is not always limited to, the avoidance of advertising that is misleading, deceptive or otherwise unfair.

It is primarily in jurisdictions where there have been substantial changes to the law of negligence in the early 2000s that there are specific prohibitions against advertising for personal injury services.

Queensland

In Queensland, advertising of personal injury services is regulated by the *Personal Injuries Proceedings Act* 2002

(Qld) (*PIPA*). Under s4(1),'[t]he main purpose of this Act is to assist the ongoing affordability of insurance through appropriate and sustainable awards of damages for personal injury'. One of the ways that this is achieved, according to s4(2)(f), is by 'regulating inappropriate advertising and touting'. There are extensive definitions in s64 of 'advertising personal injury services' and in s65 of 'allowable publication method'.

In July 2006, the Queensland Legal Services Commission (QLSC) issued 'A Guide to Advertising Personal Injury Services',[20] with a view to clarifying how practitioners can best comply with the restrictions, and cautioning that the QLSC would interpret the legislation strictly. As a supplement to these guidelines, in August 2006, the QLSC issued 'A Guide to Advertising Personal Injury Services on the Internet'.[21]

John Briton, the Queensland Legal Services Commissioner, has recently reiterated that his office is rigorous in its interpretation of the legislation and in its approach to enforcement.[22] Briton gives many examples of words, phrases and advertising techniques that have failed to comply with *PIPA*. In one especially interesting instance, he discusses whether an alphanumeric telephone number can be regarded as 'contact details'.[23] He concludes, somewhat unwillingly, that, provided the telephone number includes a word that is otherwise allowed under *PIPA*, for example 'injury', then this could be permissible.[24]

In *Malouf*, the respondent had to remove from his website the telephone number 180000HURT.[25] It can be argued that the word 'hurt' does evoke personal injury, which suggests that such a telephone number would not withstand a challenge under *PIPA*. On this point, Queensland and NSW appear to be in alignment.

Briton also reveals that the QLSC had, as of June 2007, instigated and resolved 81 investigations into various breaches of *PIPA* found in the 2007 *Yellow Pages*, without needing recourse to prosecution.[26] As a result, he predicts that virtually all advertisements for personal injury services appearing in the 2008 *Yellow Pages* will be compliant.[27]

Northern Territory

The Northern Territory provisions relating to advertising legal services for personal injury claims are covered in the *Legal Profession Act* 2007 (NT) and the *Legal Profession Regulation* 2007 (NT).

Part 3.2 of the *Legal Profession Act* 2007 (NT), entitled 'Advertising legal services for personal injury claims', commences with s288, which lists exceptions to the application of the Part. These exceptions include s288(1)(b), 'an advertisement or publication made for educating people about the content of the law or their rights, liabilities and duties under the law', and s288(1)(g) 'an advertisement or publication prescribed by >>

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The noble aspirations of the law have, over the years, been eroded to some extent by the commercial imperatives of practice.

the regulations'. Regulation 79 of the *Legal Profession Regulation* 2007 (NT) gives, as one prescribed type, 'an advertisement ... informing persons about where they may obtain legal advice about the law relating to personal injuries ...'. The concern that the public would be deprived of critical information regarding their legal rights raised by the CCLCG in the *APLA* case is prioritised and explicitly addressed in the Northern Territory provisions.

The key restrictive provision is s290(1), which makes a practitioner guilty of an offence if a statement s/he has published, or caused to be published, is intended to make a person bring a claim and be represented by the practitioner or firm publishing the statement. Section 290(2) states that s290(1) is inapplicable if a practitioner uses a 'complying statement' to advertise personal injury claims. A 'complying statement', defined in s290(3), is one that specifies only the name and contact details of the practitioner or his or her firm, and the practitioner's or the firm's specialty. The legislation also covers permitted methods of advertising in s291.

Western Australia

Sections 16 to 18 of the *Civil Liability Act* 2002 (WA) relate to advertising personal injury legal services. 'Publish' is broadly defined in s16 of the Act. The key restrictive provision, s17(1), has the same effect as its Northern Territory equivalent. According to s17(2)(b), it is permissible to publish a statement on the practitioner's website, provided it is limited to explaining how negligence law operates, a person's rights under negligence law, and the conditions under which a practitioner will provide personal injury services.

Victoria

Rule 35 of the *Professional Conduct and Practice Rules* 2005 (Vic) regulates advertising of legal services in general. The introduction of r35.5, dealing specifically with 'no win, no fee' advertising, requires that any conditions be sufficiently detailed and prominent so as to be easily understood by a potential client.

To conclude, underlying all the state legislative schemes in relation to personal injury services advertising is a concern not to mislead or deceive the public, and not to bring the profession into disrepute. The legislation in NSW, however, is far more prescriptive and prohibitive in its terms and its application.

PAST, PRESENT AND FUTURE PURPOSES

Traditionally, advertising legal services has been viewed as largely incompatible with the conservative, dignified image of the legal profession. This long-held distaste for advertising was also associated with a desire to be distinguished from other groups that practised overtly commercial pursuits. However, the noble aspirations of the law have, over the years, been eroded to some extent by the commercial imperatives of practice. Government encouragement of greater competition within the legal profession, public demand for greater access to legal information, and a focus on consumer rights, resulted in incremental deregulation of advertising in the legal profession. In more recent years, however, the mood has once again become one of strict regulation. This shift has been influenced primarily by increased lobbying by insurance companies, sensationalised media reports and government intervention. These groups have argued that advertising personal injury services has led to a significant increase in litigation and upwardly spiralling insurance premiums.

The case of *Malouf* is a clear warning sign to the NSW legal profession that the Commissioner and the Tribunal will not tolerate, and will strictly enforce, breaches of clause 139 of the 2002 Regulation and clause 24 of the 2005 Regulation. On the horizon, too, could be further amendments to the 2005 Regulation once the NSW attorney-general has considered new draft advertising guidelines from the Law Society of NSW and submissions by the Commissioner.[28] As yet, these are not in the public domain. At present, former premier Carr's claim does appear to be correct, giving NSW the dubious distinction of having the toughest restrictions on personal injury advertising in the country. The depletion of the public's right to information and, consequently, the reduction of the public's right to avail itself of legal remedies, are the prices paid by having such far-ranging restrictions in place.

The public's legitimate expectation to be well informed of its legal rights must be balanced against the need to ensure that advertising of personal injury services does not exploit vulnerable groups by creating unrealistic hopes. Ultimately, creating such unrealistic hopes will not serve either the public interest or the interests of the legal profession. Quite simply, the advertising of legal services in general, and personal injury services in particular, is a necessary component of a robust legal

system. If appropriately prepared, advertising benefits the public and fosters competition. On condition that advertising for personal injury services satisfies basic criteria such as being fair, straightforward and not bringing the legal profession into disrepute, it has a valid and valuable part to play in serving the community. This role should not be overly stifled. ■

Notes: **1** (2005) 224 CLR 332. **2** [2007] NSWADT 215. **3** *Legal Services Commissioner v Keddie* [2008] NSWADT 185. The decision applies the approach to determining penalty used in *Malouf*. Russell Keddie was publicly reprimanded and fined $10,000 for breaches of the 2002 Regulation. **4** Note 2 above at [3]. **5** Note 2 above at [53]. **6** Note 2 above at [71] and [86].**7** Note 2 above at [72]. **8** Note 2 above at [110]. **9** NSW, *Parliamentary Debates*, Legislative Assembly, 16 March 2004, 7288 (Bob Carr). **10** For detailed discussions of the case, see Keven Booker, 'The APLA constitutional challenge to restrictions on the advertising of legal services' (2004) 65 *Precedent* 40; and Keven Booker, 'The Constitution and Advertising Legal Services: *APLA Ltd v Legal Services Commissioner (NSW)*' (2006) 72 *Precedent* 42. **11** Note 1 above at [352]. **12** Note 1 above at [412]. **13** Note 1 above at [423]. **14** *Ibid.* **15** Note 2 above at [63]. **16** Simon Moran, 'Restricted access: Access to justice impaired by personal injury regulation',(2005) 43(10) *Law Society Journal*, p72. **17** Note 1 above at [352]. **18** SA, Tas and the ACT do not. **19** SA – Rules of Professional Conduct & Practice r36; Tas – Rules of Practice 1994 rr7 & 8; ACT – Legal Profession (Solicitors) Rules 2007 r38; WA – Professional Conduct Rules 2005 sch 3; Vic - Professional Conduct and Practice Rules 2005 r35; Qld – Legal Profession (Solicitors) Rule 2007 r36; NSW – *Legal Profession Act* 2004 ss84-6. **20** Queensland Legal Services Commission, *A Guide to Advertising Personal Injury Services* (July 2006) <http://www.lsc.qld.gov.au/policiesandguidelines/Plguides.pdf> at 12 May 2008. **21** Queensland Legal Services Commission, *A Guide to Advertising Personal Injury Services on the Internet* (August 2006) <http://www.lsc.qld.gov.au/policies and guidelines/Plinternetguide.pdf> at 12 May 2008. **22** John Briton, 'Ethics and the Personal Injuries Lawyer: Compliance, Spiritless Compliance, Skilful and Other Evasions' (Paper presented at Queensland Law Society Personal Injuries Conference, Brisbane, 29 June 2007). <http://www.lsc.qld.gov.au/speeches/PI_Conference_290607_JB_final.pdf> at 12 May 2008. **23** Note 22 above at pp4-5. **24** *Ibid.* **25** Note 2 above at [14]. **26** Note 22 above at pp9-10. **27** Note 22 above at p9. **28** Rachel Nickless, 'Unloved ad ban snares two firms', *Australian Financial Review* (Sydney), 18 April 2008, p58. **29** *The Council of the Law Society of New South Wales v Australian Injury Helpline Ltd and Ors* [2008] NSWSC 627 at [24]. **30** Note 1 at 375, footnotes 166 and 167.

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STOP PRESS

On 20 June 2008, Adams J handed down his decision in *The Council of the Law Society of New South Wales v Australian Injury Helpline Ltd and Ors* [2008] NSWSC 627. One allegation the Law Society raised was that AIH had breached clause 34 of the 2005 Regulation which restricts personal injury advertisements by persons other than barristers and solicitors. Clause 34 reads in part:

'(1) A person must not publish or cause or permit to be published a personal injury advertisement if the advertisement:

advertises or otherwise promotes the availability or use of a barrister or solicitor ... to provide legal services ...'
Under s85 of the *Legal Profession Act* 2004 (NSW) (the 2004 Act), power is granted to make regulations regarding 'the marketing of legal services'. Adams J construed clause 34 as follows: '..."advertising" must mean more than mere informing [which] is considerably wider in scope than "marketing". In short, "promoting" means commending or encouraging; it does not involve any notion of sale. ... If, on the other hand, "advertising" is not an example of promoting, but stands independently, so that it means merely informing, then [clause 34] moves even further outside the statutory authority. On either construction, therefore, [clause 34's] grasp exceeds the limits imposed by the Act.'[29]

Clause 34 has been held to be *ultra vires* and is, therefore, invalid. It remains to be seen whether this decision will be challenged. If this decision stands, by analogy, it may bring into question the validity of clause 24 of the 2005 Regulation, equivalent to clause 139 of the 2002 Regulation, which is in substantially similar, although not identical, terms to clause 34.

Whether clause 139 of the 2002 Regulation was *ultra vires* was argued before the High Court in the *APLA* case from the perspective of its extra-territorial operation. It was accepted that the regulation-making powers conferred under the 1987 Act extended to regulating with respect to advertising generally.[30] The grant of power to regulate specifically the marketing of legal services made under s38JA of the1987 Act, which is equivalent to s85 of the 2004 Act, came into effect only after the APLA case. Therefore, the High Court has not yet had an opportunity to consider whether the making of regulations such as clauses 24 and 34 of the 2005 Regulation is authorised under s85 of the 2004 Act.