

Our ref:LSC:CNM:71001907 & 71001908

8 November 2005

Private & Confidential

Mr Russell Mathews
254 Hawken Drive
ST LUCIA QLD 4067

Dear Mr Mathews

COMPLAINT ABOUT JOANNE WHITING & WAYNE TOLTON

Thank you for your complaint received by this office on 19 October 2005.

As you may be aware, the new regulatory scheme under the *Legal Profession Act 2004* (“**the Act**”) enables my office to investigate “complaints” about legal practitioners. In particular, I may investigate complaints of “professional misconduct” or “unsatisfactory professional conduct”.

It is only in respect of conduct which falls within either of these statutory descriptions by a legal practitioner that I have any power to consider whether disciplinary action should be taken.

You have raised a number concerns about the advice provided by Mr Tolton to Ms Whiting for the Brisbane City Council (**BCC**). You alleged that this advice was used by the BCC to deny you ‘Due Process’ and a ‘Right to be Heard’. In particular, you have raised concerns that Mr Tolton:

- May not have received written instructions to prepare the advice;
- Provided an ambiguous advice;
- Incorrectly interpreted sections 200 and 209 of the *Health Regulation 1996* (“**the Regulation**”); and
- Failed to consider cases on the common law right of entry in preparing his advice.

In regards to your complaint in relation to Ms Whiting I understand that you allege that she misinterpreted Mr Tolton’s advice to mean that the BCC could enter your premises without obtaining your consent.

After considering this matter carefully I regret to advise you that I am not able to deal with your complaint against either Mr Tolton or Ms Whiting. Whilst I acknowledge that the matters which are the subject of your complaint are of great concern to you they are not matters in respect of which it is appropriate for me to intervene or to take disciplinary action. Let me explain why.

I note your concern that Mr Tolton's advice refers to "recent conversations" in relation to powers of entry and that you therefore query whether or not any written instructions were provided to Mr Tolton. There is no requirement that barristers have to receive instructions in writing. Clearly Mr Tolton did receive instructions to prepare the advice and whether or not those instructions were in writing is not a conduct issues that requires disciplinary action.

You also consider that Mr Tolton's advice is ambiguous. I have examined the portion of Mr Tolton's advice that was forwarded with your complaint. I am of the view that the advice is clear in that it states that the Council does have the power to enter the property and can use force to break the chain lock in the gate to do so. In the circumstances I am unable to see how Mr Tolton's advice is ambiguous.

You are also of the view that Mr Tolton's advice is incorrect as he has misinterpreted sections 200 and 209 of the Regulation and failed to examine appropriate case law in the area. I have examined the relevant sections of the *Health Regulation 1996* and the cases referred to your complaint. I am of the view that Mr Tolton's advice was correct and that the BCC is not required to seek permission from a Court before entering the premises. Section 200 provides a statutory right to the BCC to enter a place after it has issued a notice pursuant to section 209 if that notice has not been complied with.

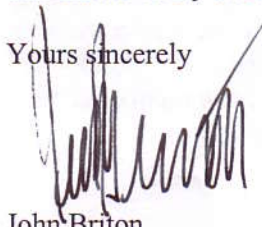
As a result of the above I do not consider that your complaint identifies any conduct issues in relation to Mr Tolton's advice that could amount to professional misconduct or unsatisfactory professional conduct.

In relation to your complaint about Ms Whiting I am of the view that Ms Whiting's interpretation of Mr Tolton's advice is also correct. Whilst Mr Tolton's advice does not specifically state that the BCC has permission to enter the premises without your consent (as stated by Whiting in her letter to you of 25 November 2004) the advice does state that "*the Council clearly has the power to enter this place by authority of section 200[1] of the Health Regulation 1996*". The fact that the BCC has power to enter a place pursuant to section 200 implies that they can do so without your consent. As a result, I do not consider that your complaint identifies any conduct issues with the actions of Ms Whiting that could amount to professional misconduct or unsatisfactory professional conduct.

On the material provided with your complaint and for the reasons set out above, pursuant to s.259(1)(b) of the Act, I do not propose proceeding further with your complaint as there is no conduct by Ms Whiting or Mr Tolton that is capable of amounting to either professional misconduct or unsatisfactory professional conduct sufficient to justify the further investigation of your complaint.

I am aware that this result may not satisfy you but I am restricted by the provisions of the Act and for the reasons I have mentioned I have no power to intervene. Thank you for bringing this matter to my attention.

Yours sincerely



John Briton
Legal Services Commissioner