

LEGAL PRACTICE TRIBUNAL

CITATION: *Legal Services Commissioner v Cousins* [2009] LPT 002

PARTIES: **LEGAL SERVICES COMMISSIONER**
(applicant)
v
SEAN PETRIE ALLEN COUSINS
(respondent)

FILE NO: 9992 of 2007

PROCEEDING: Discipline Application

DELIVERED ON: 5 February 2009

DELIVERED AT: Brisbane

HEARING DATE: 1 – 3 December 2008

JUDGE: Wilson J

PRACTITIONER
PANEL
MEMBER: Mr PJ Lyons QC

LAY PANEL
MEMBER: Ms KA Keating

FINDINGS AND
ORDERS: **The Tribunal finds the respondent –**

- (a) **guilty of professional misconduct in being directly knowingly concerned in Chaste Corporation Pty Ltd engaging in conduct in contravention of sections 48 and 52 of the *Trade Practices Act 1974* (C'th) between March 2000 and November 2001; and**
- (b) **unfit to practise.**

The Tribunal orders –

- (a) **that the respondent's name be removed from the local roll of persons admitted to the legal profession; and**
- (b) **that the respondent pay the applicant's costs of the proceeding.**

CATCHWORDS: PROFESSIONS AND TRADES – LAWYERS – COMPLAINTS AND DISCIPLINE – PROFESSIONAL MISCONDUCT – OTHER MATTERS – where the respondent barrister knowingly concerned in contraventions of sections 48 and 52 of the *Trade Practices Act 1974* (Cth)

in 2000-2001 – where the respondent barrister’s conduct amounted to professional misconduct – where disciplinary application heard in 2008 – whether the respondent barrister fit to practise at the time of the hearing

Acts Interpretation Act 1954 (Qld), s 20(2)(c), s 20(4)
Legal Profession Act 2007 (Qld), s 5(2), s 250, s 280, s 423(1), s 456(1)
Legal Profession Act 2004 (Qld), s 250, s 280, s 614(4)
Trade Practices Act 1974 (Cth), s 48, s 52

Adamson v Queensland Law Society Inc [1990] 1 Qd R 498, applied
Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd & Ors [2005] FCA 1212 (2 September 2005), considered
Downey v Carlson Hotels Asia Pacific Pty Ltd [2005] QCA 119, cited
Ex parte Attorney-General(Cth); Re A Barrister and Solicitor (1972) 20 FLR 234, cited
Medical Benefits Fund of Australia Ltd v Cassidy (2003) 135 FCR 1, cited
New South Wales Bar Association v Cummins (2001) 52 NSWLR 279, considered
Queensland Law Society Incorporated v Smith [2001] 1 Qd R 649, cited
Re Wheeler [1992] 2 Qd R 690, cited
Ziems v The Prothonotary of the Supreme Court of NSW (1957) 97 CLR 279, cited

COUNSEL: AJ MacSporran SC for the applicant
PJ Davis SC for the respondent

SOLICITORS: Legal Services Commission for the applicant
Brian Bartley & Associates for the respondent

- [1] **Wilson J:** Chaste Corporation Pty Ltd ("Chaste Corporation"), a company controlled by Peter Foster and Braddon Webb, sold exclusive distributorships for a product called "TRIMit", which was to be marketed as a weight-loss pill. In doing so, it contravened sections 48 and 52 of the *Trade Practices Act 1974* (Cth), which proscribe resale price maintenance and misleading or deceptive conduct in trade or commerce.
- [2] The respondent has been a barrister at all material times. The applicant alleges that he was knowingly concerned in Chaste Corporation's contraventions of the *Trade Practices Act 1974*, and that his conduct amounted to professional misconduct or alternatively unsatisfactory professional conduct.¹

¹ Discipline application filed 7 November 2007 (Tribunal document no. 1); Amended by leave 1 December 2008.

- [3] The respondent concedes that his conduct amounted to professional misconduct as described in *Adamson v Queensland Law Society Inc*² and that at the time he was unfit to practise because of that conduct and his mental condition.³
- [4] Where the Tribunal finds a practitioner guilty of professional misconduct, it may make any order it sees fit, including an order recommending that his or her name be removed from the local roll.⁴ Fitness to practise is to be determined at the time of the hearing. Counsel agreed that the critical issue in the present case is the respondent's current fitness to practise. In order to determine this, it is necessary to analyse the conduct in question and what it revealed of the respondent's character, to consider his antecedents, and to consider his subsequent conduct (including but not limited to his professional practice).

Particulars of the charge

- [5] The Australian Competition and Consumer Commission ("ACCC") brought proceedings against Chaste Corporation and others, including the present respondent.⁵ On 2 September 2005 Lander J made declarations and orders against (amongst others) the present respondent.
- [6] The respondent promptly notified the Bar Association of Queensland ("the Bar Association") of the outcome of the Federal Court proceedings.⁶ Investigations by the Bar Association and the Legal Services Commission ("the LSC") followed.⁷
- [7] The particulars of the charge in this discipline application refer to those proceedings in the Federal Court and incorporate by reference the declarations and orders made by Lander J.⁸
- [8] The applicant alleges that at all material times the respondent was a "local lawyer" within the meaning of the *Legal Profession Act 2007* (Qld) ("the 2007 Act"),⁹ and that he was –
- (a) retained as Chaste Corporation's legal adviser between March 2000 and April 2000;
- (b) the manager and chief executive officer of Chaste Corporation between May 2000 and November 2000; and

² [1990] 1 Qd R 498 at 507 – 508.

³ Transcript of proceedings on 3 December 2008, pp 3.40 – 3.41.

⁴ *Legal Profession Act 2007*(Qld), s 456(1).

⁵ *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd & Ors* [2005] FCA 1212 (2 September 2005).

⁶ Letter from respondent to Bar Association of Queensland dated 5 September 2005: Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-1 (Court document no. 8), p 2.

⁷ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-1, p 1 and ex LMS-2, p 36.

⁸ Transcript of proceedings on 3 December 2008, pp 3.32, 3.36 and 3.42.

⁹ *Legal Profession Act 2007* (Qld), s 5(2).

(c) retained as Chaste Corporation's legal adviser between November 2000 and November 2001.

[9] Lander J declared that the respondent held these positions, and that he held himself out, and allowed Chaste Corporation to hold him out, as doing so. He made or caused or permitted certain representations to be made on behalf of the corporation¹⁰ –

(a) about the advertising campaign and marketing team it would employ to promote TRIMit;¹¹

(b) about delays in the marketing campaign;¹²

(c) about what it would do if an area manager wished to discontinue a distribution agreement;¹³

(d) about the credentials and efficacy of TRIMit;¹⁴

(e) that the business provided a genuine business opportunity, but concealed the involvement of Mr Foster and the distribution of its income to Messrs Foster and Webb;¹⁵

and that in respect of each representation he was directly knowingly concerned in the corporation's engaging in conduct that was misleading or deceptive in contravention of s 52 of the *Trade Practices Act 1974*. His Honour declared that between at least May 2000 and November 2001, the respondent knowingly permitted, assisted and authorised the corporation to engage in resale price maintenance in contravention of s 48 of the *Trade Practices Act 1974*.¹⁶

[10] Lander J ordered that the respondent pay a pecuniary penalty of \$100,000, imposed various restraints on his conduct for five years from the date of the order, and ordered him to pay the ACCC's costs agreed in the amount of \$25,000.¹⁷

Evidence

[11] The evidence before this Tribunal consisted principally of the following –

¹⁰ *Australian Competition and Consumer Commission v Chaste Corporation Pty Ltd & Ors* [2005] FCA 1212 (2 September 2005) per Lander J at para 33.

¹¹ *Ibid*, para 33.1.

¹² *Ibid*, para 33.2.

¹³ *Ibid*, para 33.3.

¹⁴ *Ibid*, para 33.4 – 33.6.

¹⁵ *Ibid*, para 33.7 – 33.8.

¹⁶ *Ibid*, paras 34 – 35.

¹⁷ *Ibid*, paras 36 – 42.

- (a) agreed statement of facts;¹⁸
- (b) admissions in joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005;¹⁹
- (c) the respondent's responses to the investigations by the Bar Association and the LSC;²⁰
- (d) affidavit by the respondent sworn 27 October 2008;²¹
- (e) cross-examination and re-examination of the respondent;²²
- (f) affidavit by Louise Maree Syme sworn 18 September 2008²³ – a solicitor and investigator in the employ of the LSC, to which were exhibited various documents including transcripts of interviews with the respondent on 18 December 2002,²⁴ 26 February 2004²⁵ and 22 March 2004,²⁶ and various affidavits used in the Federal Court proceedings;
- (g) further affidavit by Ms Syme sworn 28 November 2008²⁷ and certain of the affidavits exhibited to it – namely, those of CN Parker, Clough, Young, Waters, Webb and Drew;²⁸
- (h) cross-examination of CN Parker,²⁹ Clough,³⁰ Waters,³¹ Webb³² and Drew;³³
- (i) affidavit of Katrina Mary Close sworn 26 November 2008³⁴ a solicitor for the ACCC who had the carriage of the Federal Court proceedings;
- (j) affidavit of Tracey Lee Alker sworn 21 November 2008;³⁵

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Exhibit 1: Statement of Agreed Facts.

19

Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-8, pp 79 – 114.

20

Ibid, ex LMS-4, pp 38 – 58; 20 September 2008: ibid, ex LMS-7, pp 64 – 73; 24 September 2007: ibid, ex LMS-8, pp 74-76.

21

Filed 28 November 2008 (Court document no.15).

22

Transcript of proceedings on 1 December 2008, pp1.38 - 1.56, 1.63 - 1.99; transcript of proceedings on 2 December 2008 2.2 - 2.14, 2.18 - 2.42, 2.72 - 2.76.

23

Filed 19 September 2008 (Court document no. 8).

24

Affidavit of Louise Maree Syme filed September 2008, ex LMS-19 pp 337 - 506.

25

Ibid pp 507 - 596.

26

Ibid pp 694 - 765.

27

Filed 28 November 2008 (Court document no. 23).

28

Transcript of proceedings on 2 December 2008, pp 2.84 – 2.85.

29

Transcript of proceedings on 1 December 2008, pp 1.58 – 1.62.

30

Transcript of proceedings on 2 December 2008, pp 2.77 – 2.79.

31

Transcript of proceedings on 1 December 2008, pp 1.31 – 1.35.

32

Transcript of proceedings on 1 December 2008, pp 1.25 – 1.28.

33

Transcript of proceedings on 1 December 2008, pp 1.18 – 1.21.

34

Filed 26 November 2008 (Court document no. 21).

35

Filed 24 November 2008 (Court document no. 20).

- (k) affidavit of Tamika Ruth Simpson sworn 21 November 2008;³⁶
- (l) reports of Dr Trevor N Lotz, psychiatrist, 30 October 2008 and 18 November 2008,³⁷ and cross-examination and re-examination of Dr Lotz;³⁸
- (m) report of Craig Holt, psychologist, 10 March 2008,³⁹ and cross-examination and re-examination of Mr Holt;⁴⁰
- (n) a series of character references,⁴¹ and cross-examination of two of the referees – Margaret May⁴² and Mary Alcorn;⁴³
- (o) edited video of the product launch on 9 August 2000.⁴⁴

Jurisdiction and definitions

- [12] The conduct occurred prior to the commencement of the *2007 Act* on 1 July 2007, and prior to the commencement of its predecessor the *Legal Profession Act 2004* (Qld) ("the *2004 Act*") on 1 July 2004. The "Complaints and discipline" provisions in chapter 4 of the *2007 Act* are applicable to conduct before or after 1 July 2007.⁴⁵ By s 456(1) of the *2007 Act* –

“456 Decisions of tribunal about an Australian legal practitioner

(1) If, after the tribunal has completed a hearing of a discipline application in relation to a complaint or an investigation matter against an Australian legal practitioner, the tribunal is satisfied that the practitioner is guilty of unsatisfactory professional conduct or professional misconduct, the tribunal may make any order as it thinks fit, including any 1 or more of the orders stated in this section.”⁴⁶

"Professional misconduct" and "unsatisfactory professional conduct" are defined in the dictionary in schedule 2 to the *2007 Act*. Relevantly each of those definitions provides –

³⁶ Filed 24 November 2008 (Court document no.19).

³⁷ Affidavit of Brian David Bartley sworn and filed 21 November 2008 (Court document no.18), pp 51 – 55; 61 – 62.

³⁸ Transcript of proceedings on 2 December 2008, pp 2.46 – 2.52.

³⁹ Affidavit of Brian David Bartley sworn 21 November 2008, pp 47 – 49.

⁴⁰ Transcript of proceedings on 2 December 2008, pp 2.80 – 2.84.

⁴¹ Exhibited to affidavit of Brian David Bartley filed 21 November 2008 and further affidavit of Brian David Bartley filed 28 November 2008 (Court document no. 22).

⁴² Transcript of proceedings on 2 December 2008, pp 2.16 – 2.18.

⁴³ Transcript of proceedings on 2 December 2008, pp 2.67 – 2.68.

⁴⁴ Exhibit 2.

⁴⁵ *Legal Profession Act 2007* (Qld), s 423(1).

⁴⁶ Emphasis added.

"(a) for dealing with a complaint about conduct that happened before 1 July 2004— see chapter 9;"

Chapter 9, "Transitional, savings and repeal provisions for Legal Profession Act 2007" does not contain any express definition of these terms in relation to conduct before 1 July 2004. As s 723 preserves the operation of s 20 of the *Acts Interpretation Act 1954* (Qld), any liability accrued under or saved by the operation of the *2004 Act* is unaffected by the repeal of the *2004 Act*.⁴⁷

- [13] The disciplinary provisions of the *2004 Act* applied to conduct before 1 July 2004.⁴⁸ The Tribunal's power to sanction a practitioner depended on a finding of unsatisfactory professional conduct or professional misconduct.⁴⁹ In relation to conduct of a barrister which occurred before 1 July 2004, "professional misconduct" and "unsatisfactory professional conduct" were defined in s 614(4) as follows –

"**professional misconduct**' means professional misconduct according to the law applied by the Supreme Court when exercising its inherent jurisdiction to deal with the conduct of a barrister before the commencement of this section.

'**unsatisfactory professional conduct**' means unsatisfactory professional conduct according to the law applied by the Supreme Court when exercising its inherent jurisdiction to deal with the conduct of a barrister before the commencement of this section."⁵⁰

- [14] Before the commencement of the *2004 Act* there was no statutory definition of "professional misconduct" or "unsatisfactory professional conduct" of a barrister. The terms in common usage were "professional misconduct" and "unprofessional conduct", and the Supreme Court of Queensland followed the common law as to their meaning and application. There was never any suggestion that their essential meanings differed according to whether they were applied to barristers or solicitors. Generally professional misconduct was regarded as the more serious, although the ultimate question was always that of fitness to practise, and a finding of either professional misconduct or unprofessional conduct could result in an order that a person be struck off the relevant roll of practitioners. In some cases, personal misconduct was distinguished from professional misconduct, but it was recognised that personal misconduct could also demonstrate that someone was not a fit and proper person to practise and so lead to striking off.⁵¹ In some cases, the expression "professional misconduct" was limited to misconduct in the course of or connected with a practitioner's profession.⁵² In *New South Wales Bar Association v Cummins*,⁵³ Spigelman CJ said –

⁴⁷ *Acts Interpretation Act 1954* (Qld), ss 20(2)(c) and 20(4).

⁴⁸ *Legal Profession Act 2004* (Qld), s 250.

⁴⁹ *Legal Profession Act 2004* (Qld), s 280.

⁵⁰ Emphasis added.

⁵¹ See the discussion in *Ziems v The Prothonotary of the Supreme Court of NSW* (1957) 97 CLR 279 at 290 per Fullagar J.

⁵² For example, *Queensland Law Society Incorporated v Smith* [2001] 1 Qd R 649 at 652; *Re Wheeler* [1992] 2 Qd R 690 at 697.

⁵³ (2001) 52 NSWLR 279 at 289.

"There is authority in favour of extending the terminology 'professional misconduct' to acts not occurring directly in the course of professional practice. That is not to say that any form of personal conduct may be regarded as professional misconduct. The authorities appear to me to suggest two kinds of relationships that justify applying the terminology in this broader way. First, acts may be sufficiently closely connected with actual practice, albeit not occurring in the course of such practice. Secondly, conduct outside the course of practice may manifest the presence or absence of qualities which are incompatible with, or essential for, the conduct of practice. In this second case, the terminology of 'professional misconduct' overlaps with and, usually it is not necessary to distinguish it from, the terminology of 'good fame and character' or 'fit and proper person'."

- [15] In *Adamson v Queensland Law Society Inc*,⁵⁴ Thomas J (with whom Connolly and Ambrose JJ agreed) said of professional misconduct –

“The test to be applied is whether the conduct violates or falls short of, to a substantial degree, the standard of professional conduct observed or approved by members of the profession of good repute and competency⁵⁵.”

- [16] The respondent has properly conceded that his conduct amounted to professional misconduct according to this test.

Background

- [17] The respondent was born on 1 October 1964. After graduating from the University of Queensland with Bachelor of Arts and Bachelor of Laws degrees and completing articles of clerkship, he was admitted as a solicitor on 13 December 1990. He worked as a solicitor, initially as an employee and subsequently as a member of a firm, until 16 March 1998, when he was admitted to the bar. He has been a barrister continuously since then. He has always been based on the Gold Coast.
- [18] By 2000 Peter Foster had a criminal history in Queensland, California and the United Kingdom, and he had acquired a reputation as a confidence trickster. The respondent first came into contact with him in about 1996: Mr Foster was then charged with three counts of attempting to induce a witness to give false testimony, one count of being in possession of a false passport, and two counts of imposition on the Commonwealth by an untrue representation. The respondent acted for him in the District Court on an unsuccessful application for bail, and subsequently when he pleaded guilty and was sentenced to 18 months' imprisonment. In the course of

⁵⁴ [1990] 1 Qd R 498 at 507 – 508.

⁵⁵ *Ex parte Attorney-General (Cth); Re A Barrister and Solicitor* (1972) 20 FLR 234 at 242-243 and 245-246.

those proceedings, material was placed before the Court showing that Mr Foster had this criminal history:

- (a) In 1987 he was convicted in the Magistrates Court at Southport of being involved in the management of a company Slimway Tea Pty Ltd whilst he was an undischarged bankrupt;
- (b) In 1989 he was convicted in Los Angeles of two counts of false advertising and one count of representing a drug or device to have certain effects in violation of the *California Health and Safety Code*. One of the orders made prevented him from selling any tea or products purporting to have health benefits in California;
- (c) In 1994 he was convicted in Warwick in England of five counts of offering to supply goods to which a false trade description had been applied and one count of supplying goods to which a false trade description had been applied; and
- (d) In 1995 he was convicted in Liverpool in England of conspiracy to supply goods to which a false trade description applied.

Generally these earlier convictions had resulted in fines, though the 1995 conviction had resulted in a sentence of two years' imprisonment, reduced on appeal to 18 months.⁵⁶

- [19] The respondent formed a favourable view of Mr Foster despite his history. He thought he was a clever man, and that if his energies could be channelled in the right direction, he would be successful. He still held that view when he agreed to become involved in the business of Chaste Corporation in 2000.⁵⁷

Involvement with Chaste Corporation to late April 2000

- [20] In early 2000 Mr Foster was in prison on remand awaiting extradition to the United Kingdom.⁵⁸ The respondent had acted for him at an early stage of the extradition proceedings (while he was still a solicitor), and had got to know his mother Louise Foster, his sister and his sister's daughter. Louise Foster had spoken to him about Chaste Corporation and TRIMit, and asked him if he would invest in the company, but he had declined. They wanted him to meet Brad Webb. The respondent may have met Mr Webb several years previously, but he had no recollection of him.

⁵⁶ See sentencing remarks of Newton DCJ on 15 November 1996: Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-14, p 215 *et seq*; File note Louise Syme dated 5 September 2008: Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-15, pp 226-227.

⁵⁷ Transcript of proceedings on 2 December 2008, p 2.8.

⁵⁸ Transcript of taped interview between Mr David Johnson (AGS) and Mr Sean Cousins conducted Wednesday 18 December 2002: Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-19, p 341.

- [21] From prison Mr Foster sent the respondent a letter by facsimile dated 6 March 2000, asking him to provide a reference for a man from Townsville who "would be interested in discussing with you a long-term mutually rewarding professional association".⁵⁹ That man was Braddon Webb. The respondent met him more than once at Louise Foster's house on the Gold Coast, when Mr Webb showed him some documentation about his business background and experience. The respondent was given to understand that Chaste Corporation was Mr Webb's business, although Mr Foster would be providing advice on a consultancy basis and Mr Webb and the corporation would be making payments to a Foster entity in return for that advice.⁶⁰ On 8 March 2000 the respondent gave Mr Webb a reference on his professional stationery; it was in these terms⁶¹ –

“TO WHOM IT MAY CONCERN

MR BRADDON WEBB, CHASTE CORPORATION PTY LTD

I am pleased to introduce Mr Braddon Webb, the Managing Director of Chaste Corporation Pty Ltd.

Mr Webb has a proud history of operating successful and innovative business enterprises throughout Australia.

He is a quiet unassuming man, but underneath that exterior is a clever, reliable and conscientious businessman of high principles and integrity.

Of course, you should rely on your own enquiries, but I would be happy to expand on the above.”

- [22] On 22 March 2000, again on professional stationery, the respondent issued an invoice to Chaste Corporation for consultancy fees in the sum of \$2,000.⁶² It related to the use of the reference and being on standby, if needed, to advise or to go to a meeting.⁶³ He received telephone calls from potential area managers, following up the reference.⁶⁴
- [23] The respondent was overseas from late March to late April 2000. He agreed to become the chief executive officer and manager of Chaste Corporation about the end of April or early May 2000.

⁵⁹ The substance of the facsimile is reproduced in the transcript of interview: *ibid*, p 343.

⁶⁰ *Ibid*, p 345; Transcript of proceedings on 1 December 2008, pp 1.54 – 1.55.

⁶¹ Affidavit of Katrina Mary Close dated 28 May 2004, exhibited to: Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-21 part 2, p 779.

⁶² *Ibid*, p 780.

⁶³ Interview between Katrina Mary Close and Felicity Potter (AGS), Sharyn Vaughan (ACCC) and Sean Cousins dated 26 February 2004, exhibited to: Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-20, p 512; Transcript of proceedings on 1 December 2008, p 1.71.

⁶⁴ Affidavit of Louise Maree Syme: *ibid*, p 509; Affidavit of Sally Young dated 26 March 2004, exhibited to: Second affidavit of Louise Maree Syme filed 28 November 2008 (Court document no. 23), ex LMS-5, pp 40 - 41.

May 2000 - November 2000: manager and CEO

[24] The applicant alleges that the respondent was the manager and chief executive officer of Chaste Corporation between May 2000 and November 2000.⁶⁵ In his affidavit the respondent swore that he held those positions only until the national launch of the business on 9 August 2000.⁶⁶ What the respondent said in his affidavit is inconsistent with the joint submissions placed before the Federal Court and inconsistent with objective evidence before this Tribunal.

[25] In the joint submissions the applicant admitted that he was the manager and chief executive officer from May 2000 until about November 2000⁶⁷ and further -

“18. On 9 May 2000, in correspondence to Area Managers, Mr Cousins was introduced as having been retained by Chaste 'to advise on, and oversee, all areas of the company in the lead up to the product launch', with 'full authority to make decisions, and act on the company's behalf in the lead up to the launch.' (See Waldron affidavit annexure DW-7) Mr Cousins drafted this correspondence.

19. From May 2000 until about November 2000, Mr Cousins was the manager and Chief Executive Officer of Chaste, and received regular remuneration for his role. During this period Mr Cousins participated in the planning, promotion, supervision and management of the Chaste business; oversaw aspects of Chaste's operations; sent correspondence to prospective Area Managers or gave directions to the general manager, Mr Xenoudakis, as to communications that were to be made to Area Managers; dealt directly with Stephen D'Alton in relation to clinical trials of TRIMit and the publication of material in relation to those trials; wrote newsletters to Area Managers; negotiated with various agencies in relation to the provision of advertising for Chaste; and carried out instructions he received from Peter Foster and Brad Webb. Peter Foster was at the relevant times in custody in Australia, and subsequently in the United Kingdom, and then based in Fiji and Vanuatu. Mr Cousins travelled to both Fiji and Vanuatu, at the expense of Chaste, where he obtained instructions from Mr Foster.”

[26] In his affidavit the respondent asserted that the joint submissions were drafted almost entirely by the ACCC and the Australian Government Solicitor without significant input from him⁶⁸ and that in those joint submissions he made a number of admissions "for the purpose of resolving the Federal Court proceedings without the necessity of an expensive, stressful and lengthy trial".⁶⁹ The significance of the respondent's participation in making those joint submissions will be discussed later

⁶⁵ Amended discipline application - particulars of charge para 1.1 (c).

⁶⁶ Affidavit of respondent filed 28 October 2008 (Court document no. 15), para 2(b), 9.

⁶⁷ Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 16.2.

⁶⁸ Affidavit of respondent filed 28 October 2008, para 23.

⁶⁹ Ibid, para 21.

in these reasons for judgment. For the moment, suffice it to say that the Tribunal accepts what is contained in those submissions about the respondent's role between May 2000 and November 2000.

[27] The launch took place in Sydney on 9 August 2000. The respondent went overseas on 30 August 2000, and in his oral evidence he said that in the interim he was engaged in a "wind-down" from his previous role.⁷⁰ He was overseas until 24 September 2000. While overseas he continued to issue instructions about the operations of Chaste Corporation, and visited Mr Foster, who was in prison in the United Kingdom, at least three times for purposes associated with the business of Chaste Corporation.⁷¹ On 27 September 2000, in support of a claim for payment from the corporation, he wrote that he had "continued to play a significant role", and that while overseas he had "spent on average 3 hours on the e-mail every day".⁷²

[28] In October 2000 the respondent –

- (a) gave instructions for a response on behalf of Chaste Corporation to a letter from the Complementary Healthcare Council of Australia about a document produced by the corporation, and for a memorandum to be circulated to Area Managers;⁷³
- (b) travelled to Fiji and to Sydney on business for the corporation;⁷⁴
- (c) drafted a letter to be sent by Mr Con Xenoudakis (who had been appointed general manager) to someone who no longer wished to be an area manager;⁷⁵
- (d) prepared correspondence to be sent to persons who had attempted to contact him in a way that sought to demonstrate that he continued to be actively busy about the corporation's business;⁷⁶
- (e) gave instructions to Mr Xenoudakis about dealings with someone who had apparently prepared a website for the corporation, about a response to persons who had been Area Managers, and about dealings with the Complementary Healthcare Council;⁷⁷
- (f) prepared correspondence to be sent to the person who no longer wished to be an area manager and her husband;⁷⁸ and
- (g) signed a contract on behalf of the corporation with two persons engaged in a public relations exercise.⁷⁹

In November 2000 he engaged in correspondence with the State Manager - Victoria and Area Managers.⁸⁰

⁷⁰ Transcript of proceedings on 2 December 2008, p 2.54.

⁷¹ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-22, pp 1323-1328.

⁷² Ibid, ex 21, p 1050.

⁷³ Ibid, ex 21, pp 1060 -1061.

⁷⁴ Ibid, ex 21, pp 1053, 1064.

⁷⁵ Ibid, ex 21, pp 1054 – 1055; transcript of proceedings on 2 December 2008, p 2.64.

⁷⁶ Ibid, ex 21, 1066 – 1068; transcript of proceedings on 2 December 2008 2.65 – 2.66, 2.69.

⁷⁷ Ibid, ex 24, pp 1446 – 1447; transcript of proceedings on 2 December 2008, pp 2.70 – 2.71.

⁷⁸ Ibid, ex 24, pp 1451 – 1452; transcript of proceedings on 2 December 2008, p 2.72.

⁷⁹ Ibid, ex 21, pp 1070 – 1071; transcript of proceedings on 2 December 2008, p 2.70.

⁸⁰ Ibid, ex 21, pp 1081 – 1086.

- [29] The Tribunal is satisfied that the respondent continued to act as the chief executive officer of Chaste Corporation until November 2000, and that his evidence that he ceased to do so after the launch on 9 August 2000 should be rejected.

November 2000 - November 2001 : retained as legal adviser

- [30] The applicant alleges that the respondent was retained as Chaste Corporation's legal adviser between November 2000 and November 2001.⁸¹
- [31] In the joint submissions the applicant admitted -

"20. From November 2000 until the company was placed in administration in November 2001, Mr Cousins provided consultancy services to Chaste, for which he received payments. This included preparing correspondence to Area Managers seeking to terminate their agreements with Chaste; and assisting in further promotion of the TRIMit product overseas."⁸²

- [32] The respondent has conceded that he worked as the corporation's legal adviser on discrete issues over that period (in contrast to the ongoing retainer he held initially).⁸³

Being knowingly concerned in resale price maintenance

- [33] The corporation entered into written agreements with approximately 74 Area Managers, pursuant to which each Area Manager was appointed as the exclusive distributor of TRIMit in a specified geographical area. The agreements required Area Managers to establish a minimum of 50 retail outlets selling TRIMit in each specified territory prior to the launch of TRIMit, increasing at the rate of 5 new retail outlets per month thereafter.⁸⁴
- [34] The terms of the Area Management Agreements were set out in three documents entitled: Area Management Agreement, Area Management Proposal ("Pure by Nature, Perfected by Science"), and "We Answer Your Questions".⁸⁵ The second and third of these documents were incorporated by reference into the first.⁸⁶
- [35] The following appeared on page 4 of "We Answer Your Questions" -

⁸¹ Amended Discipline Application - particulars of charge para 1.1 (d).
⁸² Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 20.
⁸³ Transcript of proceedings on 2 December 2008, pp 2.25 – 2.26.
⁸⁴ Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 77.
⁸⁵ Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 21.
⁸⁶ Area Management Agreement clause 6; Affidavit of Tracey Lee Alker, pp 69-70.

"15. Who determines the price at which I sell my stock?"

The company will set the recommended retail price and wholesale price that must be adhered to by all Area Managers. There must be no discounting or price cutting without the written permission of the company. This ensures everyone is protected from unnecessary price wars."

Page 15 of the other document was in these terms –

"PROFIT MARGINS

Since massive distribution of the product will occur within weeks of the release date it is most important that a **regulated price policy** be adhered to in the interest of all parties involved.

Very few products enter the Australian market with the potential of **TRIMit™** and we have therefore established the following as the costing structure to be applied in all markets.

"PROFIT STRUCTURE TRIMit™		
Area Manager Cost	\$ 19.50	
Profit	<u>\$ 10.00</u>	51%
Retailer Cost	\$ 29.50	
Retailer Profit	<u>\$ 20.45</u>	70%
Recommended Retail	\$ 49.50"	

[36] The corporation issued presentation folders to prospective Area Managers. These contained statements of prices at which the Area Manager was to sell the stock to retailers and of recommended retail prices. These folders and the statements in them were to be used by the Area Managers when they made presentations to potential retail outlets. The corporation also made statements about prices which were likely to be understood by Area Managers as the prices below which stock was not to be sold.⁸⁷

[37] Upon taking the position as CEO and manager, the respondent spent a couple of weeks reviewing documentation,⁸⁸ including the two documents issued to Area Managers and potential Area Managers entitled "We Answer Your Questions"⁸⁹ and

⁸⁷ Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 79.

⁸⁸ Transcript of proceedings on 1 December 2008, pp 1.78 – 1.82.

⁸⁹ Affidavit of Tracey Lee Alker 21 November 2008, pp 1174 – 1180.

"Pure by Nature, Perfected by Science".⁹⁰ From at least May 2000 he knew the agreements offered by the corporation contained the offending provisions. That he appreciated their significance to Area Managers is illustrated by this passage in his cross-examination in this disciplinary application –

“Now, do you also accept that the pricing policy in the documentation was a very important part of the way this product was promoted?-- Yes.

It was integral to the perception of the profitability of the venture, was it not?-- Yes.

And very important to potential area managers as to what their profit margin and income would be?-- Yes.”⁹¹

As chief executive officer he assisted the corporation to promote and offer those agreements.⁹²

- [38] Early on, the respondent thought that these arrangements constituted resale price maintenance. He raised his concern with Mr Webb, who assured him that a Melbourne lawyer Shane Hough and someone else "experienced in these matters" had considered the documents and "were satisfied that they were okay".⁹³ But he became concerned again on about 21 June 2000 when a prospective area manager's solicitor queried the potential for the pricing policy to contravene the resale price maintenance provisions of the *Trade Practices Act 1974*.⁹⁴ Nevertheless he replied on professional stationery directly to the prospective area manager -

“4. No one has ever raised any concerns about implications of the Trade Practices Act nor do I think that there are any. Of course you must rely on your own advice.”⁹⁵

- [39] The respondent was aware of the seriousness of the corporation's resale price maintenance contraventions, and raised them with Mr Webb and Mr Foster. When they refused to take any steps to alter the corporation's conduct, he continued to act for it as before.⁹⁶

⁹⁰ Ibid, pp1147-1172.

⁹¹ Transcript of proceedings on 2 December 2008, p 2.34.

⁹² Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 80.4

⁹³ Transcript of proceedings on 1 December 2008, pp 1.80, 1.83. See also affidavit of respondent filed 28 October 2008, para 20(a).

⁹⁴ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-21 pp, 910 - 913; Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 92; Transcript of proceedings on 1 December 2008, p 1.83.

⁹⁵ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-21, p 914 – 915.

⁹⁶ Joint submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 93; Transcript interview 18 December 2002; Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-19, pp 399-400; 435-438; ex 21, pp 664 – 665; Transcript interview 26 February 2004.

[40] In his affidavit sworn in this disciplinary proceeding the respondent deposed to the assurances given by Mr Webb and Mr Foster apparently based on Mr Hough's advice and went on –

“20 Paragraphs 34 and 35: I disagree with these declarations because:

(a) ...

(b) When I came to appreciate that Chaste was, in fact, in breach of section 48 of the TPA, I gave advice to Chaste to that effect together with advice that the offending representations should be removed from the sales material provided to potential area managers. I told this to Kevin McMullan, the Sales Director (and one of the eventual respondents in the ACCC proceedings), and to Webb. In one of my interviews with the ACCC and the AGS, I mistakenly said I had informed Con Xenoudakis. In fact I informed McMullan, not Xenoudakis. As Sales Director, I believed that McMullan was in charge of what was contained in the sales material;”⁹⁷

[41] On 9 August 2000 the corporation staged a “national launch” of TRIMit at a hotel in Sydney. About 70 or 80 people were in attendance, including Area Managers from around the country, Mr McMullan, the respondent, Mr Webb, Mr Xenoudakis, Kerri-Anne Kennerley (a television personality who was enlisted to promote the product) and Peter Kirk from D & D Advertising. There were various presentations, including one by someone who took the audience through the pricing structure.⁹⁸ Proceedings were filmed by David Endre of Pro Shot Videos, who later produced a video for distribution. Area Managers were required to pay the balance owing for the purchase of their areas (between \$19,000 and \$20,000).⁹⁹

[42] In his affidavit in this disciplinary proceeding the respondent said –

“20 Paragraphs 34 and 35: I disagree with these declarations because:

...

(c) At the August 2000 launch, I advised those in attendance to the effect that the TRIMit product could be sold at whatever price the area managers determined, that they were not bound by a recommended resale price and that Chaste did not want to be in breach of the law by fixing a resale price. I said it then, because I knew that no-one

⁹⁷ Affidavit of respondent filed 28 October 2008, para 20(b).

⁹⁸ Transcript of proceedings on 2 December 2008, p 2.35.

⁹⁹ Affidavit of Tracey Lee Alker 21 November 2008, pp 20 – 21, paras 100 – 103.

could censor what came out of my mouth, Some of my earlier correspondence and newsletters had been censored by either or both of Webb and Foster.¹⁰⁰

This is more or less consistent with what he told the ACCC investigators.¹⁰¹ He mentioned it in a letter to the Legal Services Commission dated 24 September 2007,¹⁰² and he maintained it in his oral evidence.¹⁰³

- [43] A video recording of the launch was played before the Tribunal, which did not contain any statement by the respondent consistent with his evidence that he told the Area Managers they were not bound by any recommended resale price.¹⁰⁴ But it was not a complete record of the launch, and had clearly been edited.
- [44] A number of Area Managers gave evidence before the Tribunal – Mr Waters, Mr Drew, Ms Webb, Mr Clough and Mr CN Parker. They had all attended the launch, and in 2004 they had all sworn affidavits in the Federal Court proceedings in which they had sworn that they had not been told at the launch by the respondent or anyone else that they were not bound by the recommended resale prices.¹⁰⁵ By the time they gave evidence before the Tribunal in December 2008, more than eight years had passed since the launch. Mr Waters told the Tribunal that he had no recollection of anyone saying that the Area Managers were not bound by the resale price maintenance provisions; he said that if someone had made such a statement he would have remembered it, because it was a “pretty fundamental part of the way we operated”.¹⁰⁶ It was apparent from the cross-examination of the others that they no longer had sufficient memory to be able to say whether or not the respondent had made statements to the effect set out in his affidavit,¹⁰⁷ although Mr Parker was sure that no-one had said anything to that effect.¹⁰⁸
- [45] It is inherently improbable that on an occasion such as the launch the corporation’s CEO would have made a statement so patently inconsistent with the documentation which had been provided to the Area Managers. Moreover, the launch took place less than two months after the respondent had written to a prospective Area Manager disingenuously saying that he had no concerns about the implications of the *Trade Practices Act*.¹⁰⁹ There was no suggestion that after the launch anyone relied on any statement by him that they did not have to comply with the pricing

¹⁰⁰ Affidavit of respondent filed 28 October 2008, para 20(c).

¹⁰¹ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-19, pp 399, 499.

¹⁰² Ibid, ex LMS-8, p 76.

¹⁰³ Transcript of proceedings on 2 December 2008, pp 2.35 – 2.37.

¹⁰⁴ Exhibit 2.

¹⁰⁵ Affidavit of Christopher Lee Waters sworn 26 March 2004, para 20; Affidavit of David Traill Drew sworn 25 March 2004, para 22; Affidavit of Therese Joy Webb sworn 26 March 2004, para 21; Affidavit of Fredrick Clough sworn 24 March 2004, para 23; Affidavit of Christopher Norman Parker sworn 21 April 2004, para 33 – 34.

¹⁰⁶ Transcript of proceedings on 1 December 2008, p 1.31.

¹⁰⁷ Drew, transcript of proceedings on 1 December 2008, pp 1.18 – 1.21; Webb, transcript of proceedings on 1 December 2008, pp 1.25 – 1.28; Clough, transcript of proceedings on 2 December 2008, pp 2.77 – 2.79; Parker, transcript of proceedings on 1 December 2008, pp 1.58 – 1.62.

¹⁰⁸ Transcript of proceedings on 1 December 2008, p 1.62.

¹⁰⁹ 22 June 2000: Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-21, pp 914 – 915.

provisions of the documentation provided by Chaste Corporation. Curiously, his own oral evidence was that he did not notice any reaction to his statement when he made it at the launch.¹¹⁰

- [46] The respondent's evidence in this regard is of course inconsistent with the Joint Submissions put before the Federal Court, in which he admitted being knowingly concerned in or party to, and aiding or abetting the corporation's breach of the resale price maintenance provisions of the *Trade Practices Act*.¹¹¹
- [47] After carefully considering the conflicting evidence on this point, the Tribunal has concluded that the respondent's evidence before it in this regard should be rejected.
- [48] The Tribunal is satisfied that the allegation in this disciplinary proceeding that the respondent was directly knowingly concerned in conduct by the corporation that contravened s 48 of the *Trade Practices Act* has been made out.

Being knowingly concerned in misleading or deceptive conduct

- [49] The respondent is alleged to have been directly knowingly concerned in conduct by the corporation that contravened s 52 of the *Trade Practices Act* – that is, misleading or deceptive conduct in trade or commerce.
- [50] Justice Lander found that by making certain representations on behalf of the corporation, or causing or permitting those representations to be made on its behalf, the respondent was, in respect of each representation, directly knowingly concerned in the corporation's engaging in conduct that was misleading or deceptive in contravention of s 52.
- [51] The respondent was knowingly involved in misleading or deceptive conduct by the corporation within the meaning of s 75B of the *Trade Practices Act* if -
- (a) the representations were in fact made;
 - (b) he knew their content; and
 - (c) he was aware of matters that would allow that content to be characterised as misleading or deceptive.¹¹²
- [52] Justice Lander's findings were consistent with admissions made by the respondent in the joint submissions.¹¹³ On 29 November 2005 the respondent said in a letter to the Bar Association –

¹¹⁰ Transcript of proceedings on 2 December 2008, p 2.36.

¹¹¹ Joint Submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 46.1.

¹¹² *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1 at 10 - 11; *Downey v Carlson Hotels Asia Pacific Pty Ltd* [2005] QCA 199 at [138].

¹¹³ Joint Submissions of the respondent and the ACCC in the Federal Court proceedings dated 10 June 2005, para 46.2.

“I appreciate that I am now stuck with the admissions which allowed His Honour to make the Declarations and Orders he did. I again apologise for my wrongdoings. Please understand, though, the circumstances in which they came about. Therefore, I wish to add a few more comments, *ad seriatum*, to the Declarations commencing at paragraph 33 of the Judgment.”¹¹⁴

- [53] Before the Tribunal, the respondent did not dispute that those representations were made, but attempted to qualify his knowing involvement in their being made. It is instructive to compare each representation referred to by Lander J (identified by the relevant paragraph number in His Honour’s order)¹¹⁵ with the corresponding paragraph in the respondent’s affidavit.¹¹⁶

Representations 33.1 and 33.2

The representation

- 33.1 a representation in documents provided to area managers and potential area managers that the corporation would promote TRIMit by an extensive national television, radio and magazine campaign with a forecast expenditure of over \$1.5 million in the first year of sales and would further provide a national team of marketing, management and advertising experts to assist area managers when in fact and to his knowledge the corporation had no such plans or arrangements in place, had no apparent means of executing them, had not engaged the represented marketing, management and advertising experts and the sixth respondent deliberately refrained from making the necessary enquiries to ascertain whether the corporation had the financial means to fund the represented expenditure;
- 33.2 representations to area managers that delays in commencement of the said campaign were due to the actions of persons other than the corporation and its officers when in fact and to his knowledge the campaign had not proceeded because it had not been arranged or agreed to by the corporation and the corporation continually refused to pay deposits or other payments required for aspects of the campaign to proceed;

The respondent’s affidavit

- 10 Subparagraphs 33.1 and 33.2: The representations alleged were made by Chaste, I did not cause the representations to be made, nor was I in a position either to permit or to prevent the representations from being made, The representations were contained in

¹¹⁴ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-4, p 41.

¹¹⁵ Discipline application filed 7 November 2007 (Tribunal document no. 1); Amended by leave 1 December 2008.

¹¹⁶ Affidavit of respondent filed 28 October 2008.

promotional material, the distribution of which had commenced months prior to May 2000 and which continued to be distributed after May 2000. I had absolutely no involvement in the preparation or wording of any of that material. I deny that the representations were false to my knowledge and further deny knowledge that Chaste had not the means of executing the marketing plans or arrangements. I did make enquiries as to Chaste's financial capacity and was assured by Webb at all material times that Chaste both had that capacity, and intended, to conduct the marketing campaign as represented. From May 2000 until after the national launch in August 2000, I believed, on the basis of information given to me, that Chaste intended to conduct the marketing campaign. I played a role in trying to commence plans for the campaign, as I knew it had to be done. A public relations agent and an advertising agency had been retained and I felt confident that the marketing campaign would proceed. Webb continually assured me that it would.

Representation 33.3

The representation

33.3 a representation to area managers and potential area managers that if they wished to discontinue their distribution arrangement with the corporation, the corporation would, upon ninety days notice, repurchase all unsold stock and point of sale material supplied to the area manager and arrange a new area manager for the distribution area when in fact and to his knowledge during the period when the corporation was making the representation, the corporation and the sixth respondent wrote correspondents [sic] to area managers who sought to terminate their agreements, requiring them to continue to perform their obligations under the agreements, or refusing to refund their deposits in full, until such time as their areas were re-sold.

The respondent's affidavit

11 Subparagraph 33.3: The "buy back" representations were made in the sales material. They were not written or made by me. This only became an issue after the launch. I interpreted the "buy back" provisions one way; Webb and Foster interpreted them in another way. I wrote to Con Xenoudakis, the seventh respondent in the Federal Court proceeding, and told him how I thought they should be interpreted. I recall they were a little ambiguous.

Representations 33.4 and 33.5

The representation

33.4 representations that:

33.4.1 TRIMit was a thoroughly researched and scientifically tested product;

33.4.2 TRIMit's efficacy as a weight loss product was without question;

33.4.3 TRIMit (or an equivalent product) had been successfully launched in the United States and has been scientifically tested at eleven universities;

when in fact and to the knowledge of the sixth respondent TRIMit was a new and unique formulation and none of these matters were true;

33.5 representations that:

33.5.1 clinical studies had shown the combination of ingredients in TRIMit were 700% more effective than hydroxycitric acid alone;

33.5.2 the corporation had the results of independent research into, scientific testing of, or independent clinical trials of TRIMit (or an equivalent product) which proved it was a quality product, safe to use and effective as a weight loss aid;

when in fact and to the knowledge of the sixth respondent the corporation did not have such results, and such clinical trials as were conducted for the corporation were conducted without scientifically controlled conditions, and largely involved subjects who had an interest in the business of the corporation;

The respondent's affidavit

12 Subparagraphs 33.4 and 33.5: The representations as to the characteristics and efficacy of "TRIMit" commenced months prior to May 2000 and continued after my appointment as manager and CEO in May 2000. I relied upon information and scientific papers and advice provided to me by consultants to Chaste, namely Professor Dalton, Mr Basil Evans, and Dr Das and did not in fact know that the representations set out in subparagraph 33.4 were untrue, nor that Chaste did not have the results set out in subparagraph 33.5, nor that the clinical trials referred to in subparagraph 33.5 suffered from the limitations alleged, I did not conduct the trials.

Representation 33.6

The representation

33.6 representations that claims made by the corporation as to TRIMit's potency, use and effectiveness had a scientific basis and *Therapeutic Goods Act* approval, when in fact (and to the knowledge of the sixth respondent the claims did not have a scientific basis, and such approval as was obtained

under the *Therapeutic Goods Act* did not provide verification of the product's efficacy;

The respondent's affidavit

- 13 Subparagraph 33.6: I accept the criticisms made of the representations. However, I did not cause or permit those representations to be made because I was not, in fact, in a position to prevent the representations from continuing to be made following my appointment as manager and CEO. The title "CEO" was a misnomer, in fact I was simply the launch coordinator.

Representation 33.7

The representation

- 33.7 a representation to area managers and to the public that the corporation was a genuine business conducted on an ordinary commercial basis and that the opportunity offered by it to area managers was a genuine business opportunity when:
- 33.7.1 it was the fact and he knew, but did not inform the public and area managers, that the fourth respondent had extensive involvement in the management and marketing of the said corporation;
- 33.7.2 it was the fact and he was aware that the fourth respondent had convictions in relation to the unlawful sale and promotion of weight loss products;
- 33.7.3 he was aware that the fourth respondent had a reputation as the instigator of dubious and failed schemes for profit for the conduct of businesses promoting and selling or purporting to sell purported slimming or weight loss products;
- 33.7.4 he believed that if the public and potential area managers of the corporation knew of the involvement of the fourth respondent in the said corporation that they would be unlikely to buy its weight loss products or become its distributors;
- 33.7.5 it was the fact and he knew that while allowing himself to be held out as chief executive officer of the corporation he was not authorised or empowered to make routine or day to day decisions in relation to the running of the company or to incur expenses or authorise

payments without the express instruction of the second and fourth respondents;

- 33.7.6 it was the fact and he knew that instructions given to him by the second and fourth respondents with which he complied, including as to correspondence to be sent to potential area managers, area managers and advertising agencies with whom the corporation was dealing, were contrary to what he believed to be proper business standards contrary to his own business ethics;
- 33.7.7 it was the fact and he knew that communications to area managers which described him as being the chief executive officer and having the full authority of the role were untrue;
- 33.7.8 it was the fact and he knew that invoices sent to the corporation by external persons who had carried out services for it were routinely not paid, or were partially paid or were queried or contested on grounds that he believed to be unreasonable and not genuine;
- 33.7.9 it was the fact and he knew but did not inform area managers or the public, that gross income from sale of distributorships and goods by the corporation had been distributed to, or at the direction of the second and fourth respondents but refrained from making any enquiry, as he should have in all the circumstances, as to whether there were any, or any adequate, funds to make good on representations on future expenditure by the corporation;

The respondent's affidavit

- 14 Subparagraph 33.7: I accept the accuracy of subparagraphs 33.7.1 - 33.7.4.
- 15 Subparagraph 33.7.5 and 33.7.7: The limitations on my authority as CEO were not known to me at the time of my appointment, but only became apparent over time when my decisions and recommendations were ignored or otherwise not implemented by Webb and Foster, Sometimes they accepted my decisions and recommendations, Other times they did not. Due to my state of health at the time, I was trying to avoid stressful situations and conflict. I did not want to engage in arguments. I did not want to be blamed for a failure of the business if I resigned.

- 16 Subparagraph 33.7.6: I do not accept that my behaviour was "unethical", in either a business or legal sense. Whilst I did not always personally agree with the contents of some of the correspondence I caused to be sent, I felt I was being paid to advance the opinions or arguments of my employer.
- 17 Subparagraph 33.7.8: The practice of querying, contesting or otherwise not paying some invoices became known to me after the August 2000 launch, I was not responsible for payment of accounts, nor did I have the ability, in fact, to make payments on behalf of Chaste. As far as I knew, Webb was the only person who could authorise a cheque or payment of account. The best I could do, and in fact did do, was recommend that bona fide accounts that were brought to my attention be paid.
- 18 Subparagraph 33.7.9: Not long after my appointment, I made enquiry of Webb and Foster as to the disposition of gross income from the sale of distributorships and was informed by both to the effect that a proportion of that income was to be retained within Chaste to enable it to discharge its obligations; however, I did not have access to bank statements in order to verify that information. At no time up until just before Chaste's liquidation did I ever have knowledge of its financial status.

Representation 33.8

The representation

- 33.8 representations to potential area managers that the corporation was a good business opportunity, while deliberately not revealing the involvement of the fourth respondent to area managers and potential area managers, and thereby misrepresenting the risks associated with the corporation's business opportunity has, in respect of each representation, been directly knowingly concerned in a corporation engaging in conduct that was misleading or deceptive in contravention of s 52 of the Trade Practices Act 1974 (Cth).

The respondent's affidavit

- 19 Subparagraph 33.8: I admit not informing area managers or potential area managers of Foster's involvement, but did not believe that as a consequence of Foster's involvement the potential area managers were not being offered a good business opportunity and did not consider that I was required to disclose that information. I was never asked if Foster was involved.

- [54] The Tribunal rejects the respondent's evidence that when he became involved with the corporation he did not appreciate that it was controlled by Mr Foster as untruthful.¹¹⁷
- [55] It was soon apparent to the respondent that the corporation's affairs were very disorganised.¹¹⁸ He told the Tribunal that on reviewing documentation, he appreciated that extravagant claims about advertising and budgets were being made. He thought that the advertising would be funded from income from the sale of "areas" – in other words, that the whole scheme would be dependent upon selling enough areas to generate the income to pay for the advertising to sell the areas.¹¹⁹ Within the corporation and when speaking in the presence of others Mr Foster was not referred to by name but as "our friend" in order to conceal his involvement.¹²⁰ Mr Foster and Mr Webb made most decisions and controlled the finances, and the respondent was the CEO in name only.¹²¹ Nevertheless, he allowed himself to be represented as the CEO.
- [56] The respondent was cross-examined about a number of the representations. His responses about the non-disclosure of Mr Foster's involvement were particularly disturbing. He had said to the Bar Association –

"33.7

.1 to .4. I naively thought Caveat Emptor applied. Noone specifically asked, 'is Peter Foster part of the business?', so noone was told. However see my comments below about the entirety of my conduct.

.....

33.8 I do not believe the law requires me to point out those risks. However, I accept that the entirety of my conduct, when seen in conjunction with the entirety of conduct of everyone else, had the ability to be misleading and deceptive."¹²²

- [57] The following exchange took place in cross-examination on the first day of the hearing –

"You do agree, don't you, that you deliberately didn't tell people, these area managers in particular, members of the public, you didn't tell any of them about Foster's involvement, did you? – No.

¹¹⁷ Transcript of proceedings on 1 December 2008, pp 1.88 – 1.89.

¹¹⁸ Transcript of proceedings on 1 December 2008, pp 1.66, 1.90.

¹¹⁹ Transcript of proceedings on 1 December 2008, p 1.78.

¹²⁰ Transcript of proceedings on 2 December 2008, p 2.75.

¹²¹ Transcript of proceedings on 1 December 2008, pp 1.90 – 1.91.

¹²² Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-4, p 42.

And you deliberately didn't tell them? – No one ever asked me.

Oh, that makes it all right, does it, that no one asked you so you didn't disclose it? – I did not disclose it. I make no secret of the fact that I didn't disclose it.

What would have happened, Mr Cousins, if you'd disclosed that Foster, Peter Foster and or Louise Foster were behind this company? – Some people probably would not have invested in the company.

Just some people might not have? – Well, maybe a lot of people I don't know.

Maybe all of them? – Perhaps.

You understood that that was the case. The people, if they knew that Foster was behind this organisation, would not be prepared to sign up? You understood that, didn't you? – Yes. If they knew that Foster was linked to the company that would raise concerns in many people's minds."¹²³

[58] On the second day of the hearing, he was questioned about his dealings with Kerri-Anne Kennerley. This exchange occurred –

“Look, Mr Cousins, to not put too fine a point on it, you knew that Foster was what we would refer to as a conman? - Yes, I did.

And you knew that at the time? – Yes.

And you were still prepared to become involved in this business with him? – Yes.

Well, you've already told us, and you've admitted in the material generally, that you deliberately did not tell people about Foster's connection with this business? – Yes.

And that came into sharp focus, didn't it, when Kerry Ann became nervous about your connection with, in particular, Louise Foster? – Yes.”¹²⁴

He admitted deliberately deceiving Ms Kennerley by the misleading responses he gave her when she directly confronted him about the issue.¹²⁵ In his letter to the Bar Association of 29 November 2005, the respondent said of representation 33.8 –

¹²³ Transcript of proceedings on 1 December 2008, pp 1.89 – 1.90.

¹²⁴ Transcript of proceedings on 2 December 2008, p 2.5.

¹²⁵ Transcript of proceedings on 2 December 2008, pp 2.6 – 2.7.

“33.8 I do not believe the law requires me to point out those risks. However, I accept that the entirety of my conduct, when seen in conjunction with the entirety of conduct of everyone else, had the ability to be misleading and deceptive.”¹²⁶

When counsel for the applicant put the difference between what he had said to the Bar Association and what he said in para 19 of his affidavit to him, this exchange occurred –

A complete about-face? – What I mean in paragraph 19 is that taken in isolation Foster’s involvement just in itself didn’t mean it was [sic] a good business opportunity, but when you look at all of the aspects it was not a good business opportunity.

Well, that’s really just nitpicking, isn’t it? – Perhaps.

That’s all that amounts to really. You had accepted in the Bar Association response your conduct overall was capable of being misleading and deceptive? – Yes, I agree with that.”¹²⁷

- [59] The Tribunal is satisfied that the respondent knew that the various representations were being made, and that he was aware of facts and circumstances that would allow their content to be characterised as misleading or deceptive. That was the effect of his admissions before the Federal Court, for which the ACCC had obtained substantial corroborating evidence. Despite the contents of his affidavit, in cross-examination he made many concessions, which his counsel acknowledged in oral submissions.¹²⁸ In so far as the correctness of any of Lander J’s findings may have been left in issue, the Tribunal rejects any evidence of the respondent inconsistent with the admissions made in the joint submissions.

Professional misconduct

- [60] The Tribunal is satisfied that the respondent’s conduct constituted “professional misconduct” according to the test in *Adamson v Queensland Law Society Inc*¹²⁹ and within the meaning of s 456(1) of the *2007 Act*.

Fitness to Practise

- [61] For almost ten years before becoming involved with Chaste Corporation, the respondent practised as a solicitor and subsequently as a barrister without his fitness to practise ever being called into question in a disciplinary proceeding. He was a competent criminal lawyer, and he contributed positively to the wider community by his involvement in charitable and political organisations.

¹²⁶ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-4, p 42.

¹²⁷ Transcript of proceedings on 2 December 2008, p 2.12.

¹²⁸ Transcript of proceedings on 3 December 2008, p 3.40.

¹²⁹ [1990] 1 QdR 498 at 507-508.

- [62] In the late 1990's the respondent's marriage crumbled, he and his wife finally separating in January 2000. He had difficulty in acknowledging his homosexuality and coming to terms with it. In November 1999, aged 35, he had a heart attack.
- [63] In September 1998 the respondent consulted Mr Craig Holt, a psychologist, about the anxiety and depression he was suffering. Mr Holt counselled him on 18 occasions between then and mid June 2000: the consultations were clustered at the beginning and end of that period, with a significant break in the middle (including the couple of months before the heart attack).¹³⁰
- [64] On 6 March 2000 the respondent received a letter from Mr Foster who was in prison, asking him to supply a reference for Mr Webb.¹³¹ He did so two days later. He went overseas on 21 March 2000: he was away about a month, spending part of the time doing an advanced course in trial advocacy at Harvard.¹³² Soon after his return he took up the position of CEO of Chaste Corporation.
- [65] The respondent has conceded that his conduct in the relation to the corporation's contraventions of the *Trade Practices Act* amounted to professional misconduct, and that at the time he was unfit to practise because of that conduct and his mental condition.¹³³ He sought to explain his conduct as the product of "a very, very bad error of judgement",¹³⁴ and as an aberration attributable to vulnerability arising from the anxiety and depression from which he was suffering.
- [66] The capacity for making sound judgements is an important aspect of fitness for practice, and an error of judgement of this magnitude necessarily casts a shadow over that fitness. But in the Tribunal's view the conduct by which the charge has been particularised revealed a serious character flaw beyond an error of judgement. The respondent was concerned in the corporation's making various representations about TRIMit, including the corporation's plans to promote it, its efficacy, its testing and its having regulatory approval, and about the business opportunity presented by the corporation, when he was aware of facts making those representations misleading or deceptive. He was knowingly involved in the corporation's practice of resale price maintenance.
- [67] The Tribunal does not accept that the respondent's professional misconduct can be explained as an aberration attributable to vulnerability. His enthusiastic promotion of the corporation's business is inconsistent with psychological impairment by anxiety and depression. In making this observation the Tribunal does not overlook the opinion of the psychiatrist Dr Lotz that a person suffering from depression may still function in society, albeit at a sub-optimal level, without his or her deficits being appreciated by inexperienced lay persons.¹³⁵ But there is no independent

¹³⁰ Holt's report exhibited to affidavit of Brian David Bartley filed 21 November 2008; Transcript of proceedings on 2 December 2008, p 2.80.

¹³¹ Transcript of proceedings on 1 December 2008, p 1.52.

¹³² Affidavit of respondent filed 28 October 2008, para 30(b).

¹³³ Transcript of proceedings on 2 December 2008, pp 3.40 – 3.41.

¹³⁴ Transcript of proceedings on 3 December 2008, p 3.39.

¹³⁵ Transcript of proceedings on 2 December 2008, pp 2.51 – 2.52.

evidence that he ever faltered in his presentation in any discernible way, and his presentation at the launch in August 2000, as depicted in the video,¹³⁶ for example, was confident, assured and focussed. Nor is there evidence that he was receiving specialist treatment over the period of his involvement with the corporation.¹³⁷

- [68] The respondent severed his connections with Chaste Corporation and Mr Foster and returned to the Bar in late November 2001. Over time he rebuilt his criminal law practice, and a number of fellow practitioners have attested to his diligence and competence. His conduct since November 2001 has not been the subject of any disciplinary charges. He has continued to perform valuable community work, particularly in connection with a respected drug rehabilitation program on the Gold Coast. A number of referees have attested to his general good character.¹³⁸
- [69] However there is good reason to conclude that he is presently unfit to practise.
- [70] The findings and declarations made by Lander J were consistent with the joint submissions. Soon after they were made the respondent contacted two Members of Parliament¹³⁹ complaining about pressure having been exerted by the ACCC and the Australian Government Solicitor, and asking them to make representations to the Attorney-General (C'th) on his behalf. In this disciplinary application, both in his affidavit and in his oral evidence, he attempted to controvert the effect of some of the findings and to retreat from concessions he had made in the joint submissions, asserting that the concessions had been the product of strained financial circumstances, poor health and conflicting professional commitments, and pressure exerted by the ACCC and the Australian Government Solicitor.¹⁴⁰
- [71] There is no evidence challenging what the applicant has said about his financial circumstances at the time. His physical health was compromised by an underlying coronary arterial abnormality,¹⁴¹ and he was continuing to consult his general practitioner who prescribed anti-depressant medication.¹⁴² However, that he had not seen the psychologist Mr Holt since June 2000, that he was not referred to the psychiatrist Dr Lotz until October 2005 (after the conclusion of the Federal Court proceedings) and that he did not tell the Federal Court at a directions hearing on 17 May 2005 that he was in poor health¹⁴³ are all consistent with his mental and physical health issues being in check at the time.
- [72] The Tribunal is not satisfied that the respondent's joining in the submissions made to the Federal Court was influenced by any undue pressure exerted by the ACCC

¹³⁶ Exhibit 2.

¹³⁷ His attendances upon Mr Holt concluded in June 2000, and he did not consult Dr Lotz until October 2005.

¹³⁸ See references exhibited to the affidavits of Brian David Bartley filed 21 and 28 November 2008.

¹³⁹ Mrs Margaret May MP and Ms Kay Elson MP.

¹⁴⁰ Affidavit of respondent filed 28 October 2008, para 21-25; Transcript of proceedings on 2 December 2008, 2.18 – 2.19.

¹⁴¹ Report Dr Bryan M Farage, exhibited to the affidavit of Brian David Bartley filed 21 November 2008.

¹⁴² Transcript of proceedings on 2 December 2008, p 2.41.

¹⁴³ Affidavit of Katrina Mary Close filed 26 November 2008, para 22.

and the Australian Government Solicitor, or that they did not truly reflect the respondent's involvement in the conduct of Chaste Corporation in contravention of the *Trade Practices Act*.

[73] At the time the joint submissions were prepared the respondent was an experienced legal practitioner. The gravity of the proceedings and their potential impact on his professional career were obvious to him. He retained experienced counsel, Mr RIM Lilley of the Queensland Bar, to represent him in their preparation and before the Federal Court. In the course of the hearing in the Federal Court on 16 June 2005, Mr Lilley drew the Court's attention to provisions of the *2004 Act*, including the definition of professional misconduct, and acknowledged that the type of conduct identified in the joint submissions could lead to a legal practitioner's being struck off.¹⁴⁴ After Lander J's decision was delivered, the respondent advised the Bar Association of the outcome. It is inherently improbable that someone in his position would have been a party to the presentation of submissions to the Federal Court which were not correct and which he did not believe to be correct.

[74] Katrina Mary Close, a solicitor employed by the Australian Government Solicitor, has deposed to the circumstances in which the joint submissions were prepared.¹⁴⁵ Ms Close was not required for cross-examination, and the Tribunal accepts her evidence. Negotiations about the contents of the joint submissions occurred between 2 and 10 June 2005 in two or three meetings in person, and discussions by telephone and email, as well as discussions between senior counsel for the ACCC and Mr Lilley.¹⁴⁶ Ms Close has deposed –

“27. Following initial discussion with Mr Cousins and his counsel, a first draft of the joint submissions was prepared by AGS, and provided to Mr Cousins and his counsel. This draft was modified in the course of the negotiations with Mr Cousins and his counsel. To the best of my recollection, four or five further drafts were prepared before the document was finalised. In the course of the negotiations, the penalty amount was also revised downwards from that initially sought by the ACCC.

28. I was present at all of the negotiations with Mr Cousins other than those discussions which I am informed occurred between counsel. My instructing officer Sharyn Vaughan of the ACCC attended the negotiations by telephone. For at least one of the meetings, senior counsel for the ACCC was present. For at least one of the meetings, another AGS solicitor was also present. Mr Lilley SC attended most of the meetings, but left early on one occasion. On that occasion I asked Mr Cousins whether he wanted to proceed with the discussion or stop, and he said to me that he wished to proceed. A final draft of the joint submissions was provided to Mr Cousins and his counsel for review. The joint

¹⁴⁴ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-16, pp 236 – 243.

¹⁴⁵ Affidavit of Katrina Mary Close filed 26 November 2008.

¹⁴⁶ *Ibid*, para 223 – 25.

submissions were ultimately signed by Mr Cousins, and by me.

29. When the joint submissions were presented to the Court, the only matter remaining in issue between the ACCC and Mr Cousins was his capacity to pay a pecuniary penalty in the amount recommended to the Court as appropriate. Mr Cousins' financial capacity was to be addressed separately by Mr Cousins. It was a condition of agreement with the ACCC that Mr Cousins would not seek to subsequently rely on material inconsistent with the matters in the joint submissions. That was agreed with Mr Cousins and his counsel, on the basis that the matters in the joint submissions were correct.
30. The hearing of the joint submissions in relation to Mr Cousins commenced on the second day of the Chaste proceedings, 15 June 2005, rather than the first day of the proceedings, to accommodate the availability of Mr Cousins' counsel. Mr Cousins was present in court. At the hearing of the joint submissions, Mr Cousins' counsel was invited by Lander J to put any further submissions in relation to the joint submissions, and confirmed he was a party to the preparation of the joint submissions and supported them.”

[75] The respondent's subsequent conduct in relation to the joint submissions is indicative of lack of insight into the professional misconduct the subject of this disciplinary application, lack of respect for the integrity of the Federal Court proceedings, and lack of candour in his defence of this disciplinary application.

[76] In response to the investigations by the Bar Association and the Legal Services Commission the respondent blamed others and painted himself as a victim.¹⁴⁷ He continued to do so before this Tribunal. Some of his evidence before the Tribunal has been rejected as dishonest – for example, his evidence concerning what he said at the launch about price fixing and his evidence about the extent of his involvement in the affairs of the corporation after the launch.

[77] By his conduct since November 2001 the respondent has shown his continuing unfitness to practise.

Findings and orders

- [78] The Tribunal finds the respondent –
- (a) guilty of professional misconduct in being directly knowingly concerned in Chaste Corporation Pty Ltd engaging in conduct in

¹⁴⁷ Affidavit of Louise Maree Syme filed 19 September 2008, ex LMS-4, pp38 – 45; ex 7, pp 64 – 73.

- contravention of sections 48 and 52 of the *Trade Practices Act 1974* (C'th) between March 2000 and November 2001; and
- (b) unfit to practise.

[79] The Tribunal orders –

- (a) that the respondent's name be removed from the local roll of persons admitted to the legal profession; and
- (b) that the respondent pay the applicant's costs of the proceeding.