RECENT DEVELOPMENTS

Katherine Cook

Commissioners announced for Victorian informants' Royal Commission

The Andrews Labor Government has announced a former President of the Queensland Court of Appeal will lead the Victorian Royal Commission into Management of Informants.

Attorney-General Jill Hennessy has announced the appointment of the Honourable Margaret McMurdo AC as the Royal Commission Chair, along with former South Australian Police Commissioner Malcolm Hyde AO APM as a Commissioner.

Justice McMurdo has had a highly distinguished legal career, having worked in the Public Defender's Office (1976–1989), and was admitted as a barrister of the Supreme Court of Queensland in 1989. She was appointed a judge of the District Court of Queensland and the Children's Court of Queensland (1993–1998).

In 1998, Justice McMurdo was appointed President of the Court of Appeal, Supreme Court of Queensland. She was appointed a Companion of the Order of Australia (2007) for service to the law and judicial administration in Queensland.

After serving 30 years as a member of Victoria Police, Mr Hyde was appointed Police Commissioner for South Australia Police in 1997. He was reappointed three times before he retired from the role in 2012.

From 2012 to 2013, Mr Hyde was a special adviser to the Victorian Parliament's Family and Community Development Committee Inquiry into the Handling of Child Abuse by Religious and other Non-Government Organisations (Betrayal of Trust Inquiry).

Mr Hyde also conducted the Tasmanian Bushfires Inquiry in 2013, inquiring into three major fires in 2013. The inquiry covered the cause and circumstances of the fires as well as all aspects of the emergency response, including preparation and planning.

Under the Royal Commission's terms of reference, Justice McMurdo and Mr Hyde will inquire into and report on matters including:

- the number and extent of cases affected by informant 3838;
- the conduct of current and former members of Victoria Police in the handling and management of 3838;
- the current adequacy and effectiveness of Victoria Police's processes for recruiting, handling and managing human sources who are subject to legal obligations of confidentiality or privilege;
- the current use of human source information in the criminal justice system from human sources who are subject to legal obligations of confidentiality or privilege; and
- the appropriateness of Victoria Police's practices around the disclosure or non-disclosure of the use of such human sources to prosecuting authorities.

Under the *Inquiries Act 2014* (Vic) the Commission can share information with any body or agency for investigation or action if it considers it relevant or appropriate.

The inquiry will provide an interim report by 1 July 2019 and provide a final report by 1 December 2019.

<https://www.premier.vic.gov.au/commissioners-announced-for-informants-royal-commission/>

Commonwealth Integrity Commission review panel announced

The panel of experts who will advise Government on the development of the legislation for the Commonwealth Integrity Commission (CIC) has been announced by the Morrison Government.

The panel will initially advise the Government directly whilst the public consultation on the proposed model, released last week, occurs. This will include the panel discussing the model directly with key agency stakeholders over the course of January 2019. Between now and 1 February 2019, while the public consultation phase on design principles is conducted, the panel will focus on providing advice based on interactions with key public sector stakeholders on successive drafts of the legislation before it progresses to Cabinet and the Coalition party room for approval ahead of further public consideration of the resulting legislation.

Margaret Cunneen SC is a longstanding figure in the criminal law fraternity with firsthand experience of the failings of State integrity bodies at a State level. Shortly to retire from the position of Deputy Senior Crown Prosecutor in New South Wales, Ms Cunneen was appointed Senior Counsel in 2007 and led the NSW Special Commission of Inquiry into matters relating to the police investigation of certain child sexual abuse allegations in the Roman Catholic Diocese of Maitland–Newcastle.

After a long career in the senior ranks of the West Australian public sector (including as Director-General of the WA Department of the Premier and Cabinet), Mal Wauchope AO was appointed as WA Public Sector Commissioner in 2008. In this role, Mr Wauchope was responsible for ensuring that the Western Australian public sector acts with integrity, performs efficiently and meets the high standard expected by the public. He will bring these unique insights to the development of the public sector division of the Government's proposed CIC.

Mick Keelty AO APM was Commissioner of the Australian Federal Police from 2001 to 2009 and the inaugural Chairperson for the Australian Crime Commission in 2003. Mr Keelty's extensive experience in law enforcement and understanding of the organised crime and corruption landscape will be invaluable to ensuring the law enforcement division of the CIC is appropriately equipped to deal with this higher risk environment.

The unique experiences of these three individuals across criminal law and prosecution, public sector administration and law enforcement will assist the Government to ensure that the model for the CIC is effective, appropriate and balanced.

The Government has released a consultation paper and invited public submissions on the proposed model for a CIC. Submissions close on 1 February 2019. The paper is available at:

<https://www.ag.gov.au/Consultations/Pages/commonwealth-integrity-commission.aspx>

<https://www.attorneygeneral.gov.au/Media/Pages/Commonwealth-Integrity-Commission-Review-Panel-Announced-18-Dec-2018.aspx>

Preventing data breaches should be business as usual

The latest report of the Office of the Australian Information Commissioner (OAIC) shows it has been notified of 245 data breaches affecting personal information between July and September 2018.

The quarterly statistics report on the Notifiable Data Breaches (NDB) scheme indicates 57 per cent of incidents were caused by malicious or criminal attack and 37 per cent resulted from human error.

Australian Information Commissioner and Privacy Commissioner Angelene Falk said training staff on how to identify and prevent privacy risks needs to be part of business as usual.

'Everyone who handles personal information in their work needs to understand how data breaches can occur so we can work together to prevent them', Ms Falk said.

'Organisations and agencies need the right cyber security in place, but they also need to make sure work policies and processes support staff to protect personal information every day.

'Our latest report shows 20 per cent of data breaches over the quarter occurred when personal information was sent to the wrong recipient, by email, mail, fax or other means.

'Importantly, we also need to be on the alert for suspicious emails or texts, with 20 per cent of all data breaches in the quarter attributed to phishing.

'Phishing is when an individual is contacted by email or text message by someone posing as a legitimate institution to lure them into providing passwords or personal information.

'This can result in their credentials — their username and password — being compromised and used to gain access to their system or network, if additional protections are not in place.'

The report can be found at <www.oaic.gov.au/ndbreport>.

Key statistics

The Notifiable Data Breaches July–September 2018 report shows:

- 245 data breaches were notified to affected individuals and the OAIC, compared to 242 the previous quarter:
  - — 57 per cent were attributed to malicious or criminal attacks, compared to 59 per cent the previous quarter;
  - — 37 per cent were attributed to human error, compared to 36 per cent the previous quarter;
  - — 6 per cent were attributed to system faults, compared to 5 per cent the previous quarter;
- 63 per cent involved the personal information of 100 or fewer individuals, compared to 61 per cent the previous quarter;

- the top five industry sectors to report breaches were:
  - — private health service providers: 45;
  - — finance: 35;
  - — legal, accounting and management services: 34;
  - — private education providers: 16; and
  - — personal services: 13.

Background

The Notifiable Data Breaches (NDB) scheme requires regulated entities to notify affected individuals and the Australian Information Commissioner about 'eligible data breaches'. These are breaches where:

- there is unauthorised access to or unauthorised disclosure of personal information, or a loss of personal information, that an entity holds;
- this is likely to result in serious harm to one or more individuals; and
- the entity has not been able to prevent the likely risk of serious harm with remedial action.

The scheme commenced on 22 February 2018. The OAIC publishes quarterly statistical information about notifications received under the scheme to help the community, business and government understand its operation and the causes of data breaches.

Notifications to the OAIC from multiple entities relating to the same data breach are counted as a single notification in the report.

The OAIC has produced a data breach preparation and response guide for agencies and private sector organisations with obligations under the Privacy Act. Guidance for individuals on what to do after a data breach notification is also available at <oaic.gov.au>.

Religious freedom announcement

The Australian Human Rights Commission (AHRC) welcomes the release of the Religious Freedom Review.

The Commission looks forward to assessing any legislative proposals when they are released in order to ensure that they appropriately balance human rights.

'It is critical that any new laws do not create new forms of discrimination.

'Australia must protect the rights of all people, including those of faith and those who are lesbian, gay, bisexual, transgender, intersex or pregnant', said Commission President Rosalind Croucher.

The Commission welcomes the commitment of the Government to introduce religious freedoms protection.

The organisation has recommended such protections be introduced since its 1998 report titled Article 18.

'The use of exemptions to the Sex Discrimination Act is the wrong approach to protect religious freedom', said Human Rights Commissioner Edward Santow.

'We call for the urgent repeal of the exemption in section 38 of the SDA relating to students and teachers.'

The Commission recommended repeal of this section as far back as 1992 in relation to sex, pregnancy and marital status.

The AHRC welcomes the Government's commitment to referring an inquiry to the Commission to investigate the experience of discrimination and violence experienced by people of faith.

The Commission had recommended this in its submission to the Religious Freedom Review.

'Our goal should be to eliminate all forms of discrimination', said Commissioner Santow.

'Australia's piecemeal law in this area should be amended to prohibit all discrimination on the basis of religion and other belief, and also to remove the broad and out-dated exemptions in the Sex Discrimination Act.'

<https://www.humanrights.gov.au/news/media-releases/religious-freedom-announcement>

Release of the NSW Ombudsman's annual report

On 22 October 2018, the NSW Ombudsman, Mr Michael Barnes, tabled the NSW Ombudsman *Annual Report 2017–18* in the New South Wales Parliament.

The report details the work done across the broad range of areas within the Ombudsman's jurisdiction. The Ombudsman watches over New South Wales public sector agencies and thousands of private sector agencies that care for children and provide community services.

'This year we provided assistance and advice to more than 40 600 people and agencies who contacted the office for help', said Mr Barnes. 'We also finalised eight formal investigations and tabled six reports in Parliament on public interest issues.'

The annual report highlights the many ways that the Ombudsman adds value, including dealing with individual requests for assistance. Examples from the Ombudsman's report include:

- helping an Aboriginal father to enforce a 13-year-old arrangement for his weekly contact with his daughter, who was in care — see case study 3, p 50;
- assisting a complainant whose local council had changed parking restrictions without warning and fined him under those new restrictions, despite him having parked his car legally — see case study 29, p 77;
- helping a man to get his mother's estate finalised following delays at the Trustee and Guardian — see case study 23, p 69;
- helping an elderly couple in social housing after their oven became so hot they could not touch it — see case study 19, p 67;
- securing financial support for grandparent carers after their payment was stopped when they moved interstate — see case study 7, p 51;
- getting a child, who had been regularly suspended from his former school, back to school — see case study 16, p 66; and

- making service wide improvements following a complaint about a young person with disability being transported in the boot of a car — see case study 60, p 118.

These different examples give a flavour of the range of matters the Ombudsman deals with every day — reinforcing the public's confidence that the office can help resolve matters that affect them.

'Although it is important for my office to achieve the best possible outcomes for individual complainants, it is equally important for us to focus on fixing systemic issues and promoting best practice in the agencies we oversight', said Mr Barnes.

<https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0003/61698/Media-Release-Release-of-the-NSW-Ombudsmans-Annual-Report.pdf>

Commonwealth Ombudsman releases investigation report on the Department of Home Affairs' implementation of the recommendations of the Thom Review to prevent the immigration detention of Australian citizens

The Commonwealth Ombudsman, Michael Manthorpe PSM, has released a report on the Department of Home Affairs' implementation of the recommendations made in Dr Vivienne Thom's independent review of the detention of two Australian citizens in 2017 (the Thom Review).

The Thom Review made four recommendations in relation to the Department's strategies it had in place to prevent an Australian citizen from being detained. The Department accepted all recommendations made by Dr Thom.

During this investigation, the office looked at the implementation of the recommendations at a selection of critical points across the immigration detention process. The investigation enabled the office to identify gaps where, in practice, the Department's implementation activities had not entirely met its intent or the intent of the relevant recommendation.

'While I acknowledge the Department's progress in implementing the recommendations of the Thom Review, I consider further improvements are necessary to safeguard against the detention of Australian citizens and lawful non-citizens', Mr Manthorpe said.

'In my view, the Department and the Australian Border Force need to take further steps to ensure all relevant officers are adequately trained in the requirements for obtaining Australian citizenship, that tools and processes support officers to lawfully perform their roles and that quality assurance processes at these points are robust.'

The report makes 15 recommendations to the Department that offer specific guidance on ways it can ensure it has implemented the recommendations of the Thom Review effectively. The Department has accepted all of the Ombudsman's recommendations, 14 in full and one in part. The office will be monitoring the implementation of these recommendations.

<http://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2018/06-december-2018-commonwealth-ombudsman-releases-investigation-report-into-the-department-of-home-affairs-implementation-of-the-recommendations-of-the-thom-review-to-prevent-the-immigration-detention-of-australian-citizens>

Recent decisions

Administrative review of HSC results?

Valaire v NSW Education Standards Authority [2019] NSWCATAD 16 (11 January 2019)

On 22 August 2018 the applicant, Ms Valaire, made an application to the New South Wales Civil and Administrative Tribunal (the Tribunal). Ms Valaire stated, among other things, that her son Julian had studied HSC Russian in 2017 and received a mark of 84 per cent, but this mark was scaled down to a ranking of 41, which gave him an overall ATAR result of 66. Ms Valaire contended that, when Julian had enrolled in HSC Russian, the NSW Education Standards Authority (NESA) website stated it was a 'Continuers' course that was developed for non-native speakers. However, most students undertaking HSC Russian were from Russian-speaking countries and their previous education was conducted in Russian. Ms Valaire therefore believed that she was misled by the information on the NESA website. Ms Valaire further contended that Julian's results should have been scaled against those of other non-native speakers and not those who were fluent in Russian. If this had occurred, Julian's ATAR would have been higher. Ms Valaire stated that it was not until they contacted NESA following receipt of Julian's ATAR result that they were advised there were no entry requirements for HSC Russian because it is the only HSC Russian course available in New South Wales.

In her submissions, Ms Valaire identified a decision of NESA dated 8 March 2018 and a decision of the Department of Education dated 27 April 2018 as being the decisions under review. Ms Valaire contended that the relevant decisions were made under the *Children (Education and Care Services National Law Application) Act 2010* (NSW) (the Education Act) and the Children (Education and Care Services) National Law (the National Law).

The decision of NESA dated 8 March 2018 was a response by NESA to an email Ms Valaire had sent to the Minister for Education about her concerns about the eligibility of students undertaking HSC Russian and the scaling of HSC courses. The decision of the Department of Education dated 27 April 2018 was made in response to Ms Valaire's request for a review of a decision made on 26 February 2018 by the Department of Education in response to her complaint about the eligibility rules for HSC Russian and the ATAR received by Julian.

The respondents sought orders dismissing Ms Valaire's application on the basis that Ms Valaire has failed to identify a decision which is capable of being reviewed by the Tribunal.

The *Administrative Decisions Review Act 1997* (NSW) relevantly sets out the circumstances in which the Tribunal has administrative review jurisdiction over a decision of an administrator (see the *Civil and Administrative Tribunal Act 2013* (NSW) s 30). Section 55 of that Act provides that the Tribunal only has jurisdiction to review 'an administratively reviewable decision'. An administratively reviewable decision is defined in s 7 of the Administrative Decisions Review Act to be 'a decision of an administrator over which the Tribunal has administrative review jurisdiction'. Section 9 provides that the Tribunal has administrative review jurisdiction over a decision of an administrator 'if enabling legislation provides that applications may be made to the Tribunal for an administrative review under this Act of any such decision'.

The Tribunal found that the only decisions that can be reviewed by the Tribunal under the National Law are set out in ss 192 and 193 of that Act and relate to decisions determining a

person's applicability to provide educational and care services to children. The National Law does not relate to any of the matters about which Ms Valaire complained.

The Tribunal further held that it is apparent that no decision had been made by either respondent under the Education Act and the National Law. These Acts therefore do not confer any jurisdiction on the Tribunal to review the matters raised by Ms Valaire. In relation to the decision which Ms Valaire states was made by NESA on 8 March 2018, the letter sent to her does no more than explain the way in which NESA determines the eligibility criteria for students studying HSC Russian in New South Wales. The letter also stated that NESA is not involved in any matters relating to the scaling of HSC marks or determination of ATAR ranks. The letter in fact does not purport to make any decision about any matter and the information contained in the letter is not something which can be subject to any review by the Tribunal.

Similarly, in relation to the decision of the Department of Education dated 27 April 2018, there is no decision contained in the letter which is capable of review by the Tribunal. The Department of Education has made no decision on eligibility for HSC Russian, nor does it make any decision about a student's ATAR. The calculation of an ATAR for NSW HSC students is undertaken by a private company — the University Admissions Centre.

Ms Valaire's application did not disclose any decision which is capable of being reviewed by the Tribunal under the Administrative Decisions Review Act. The Tribunal therefore did not have jurisdiction to deal with the application and it was dismissed.

Error of law — no evidence

Hands v Minister for Immigration and Border Protection [2018] FCAFC 225 (17 December 2018) (Allsop CJ, Markovic and Steward JJ)

Mr Hands was born in New Zealand in 1971. He came to Australia with his parents when he was three years old. He remains a citizen of New Zealand. When asked, he said that he had not applied for Australian citizenship because he thought his mother had when he was small. By operation of law he was granted an 'absorbed person visa' on 1 September 1994.

On 16 October 2016 Mr Hands pleaded guilty to charges in the New South Wales Local Court at Batemans Bay involving property damage, stalking, intimidation and assault, all being part of a domestic violence incident involving his partner and one of his step-grandchildren. He was sentenced to 12 months' imprisonment, with a non-parole period of five months.

The sentence of 12 months engaged s 501 of the *Migration Act 1958* (Cth). Under s 501(3A), the Minister must cancel a visa if the Minister is satisfied, relevantly, that the person does not pass the 'character test' because the person has a 'substantial criminal record' as set out in s 501(7)(a), (b) or (c) — that is, the person has been sentenced to death, or to a term of imprisonment for life, or to a term of imprisonment of 12 months or more; and the person is still serving a full-time custodial sentence.

On 16 February 2017, about two weeks before he would have been released on parole, Mr Hands received notification that his absorbed person visa had been cancelled under s 501(3A). He was advised of the consequences of removal and that he could make representations to the Assistant Minister as to why the Assistant Minister should revoke the cancellation of the visa.

In his representations, Mr Hand submitted that, after coming to Australia as an infant with his mother and father, he left a violent or strict home in Warilla on the South Coast as a young teenager at 12 or 13 and was taken in by the Aboriginal community at Wallaga Lake. He came to be accepted by the community as Aboriginal and recognised by the Aboriginal community as a Koori man with long-term family connections with five local Aboriginal families — the Walkers, the Campbells, the Thomases, the Henrys and the Stewarts.

After receiving these submissions, the Assistant Minister decided not to revoke the Minister's decision to cancel Mr Hands' visa because he was not satisfied for the purposes of s 501CA(4)(b)(ii) that there is another reason why the original decision under s 501(3A) to cancel Mr Hands' visa should be revoked. As part of his decision, the Assistant Minister found that 'whilst I acknowledge Mr Hands may experience short term hardship, I find that over time he would be capable of settling in New Zealand without undue difficulty'.

Mr Hands sought review of the Assistant Minister's decision not to revoke the decision to cancel his visa in the Federal Court. The Federal Court dismissed the appeal and Mr Hands sought review of that decision in the Full Federal Court.

Before the Full Federal Court, Mr Hands contended that there were findings of fact in the Assistant Minister's decision for which there was no evidence.

The Full Court did not consider that there was any rational or probative evidence to support a conclusion that Mr Hands' emotional and psychological hardship would be short-term. All the material, if considered, would lead any reasonable person to a conclusion that this decision, unrevoked, will cause lifelong grief and psychological hardship to a number of people, including Mr Hands. The existence of the same language and similar culture and the standard of health care and social services in New Zealand are matters hardly to the point.

The Full Court held that the separation of Mr Hands from his community, his wider family, his partner, his children, grandchildren and step-grandchildren is a life-changing decision, potentially life-destroying, and this was a central and crucial consideration. The statements that he 'may experience some emotional and psychological hardship' and 'may experience short term hardship, [but] would be capable of settling in New Zealand without undue difficulty' are findings of fact that are simply incapable of being reasonably made by any decision-maker. There was no evidence at all to support them.

The Full Court found that the making of these findings without any material to found them was a sufficient basis to conclude that there has been jurisdictional error, given their central importance to the Assistant Minister's reasoning.

Procedural fairness and the legal practitioner

Livers v Legal Services Commissioner [2018] NSWCA 319 (14 December 2018) (Gleeson JA, Barrett AJA and Simpson AJA)

The appellant, Peter James Livers (the practitioner) is a legal practitioner who has practised as a solicitor since September 1974, becoming a principal of the firm Slattery Thompson in 1979 and its sole practitioner since 1989.

On 9 March 2015, the WorkCover Independent Review Office (WIRO) complained to the Legal Services Commissioner (the Commissioner) about the practitioner's conduct. WIRO manages the Independent Legal Advice Review Service (ILARS), which funds legal costs for workers to challenge insurers' workers compensation decisions. The practitioner had

entered into an agreement with WIRO in December 2012 to provide legal services to legally assisted persons.

WIRO alleged that the practitioner had misled it in the answers he gave to two questions in a funding application submitted in September 2014 and had attached documents that had been falsified as to their true date (including a client statement and an audiogram). WIRO alleged that the practitioner had failed to advise it of a prior claim for industrial deafness made by his client (Mr Souaid) in July 2012 (when Mr Souaid also represented by the practitioner) and the resolution of that claim by consent orders made by the Workers Compensation Commission (the Commission) in November 2013.

Following that complaint, the Legal Services Commissioner applied to the New South Wales Civil and Administrative Tribunal (the Tribunal) for a finding that the practitioner had engaged in professional misconduct and an order under s 562(2) of the Legal Profession Act that the practitioner's name be removed from the roll of lawyers or, alternatively, that the practitioner be publicly reprimanded or fined or for such other order as the Tribunal thinks fit.

The primary basis of the Commissioner's application to the Tribunal was that, in making the funding application in 2014, the practitioner had deliberately sought to conceal from WIRO the earlier claim for workers compensation for industrial deafness made by the client in 2012, including by altering the date on an audiogram that was submitted in support of the funding application. The Commissioner made no mention of alleged altering of the client statement.

The practitioner's response was that he believed that there was a proper basis for the client to make a claim for hearing aids in 2014. While he admitted negligence in respect of some of his conduct, he denied any knowing or recklessly careless conduct in misleading WIRO about the 2012 claim or that he falsified any document. In an affidavit filed by the practitioner he deposed that he believed Mr Souaid altered the date from 2012 to 2014.

On 3 August 2017, the Tribunal found the practitioner guilty of professional misconduct (the Stage One decision).

On 7 September 2018, after a hearing on penalty, the Tribunal ordered that the practitioner's name be removed from the roll of lawyers pursuant to s 562(2)(a) of the Legal Profession Act and that he pay the Commissioner's costs of and incidental to the filing and hearing of the application (the Stage Two decision). Relevantly, the Tribunal commenced these proceedings by summarising the background to the complaint against the practitioner and the Tribunal's findings and orders in the Stage One decision, including that the practitioner had altered the date of the client statement, in addition to altering the date on the audiogram.

The practitioner then appealed the Tribunal's decision to the NSW Court of the Appeal. The practitioner contended, among other things, that the Tribunal denied him procedural fairness by determining an allegation adverse to him not pleaded by the Commissioner — namely, that the practitioner had altered the date of the client statement. In response, the Commissioner accepted that the practitioner did not have an opportunity to be heard on the allegation that he was responsible for the alteration to the date of the client statement but submitted that the Tribunal did not find that such conduct itself constituted misconduct or dishonest behaviour and, in any event, the practitioner was on notice because he had referred to the issue in his affidavit sworn on 2 November 2016.

The Court found that the requirement to accord procedural fairness to the practitioner in this case is sufficiently stated in *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63, where the plurality referred (at [32]) with approval to the following statement by the Full Court of the Federal Court in Commissioner for *ACT Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 590–1 (Northrop, Miles and French JJ):

> It is a fundamental principle that where the rules of procedural fairness apply to a decision making process, the party liable to be directly affected by the decision is to be given the opportunity of being heard. That would ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material. (Emphasis in original.)

In this case, the Court held that this did not occur before the Tribunal. The allegations that the practitioner had altered the date of the client statement was not put to the practitioner before the Tribunal, nor was the practitioner given an opportunity to respond to the issues raised by these allegations. Further, and contrary to the Commissioner's submissions, the practitioner was not on notice that what he said in his affidavit concerning the alteration of the date of his client statement was in dispute or in issue, nor was the specific finding by the Tribunal concerning the synchronicity between the two dates on the audiogram and the client statement put to the practitioner in cross-examination for him to respond to.

The Court opined that it has been said that underlying the principles of procedural fairness is the concern of the law to avoid practical injustice: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [37] (Gleeson CJ). Therefore, the Court will not order a new hearing exercising its powers under s 75A of the Supreme Court Act unless it appears to the Court that some substantial wrong or miscarriage has occurred: *Uniform Civil Procedure Rules 2005* (NSW) (UCPR), r 51.53. Accepting that the practitioner was denied procedural fairness before the Tribunal, it is necessary to consider whether it would be futile to order a new hearing because to do so would inevitably result in the making of the same orders as made by the Tribunal: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145.

In this context, all that the practitioner needs to show is that the denial of procedural fairness deprived him of the opportunity of a successful outcome. To negate that possibility, the Commissioner must demonstrate that a properly conducted hearing could not possibly have produced a different result: *Stead v State Government Insurance Commission* at 147.

The Court held that, notwithstanding the weight of the evidence concerning the change of the date of the audiogram (which the practitioner denied making), the Court did not accept the Commissioner's submission that a favourable finding that the practitioner had no involvement in altering the date of the client statement would have had no material effect on the outcome of the complaint. First, the seriousness of the finding of the Tribunal that the practitioner altered the date of the client statement cannot be underestimated. The Tribunal found that the practitioner had deliberately falsified a document. It is not to the point that the Tribunal did not go on to say expressly that this conduct involved misconduct by the practitioner, given the absence of a pleaded complaint in relation to the alteration to the date of the client statement.

Further, and importantly, the Court held that the Commissioner's submission that the impugned finding was not taken into account by the Tribunal in its Stage Two decision cannot be accepted. The Tribunal referred in its Stage Two decision to its earlier finding that the practitioner had altered the date of the client statement and described the practitioner's conduct as deliberate and involving the falsification of a document. It was not possible to separate or unscramble the cumulative effect of this finding from the other

findings of the Tribunal which led to its characterisation of the practitioner's professional misconduct as justifying the removal of the practitioner's name from the roll of lawyers.