

# Traps in advertising under the new Act

This month's report will deal with the advertising provisions of the Legal Practitioner (Costs and Advertising) Act and Regulations which are to commence on 1 May 2004.

As stated in my last *Balance* column, the costs aspects of this legislation may hold many traps for the unwary. The consequences of getting it wrong can include a possible misconduct charge, a review of the costs or conditional costs agreement and the client being able to avoid the agreement altogether or the agreement being varied.

The advertising provisions are based on those that have been applied interstate and, as has been stated previously, seem primarily designed to counter behaviours that are not exactly rife in the Northern Territory. However practitioners still should be wary. As has already been pointed out to the Government, the provisions also hold potential traps for nurses and others associated with accident victims.

I will initially address what the advertising provisions do not deal with:

- \* the generality of advertisements in this area that were published before commencement of the advertising provisions;
- \* an advertisement or publication made for the purposes of educating persons about the contents of the law or their rights liabilities and obligations under the law;
- \* an advertisement or publication made for the purpose of identifying persons who are entitled to become parties to a class action specified in the advertisement or publication;
- \* an advertisement or publication made under a statutory duty, function or power;
- \* an advertisement or publication made in relation to the Legal Aid Contingency Fund;
- \* an advertisement or publication made for the purpose of confirming the existence of a certain contractual arrangement;

\* certain advertisements made by the Law Society, NT Legal Aid Commission or a community legal centres (the Law Society could, for instance provide a member of the public with a list of firms specialising in personal injury work); and

\* an advertisement or publication within a firm of legal practitioners relating to legal services provided in connection with making a claim for compensation or damages for a personal injury.

The Act does not apply to statements made by a person holding office in the course of carrying out their functions or other "prescribed persons" including the NT Legal Aid Commission, a community legal centre, the Commissioner of Consumer Affairs, an employee or ambassador, consul or diplomat.

Therefore, there are some wide exemptions.

Section 130AC (1) is the key provision. It provides that a legal practitioner must not (whether directly or through a person on their behalf) publish a statement that may reasonably be thought to be intended or likely to encourage or induce a person to make claims for compensation or damages under an Act or other law for a personal injury (see section 130AB for definitions of those terms – it should be noted the definition of "personal injury" encompasses the wide definition contained in the *Personal Injuries (Liabilities and Damages) Act* and the services of a legal practitioner or a legal practice named in the statement in connection with making such a claim.

The penalty for non-compliance is 50 penalty units (\$ 5,500) and it can also constitute professional misconduct under section 45(2)(aa) of the *Legal Practitioners Act (LPA)*.

However s.130AC(2) provides an



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exemption for certain statements giving a few basic details published in accordance with section 130AD. Practitioners should look at this exemption if intending to even publish the bare details provided for in this subsection. One area of danger appears to be publishing in a hospital or the vicinity of a hospital, though it appears that publishing details in a telephone book that is in a hospital is ok.

Also not exempted is including details on the firm's website but inclusion in a directory published on an independent website could be ok. It could be argued that if the details had been included on the website before the commencement date they would be in compliance – but what if they were part of a website that had been amended after the commencement date? Practitioners should consider this issue carefully.

Under section 130AC(3) if a statement is published in accordance with the professional conduct rules, section 130AC(1) does not apply. The Law Society is reviewing this position and it may be such rules have to be made at some time.

Section 13AE is perhaps the most controversial provision. Under section 130AE a person who is at the scene of an incident or at a hospital after an incident at which another person allegedly suffers or has suffered a

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# The number crunching decisions behind ILPs and MDPs cont...

## Company

In respect of income derived through incorporated practice entities, the Australian Taxation Office (ATO), through the application of Rulings such as IT 25, IT 2503, IT 2639 and IT 2330, effectively assesses income derived by an LPC incorporated under the old LP Act to its shareholders, by ensuring that no significant amount of profits can be retained within the company, forcing them to be paid out to the owner or practitioners as either wages or dividends each year. This therefore means that profits cannot be sheltered within the company and taxed at the company tax rate of 30% (rather than individual marginal rates of up to 48.5%), as is the case with all other companies other than professional practice companies.

Therefore, the only taxation advantage to be gained through the use of this structure to date has been to enable fully tax deductible superannuation contributions (up to the age based limits) to be made for the practitioner each year, rather than the partially deductible amounts (first \$5000 plus 75% of amounts over \$5000 up to age based limits) available to a self employed practitioner.

It is unclear at this stage whether the ATO will attempt to impose this rationale when assessing income derived by newly formed ILPs, or whether they will be allowed to accumulate profits (and therefore shelter income from tax) for tax purposes.

In deciding whether to adopt an MDP or an ILP to run your existing or new

practice, you should always be aware of the potential application of Part IVA of the Income Tax Assessment Act, which contains the anti avoidance provisions. These provisions effectively allow the Commissioner to assess tax on income derived by the company as though it were taxable income of the individual practitioner. It also allows imposition of penalties of up to 200% of the tax concerned. These provisions are often interpreted and applied quite widely by the Commissioner, and therefore it is very important to review them in light of your actual circumstances to ensure they cannot be applied to you. If unsure as to their application it would be prudent to take professional advice and perhaps even seek a Ruling from the Taxation Office as to the tax consequences of such action.①

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personal injury must not solicit or induce a potential claimant involved in the incident to make a claim. A legal practitioner who did this even for the best of motives could be liable to a fine of 500 penalty units and could be guilty of professional misconduct under section 45(2)(aa) of the LPA. This would apply to a legal aid lawyer who was on site at the time and who was asked for advice by an alleged victim.

Even more so, subsection (2) specifically targets health professionals such as doctors and nurses as well as police and even innocent bystanders.

Under section (3) it extends to persons who receive the information in the course of their employment.

Under section 130(3) this does not appear to apply to a solicitor taking instructions provided the disclosure is not likely to result in a potential claimant involved in the incident being induced to make a claim. This wording is arguably ambiguous.

Finally section 103AF prohibits paying for touting of potential clients. A person must not reward another person for soliciting or inducing a potential claimant to make a claim or seek or reward for soliciting or inducing a potential claimant to make a claim. The maximum penalty is again \$5,500 and it can constitute professional misconduct if carried out by a legal practitioner. Section 130AF(1) provides some exemptions including charging a potential claimant a fee for legal services provided to the potential claimant as part of making a claim.

The Law Society will be closely monitoring the operation of these provisions and will not be hesitating to bring any further concerns to the Government.

In the meantime I would urge practitioners to carefully check their operations in the light of the new legislation.①