SUBMISSION TO PRODUCTIVITY COMMISSION INQUIRY

- ACCESS TO JUSTICE ARRANGEMENTS

My submission is based on my experiences over the past couple of years with complaint processes in South Australia involving:

-a firm of solicitors
-the South Australian Legal Practitioners Conduct Board
-its "lay observer"
-the South Australian Ombudsman
-the taxation of bills system

As a result of my recent experiences, a number of issues raised in the Draft Report resonate very loudly with me, and have encouraged me to contribute to the debate.

I am aware that the current inquiry is multi-faceted, but I will confine my comments to my own experiences.

I agree with the relevant shortcomings identified in those areas in the draft report and I fully support the need for reform.

I am a fellow of the Institute of Chartered Accountants and a CPA (both over 40 years). I have had extensive dealings with lawyers throughout my career.

My concerns emanate from dealings with a law firm which acted for me in handling an objection to an unfavourable capital Gains Tax amended assessment arising from the sale of a business, and the initial denial of access to the Small Business CGT concessions. The same firm acted during the sale process, including contract negotiations and documentation, due diligence and specific capital gain tax advice, incurring fees of the order of $80k.

At the time we had no concerns with their advice, actions or fees, and their fees were paid without question. Concerns only arose when I received the amended assessment that was contrary to specific taxation advice previously given. The issues that specifically gave rise to my complaints emanated from changes in personnel within the firm, and the approach taken by the last partner handling the matter.

BILLING PRACTICES

I agree with the comments and concerns raised in clause 6.2 of the Draft report. My experience had several aspects to it.

Firstly, I was subject to three changes of personnel within the legal firm.

The firm had extensive knowledge of the issues involved in the sale.

As a direct result of it's past involvement, and since one of the items disallowed by the ATO was directly contrary to advice given by the firm, I decided that they should be engaged to lodge an objection.

The original partner was unable to continue to act due to family circumstances. Another staff solicitor took over, who had no prior involvement. When that person's service contract with the firm was not renewed, I was told that a new tax partner was joining the firm, and would take over. I was assured, both verbally and subsequently in writing that I would not be charged for any overlap or duplication of effort.

In accordance with that undertaking, a substantial portion of the bill for work performed to that point in time (i.e. drafting of a notice of objection) was rebated.

When the new tax partner took over, I then became the victim of what is best described on page 184 of the draft report. "The end result can be lawyers exploring every 'rabbit hole', with little regard to expediency, cost and added benefit of doing so."

The new partner reviewed the draft objection, and lodged it a few days later, with very few changes. A bill for $5,500 was rendered.

I was assured by him that "we do not need to commit significant resources at this stage in any event". (extract from solicitors file note). A month later I was given a bill for $9,515, which, on subsequent inspection, indicated that much of the work charged for was clearly "getting up to speed". By that stage, no meaningful contact had been made with the Australian Taxation Office.

I complained at the extent of 'rabbit hole exploring' going on (even to the extent of the new partner preparing draft briefing notes for court action). I was assured that this was absolutely necessary, since the ATO could make a decision at any time, and that we hade to be fully prepared for any eventuality.

Two weeks later I received another bill for $20, 673. By that stage there had still been no meaningful contact with the ATO case officer handling the objection.

I escalated my complaint within the firm. A couple of weeks later, I received a "heavy handed" reply, jointly signed by the tax partner and the managing partner, wherein I was requested to pay $19,800 into to the firms trust account, or they would cease to act. The letter went on to say that I had to do this quickly, as "further delay may prejudice your interests".

As I subsequently found out, after inspecting to firm's file notes, nothing could have been further from the truth. . I discovered that full and frank disclosure of what took place in the telephone discussion with the ATO case officer was not made. In fact it was misrepresented.

The firm's own file note of that conversation, and the practitioner's subsequent response to the Legal Practitioners Conduct Board, evidence the fact that the ATO officer said she "would be happy to provide a draft objection decision and make submissions in relation to that draft." This was withheld from me.

I was never given a fee estimate, either earlier, or at the last changeover, or subsequently. I was not given a cost agreement until a month or so after the last changeover. No cost estimate was offered until the final letter which led to me dispensing with their services.

I submitted in my complaint to the Legal Practitioners Conduct Board that the solicitor had an obligation to tell me about the ATO's conciliatory approach, but he did not. It is not difficult to draw a conclusion that this would have revealed that his "modus operandi" was flawed, and no doubt would have caused embarrassment. The practitioner has never disputed that this was withheld from me.

As a direct consequence of the aforementioned letter, and still without the knowledge of the ATO's actual position, I decided to bite the bullet, and dispense with their services. This was not an easy thing to do, in view of the false impression of urgency, and concerns about how a change of legal representation might be interpreted by the ATO. In view of my mounting concerns, as well as the intimidating letter, I felt I was left with no choice.

The new solicitor could not have handled it more differently. I did incur fees in him familiarising himself with the issues. I understood and accepted this.

Fortunately, and in stark contrast to the previous solicitor, his recommendation was that early contact be made with the ATO case officer, which he did without much detailed research. He was told about the offer of a draft decision, and was also told that they were checking one particular technical aspect with the ATO Centre of Excellence. He did nothing until the ATO got back to him.

A few weeks later, the ATO came back and said that they were wrong on the major technical issue. This led to the ATO conceding full entitlement without any further argument.

The fees incurred with the new solicitor, to see the matter through to its conclusion, were still quite a bit less that the $20k final demand from the previous firm. I had already paid $33k prior to sacking the first firm. Given their "burn rate" (over $20,000 in 2 weeks), I expect the $20k in advance would have been depleted quite quickly, to be followed by demands for more fees in advance.

In his response to the Legal Practitioners Conduct Board, the ATO's conciliatory approach was acknowledged, but he "thought it was an excellent opportunity to finalise our position on the various issues, obtain the final valuations and forward our letter and submissions (that had been prepared in draft form) to the ATO by way of response."

Despite this being clearly fitting the description of "chasing rabbits down holes" the Legal Practitioners Conduct Board found no fault.

They dismissed my complaints with the words "Most of the complaints are made with the benefit of hindsight"

What a trite comment! All complaints are made with the benefit of hindsight. The only reason people employ a professional is that they profess to have experience in a particular field. I maintained, and continue to maintain that any professional should be aware of ATO practices.

Irrespective of this defence, once the practitioner learned that the ATO was going to approach the case in a different manner that he had been suggesting, he had a clear duty to inform me. The hindsight excuse disappeared at that moment.

It is unconscionable that he not only failed to inform me, but demanded fees in advance to continue in the same flawed manner.

The Legal Practitioners Conduct Board saw fit to find no fault with this!

AUSTRALIAN TAXATION OFFICE EXPERIENCE

Once these technicalities had been finalised, I then took over dealing with the ATO myself, primarily in chasing up refunds, and interest on overpayments.

I had dealings with at least 3 different people, and found them all to be approachable and helpful. They were under a bit of pressure due to problems with computing systems, which delayed things for a while, but they were apologetic and went out of their way to keep me informed.

I have read the submission from the ATO on the Commission's website; I commend them on their positive approach to dispute resolution, and, based on my experience, can confirm that they "practised what they preach" with me.

My only complaint was the approach by the original audit officer. As a result his "creative" interpretation, which was subsequently rejected out of hand by the ATO Centre of Excellence and which led to a full allowance of my objection, I personally lodged a claim for compensation for defective administration.

Again I was treated with courtesy and respect. My claim was mostly successful, with the exception that they did not accept that the fees of the first firm were fair or reasonable.

The ATO records revealed little in the way of contact, and, in their written decision, commented that :

"The remainder of the invoices totalling $33,378.95 relate to follow up of the objection. This amount does not appear to be reasonable in the light of the nature of the issues and the actual work performed. In this regard I note that the ATO records do not record any significant of substantive contact between (name of firm) and the ATO. It is difficult to conceive what these fees might reasonably relate to. I do not consider that compensation is payable for these costs."

The Legal Practitioners Conduct Board took no notice of this damning independent appraisal.

COMPLAINTS PROCESS

My first complaint to the managing partner fell on deaf ears. They did make a token offer to refund the final bill of $3k, which I rejected

LEGAL PRACTITIONERS CONDUCT BOARD

LEGISLATION

Firstly, I submit that there appear to be serious shortcomings in the South Australian Legal Practitioners Act dealing with powers of the Board in relation to minor misconduct.

Section 77AB (1)(b) states that if "the misconduct in question was relatively minor and can be dealt with under this subsection, the Board, if the legal practitioner consents to such a course of action, determine not to lay charges before the Tribunal and may instead exercise any one or more of the following powers:……."

It seems incongruous that the Board's power be fettered in such a way. Why would any practitioner consent, given that the higher charges of unprofessional or unsatisfactory conduct bear a much higher burden of proof?

The practical effect of the aforementioned deficiency in the Legal Practitioners Act mean that there is no effective mechanism for dealing with anything other than blatantly obvious cases of misconduct.

PROFESSIONAL CONDUCT

As mentioned above, the Board claimed that it was hamstrung by legislative restrictions. To quote from one of their letters;

"It is only when conduct falls within these statutory definitions that the Board has power to take any disciplinary action."

The same letter goes on to say:

"Generally the way in which a practitioner handles a matter on behalf of a client does not amount to unprofessional conduct or unsatisfactory conduct except in unusual or extreme cases in which the conduct can be described as grossly negligent or incompetent."

I have great difficulty with the concept, which the aforementioned quote supports, of a solicitor, after giving advice on a certain course of action, can then magically turn acceptance of that advice into a clients instructions, for which the client becomes fully responsible.

My complaints about failure to adequately inform me important developments (i.e. the ATO's conciliatory approach, which was diametrically opposed to the advice given) also fell on deaf ears.

The solicitor also canvassed another argument supporting disallowance of my claim which had not even been contemplated by the ATO – again the Board saw no basis in my objection, despite this clearly being a case of not just failing to act in my best interests, but in fact acting contrary to my best interests.

OVERCHARGING

I note from draft recommendation 6.4 that complaints bodies should have the power to access existing files relating to the quantum of bills. My experience with the Board was that this wasn't an impediment. The solicitor did provide full details, including work-in-progress computer printouts.

My concerns stem from:

1. The fact that, despite clear documentary evidence to the contrary, in the form of the dates on the firms actual bills, the Board accepted the proposition put by the practitioner that the rebate allowed in relation to his predecessor was in for his account, when clearly it was not.

2. The Board ignored the verbal and written undertakings of the firm that I would not be charged for cost of changeover in personnel (i.e. getting up to speed). They took the view that "It is only necessary to consider whether there is an overall overcharge by the firm, as it is the firm that renders the bill to the client."

2. The Board ignored the fact that many of the itemised charges could not be categorised as anything but initial "getting up to speed." They only seemed interested to see if the bill could be justified by time actually spent. There appeared to be little by way of enquiry into whether or not the work done was necessary or appropriate.

3. The Board showed no interest in the fact that the ATO could see no value for the post objection lodgement legal fees.

4. The Board ignored the fact that the success of my claim for compensation for defective administration was only successful on the basis that decisions of the ATO audit officer were technically unsound, a fact which should have been know by a competent tax lawyer charging $495 per hour.

5. Despite having a legal obligation to consider overcharging complaints, I believe that they did not adequately address this obligation. They suggested that I should seek redress in having the bills taxed.

PROCESSES OF THE BOARD

I experienced a considerable lack of openness and transparency in my dealings with the Board. Despite many attempts for meetings, they steadfastly refused.

They required everything to be put in writing. They have failed to respond to many of the issues I have raised, including specific responses as to reasons why they found no fault with many of the actions mentioned above.

Responses which have been given are glib, and do not address specifics. e.g. “the Board is not satisfied that there is evidence that the complainant has been overcharged”, and can be best described as “stonewalling”.

I found the Board’s processes and practices to be out of step with what I would have expected from a review board which acts as a self regulatory body for a profession which claims to be all about due process and natural justice.

I was denied access to a copy of the staff report presented to the Board. Legal professional privilege was the reason given (staff of the Board are solicitors, so somehow the Board is deemed to be their client). I understand that the Board has defended this position in the Courts.

Irrespective of the legal technicalities, it seems a clear denial of natural justice if complainants do not know what is being put before the Board, and therefore have no right of reply.

I urge the Productivity Commission to redress this shortcoming.

LAY OBSERVER

Complainants who are dissatisfied the Board’s decision can “make representations” to the Lay Observer, who is a person appointed by the Attorney-General under the Legal Practitioners Act 1981.

The powers and functions of the Lay Observer, as set out in the Board’s information sheet, seem quite limited.

“The Lay Observer cannot “overrule” a decision by the Board..”
“The Lay Observer does not re-invesitgate your complaint...”

Access to the Lay Observer was even more difficult than the Board – in fact it was impossible. There is no address or telephone number on his letterhead – only a Post Office Box Number.
I am left with the distinct impression that the Lay Observer serves no useful purpose, and any possible effectiveness is curtailed by legislative impediment.

OMBUDSMAN

From my initial enquiries with the Ombudsman’s office, I was advised that I needed to exhaust all other avenues of complaint before they would get involved. After getting no joy from the Lay Observer, I then asked to Ombudsman to intervene.

His initial appraisal was that there was a case to answer. After a detailed review, he did publish a recommendation that the Board should provide me with more detailed reasons behind their decision. I did ask that a number of concerns, including those mentioned above, be addressed.

The response I received provided no more than previously given. It was simply a rehash of past correspondence. It did not address my specific questions.

I am still awaiting advice from the Ombudsman as to whether he accepts the letter accords with his recommendation.

The Ombudsman also advised that his powers are limited to reviewing the Agency's procedures and practices, he has no power to change a decision.

TAXATION OF BILLS

The Legal Practitioners Conduct Board suggested that I should seek redress on complaints about bills through the taxation of bills arrangements.

I have made enquiries through the Court system and find that this is a mysterious process, to say the least. They could offer no guidance -each case is different. I am reticent about throwing good money after bad in going down this track, since it will do doubt incur more fees to be represented, and there is also a risk of costs being awarded against me. This is another serious impediment and failing in the current system.

I am currently taking advice on the seeking to have the bills taxed by a master of the Supreme Court. Initial advice suggests that this is likely to cost in excess of $10,000, which is a major impediment to contemplate this course of action.

CONCLUSION

Going through this process has been a lengthy, time consuming, frustrating and challenging process. I am sure most people would simply give up. Were I not so incensed by my experiences, in particular the over-servicing, and the withholding of critical information, I also would have given up.

My concerns can be summarised as follows:

1. The Legal Practitioners Act contains a glaring loophole that allows practitioners to avoid scrutiny for "relatively minor misconduct."
2. The Legal Practitioners Conduct Board has limited powers to intervene in all but the most blatant cases of misconduct. My experience is that it acts as more of an apologist for the profession, rather than an independent review authority.
3. The Lay Observer review is ineffective.
4. The Ombudsman's power to intervene is too restricted, in being constrained to a review of bureaucratic processes.
5. The cost of taxation of bills, and the possibility of costs being awarded against an unsuccessful complainant, acts a severe deterrent.

If it serves a useful purpose in this enquiry, and leads to inequities in the current system being redressed, then I will be somewhat placated. I am happy to provide copies of source documents (in confidence) to support any aspect of my submission.