

SEAFARER SUBJECT GUIDE

USING LAWYERS IN AUSTRALIA

This Guide deals in general terms with using lawyers in Australia. It aims to help a seafarer understand the legal profession in Australia, and how to select, engage, and if need be, change his lawyer. This Guide does not, however, constitute specific legal advice in relation to the use of any particular lawyer. If a seafarer is dissatisfied with his lawyer, he is strongly advised to consult another lawyer qualified to practice in Australia.

1. What is the structure of the legal profession?

- 1.1 Once a legal practitioner satisfies the requirements of the relevant legislation in any particular State or Territory, he is referred to as a solicitor and barrister. These two terms refer to different types of practice, and a legal practitioner can choose to specialise in either or both types. A barrister specialises in presenting cases in courts and before tribunals, and providing opinions in relation to complex legal matters. A solicitor usually restricts himself to the general practice of the law, apart from all but minor court work, and he instructs the barrister by way of a 'brief' in relation to more complex court work and legal matters.
- 1.2 Australia is a federation of six States, Western Australia, New South Wales, Victoria, South Australia, Queensland and Tasmania. Each State has its own State Government and State Legislation which regulates, amongst other things, the legal profession in each State. In addition to the States there are nine Territories, which are all administered directly by the Federal or Commonwealth Government. The Federal Government is responsible for legislating in relation to matters affecting the entire Federation or Commonwealth of States, in accordance with the Constitution.
- 1.3 Since 2004, all States and the two largest Territories (Northern Territory and the Australian Capital Territory) have had their own legal professional legislation based upon a national model bill. However, variations between the legislation enacted by the States had the result that there was no single national legal professional legislation. In 2011 attempts once again commenced for the reform of the legislation so as to result in a unified legal profession but this has not yet been achieved.
- 1.4 When in need of legal assistance, a seafarer should engage a solicitor in the State or Territory in which the seafarer is residing, and the solicitor may, as he deems necessary, instruct a barrister on the seafarer's behalf. A solicitor can advise on any legal matter including criminal and civil matters. He can appear in all courts apart

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from the Smalls Claims Court (claims not exceeding AUD10,000), where the litigant must appear in person, unless specific permission from the court is obtained for a lawyer to represent him. Permission will only be granted where the matter is relatively complex. Barristers and solicitors can appear in the Small Claims Court (if the Court grants permission), the Magistrates Court (civil claims up to AUD75,000), District Courts (civil claims up to AUD750,000), Supreme Courts, Federal Courts and the High Court. The Federal Courts and High Court deal with cases which are of significance and relevance to Federal issues.

- 1.5 Barristers are specialists in court procedure and evidence and in conducting advocacy in court. Barristers and solicitors can appear in all levels of court, although barristers have specialised skills and experience in relation to such representation in court. The barristers' profession is a referral profession, which means that the seafarer should first approach a solicitor who, in turn, instructs a barrister.

2. How is the legal profession regulated?

- 2.1 Barristers and solicitors are regulated by the various Legal Practice Boards or Law Societies established under the specific legislation applicable to the State or Territory in question. The various State bodies are as follows:

- .1 The Legal Practice Board of Western Australia (www.lpbwa.org.au) (website in English)
- .2 New South Wales Law Society (www.lawsociety.com.au) (website in English)
- .3 Legal Services Board of Victoria (www.lsb.vic.gov.au) (website in English)
- .4 Queensland Law Society (www.qls.com.au) (website in English)
- .5 Law Society of South Australia (www.lawsociety.asn.au) (website in English)
- .6 Law Society of Tasmania (www.taslawsociety.asn.au) (website in English)

- 2.2 The two larger Territories also have their own professional bodies:

- .7 Law Society Northern Territory (www.lawsocietynt.asn.au) (website in English)
- .8 ACT Law Society (www.actlawsociety.asn.au) (website in English)

- 2.3 All barristers and solicitors must be registered with the relevant Law Society of the particular State or Territory, and they are bound by a strict professional code which, if not complied with, may result in disciplinary action and possibly being struck off the roll of barristers and solicitors. Each State or Territory has its own Code of Conduct which is enforced in relation to Board Members in the particular State or Territory.

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3. How can a seafarer find a lawyer?

- 3.1 Seafarers wishing to engage a solicitor in any particular State or Territory can obtain names of all solicitors who practise in the State or Territory from the relevant Legal Practice Board referred to above. There are also directories published on the internet such as the Australian Lawyers' Directors (www.australianlawyersdirectory.com.au) (website in English) which publishes a guide to solicitors and barristers who have registered with that organisation. This directory is, however, not comprehensive and requires the solicitors and barristers to be registered with it. In the event of a seafarer requiring the contact details of lawyers specialising in maritime law, the seafarer should contact the Maritime Law Association of Australia and New Zealand (www.mlaanz.org) (website in English).
- 3.2 Seafarers with claims or problems arising from their employment aboard a ship, or against their employer for wages, should consider instructing a specialist maritime law firm. If a seafarer faces an investigation by the police or the relevant marine authority concerning a marine accident or incident, he should appoint a criminal lawyer.
- 3.3 A seafarer's trade union might be able to recommend a suitable solicitor, or the union may appoint a solicitor on behalf of the seafarer. If the incident concerns the operation of a ship, the ship owner's solicitor may be able to represent the seafarer, provided that there is no conflict of interest.

4. On what terms can a seafarer engage a lawyer?

- 4.1 When accepting instructions from a seafarer, solicitors are required by law to set out their terms of engagement in a formal letter known as a retainer letter, which specifies the standard terms and conditions which will regulate the professional arrangements between the seafarer and his solicitor.
- 4.2 The retainer letter is required to set out amongst other things the following important information:
- .1 details of the agreed scope of work to be undertaken and the procedures for keeping the seafarer informed of progress;
 - .2 the name and status (e.g. a partner in the firm or an associate) of the solicitor assigned to the case;

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- .3 quality assurance and the procedures for handling any complaints should the seafarer be dissatisfied with the standard of service provided;
- .4 the basis upon which the seafarer will be charged for work to be undertaken;
- .5 details of any advance payment required from the seafarer, arrangements for rendering bills and terms of payments; and
- .6 the firm's responsibility and professional liability to the seafarer.

5. How will a seafarer be charged fees by his lawyer?

- 5.1 Solicitors and barristers normally charge on the basis of hourly rates, which will be set out in the retainer letter. A number of factors will influence the rates charged, such as the seniority of the solicitor and barrister working for the seafarer, the type and location of the law firm, and the complexity and value of the dispute or the claim. In addition, solicitors will charge for any disbursements they incur on behalf of the seafarer such as the barrister's fees if a barrister is instructed, court fees and the fees of any other professional advisors whom they may instruct, such as medical experts in personal injury claims.
- 5.2 Australian jurisdictions do not permit solicitors and barristers to charge contingency fees. However in all States and Territories, except for South Australia, solicitors and barristers may charge a conditional fee, being a fee calculated at the solicitor's reasonable hourly rate which is payable out of the proceeds of the claim if the claim is successful. In the same jurisdictions an additional success fee, or uplift fee, of 25% of the total fees, may be charged in addition to the normal charges.
- 5.3 In addition to fees calculated on an hourly rate, a solicitor and barrister may offer to perform the services on behalf of the seafarer for an agreed fee, in which the total amount of fees to be charged is agreed in advance.
- 5.4 The constraint against contingency fees does not apply to litigation funders, which are commercial organisations permitted to enter into an arrangement with a person, to provide the funding to that person for the litigation, in return for a percentage payment of the proceeds of a successful claim. Litigation Funding is dealt with more fully below.

6. Can a seafarer get legal aid in a criminal case?

- 6.1 Every seafarer has a right to obtain legal aid if he is detained by the police in connection with a suspected offence. If a seafarer, who cannot afford legal

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representation, is with an offence, he may qualify for legal aid in relation to the cost of his defence in the criminal trial.

- 6.2 In each separate State and Territory there is a statutory authority funded by both State and Commonwealth Funds which is required to provide legal aid. The criteria for the provision of legal aid are set out in guidelines published on the websites of each State or Territory authority, which are listed below. All jurisdictions permit access to legal aid provided the guidelines for the grant of legal aid are fulfilled. The legislation in Western Australia is the Legal Aid Commission Act 1976, and there are separate acts to the same effect in the other States and Territories.

7. Can a seafarer get legal aid in a civil case?

- 7.1 Legal aid in civil matters is available to any person resident in Australia as well as a citizen thereof. Each State and Territory has its own guidelines for the provision of legal aid. They vary from State to State, and are usually determined by the Commissioner of Legal Aid in each State or Territory. Details of these guidelines can be found on the various websites in each State or Territory, as follows:

- .1 Western Australia (www.legalaid.wa.gov.au) (website in English)
- .2 Legal Aid New South Wales (www.legalaid.nsw.gov.au) (website in English)
- .3 Victoria Legal Aid (www.legalaid.vic.gov.au) (website in English)
- .4 Legal Aid Queensland (www.legalaid.qld.gov.au) (website in English)
- .5 South Australia (www.lsc.sa.gov.au) (website in English)
- .6 Tasmania (www.legalaid.tas.gov.au) (website in English)
- .7 Northern Territory (www.ntlac.nt.gov.au) (website in English)
- .8 Australian Capital Territory (ACT) (www.legalaidact.org.au) (website in English)

- 7.2 Recent decisions in the courts of Western Australia and New South Wales have determined that a person is entitled to receive financial assistance for the purposes of financing litigation from a litigation funder. In both cases an application was made to the Court for a declaration that litigation funding was an abuse of process. In both cases the Courts held that, so long as the funder was just providing the financial means, and did not have control of the way the action was run, there was no problem.

- 7.3 A litigation funder is a commercial organisation whose activities are not subject to regulation by the various Law Societies and whose sole interest in the litigation is obtaining a financial return in consideration for funding the litigation in question. The

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funding is usually based upon a percentage of the proceeds recovered in the litigation which is payable to the litigation funder.

- 7.4 There is no statutory regulation of litigation funders because they are merely financiers. The terms and conditions of the financing arrangement are determined by supply and demand and competition. The usual fee is in the region of 30% of the total recovery. It is always open to the other party to the litigation to attack the litigation funding arrangement, if it can produce evidence that the funder is controlling or attempting to influence the way the action is run.

8. Can a seafarer get any other free legal advice?

- 8.1 A seafarer may get a question between himself and the master or shipowner answered apparently free of charge by a superintendent who is appointed by the Australian Maritime Safety Authority.
- 8.2 A master or ship owner may agree with a seafarer to refer a question which has arisen between them to a superintendent for his decision.
- 8.3 Unless the contrary intention appears from the agreement, the agreement shall be deemed to contain a provision that the decision of the superintendent shall be final and binding on each party to the agreement and a person claiming under such a party. A superintendent who gives a decision on a question referred to him shall record that decision in a document which is admissible in evidence in court.

9. Can a seafarer sue his lawyer?

- 9.1 A seafarer may sue his solicitor or barrister where he has displayed negligence or breach of contract or breach of fiduciary duty or even breach of statutory obligations. An example of negligence by the solicitor would be his failure to issue proceedings in court on behalf of the seafarer within the specific time set down by an act of Parliament. Generally, a court would be reluctant to penalise a seafarer on account of the conduct of his solicitor or barrister, provided that the seafarer was not responsible for the delay.
- 9.2 However, even if the delay is due entirely to the neglect of the seafarer's solicitor or barrister, there is a limit beyond which a seafarer cannot escape the results of his solicitor's or barrister's lack of diligence. So, the seafarer is not entitled to hand over the matter to his solicitor or barrister and then wash his hands of it. If it has become

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obvious to a seafarer that there is a protracted delay in proceedings, he cannot sit passively by, without directing any reminder or enquiry to his solicitor and expect to be exonerated of all blame.

10. How can a seafarer complain about his lawyer?

- 10.1 The retainer letter is required to provide details of what the seafarer may do if he is dissatisfied with the progress of his case or with the service he is receiving from his solicitor. All solicitors' firms are required to have a procedure for dealing with complaints promptly, fairly, openly and effectively.
- 10.2 If the seafarer is still dissatisfied after going through the solicitors' complaints procedure, the seafarer may refer the complaint to the relevant State or Territory law society. In Western Australia, the procedure for dealing with complaints, is set out in the Legal Profession Act 2008 (WA), and can be reviewed on the website of the Legal Practice Board set out above.
- 10.3 If the seafarer is dissatisfied with the service of the barrister who represents him, the seafarer should report the complaint to the bar council in the State or Territory in question if such a bar council exists in that State or Territory, failing which the relevant law society.

11. How can a seafarer change his lawyer?

- 11.1 A seafarer may terminate the services of his solicitor at any time and appoint a new solicitor. The seafarer's previous solicitor will, however, be entitled to hold on to documents in his possession relating to the matter whilst there is still money owing to him for fees and disbursements. A seafarer may terminate the services of his solicitor at any time by instructing his solicitor to do so.
- 11.2 Seafarers should bear in mind that changing lawyers invariably involves delays and additional expenses, especially if the seafarer's case is at an advanced stage, as the new lawyers will need to read the documents and familiarise themselves with the case.

12. Is a foreign seafarer treated differently?

- 12.1 Foreign seafarers who pursue claims or who face criminal prosecution in Australian courts are not treated differently to Australian nationals.

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- 12.2 However, in certain circumstances a foreign seafarer who is not resident in Australia may have to provide security for the other side's legal costs of defending a civil claim. As a matter of principle, security for costs is never required to be provided by a defendant. Where a plaintiff in a civil action is a company, the Corporations Act 2001 provides that the company can be required to pay security for costs.
- 12.3 As regards an individual, the court always approaches an application for the plaintiff to pay security for costs with great caution, because the defendant may have caused the plaintiff's poor financial position in the first place. But where the plaintiff has no property or assets in the jurisdiction, making it easy for him to avoid any order to pay monies by simply leaving the country, a court will be far more likely to order that he provides security for the costs of the action.

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