IN THE MATTER OF:

THE LEGAL PRACTITIONERS ACT 1981

Action No. 1 of 2020

And

IN THE MATTER OF:

ROXANNE MARIE McCARDLE

REASONS FOR DECISION

MEMBERS CLARK SC & DAWSON:

Background and Hearing

1. In this action Roxanne Marie McCardle ("the **Practitioner**") is charged with professional misconduct pursuant to s82(2) of the *Legal Practitioners Act 1981* (SA) ("the **Act**"). There are two counts, relating to the Practitioner's alleged failure to cooperate with reasonable requests to respond to two complaints, specifically a failure to comply (or comply adequately) with notices issued on 1 March 2017 pursuant to Schedule 4, Part 2, clause 4(1) of the Act.

2. On 19 September 2017 the Commissioner commenced an investigation at his own initiative pursuant to s77B(1) of the Act, and on 7 February 2020 the Charge was filed.

3. The Practitioner, who presently resides in Queensland, has repeatedly asserted that the Tribunal does not have jurisdiction to conduct an inquiry into her alleged conduct. She sought summary dismissal on this and other grounds which was the subject of argument on 27 November 2020. Reasons for our ruling dismissing the Practitioner's application were published on 12 January 2021. The Practitioner did not appeal, but has made it clear in subsequent hearings and in voluminous email correspondence with the Secretary of the Tribunal that she does not accept the ruling. We re-iterate what was said in our earlier ruling and in particular record as follows:

3.1. The Practitioner was admitted to practice in South Australia on 8 May 2006 and last held a practising certificate in this State in the 2011 – 2012 year.

3.2. Thereafter the Practitioner moved to Western Australia and held a practising certificate there for a period of time.

3.3. The Practitioner sought to be obtain a practising certificate in Victoria and was unsuccessful, leading to a dispute in that State which is apparently stayed.

3.4. Although she is no longer practising as a solicitor in South Australia (or in any other State), the Practitioner's name remains on the Roll of Practitioners ("the **Roll**") and she therefore falls within the definition in s5 of the Act of a 'legal practitioner', being a person duly admitted and enrolled as a barrister and solicitor of the Supreme Court of South Australia.

3.5. The Practitioner therefore remains subject to the Act, and the exercise of administrative disciplinary procedures contained within it, regardless of where she resides and whether she holds a current practising certificate or not.

4. On 19 February 2021 the hearing of the inquiry in this matter was scheduled for 13-14 May 2021. With the consent of the Commissioner, leave was given to the Practitioner to participate remotely if she wished given uncertainties surrounding travel restrictions due to the COVID-19 pandemic and the Practitioner's recovery from surgery on her right shoulder. A timetable was set for the Practitioner to file her Response, give notice of documents she sought to rely upon and any objections to the Commissioner's documents.

5. The Practitioner did not comply with the timetable, nor did she make an application for an extension of time. The Secretary of the Tribunal made contact with the Practitioner to ensure she was prepared to participate remotely in the hearing. The Secretary informed the Tribunal that it was apparent the Practitioner was not ready, so on 12 May 2021 the matter was called on for urgent directions. The Practitioner was not able to attend the directions hearing (by telephone) due to her work commitments. The transcript was emailed to her as soon as it was available.

6. At the commencement of the hearing on 13 May 2021 the Practitioner, appearing by telephone, sought an adjournment of 8 weeks indicating that she wished to travel to Adelaide and appear at the hearing in person. She did not have the Commissioner's Book of Documents with her, though they had been available to her electronically since 7 May

2021 and a hard copy awaiting collection since 10 May 2021. The adjournment was opposed.

7. A compromise was reached whereby the Tribunal adjourned until 10am on 14 May 2021 to enable the Practitioner to collect and review the hard copy Book of Documents and then for the Commissioner's case to proceed (with the Practitioner by telephone). Following this the Tribunal indicated it would adjourn part-heard to give the Practitioner further time to prepare her defence having had the benefit of hearing the Commissioner's case in chief.

8. This occurred, and the Commissioner's evidence, which was entirely documentary, was concluded on 14 May 2021. Since the Practitioner did not file a Response, the Commissioner proceeded on the basis that all substantive allegations were in dispute and that he needed to establish all relevant facts. At the conclusion of this day of hearing, the Practitioner indicated that there were witnesses she may wish to call in her defence and documents she might want to tender, but that she had not made arrangements to call these witnesses, nor were all the documents in her possession. It was clear to the Tribunal and suggested to the Practitioner that some, if not all, of the proposed witnesses were unlikely to appear voluntarily.

9. The Tribunal gave directions permitting the Practitioner to bring an application in relation to discovery of documents and for the issue of summonses to witnesses, and listed that application for hearing on 25 May 2021.

10. The Practitioner made an application in which she sought discovery and to have summonses issued to the Commissioner and to a solicitor who was formerly employed in the Commissioner's office, Ms Deslie Billich. At the hearing on 25 May 2021 she sought an adjournment of her application which was refused. After hearing argument, the Tribunal adjourned briefly to confer before giving a ruling refusing both aspects of the Practitioner's application.

11. The hearing proper was scheduled to resume for the presentation of the Practitioner's case on 23 July 2021. She was directed to provide copies of any documents on which she intended to rely by 12 July 2021. A directions hearing was scheduled for 14 July 2021 to check on the Practitioner's readiness to proceed.

12. The Practitioner did not appear at the directions hearing on 14 July 2021, nor did she provide any documents she intended to tender to the Commissioner's solicitor. Although at this stage the resumption of the hearing was confirmed for 23 July 2021, by 16 July

2021 South Australia's border restrictions with Queensland were tightened (at least for those travelling through Brisbane and the South-East region) and then on 20 July 2021 South Australia moved to Level 5 COVID-19 related restrictions.

13. Although the courts remained open as an essential service, the Tribunal of its own motion determined that the hearing should be adjourned. We took into account the difficulties that the Practitioner would face should she attempt travel to Adelaide from her home near Bundaberg, and the undesirability of holding an in-person hearing with three Tribunal members, legal representatives and court staff in circumstances where it could not be said that the hearing was urgent.

14. Resumption of the hearing was rescheduled for 29 September 2021, with leave for the Practitioner to participate remotely depending on her preference and the practicalities of travel at that time. As it transpired, border restrictions were eased such that it was possible for the Practitioner to enter South Australia without quarantine to attend the resumed hearing in person, had she wished to do so.

15. The Practitioner failed to appear (in person or by telephone) on 29 September 2021. She sent a 4.5 page email at 5:04am that morning (Exhibit P1) re-agitating her argument that the Tribunal lacks jurisdiction and seeking, *inter alia*, a stay or dismissal. The Tribunal determined that in circumstances where the Practitioner had failed to appear and present any evidence, we would take into account her email as constituting her submissions, but otherwise proceed to hear the Commissioner's closing.

16. The Tribunal sought that further evidence be provided confirming that the Practitioner's name was still on the Roll in South Australia, and leave was granted for this to be done after the hearing concluded. A letter from the Law Society of South Australia dated 5 October 2021 was provided to the Tribunal and became Exhibit C19.

Evidence

17. In addition to P1 and C19 mentioned above, the evidence was contained in two volumes referred to as the Book of Documents (Exhibits MFI C1 and MFI C2). The Commissioner's solicitors prepared these volumes so that they contained every document that the Practitioner might conceivably seek to rely upon, not all of which was necessary to the Commissioner's case. Ultimately, counsel for the Commissioner tendered only 16 documents within the Book of Documents, each of which was separately marked as Exhibits C3 – C18.

18. As explained above, the Practitioner elected not to participate and did not tender any documents, whether contained in the Book of Documents or otherwise.

19. Noting the inquisitorial nature of a hearing before the Tribunal, the members indicated our intention to read and, where appropriate, have regard to material in the Book of Documents even if it had not been tendered. Counsel for the Commissioner took no objection, agreeing that we were entitled to do so.

20. Finally, counsel for the Commissioner invited us to have regard to the manner in which the Practitioner conducted herself during the course of these proceedings. At all times the Practitioner was self-represented. More precisely, the Tribunal was asked to consider:

    20.1. The Practitioner's failure to comply with the Tribunal's timetable directions;

    20.2. The Practitioner's unwillingness (in the absence of any appeal) to accept the Tribunal's ruling as to its jurisdiction;

    20.3. Her lengthy, repetitive and often difficult to follow 'Statements of Contention' and email communications with the Tribunal Registry and unilateral communications sent without leave or the consent of the Commissioner;

    20.4. Allegations of bias and impropriety directed at the Commissioner, Tribunal members, counsel for the Commissioner and various members of the legal profession;

    20.5. The request to adjourn the hearing in May 2021, so that the Practitioner had more time to prepare her case, only to have her fail to participate at all in September 2021 when the hearing resumed.

21. A bundle of all the email communications and copies of the submissions/Statements of Contention sent by the Practitioner to the Tribunal has been compiled and is Exhibit C20.

Practitioner's Shoulder Injury

22. The Practitioner at various times made complaints of denial of procedural fairness because, she contended, inadequate allowances (including refusal of adjournments) were made by the Tribunal to take into account her recovery from shoulder surgery.

23. The Practitioner provided a work capacity certificate from her worker's compensation claim which indicated that she was fit to return to modified light duties from 12 April 2021. She also provided rehabilitation instructions directed to her physiotherapist from her

orthopaedic surgeon. Those instructions foreshadowed a slow return to full strength and function over a 6-month period, which by reference to the work capacity certificate would end in about late June 2021.

24. The Tribunal was reluctant to act on this evidence because the Practitioner had been cleared to return to light work duties, and given the lengthy written material she was submitting, it was unclear how the shoulder injury was preventing her active participation in the inquiry. The Practitioner was advised that she would need to obtain medical evidence which confirmed she was unfit to appear in the Tribunal if she sought an adjournment on the grounds of medical incapacity. No further evidence was provided.

25. In the end, the Practitioner consented to the substantive hearing being adjourned part-heard until 14 July 2021. By the time that date was abandoned due to the pandemic, and re-listed for 29 September 2021, the 6-month recovery period had well and truly passed. Therefore, whether it was correct or not to refuse to act on the evidence provided, it cannot be said that there was a denial of procedural fairness in connection with the Practitioner's shoulder injury, especially where she had the option of making her submissions orally, and to appear remotely.

Complaints Leading to Commissioner's Investigation

26. The Practitioner was involved in long-running and acrimonious family law proceedings before the Federal Magistrates Court, Federal Circuit Court and Family Court of Australia (as each of those Courts were known at the relevant times). For much of those proceedings the Practitioner was self-represented.

27. She was also involved in proceedings seeking family violence restraining orders against her ex-husband, first in the South Australian Magistrates Court at Victor Harbor and later in the Western Australian Magistrates Court at Busselton, and on appeal in the Western Australian District Court, in the Supreme Court of Western Australia, and leave to appeal to the Western Australian Court of Appeal and High Court of Australia.

28. Two of the legal practitioners involved in the family law and restraining order proceedings as counsel for the Practitioner's ex-husband made complaints to the Commissioner about the Practitioner's conduct. The first was a complaint by Mr Todd Grant dated 11 March 2015 (Exhibit C4, **TMG Complaint**), supported by a letter from Ms Frances Nelson QC (Exhibit C6, **EFN Complaint 1**), followed by another complaint by Ms Nelson QC dated 14 August 2015 (**Exhibit C7, EFN Complaint 2**).

29. The substance and merits of these two complaints are not before the Tribunal. The Charge brought against the Practitioner relates solely to the question of whether she failed to cooperate in the investigation of the two complaints, in particular by failing to adequately respond to two notices issued to her pursuant to Schedule 4, part 2, Clause 4(1) of the Act.

30. The Commissioner contends, and we accept, that the Practitioner had available the information she needed in order to properly respond to the notices. The TMG Complaint and the EFN Complaint had been published to her (and re-supplied a number of times at her request), together with a box of all of the supporting materials relevant to the two complaints which was delivered to the Practitioner on 31 July 2015.

Count 1 of the Charge

31. This count relates to the Notice issued on 1 March 2017 in relation to the TMG Complaint (Exhibit C10, **TMG Notice**). It was served personally on the Practitioner on 8 March 2017 (Exhibit C12). A copy of the TMG Notice is Annexure 1 to these reasons to assist in understanding the Tribunal's decision.

Count 2 of the Charge

32. This count relates to the Notice issued on 1 March 2017 in relation to the EFN Complaint 1 and EFN Complaint 2 (Exhibit C11, **EFN Notice**). It was served personally on the Practitioner on 8 March 2017 (Exhibit C12). A copy of the EFN Notice is Annexure 2 to these reasons to assist in understanding the Tribunal's decision.

Consideration of the Charge

33. Both the TMG Notice and the EFN Notice (together "the **Notices**") required the Practitioner to respond, in writing, by 4:00pm on 24 March 2017. A description of the concerns the Practitioner was required to address were specified in the schedules to the Notices, in the case of the TMG Notice at paragraphs [4] – [7] and in the case of the EFN Notice in paragraphs [5] – [6].

34. Although the TMG Notice seeks a response to paragraphs [4] – [7] inclusive, paragraphs [5] and [6] are statements which do not clearly call for any response. The same can be said of [6] in the EFN Notice. Therefore, properly construed, the Notices only required the Practitioner to provide written responses to [4.1]-[4.7] and [7.1]-[7.4] of the TMG Notice and [5.1]-[5.4] of the EFN Notice. We consider that an admitted legal practitioner should be capable of understanding what the Notices required.

35. Each Notice made reference to a previous written request from the Commissioner that the Practitioner respond to the relevant complaints. In the case of the TMG Notice, reference is made to a letter of 27 January 2017 (MFI C2, p.643) and in the case of the EFN Notice to a letter of 25 January 2017 (Exhibit C15). We mention this as it is relevant to the Practitioner's submission that she did not understand what the Notices required of her that the issues raised were not new and had been canvassed in some detail in this and previous correspondence from the Commissioner.

36. On 23 March 2017 the Practitioner sent a 5-page facsimile to the Commissioner (Exhibit C13, **Practitioner's Fax**) containing her response to both the TMG Complaint and the two EFN Complaints. Although the correspondence does not refer expressly to the Notices, it is clear that it does refer to them indirectly: 'RE: Ms Nelson QC and Mr Grant - I refer to the recently served documents on me in Victoria in relation to the above.'

37. The question is therefore not whether the Practitioner failed to respond within time, but whether her response was adequate in the context of her obligations under the Act.

38. After receipt of the Practitioner's Fax, the solicitor for the Commissioner wrote to the Practitioner on several occasions (contained in Exhibits C16, C17) indicating the Commissioner's view that the Practitioner had not adequately complied with the Notices. This resulted in further communications from the Practitioner to the Commissioner which, although sent after the time specified in the Notices, should be considered in determining whether the Practitioner discharged her obligations, albeit out of time. Those communications were:

    38.1. an email from the Practitioner dated 25 May 2017 relating to the TMG Complaint only (part of Exhibit C16, p.689);

    38.2. an email from the Practitioner dated 29 May 2017 (part of Exhibit C16, p,691);

    38.3. an email from the Practitioner dated 3 September 2017 (part of Exhibit C16, p.695);

    38.4. a 10-page letter from the Practitioner dated 10 October 2017, sent as an attachment to an email dated 13 October 2017 (part of Exhibit C16, pp.698-708 "the **Practitioner's Letter**");

    38.5. an email from the Practitioner dated 22 October 2017 relating to the TMG Complaint only (part of exhibit C16, p.709).

39. Schedule 4 to the Act sets out various Investigatory powers, including those of the Commissioner. Part 2 of Schedule 4 pertains to "Requirements relating to documents, information and other assistance" and applies, *inter alia*, to complaint investigations. Clause 4(1) provides:

> *4(1) For the purpose of carrying out a complaint investigation in relation to a legal practitioner or former legal practitioner, an investigator may, by notice served on the practitioner or former practitioner, require the practitioner or former practitioner to do any 1 or more of the following:*
>
> *(a) to produce, at or before a specified time and at a specified place, any specified document (or a copy of the document);*
>
> *(b) to provide written information on or before a specified date (verified by statutory declaration if the requirement so states);*
>
> *(c) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.*

40. In this matter the question is whether the Practitioner met the obligation in subclause 4(1)(b).[1] Although the Commissioner also relied upon subclause 4(1)(c), in circumstances where the cooperation required was to respond in a written format, it is questionable whether this requires anything further to or different from the obligation to 'provide written information'.

41. The Tribunal was not taken to any authority in which the requirements for a response under Clause 4(1) has been considered. It appears there is not any. During submissions the Tribunal questioned counsel for the Commissioner as to the level of detail which is required in a response by a practitioner, and whether a bare denial of a concern raised in a notice would be sufficient.

42. It is difficult to set any firm guidelines as to the type of information and level of detail required of a response as it will depend very much on the issue(s) under investigation. The response should be sufficient for the Commissioner, and those working in the Commissioner's office, (a) to be advised of the practitioner's position, and (b) to understand the reasons for that position. If a direct question is posed in the notice, then an express answer is required.

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[1] There was no requirement in this instance for verification by statutory declaration.

43. Although it might be possible for a bare denial to suffice, those circumstances will be rare. On the other hand, making an admission may frequently be a sufficient answer. It would be up to the practitioner if they wished to add further explanation or context to their admission.

44. If an allegation is denied by a practitioner, they must make that clear, but also explain why. For example, are some or all of the facts in dispute? If so, what are the correct facts according to the practitioner? If the facts as stated in the notice correct, are there are additional relevant facts or some explanation according to the practitioner?

45. This is perhaps best illustrated by an obvious example using the TMG Notice, which at subparagraphs [4.3] – [4.7] makes references to various costs orders made against the Practitioner in 2013-2015 which remain unsatisfied. A sufficient and proper response by the Practitioner (factually accurate in her particular circumstances) would be: 'The facts in [4.3] – [4.7] are admitted. The reason why those costs have not been paid is because I am an undischarged bankrupt and I have not had the financial means to pay.'

46. Subparagraphs [7.1], [7.3]-[7.4] of the TMG Notice could be the subject of a similar response, or even a simple 'The facts in [7.1], [7.3]-[7.4] are admitted.' Subparagraph [7.2] could also be admitted if the Practitioner accepted that the inevitable impact of her costs appeals was to delay finalisation of her original appeal. If she denied it, then she would need to state what other factor(s) could or did in fact cause delay.

47. Other issues will not be amenable to such short, straightforward answers. For example, take subparagraphs [4.1]-[4.2] of the TMG Notice which raises not only factual allegations, but their legal characterisation as an abuse of the Court's process. Paragraph [5] of the EFN Notice is in the same category. Those paragraphs raise matters which, assuming they were denied by the Practitioner, called for a more detailed explanation, for example why she considers her applications did have merit, or outlining evidence she did have available in support of allegations she made.

48. These paragraphs ([4.1]-[4.2] of the TMG Notice and [5] of the EFN Notice) were the subject of complaint by the Practitioner that they lacked particularity. There is some force in that submission, and ideally a notice would be drafted so as to put beyond any doubt precisely which pleadings, affidavits, applications, submissions and allegations were in issue. Having said that, a Clause 4(1) notice is not a pleading, and in the case of these Notices, they were issued in circumstances where the TMG and EFN Complaints, all of the supporting materials, including critically, the relevant judgments and transcript, had

been provided to the Practitioner. The Commissioner is entitled to expect that a reasonably competent solicitor in the position of the Practitioner to have read the judgments (in matters where she was a self-represented party) and would be well able to understand what [4.1]-[4.2] of the TMG Notice and [5] of the EFN Notice were referring to.

49. We have had the benefit of reading Member Gillam's reasons.

    49.1. We agree that the doctrine of *res judicata* does not prevent a practitioner from providing in their response to the Commissioner an explanation for why the finding of a Court may be incorrect or even unfair. To utilise an example from this case, the Practitioner relied in one instance upon having sworn an affidavit, but the Registry refused to accept it for filing. Therefore, she argued, the Court did not have all of the relevant evidence before it when making the finding in question. This is not a case in which the Practitioner accepted that the court records were in every instance a complete and accurate record. The Commissioner was correct not to simply assume that they were.

    49.2. A notice issued in reliance upon s4(1)(b) may call for the provision of information in a written format even where that information may not previously (prior to the practitioner's response to the notice) have been recorded anywhere in writing. This is consistent with a purposive approach to the interpretation of the Act. It is s4(1)(a) which is directed to the production of documents already in existence. It is always possible that there might be matters of fact, known only to a practitioner and relevant to an investigation, which have not been recorded anywhere in writing prior to the practitioner's response to a notice. We therefore agree that the Notices were not *ultra vires.*

    49.3. A practitioner may frequently provide a response to a notice which includes submissions (as is their right), however the obligation is to assist the Commissioner's investigation must first and foremost address the factual issues raised on the notice. To take an example from the present case, do the orders for costs made against the Practitioner remain unsatisfied as at the time of her response to the TMG Notice? If the costs orders had been complied with, her response would need to provide details of when and how payment was made. If not, is there some explanation for the non-compliance, the facts of which the Commissioner should be made aware?

49.4. We agree with Member Gillam that those parts of a notice which raise mixed questions of fact and law are more complex. Member Gillam concludes that a practitioner should not be obliged in their response to engage in legal argument either accepting or challenging the Commissioner's legal characterisation of alleged conduct (in this case, abuse of process). We accept there is some doubt as to whether 'written information' in s4(1)(b) is broad enough to encompass matters of submission. However, s4(1)(c) clearly is broad enough to require a practitioner '*to otherwise assist in, or cooperate with, the investigation.*' We find that a notice may require a practitioner to, at a minimum, make clear to the Commissioner whether they accept or dispute a legal contention put forward in the notice. It would be prudent for the response to canvass not only the factual basis for any dispute (which we consider a mandatory requirement for an adequate response), but also any associated legal argument. Explaining the practitioner's position is consistent with their obligation to cooperate. We take into account that the recipient of a notice is a qualified legal practitioner who should have the capacity to formulate a response which clearly and succinctly states their position.

49.5. All three members of the Tribunal are in agreement that even though the statutory language does not contain an express requirement for an 'adequate' or 'fulsome' response, it cannot be the case that anything at all submitted as a 'response' at will suffice. To be a proper response, the content needs to be responsive to the notice. The argument advanced for the Commissioner was that much of what the Practitioner wrote supposedly in response to the Notices was in fact 'non-responsive'. The submission is fair, as one needs to comb carefully though the Practitioner's Fax to find the few parts which are connected to the issues raised on the Notices.

49.6. The finding on which we are not agreed, is whether the Practitioner's response, which was also out of time, was in fact an 'adequate' response to the whole of the Notices. For reasons which follow, we find that it was not.

50. We turn now to whether the Practitioner's Fax discharged her obligation under subclause 4(1)(b), and if necessary (c), of Schedule 4 to the Act.

51. The only parts of the document which could be said to respond to [5] of EFN Notice are on p.1 (C13, p.682) where the Practitioner states: '*In relation to Ms Nelson, I deny the allegations within her complaint*' and on p.3 (C13, p.684) where she writes '*If anyone has*

a lack of evidence, it is Ms Nelson. If anyone is cavalier, it is Ms Nelson.' The balance of pages 1, 2 and the first two thirds of page 3 of the Practitioner's Fax contain criticisms of Ms Nelson QC's conduct, and that of a solicitor Ms Collie, and do not respond meaningfully to the EFN Notice.

52. For the reasons explained above, a bare denial to [5] of the EFN Notice is not sufficient and is a failure by the Practitioner in her duty to cooperate in the Commissioner's investigation. She needed to provide an explanation for her position. The Tribunal by majority concludes that Practitioner's Fax is not an adequate response to the EFN Notice.

53. The bottom third of page 3 through to the end of page 4 of the Practitioner's Fax purports to respond to the TMG Notice, but is best described as non-responsive. The Practitioner queries Mr Grant's motivations in making the TMG Complaint and makes various criticisms of him, Ms Nelson QC, Ms Collie and others. It does not deal with paragraph [4] or [7.2] of the TMG Notice at all. 'Unpaid costs' are mentioned on page 4, but only in the context of asserting that they are not a matter within the Commissioner's jurisdiction. We conclude that the Practitioner's Fax is not an adequate response to the TMG Notice.

54. The Practitioner did, however raise the obvious explanation for her failure to pay costs, namely her bankruptcy, in her email to the Commissioner on 25 May 2017. The Tribunal finds that there was, albeit late, an adequate response provided by the Practitioner to part of the TMG Notice, namely subparagraphs [4.3] – [4.7].

55. We have considered the emails set out in paragraph 38 above. Their content does not provide any further meaningful response to the Notices which rises beyond a bare denial.

56. We turn now to whether the Practitioner's Letter discharged (out of time) her obligation under subclause 4(1)(b) of Schedule 4 to the Act.

57. The Practitioner's Letter does provide (almost hidden amongst lengthy criticism of other practitioners) responses to some of the matters in paragraph [5.1] of the EFN Notice.

58. In numbered paragraphs 1 and 2, the Practitioner gives her explanation for why she considered one of her applications in the family law proceedings (to restrain Ms Collie and Ms Nelson QC from acting) had merit. Her position is that Ms Nelson QC had a conflict of interest owing to prior communications between Ms Nelson QC's chambers and the Practitioner, and that Ms Collie was aware of her ex-husband's failure to disclose assets prior to consent orders being entered. A further explanation proffered in relation to Ms

Collie is that Ms Collie had interfered in a third-party bank's evidence by encouraging the bank to object to the Practitioner's subpoena.

59. In numbered paragraph 6 the Practitioner states that the reason she applied for a second family violence restraining order in Western Australia was that her ex-husband was continuing to abuse her after the Practitioner relocated to that State.

60. The Practitioner's Letter in paragraph 3 also addresses the allegation in [5.2] of the EFN Notice by stating that she did have a sworn affidavit supporting her application to restrain Ms Collie from acting, but that the Registry had refused to receive it for filing. She says that an unfiled copy of her affidavit was before the Judge and that the later finding that she produced no evidence was in error.

61. Finally, the Practitioner's Letter addresses the allegation in [5.4] of the EFN Notice that she displayed a cavalier attitude to the Court in paragraphs 8, 9 and 11. She explains that on two occasions (one in Western Australia, date not identified and one in Victoria in 2015) she was disconnected from telephone hearings due to circumstances outside her control. In the first instance, she describes suffering a panic attack which led to her terminating the call. In the second, she describes collapsing due to a severe infection, after which the court disconnected the call. The Practitioner also makes mention of medical treatment for depression, anxiety and memory loss, and states that she considers every court case to be a serious matter.

62. The Tribunal finds that there was, albeit late, an adequate response provided by the Practitioner to part of the EFN Notice, namely subparagraphs [5.2], [5.4] and a partial, but still inadequate, response to [5.1].

63. The failure to comply with the Notices is a serious matter carrying a maximum penalty of $50,000 or imprisonment for one year.

64. The Tribunal is prepared to proceed on the basis that in this case the Practitioner attempted to comply with her obligation to respond to the Notices, and that those attempts, though unsuccessful, were genuine. This makes her conduct less egregious than that of a practitioner who simply ignores a notice and fails to respond at all, such as in *Re Dorrian* LPDT (15 April 2020) and *Legal Services Commissioner v Beatty* [2019] QCAT 45.

65. Our view is that the Practitioner's failure to adequately respond is attributable primarily to a lack of competence, aggravated by her emotional state following an acrimonious relationship breakdown involving allegations of family violence and personal bankruptcy.

It is not necessary to have regard to any medical or psychological evidence to conclude that the Practitioner's emotional state throughout the course of the Commissioner's investigation, and these proceedings, featured high levels of stress, anger, bitterness and a belief that she a victim of harassment, injustice and persecution. She considers she has been unfairly singled out for disciplinary action. This does not excuse the failure to comply with the Notices, but does give it context. The Practitioner's personal circumstances at the time of the impugned conduct (25 March 2017 and following) are relevant to its characterisation under either s68 or s69 of the Act.

66. We take into account that we have found that the Practitioner did provide responses which we consider adequate to some parts of the Notices, on 25 May 2017 by email and 13 October 2017 in the Practitioner's Letter.

67. The Tribunal by majority determines that the Practitioner's failure to adequately respond to the Notices within time constitutes two instances of unsatisfactory professional conduct within the meaning of s68 in that her attempts to respond fell short of the standard of competence and diligence expected of a reasonably competent legal practitioner.

Conduct of the Practitioner before the Tribunal

68. The attitude and conduct of the Practitioner before the Tribunal, the Commissioner submitted, are sufficient to raise the question as to her fitness to practise the law, regardless of whether the two Counts in the charge are made out.

69. After careful consideration, the Tribunal has determined:

69.1. First, that it is appropriate to take into account the conduct of the Practitioner in these proceedings, noting the nature of the inquiry, the Tribunal's freedom under LPDT Rule 11 to inform itself in such manner as it sees fit and the ultimate object of disciplinary proceedings, namely protection of the public;

69.2. Secondly, that for the reasons outlined below the manner in which the Practitioner has conducted herself before the Tribunal falls well short of the standard expected of a reasonably competent and diligent solicitor, even making allowances for her not having been in active practise for some years;

69.3. Were the Practitioner to return to practise as a solicitor in this jurisdiction or elsewhere, based on what we observed in these proceedings, there is a danger that members of the public who became clients of the Practitioner in a litigious

matter would be harmed by her inability to competently and properly analyse, prepare for and present their case. The Tribunal's concerns in this regard are sufficient to justify a finding that the Practitioner is not a fit and proper person to practise the profession of the law.

70. One feature of the Practitioner's behaviour which was most concerning was her refusal to accept the Tribunal's ruling as to its jurisdiction. She continually, and repeatedly raised this objection long after the reasons for that ruling were published and the time for her to appeal had passed. It was evident that the Practitioner either had no understanding of, or alternatively no respect for, the finality of the Tribunal's ruling (either of which is troubling). The Practitioner wasted considerable time by repeatedly raising the jurisdictional issue in her submissions, email correspondence and in telephone hearings.

71. Following on from the refusal of her application for summary dismissal, and rather than appeal, the Practitioner made various allegations (in her amended Statement of Contentions of 29 April 2021) to the effect that it was unlawful for these proceedings to continue and that the Tribunal members and Commissioner were engaging in misconduct, maladministration and, if reasons were published, defamation. The Commissioner in his capacity as the Applicant in these proceedings was described by the Practitioner as 'negligent or incompetent' and accused of 'extreme prejudice', being 'either under resourced or incompetent or vindictive', engaging in 'unacceptable serious misconduct or lack of due diligence', a failure 'to act diligently' and 'has acted in a vexatious or frivolous manner such as to be an abuse of process'. She wrote that the Applicant Commissioner 'has lacked impartiality, and has harassed, annoyed and sought to deny the Respondent [Practitioner] her legal rights of protection from such ongoing harassment and undermining conduct towards her by the Applicant'. Needless to say, there is no proper basis for any of these serious allegations.

72. The Tribunal records with concern the fact that the Practitioner spent so much of her time focused on what she perceived to be unfair and prejudicial treatment by the Commissioner, and also raising totally unrelated matters such as the disciplinary investigations relating to Mr Viscariello and Mr McGee, that she failed to meaningfully engage in the very narrow and discrete issues before us, namely whether she had adequately complied with the two statutory notices the subject of the Charge. We infer, and find, that the Practitioner was not able to properly identify and address the issues in dispute. This finding is bolstered by

the Practitioner's confusion about why the whole[2] of the complaints against her had not been referred to disciplinary bodies interstate. She appeared unable to grasp that the matter before the Tribunal was not the substance of the TMG Complaint or EFN Complaint themselves, but rather her alleged failure to comply with the Notices, clearly and exclusively a South Australian issue concerning her cooperation with the regulator in this jurisdiction.

73. The Tribunal also finds that the written submissions made by the Practitioner throughout these proceedings were prolix, repetitive, in large parts confused, misconceived and irrelevant. The Practitioner was unable or unwilling to assist the Tribunal to understand her defence and showed no understanding of the proper way to go about gathering and presenting evidence in support of her position, at times appearing to believe this was the Commissioner's responsibility.

74. Whilst the Practitioner is entitled to put the Commissioner to strict proof, and that is expected in relation to the substantive issues in dispute, it is relevant in assessing her conduct that she failed to file a Response to the Charge. The only matter she was willing to formerly and expressly admit in the hearing was her date of birth. There were other background and mechanical facts (such as her involvement in the family law proceedings which gave rise to the two complaints against her, her date of admission, the issue and service of notices upon her) which a reasonable solicitor, acting with a view to the efficient conduct of proceedings would have identified as uncontentious. It is expected that practitioners appearing before the Tribunal will make appropriate admissions to facts which could never seriously be in doubt.

75. When the Commissioner put forward a letter dated 12 May 2021 from the Law Society of South Australia detailing the date on which the Practitioner was admitted and last held a practising certificate in this State (which was necessary because these facts had not been admitted), the Practitioner responded in an email dated 12 May 2021 at 7:14pm as follows:

> *"What possible relevance this LSSA letter has on the hearing is nil but what it shows is that the LPCC in SA are looking under every stone to try and hit me with, Again, that is not being a model litigant nor objective, impartial and fair-minded. It shows underlying vindictiveness ie malice towards me, which again is what I have stated throughout…."*

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[2] Some matters relating to the Practitioner's conduct in Western Australia were referred to that jurisdiction.

76. The correspondence demonstrates that the Practitioner had no insight into the fact that the position she adopted in the proceedings (by not making admissions as to uncontroversial facts) required the production of the Society's letter. It also demonstrates how far removed from reality her allegations of improper conduct were when all the Commissioner sought to do was establish the basic facts recorded in Recitals B, C and D of the Charge.

77. In an email dated 24 May 2021 from the Practitioner to the solicitor for the Commissioner, and copied to the Tribunal's Secretary, she accused the Commissioner of 'being dishonest on more than one occasion' in the course of proceedings before the Supreme Court involving Mr Viscariello. In that same email she stated that in her opinion the Commissioner had engaged in 'corrupt behaviour' and acted in circumstances where he had a conflict of interest.

78. At the hearing on 25 May 2021, counsel for the Commissioner invited the practitioner to withdraw her allegation of dishonesty, noting the gravity of accusing the Commissioner (or indeed any practitioner) of misleading the Court. The Practitioner did not take up that invitation stating that she would look into the matter further and consider her position. There was no finding that the Commissioner was dishonest in giving his evidence. That is discernible from the reasons for judgment in *Viscariello v Legal Profession Conduct Commissioner* (2015) SASC 132 which are publicly available online. It is not clear whether the Practitioner ever did investigate the accuracy of her statements, however she has not ever withdrawn the allegations before the Tribunal., nor did she make any later attempt to substantiate her allegation.

79. We find that the allegations made by the Practitioner as to improper conduct and dishonesty by the Commissioner were unfounded, and therefore it was unprofessional of her to make them.

80. The Practitioner also accused the Commissioner's solicitors and counsel of treating her unfairly and in an overly adversarial manner. The Tribunal's observation and finding is that those representing the Commissioner were overwhelmingly patient and unfailingly courteous in their dealings with the Practitioner. There is no substance to her criticisms.

81. The final matter we take into account is that even after the Tribunal reserved its decision on the inquiry, the Practitioner continued, without leave and without the consent of the

Commissioner's representatives, to engage in unsolicited communications with us via email to the Tribunal's Secretary. This was improper.

82. The Tribunal places no weight on the Practitioner's failure to comply with its timetable directions. Whilst it is important that all parties endeavour to comply, and seek an extension of time supported by evidence when they cannot, we are conscious that practitioners coming before the Tribunal are often under enormous stress. In the Practitioner's particular circumstances, we take into account that she was in receipt of worker's compensation during the course of the proceedings and juggling rehabilitation from shoulder surgery with a return to part-time work. She advised that she did not have a computer at home and therefore relied on email from her mobile telephone as her principal means of producing documents, and at times COVID-19 restrictions would have prevented her from accessing the library or other public places offering IT facilities.

83. The Tribunal further accepts that some of the orders with which the Practitioner did not comply were optional, for example she was not obliged to provide copies of her documents for tender if she decided not to lead evidence, though it would have been courteous to advise the Commissioner's solicitors of her position.

84. The Practitioner's failure to appear on 29 September 2021, after having sought and obtained an adjournment at the commencement of the hearing in May 2021 is a matter which can be dealt with by way of costs. It is unfortunate that unnecessary delay was caused in part by the Practitioner and in part due to COVID-19 restrictions, however the Practitioner's eventual choice not to go into evidence is not something which (by itself, if considered in isolation from our other serious concerns) warrants a finding that she has departed so dramatically from the standard of conduct expected that her fitness to practise is called into question.

85. The matters in paragraphs 70 - 81 do raise that question. We are not confident that if the Practitioner regained her practising certificate, that she could properly and competently represent clients based on her conduct in these proceedings. Our ultimate duty is protection of members of the public and we cannot overlook the way in which the Practitioner has behaved during the course of the proceedings before us.

Conclusion

86. Our decision is that the Practitioner twice engaged in unsatisfactory professional conduct on or about 25 March 2017 by failing to adequately respond to the TMG Notice and the EFN Notice each having been issued under Schedule 4, Part 2, clause 4(1) of the Act.

87. Were the outcome of the Charge our only consideration, the appropriate disciplinary outcome (likely a fine) would be within the Tribunal's power to order.

88. However, in light of our finding that were the Practitioner to practise the profession of the law she would pose a danger to members of the public, the Tribunal by majority recommends that disciplinary proceedings be issued in the Supreme Court against the Practitioner pursuant to s 82(6)(v) of the Act. It is our view that the Practitioner is not a fit and proper person to practise the law. We have reached this view independently of the Charge, such that even if Member Gillam's characterisation of the Notices and the Practitioner's response is correct, we would remain of the view that disciplinary proceedings should be issued in the Supreme Court.

89. The Tribunal is confined in the scope of our inquiry to the subject matter of the charge and the way in which the Practitioner conducted herself in these proceedings specifically. The Supreme Court, both in the exercise of its inherent jurisdiction and under s89 of the Act is not so confined. In particular, pursuant to s89(5) of the Act which ousts the Rule in *Hollington*, the Court may consider not only the findings of this Tribunal, but also the following non-exhaustive list of examples of instances where Courts have made adverse findings about the Practitioner's conduct of litigation:

    89.1. Judge Kelly of the Federal Circuit Court of Australia in *McCardle & McCardle*[3] [2016] FCCA 2805 in particular at [28], [35]-[36], [57] and [61] – [69];

    89.2. Justice Strickland of the Family Court of Australia in *McCardle & McCardle (No.5)* [2015] FamCA 156 in particular at [14] – [18], [20], [24], [37], [39] and *McCardle & McCardle (No.6) (Indemnity Costs)* [2015] FamCA 157 at [12] – [14];

    89.3. Justices May, Ainslie-Wallace and Aldridge in *McCardle & McCardle* [2014] FamCAFC 163 at [108] – [110], [113], [121] – [122];

    89.4. Justice Strickland in *ex tempore* reasons delivered 31 July 2013 in *McCardle & McCardle* at [8], [14], [21], [30] and [36];[4]

[3] Noting that the judgments in the Federal Circuit Court were published under the pseudonym *Mealon & Mealon* and in the Family Court under *Medlon & Medlon.*

[4] Included in MFI C1 at pp.172 – 184 and published 7 August 2013.

89.5. Judge Fenbury of the Western Australian District Court in *McCardle v McCardle* [2013] WADC 182 at [7];

89.6. Justices Bell and Gageler of the High Court of Australia in *McCardle v McCardle* [2014] HCASL 213 at [4].

90. Whilst in all of these examples, and before the Tribunal, the Practitioner was acting for herself and not a lay client, it will be for the Supreme Court to determine whether this is a relevant distinction. As Justice Debelle stated in *Legal Practitioner Conduct Board v Boylen* [2003] SASC 241 at [52], citing *The Southern Law Society v Westbrook* (1910) 10 CLR 609 at 619:

> *"If a solicitor is permitted to remain on the roll, the Court is holding out to the public that* [they are] *a fit and proper person to be entrusted by the public with those difficult and delicate duties and that absolute confidence which the public must repose in persons who fulfil the duties of solicitors."*

91. The Practitioner's assurances that she is semi-retired and working in an industry unrelated to the law are not a sufficient safeguard to protect the public interest.

92. If the Practitioner has no intention of ever returning to the legal profession in this State (which she told the Tribunal on several occasions) and desires that she no longer be subject to the Act, then on the assumption that the Commissioner will institute proceedings, she might consider consenting to an order being made by the Supreme Court removing her name from the Roll.

MEMBER GILLAM:

93. The Practitioner is charged with failing to respond, or failing to respond adequately, to two notices issued by the Commissioner pursuant to subsection 4(1) of Schedule 4 to the *Legal Practitioners Act 1981* (SA) (**LPA**).

94. Those notices were issued on 1 March 2017. I will refer to the notices respectively as the **EFN Notice**, and the **TMG Notice**, and collectively as the **Notices**. The Notices referred to complaints which were made in March 2015. Those complaints alleged conduct by the Practitioner as a self-represented litigant in a number of cases between the Practitioner and her former husband in the years 2011 to 2015. The

Notices each specified that the Practitioner was required to respond in writing by 4.00 pm on 24 March 2017.

95. By letter to the Commissioner dated 23 March 2017, the Practitioner 'responded' or 'reacted' to the Notices. By letter to the Practitioner dated 1 May 2017 the Commissioner asserted that the Practitioner had 'failed to respond to the specific questions addressed to [the Practitioner] in the Notice', and that she had 'not provided any, or any adequate response'.[5]

96. This Tribunal must determine, with respect to each of the Notices, whether the Commissioner was empowered to issue it, and if so, whether the Practitioner has failed to comply with it.

Jurisdiction revisited

97. Before proceeding, it should first be noted that this Tribunal has previously considered the question of whether it has jurisdiction to hear this matter,[6] concluding that it does. That conclusion was reached based on this Tribunal's opinion that the threshold question – whether the Legal Practitioners Disciplinary Tribunal (**LPDT**) is vested with judicial power – should be answered in the negative: '[t]he nature of the power exercised by the Tribunal is administrative'[7] which in turn meant that the federal diversity jurisdiction was not enlivened, and that the inquiry could proceed.[8] On 4 May 2022 the High Court delivered its decision in *Citta Hobart Pty Ltd & Anor v David Cawthorn*[9] (***Citta***).

98. At paragraph 26 of *Citta* the majority said:

> Taking its nature from the nature of the power to which it is incidental, that jurisdiction of a State tribunal that is not a court of the State within the meaning of s 77(ii) and s 77(iii) of the Constitution is itself a conferral of State judicial power. Accordingly, the State tribunal exercises judicial power when it decides that a claim or complaint in respect of which its jurisdiction is sought to be invoked is or is not a matter of a description referred to in s 75 or s 76 of the Constitution.

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[5] It should be noted that the Notices did not contain any 'specific questions' or any question at all. And on the facts, the Practitioner did respond to the Notices. It is the adequacy of that response which the Commissioner has put in issue.

[6] *In the matter of Roxanne Marie McCardle* LPDT, Action No. 1 of 2020, 12 January 2021.

[7] *McCardle (No 1)* at para. 20.

[8] *McCardle (No 1)* at para. 16.

[9] *Citta Hobart Pty Ltd & Anor v David Cawthorn* [2022] HCA 16.

99. I interpret that paragraph in the context of the half dozen or so paragraphs that precede it, and consider that the comments of the majority are directed only to those State tribunals which, when determining their own jurisdiction, are exercising judicial power. As we have already determined, that is not the situation with respect to this Tribunal.

100. Further, *Citta* also contained an analysis which, if applied to the legislative provisions establishing this Tribunal, might result in a determination that the South Australian legislature has bestowed judicial power on the LPDT.

101. Although the decision in *Citta* has given me pause to consider whether our earlier decision is correct, on balance I consider that it is, notwithstanding that the position is not clear cut. If, contrary to our earlier decision, this Tribunal is vested with judicial power, then I would hold that we do not have jurisdiction to hear this matter, or even to determine whether we have jurisdiction to hear this matter. The Practitioner raised the question of jurisdiction at the outset; the question was raised fairly and without being in any way colourable; and the question is arguable.

The relevant legislation

102. Section 4 of Schedule 4 of the LPA states:

> 4—Requirements that may be imposed for investigations under Part 6
>
> (1) For the purpose of carrying out a complaint investigation in relation to a legal practitioner or former legal practitioner, an investigator may, by notice served on the practitioner or former practitioner, require the practitioner or former practitioner to do any 1 or more of the following:
>
> (a) to produce, at or before a specified time and at a specified place, any specified document (or a copy of the document);
>
> (b) to provide written information on or before a specified date (verified by statutory declaration if the requirement so states);
>
> (c) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.
>
> (2) For the purpose of carrying out a complaint investigation in relation to a legal practitioner or former legal practitioner, the investigator may, on production of evidence of his or her appointment, require an associate or former associate of a law practice of which the practitioner or former practitioner is or was an associate or any other person (including, for example, an ADI, auditor or liquidator but not including the practitioner) who has or has had control of documents relating to the affairs of the practitioner or former practitioner to give the investigator either or both of the following:
>
> (a) access to the documents relating to the affairs of the practitioner or former practitioner the investigator reasonably requires;

(b) information relating to the affairs of the practitioner or former practitioner the investigator reasonably requires (verified by statutory declaration if the requirement so states).

(3) A person who is subject to a requirement under subclause (1) or (2) must comply with the requirement.

Maximum penalty: $50 000 or imprisonment for 1 year.

(4) A requirement imposed on a person under this clause is to be notified in writing to the person and is to specify a reasonable time for compliance.

The EFN Notice

103. The EFN Notice states:

> For the purpose of carrying out a complaint investigation in relation to your conduct, you are required:
>
> (a) To provide written information as specified in the attached Schedule;
>
> (b) To assist in, or cooperate with, the investigation of the complaint as specified in the attached Schedule
>
> by 4.00 pm on 24 March 2017.

104. The schedule attached to the EFN Notice[10] contain nine numbered paragraphs. Paragraphs numbered 1 – 8 are contained under the heading 'DESCRIPTION OF WRITTEN INFORMATION REQUIRED'. None of those eight paragraphs contain, either individually or collectively, a description of the "written information required".

105. Paragraph 9 is contained under heading 'SPECIFIED MANNER OF ASSISTANCE AND CO-OPERATION REQUIRED' and it states:

> You are required to respond to all of the concerns referred to in paragraphs 5 and 6 in a written format by 4.00pm on Friday 24 March 2017.

The TMG Notice

106. The TMG Notice[11] states:

> For the purpose of carrying out a complaint investigation in relation to your conduct, you are required:
>
> (a) To provide written information as specified in the attached Schedule;
>
> (b) To assist in, or cooperate with, the investigation of the complaint as specified in the attached Schedule
>
> by 4.00 pm on 24 March 2017.

[10] Book of Documents (**BOD**) at 672.

[11] BOD at 672.

107. The schedule attached to the TMG Notice contain nine numbered paragraphs, similar to, but not identical with, those in the schedule to the EFN Notice.

The Notices

108. The Notices invoke (on their faces) both paragraph (b) and paragraph (c). Those paragraphs operate individually and collectively such that should part of a Notice not be within power pursuant to one paragraph, it might still be within power pursuant to the other.

109. Paragraph (a) refers relevantly to *specified documents*, paragraph (b) refers relevantly to *written information*, and paragraph (c) refers relevantly to *a specified manner*. Although paragraph (b) does not require that the Commissioner must *specify* in the notice what written information a practitioner is required to provide, it is incumbent upon the Commissioner to do so, for how else would a practitioner know what written information to provide? And if a practitioner does not know what information to provide the notice would be oppressive. Each Notice stated that the written information required by the Commissioner was specified in its Schedule; and each specified that the assistance or co-operation required of the Practitioner was specified in its Schedule.

What is information?

110. The word 'information' is not defined in the LPA; nor is defined in the *Legislation Interpretation Act 2021* (SA). It must be given its ordinary meaning, considered in the context of the LPA. The OED (2nd edn.) provides a plethora of meanings. That which appears most relevant to the matter at hand is: 'Knowledge communicated concerning some particular fact, subject, or event; that of which one is apprised or told; intelligence, news.' Merriam Webster Dictionary refers to 'the communication or reception of knowledge or intelligence' and 'knowledge obtained from investigation study, or instruction'.

111. A broad meaning of 'information' might be distilled as follows: 'the communication or reception of knowledge, intelligence, or data'. The presence of a requirement of communication or reception is notable, and to be expected: Information is that which informs, and something cannot inform if it is not possessed or known. This suggests that in the context of the LPA a wider definition may be appropriate, such as: 'Knowledge, intelligence, or data which if communicated would inform.' I would add the further rider, that in order to be information, the thing (putative information) must concern a matter of fact, even though the information might itself be opinion or even false.

112. Support for a definition such as this can be found in the judgment of the majority in *Kizon v The Queen* [2012] HCA 49:

> [29] The word "information" in its ordinary usage is not to be understood as confined to knowledge communicated which constitutes or concerns objective truths. Knowledge can be conveyed about a subject-matter (whether "fact, subject, or event") and properly be described as "information" whether the knowledge conveyed is wholly accurate, wholly false or a mixture of the two. The person conveying that knowledge may know or believe that what is conveyed is accurate or false, whether in whole or in part, and yet, regardless of that person's state of mind, what is conveyed is properly described as "information".
>
> [30] Both appellants relied heavily upon dictionary definitions of "information", but these definitions do not establish the appellants' central proposition about ordinary usage. It will be recalled that one definition of "information" is "[k]nowledge communicated concerning some particular fact, subject, or event". Both appellants fixed on the word "fact", which may indeed imply truthfulness. But no distinction between truth and falsity is implied by the other elements of the definition. In particular, no distinction of that kind is to be made in respect of "information" that is "[k]nowledge communicated concerning some particular … subject".

What is written information?

113. To the extent that the Notices rely on paragraph (b) of subsection 4(1), it is necessary to consider the meaning of 'written information' in the context of both s.4 and the LPA as a whole.

114. I take it as axiomatic that 'written information' is the subset of all information, the subset being information which (a) exists, and (b) is in written form. The ontological status of the 'information' is at once trivial (in the tautological sense that if it does not exist it is not information), and central to any construction of the provision in that existence, other than that which is eternal, necessarily is temporally contingent.

115. Written information cannot be provided unless (or until such time as) it exists, and any construction of the subsection must be consistent with this limitation. That is because if compliance with a demand is not possible, then the demand is oppressive. A fortiori where, as here, the penalty for not complying with the demand may include imprisonment and/or a substantial fine.

What information did the Commissioner require?

116. None of the paragraphs appearing under the chapeau 'DESCRIPTION OF WRITTEN INFORMATION REQUIRED' either on their own, or in combination with any of the others, identify any information that the Commissioner required the Practitioner to provide pursuant to the Notices. Rather than identifying any information, the Commissioner lists a number of acts (of the Commissioner and EFN with respect to

the EFN Notice, and of the Commissioner and TMG with respect to the TMG Notice) and omissions (of the Practitioner). The 'information' in a written form which the Commissioner required the Practitioner to provide was not stated or identified in the Notices (paragraphs 1 – 8 inclusive of the Notices). In particular, it was not stated in the Notices to be the Practitioner's written response to the 'concerns' referred to in the Notices. Therefore, the Commissioner failed to specify any written information that he required, and the Practitioner can scarcely be criticized for failing to provide that which was not specified in the Notices.

117. Let's assume, however, that paragraph (b) and (c) are overlapping and / or complementary powers, and that the requirement set out in paragraph 9 of the Notices relies for its force on either or both (b) and (c). Given the policy considerations behind subsection 4(1) (which include protection of the public) such a broad interpretation is appropriate. Thus, that which the Commissioner required from the Practitioner was 'written information', 'assistance and co-operation', or both. And that which fell to be provided, or done, by the Practitioner was 'to respond to all of the concerns referred to … in a written format by 4.00 pm on Friday 24 March 2017.'

118. As a matter of plain logic, the Practitioner's response to the Notices cannot have existed at any point in time prior to when the Practitioner became aware of the Notices. Similarly, the 'information' sought did not, as at the date of the Notices, exist, either in writing or at all.

119. This 'matter of plain logic' might be criticised on the basis that it contains an elision: It conflates a 'response to the Notice' with a 'response to the concerns referred to in the Notice'. The Commissioner had previously raised the 'concerns' with the Practitioner and she was therefore aware of them before receiving the Notices. If it was the case that the Practitioner had, after becoming aware of those 'concerns' as earlier raised, but before becoming aware of the Notices, formed a response (mental or emotional states) to those concerns, then it might loosely be argued that such response (to the concerns) existed prior to the Practitioner becoming aware of the Notices notwithstanding that the response had not been either (a) reduced to writing; or (b) conveyed to the Commissioner.

120. But that criticism is flawed: Firstly, there is no evidence before the Tribunal that this is what in fact happened. Nor has it been suggested by counsel for the Commissioner by way of submission that this is what happened. It is not the role of the Tribunal to speculate. If it were, we might speculate that the Practitioner's response at the time of becoming aware of the concerns was a cornucopia of emotions - anger, frustration,

suspicion, denial, paranoia – all things evident in the actual 'written response' that was ultimately provided by the Practitioner to the Commissioner on 23 March 2017 – but that her 'response' contained nothing in the nature of 'information'. Secondly, the Notice did not, as a matter of grammar, require the Practitioner to provide her response to the 'concerns', it asked her to respond to them. The Notice implicitly disclaimed (as it must) any pre-existing response of the Practitioner to the 'concerns'.

121. The structure of the request, and the information sought in this matter might be contrasted with the structure of the request, and the information sought, in the matter of *Council of the Law Society of New South Wales v Autore*[12] (**Autore**). In that matter the Civil and Administrative Tribunal considered the conduct of a practitioner in relation to a notice issued under section 371 of the *Legal Profession Uniform Law Application Act 2014* (NSW). The relevant notice contained questions which were framed to elicit, and required the provision of, information which did, at some level, exist prior to and independent of the notice, and prior to and independent of any complaint. For example:

> For each of the following tax invoices issued by you …which signed authority…relates to each tax invoice…?...On what date(s) did you 'speak' with Lorenzo at his office and where did the conversations occur?...Who was present during the meeting(s)?...On what date did you commence preparation of the itemised bills?

122. And so on. Compare with 'you are required to respond to all the concerns … in a written format.'

123. I am satisfied that the 'information' sought by the Commissioner was the Practitioner's 'response' to various 'concerns', and that the Practitioner's response did not exist prior to the Notices coming to her attention. It follows that in order to comply with the Notices the Practitioner was required to create the required information (her response to the concerns); and that if the Commissioner does not have the power to require the Practitioner to create written information, the Notices are ultra vires.

Can the Commissioner require a Practitioner to create a document?

124. Paragraph 4(1)(a) of Schedule 4 of the LPA is expressed to relate to 'specified documents'. The 'specified documents' are things which must, perforce, exist, else how can they be specified? If s.4(1)(b) were limited to 'written information' that already existed at the time of a notice, then it would be referring to documents and, to the extent that those documents are capable of being specified, the subsection would have no work to do. It follows, then, that that the phrase 'written information' in

[12] *Law Society of New South Wales v Autore* [2019] NSWCATOD 10.

4(1)(b) is sufficiently broad to empower the Commissioner to require that a Practitioner create or bring into existence a document in the form of 'written information'.

Can the Commissioner require a Practitioner to create information?

125. The conclusion that the Commissioner can require a practitioner to create a document containing information is not of itself sufficient to establish that the Commissioner can require a practitioner to create the information to be contained in the document. Nor does it address the question of whether there is a limitation on the type, character, or extent, of information the Commissioner can require be created. The only explicit limitation is contained in the chapeau to section 4 of the LPA, and it is purpose related: – the written information must be sought for the purpose of carrying out a complaint investigation. 'Complaint investigation' is defined in s.1 of Schedule 4 to mean 'an investigation of a complaint under Part 6 and includes an investigation made into the conduct of a legal practitioner or former legal practitioner on the Commissioner's own initiative…'. In the instant case the Commissioner was conducting an investigation into the conduct of the Practitioner pursuant to s.77B, which, being in Part 6, means that the investigation was a 'complaint investigation'.

126. The Notices were each issued during the course of an investigation into the complaints and were, the Commissioner says, issued for the purpose of carrying out that investigation. Yet it is not clear how a 'response' of the Practitioner to the 'concerns' (in the sense of information created by the Practitioner after receipt of the Notices) might be relevant to the investigation. Put another way, how could information which is created by the Practitioner so long after the complaint under investigation (which was 2 years earlier) be relevant to an investigation into the conduct complained of (which was 4 years earlier)? How might it assist the Commissioner? It might be the case that a notice requiring the creation of information which is not relevant to the investigation of a complaint is, to that extent, beyond power.

127. That position has some attraction, and the Notices in this case come very close to that flaw. All of the paragraphs to which the Practitioner was asked to respond, bar paragraphs 4.1 and 4.2, consist of undisputed facts: these facts all existed on the court records and in the judgments of various cases to which the Practitioner was a party. Paragraphs 4.1 and 4.2 of the TMG Notice lacked particularity, but as assertions of fact appear well supported by the same various judgments, and most were nicely summarised in the decision of Judge Kelly in the matter of ADC 491 of

2010 delivered on 1 November 2016 (and which was referenced at paragraph 6 of the EFN Notice). For present purposes, however, I am prepared to hold that the Commissioner is able to require a practitioner to create information within the limitations set out above.

Did the Practitioner respond to the Commissioner? And If the Practitioner did respond to the Commissioner was it 'adequate'?

128. The LPA does not state that a response to a section 4 notice must be 'adequate', and nor did the Notices. I infer that the Tribunal is asked to imply that requirement, or in the alternative, to treat it as analytically contained in with the term 'respond'. Thus, 'respond' becomes 'respond in such way that is adequate for the purpose for which it is sought'. In this case, the purpose for which the Commissioner's requirement that the Practitioner 'respond to all of the concerns' was to assist the Commissioner to carry out a complaint investigation. Therefore, the question of whether the Practitioner did 'respond to all of the concerns' turns on whether that which was provided by the Practitioner assists the Commissioner to carry out the complaint investigation in relation to which the Notices were issued. It should be noted that this argument was not put to the Tribunal. Indeed, no argument or submission as to why 'adequacy' ought to be implied into the requirement to 'respond to all of the concerns' was put to this Tribunal.

129. This argument has its weaknesses. For instance, the content (or class of possible contents) of a response to a notice is constrained by the form and content of the notice itself. If a response does not in fact assist the Commissioner, that may be due just as much to the content of the notice (what it required) as it is due to the content of the response. The response need go no further than what is called for by the notice. Here, the Notices were expressed, somewhat broadly, to simply require the Practitioner to 'respond to all of the concerns' which were referenced by, but not contained in, the Notices. And on the Practitioner's submission, that is what she did. In my opinion it would be unfair to the Practitioner in the context of the Notices in this matter for the Commissioner to be able to make a subjective determination as to whether the Practitioner's response (as provided to the Commissioner) was adequate. It was open to the Commissioner to have framed the Notices with precision, asking specific questions designed to elicit specific information. Had he done so, any argument as to the adequacy of the response would have been a matter

of determining whether the questions were, or were not, answered. For a contrasting exemplar I again refer to *Autore*.[13]

130. In my opinion, the Practitioner did respond in writing to the Notices, and her response was provided before the deadline imposed by the Commissioner.

131. In reaching this conclusion I have also taken into account the following exchange with the counsel for the Commissioner:[14]

Mr McCarthy:	…the Act says you must publish the complaint and the practitioner must have an opportunity to respond to the complaint.
Member Gillam:	She had an opportunity to respond and your case is she didn't. Why is that wrong of her. I mean, there's not much of a response she could make.
Mr McCarthy:	That would have been a response too. They've seen the judgment, rely on the judgment. But our point is that confronted with a notice, even if you were to determine that ultimately the notice wasn't necessary because [there are] public judgement we could have relied upon, she was served a notice. That notice has statutory compliance requirements which she didn't deal with.
Member Gillam:	That being to assist and cooperate with investigation [of a] complaint in a specified manner.
Mr McCarthy:	Correct.
Member Gillam:	How is this furthering the investigation of the complaint? It might be giving her procedural fairness to respond but the [subject matter of the] complaint had already been determined by a court.
Mr McCarthy:	Not completely.
Member Gillam:	It seems to me that the notice is well and truly superfluous.
Mr McCarthy:	The Commissioner has to separately determine whether or not the allegations are scandalous even if a judge thought they were or weren't. The submissions might be nonsensical to Strickland J and others and yes the Commissioner can rely upon that, I'm not trying to walk away from what a judge has determined, but still out of procedural fairness and also going through the requirements of the Act and to close off the investigation properly investigating the matter, this is what the officers of the Commissioner determined was necessary.
Member Gillam:	So you're saying she had to defend herself and she didn't.
Mr McCarthy:	No, all its about not defending herself, all she had to do was to respond adequately.
Chairperson:	If she'd just written back and said 'I have nothing to say beyond what are in the reasons of Judge Kelly or Strickland J', do you accept that

[13] A substantial portion of the notice under consideration is reproduced below in these Reasons for Decision.
[14] T31.9-T33.11.

that would have been an adequate response, if she said 'I have nothing further to say other than what's recorded or I accept those findings'?

Mr McCarthy: Yes, or 'I have nothing further to say'.

132. These contentions of counsel for the Commissioner made during this exchange, are:

133. The Practitioner must have an opportunity to respond to the complaint(s).

134. The Commissioner has to separately determine whether or not the allegations are scandalous even if a judge thought they were or weren't.

135. It would have been an adequate response to the Notices for the Practitioner to write 'I have nothing further to say'.

136. I will address each of these contentions in turn.

The Practitioner must be given an opportunity to respond to the complaints:

137. The Practitioner had, at various stages prior to the issue of the Notices, been given an opportunity to respond to the complaints. See, for instance, paragraphs 1 – 4 and 8 of the EFN Complaint, and paragraphs 1 – 5 and 9 of the TMG Complaint, which reference such opportunities. There was no need, or purpose, in giving the Practitioner a further 'opportunity' to respond to the complaints (concerns). Further, a Section 4 Notice is not the appropriate device for giving a practitioner an opportunity to respond. The 'opportunity' to make submissions is expressed in sections 77D and 77E as a 'right'. Those same sections also contain the mechanisms for the exercise of that right.

138. Ss 77D(1)(c) provides that the Commissioner (italics added):

> Must, before making a determination (other than a determination not to investigate, or to close a complaint) and if he or she has not already done so, give the legal practitioner or former legal practitioner a summary or details of the complaint and a notice informing the practitioner of former practitioner of the right to make submissions.

139. Ss. 77D(2)(b) provides that the Commissioner must (italics added): before making a determination and if he has not already done so, give the legal practitioner or former legal practitioner a summary or details of the reasons for the investigation and a notice informing the practitioner or former practitioner of the *right* to make submissions.

140. Ss 77E(1) provides (italics added):

> A legal practitioner or former legal practitioner who has received a notice of a decision or direction to make an investigation into his or her conduct *may*, within the period specified under section 77D, make submissions to the Commissioner about the subject-matter of the investigation, unless the matter has been closed.

141. These provisions point to further questions: If a practitioner has the right to make submissions, does this mean that a practitioner does not have the obligation to make submissions? It is superficially attractive to contrast rights and obligations as mutually exclusive concepts, and to treat a 'right to do' a thing as carrying with it a 'right not to do' that thing.

142. In my view, a legal practitioner cannot, by the device of a section 4 notice, be compelled to make submissions. By contrast, a legal practitioner can be compelled to provide written information and can be compelled to provide assistance and co-operation to and with the Commissioner. There is a line – and it must be a clear line – between a legal practitioner's right to do something, and a legal practitioner's obligation to do something. The same thing cannot be subject to both the right and the obligation. If the written information sought in the Notices is substantially equivalent in nature to submissions, then either (a) the Practitioner is being required to do that which he or she has a right not to do; or (b) the demand contained in the notice is not authorised by the LPA. In either case, the notice would be ultra vires.

143. But in this matter the Practitioner was not being asked to make submissions. Nor was she being asked to answer any questions. She was simply asked 'to respond in writing' to various concerns. And by her letter to the Commissioner, that is what she did.

<u>The Commissioner could not simply adopt the decisions of the courts in making findings against the Practitioner – he had to 'separately determine' them himself</u>.

144. In my opinion the Commissioner is correct. The principle of res judicata does not apply to bind either the Commissioner or the Practitioner to the judgements. That is because (a) the Commissioner is not a court or judicial tribunal; and (b) there is no identity of parties between the judicially determined disputes and the Commissioner's investigation. It is for similar reasons that the principle of issue estoppel does not prevent the Practitioner from asserting, and attempting to persuade the Commissioner, that he should make findings of fact and conclusions of law different to those found or made in the earlier judicially determined disputes. Although those earlier decisions contain information which is relevant to the Commissioner's considerations, and in many respects, information which is highly persuasive, that information falls short of being conclusively determinative of the complaints. It was open to the Commissioner to make findings which were in conflict with the decisions of the courts in the earlier proceedings. On the other hand, it was also open, in the circumstances of this case, to adopt those judgments and make findings consistent

with them. He did not do so, and this Tribunal is not asked to make any findings with respect to the Practitioner's conduct occurring at any time prior to the issue of the Notices.

It would have been an adequate response to the Notices to state 'I have nothing further to say':

145. In my opinion the Commissioner is correct. In the circumstances of this matter – but not necessarily all matters - such a response would have been adequate. The Commissioner would, at that point, have been within his power reasonably exercised to have made a determination on the information before him, and without seeking or gathering any further information.

146. That being the case, it is illogical to assert that saying *something* (which the Practitioner did), rather than simply saying 'I have nothing further to say', operates to turn a response from one which is adequate, into one which was not.

The case law

147. Counsel for the Commissioner has drawn the attention to the Tribunal to a number of occasions on which complaints comprising, at least in part, the failure of a practitioner to comply with a Schedule 4 Notice (or equivalent) have been upheld.

148. In *Dorrian* (4 & 6 of 2019) three of the charges against the practitioner comprised of failures to comply with Schedule 4 notices.

149. The first of those notices, dated 26 November 2018, required the practitioner to produce documents to the Commissioner, being (a) the practitioner's file; and (b) the practitioner's response to a letter to him from the Commissioner's office dated 12 September 2018.

150. The second of those notices, dated 14 January 2019, required the practitioner to produce documents.

151. The third of those notices, dated 25 January 2019 required the practitioner to (a) to produce documents described (generally) as his file; and (b) to provide written information in the nature of his response to allegations of poor communication and delay identified in the complaint, and in particular his explanation for certain delays that were specified in the notice.

152. I am unable to find any guidance in the facts of that case or in the reasons for decision published by that Tribunal that is of any assistance to this Tribunal in the instant case. Only one part of one of the three notices required the practitioner to provide written

information, and the published Reasons for Decision do not contain any consideration as to whether the relevant notice, or the relevant part of the relevant notice, was authorised by s. 4(1)(b) of Schedule 4.

153. In *Legal Services Commissioner v Michelle Rosena Beatty* [2019] QCAT 45 a complaint was brought against a practitioner who failed on four occasions to respond to a written notice issued under s 443(3) of the *Legal Profession Act 2007* (Qld). That section is functionally similar to, but lexically different from, s. 4 of Schedule 4 of the *Legal Practitioners Act* (SA) and provides:

> **443 Powers for investigations**
>
> (1) The entity carrying out an investigation as mentioned in section 435 or 436 may, for the investigation—
>
> (a) require an Australian legal practitioner who is the subject of the investigation—
>
> (i) to give the entity, in writing or personally, within a stated reasonable time a full explanation of the matter being investigated; or
>
> (ii) to appear before the entity at a stated reasonable time and place; or
>
> (iii) to produce to the entity within a stated reasonable time any document in the practitioner's custody, possession or control that the practitioner is entitled at law to produce; or…

154. Whether 'respond to all of the concerns referred to' is correlative with 'a full explanation of the matter being investigated' is doubtful. The case is of no assistance to the Tribunal with respect to the validity of the Schedule 4 Notices and provides only limited assistance as to the penalty that ought to be imposed if (a) the Schedule 4 Notices are found to be valid and within power; and (b) the practitioner has failed to comply with them.

155. The Tribunal's attention was also drawn to the matter of *Hill* (No 12 of 2011 in the Legal Practitioners Disciplinary Tribunal). That matter concerned the failure of a practitioner to comply with notices issued (according to the reported decision) 'pursuant to sub-sections 76(4)(a) [sic] and 76(3)(a) of the *Legal Practitioners Act 1981* (SA)'. It is evident, when considering s. 76 of the LPA as it then was, that the reference in the judgement ought to be to s. 76(4a).

156. Subsection 76(3)(a) states:

> (3) For the purposes of an investigation the Board, or a person authorised by the Board to exercise the powers conferred by this subsection, may—
>
> (a) by notice in writing, require specified documents, or documents of a specified class, in the custody or control of a prescribed person to be produced at a time and place specified in the notice; and

(b) at any time during ordinary business hours, inspect any documents in the custody or control of a prescribed person; and

(c) seize or make notes or copies of any documents produced in accordance with this subsection, or take extracts from them.

157. Subsection (4a) provides:

(4a) The Board may, by notice in writing, require a legal practitioner or former legal practitioner whose conduct is under investigation to make a detailed report to the Board, within the time specified in the notice, in relation to any matters relevant to the investigation.

158. Neither subsection 76(3)(a) or (4)(a) are contained within the present Act. The case is therefore little, if any, relevance to the matter at hand.

159. In *Council of the Law Society of New South Wales v Autore*[15], the Civil and Administrative Tribunal considered the conduct of a practitioner in relation to a notice issued under section 371 of the *Legal Profession Uniform Law Application Act* 2014. The practitioner argued, inter alia, that the applicant was not permitted to make the demands contained in the notice. The relevant section is, helpfully, in nearly identical form to section 4(1) of the LPA, and is reproduced as follows:

371 Requirements—complaint investigations

(1) For the purpose of carrying out a complaint investigation in relation to a lawyer ..., an investigator may, by notice served on the lawyer ..., require the lawyer ... to do any one or more of the following--

(a) to produce, at or before a specified time and at a specified place, any specified document (or a copy of the document);

(b) to provide written information on or before a specified date (verified by statutory declaration if the requirement so states);

(c) to otherwise assist in, or cooperate with, the investigation of the complaint in a specified manner.

160. The relevant parts of the notice are set out in paragraph 11 of the Reasons for Decision as follows:

You are required to provide the following information:

1. By letter dated 28 February 2017, Mr Tom Williams, your legal representative, sent a letter to the Law Society, on instructions from you, which relevantly stated under heading "5 *Absence of authority to withdraw money from the trust account":*

"..Mr Sommadossi's signed authority was not a single blanket authority, but rather individual authorities for the case of individual transfers, and it is difficult to give those

[15] *Council of the Law Society of New South Wales v Autore* [2019] NSWCATOD 10.

authorities any construction other than that they were referable to the transfers which were effected."

(a) For each of the following tax invoices issued by you to Mr Sommadossi (referred to at pages 204 to 210 of the trust report prepared by Mr Ronald Dunlop and dated 24 July 2015 (Trust Report)), please specify which signed authority (located at 213 to 220 of the Trust Report) relates to each tax invoice:

(i) Tax Invoice dated 18 March 2014 in the sum of $46,200

(ii) Tax Invoice dated 10 April 2014 in the sum of $19,800

(iii) Tax Invoice dated 1 May 2014 in the sum of $6,600

(iv) Tax Invoice dated 1 June 2014 in the sum of $6,600

(v) Tax Invoice dated 19 June 2014 in the sum of $77,000

(vi) Tax Invoice dated 1 July 2014 in the sum of $5,500

(vii) Tax Invoice dated 28 July 2014 in the sum of $5,500

(viii) Tax Invoice dated 4 August 2014 in the sum of $5,500

(ix) Tax Invoice dated 25 August 2014 in the sum of $11,000

2. At Pages 18 and 19 of the Trust Report, Mr Ronald Dunlop (Mr Dunlop) has set out his questions and your responses at an interview on 15 April 2015.

(a) Do you agree with the setting out of the questions asked of you by Mr Dunlop ?

(b) If you do not agree, please specify, in words to the effect, what you say was asked by Mr Dunlop.

(c) Do you agree with the responses attributed to you for each of the answers provided at pages 18 and 19 of the Trust Report ?

(d) If you do not agree, please specify, in words to the effect, what you say was said by you to Mr Dunlop in reply to each of his questions.

3. By letter from Mr Williams to the Law Society dated 28 February 2017, he has advised that in relation to complaint 3:

(a) "on a regular basis", you informed Mr Sommadossi of the "level of fees being incurred".

(b) On "each occasion" when Mr Sommadossi attended your office "for the purpose of discussing the amount of the bills, those bills were prepared for his scrutiny. The original bills were there.."

(c) "Clearly the bills were on the file when it was inspected by Mr Dunlop".

For each of the tax invoices issued by you in respect of acting for the Estate of Fabio Larger and the sale of the property located at 54 Bland St, Port Kembla:

(i) On what date(s) did you "speak" with Lorenzo at his office and where did the conversations occur?

(ii) Who was present during the meeting(s)?

(iii) What was said by each party? Please use direct speech in your reply.

(iv) What invoice(s) was/were discussed?

4. On what date did you commence preparation of the itemised bills?

5. If you engaged the services of a costs consultant to prepare the itemised bills, please advise the name of the costs consultant and the date of engagement of the costs consultant.

161. The information was specified by way of some 27 questions (some by way of repetition of a chapeau against a list), and all of them related one way or another to information which existed prior to the date of the notice.

Conclusion as to charges

162. For the reasons set out above, I would find that the Practitioner complied with Notices, and I would dismiss the charges.

Other matters

163. Notwithstanding my conclusion as to the charges, the conduct of the Practitioner during the proceedings has been substantially and consistently below the standard required of a legal practitioner both with respect to competence, and with respect to her ethical duties. Her unsubstantiated and bare allegations against the Commissioner in particularly are abhorrent and must be condemned in the strongest terms.

164. I respectfully adopt paragraphs 68 – 92 of the majority reasoning (save for paragraph 69.3 and 86) and recommend that disciplinary proceedings be issued against the Practitioner in the Supreme Court.

ORDERS:

1. The Tribunal recommends that disciplinary proceedings be issued in the Supreme Court against the Practitioner pursuant to s 82(6)(v) of the Act.
2. The Tribunal will list the matter for argument as to costs, including reserved costs.
3. Leave is granted for the Practitioner to appear at the costs argument by telephone.

DATED the 3rd day of June 2022

K E CLARK SC

C GILLAM

M DAWSON

Annexure 1

[redacted]

NOTICE TO LEGAL PRACTITIONER

Pursuant to Clause 4(1) of Schedule 4 of the *Legal Practitioners Act*, 1981 (as amended)

Date:	**1 March 2017**
Name of practitioner:	**Ms Roxanne McCardle**
Investigation:	**Complaint by Mr Todd Grant** **File No. 201503063X**

Any term used in this Notice that is defined in the *Legal Practitioners Act, 1981* (Act) has the same meaning in this Notice as it has in the Act

For the purpose of carrying out a complaint investigation in relation to your conduct, you are required:

(a) to provide written information as specified in the attached Schedule;

(b) to assist in, or cooperate with, the investigation of the complaint as specified in the attached Schedule

by 4.00pm on 24 March 2017.

Any documents or information required by this Notice must be provided to the Legal Profession Conduct Commissioner at his offices at Level 10, 30 Currie Street, Adelaide SA 5000 unless advised otherwise by the terms of the Schedule to this Notice.

Signed

.....

Greg May
Legal Profession Conduct Commissioner

legal profession conduct commissioner

Level 10, 30 Currie Street, Adelaide SA 5000
GPO Box 230 Adelaide SA 5001
T (08) 8212 7924 or 1800 337 570
F (08) 8231 0747
E lpcc@lpcc.sa.gov.au
www.lpcc.sa.gov.au

TAKE NOTE THAT:

1. Under clause 4(3) of Schedule 4 of the Act, you must comply with the requirements of this Notice. Failure to do so may constitute an offence for which a maximum penalty is prescribed of $50,000 or imprisonment for one year.

2. Under clause 5 of Schedule 4 of the Act:

   2.1. a failure to comply with a Notice is capable of constituting unsatisfactory professional conduct or professional misconduct as defined at sections 68 and 69 of the Act (Clause 5(6)); and

   2.2. the Supreme Court may, on application or on its own initiative, suspend your practising certificate while a failure to comply continues (Clause 5(7)).

3. Clause 4(4) of Schedule 4 of the Act says that this Notice must specify a reasonable time for compliance. The Commissioner considers that the time specified in this Notice is reasonable. If you are unable to comply within the specified time you should contact the Commissioner prior to the time specified to advise of the reason(s) why you are unable to comply. The Commissioner will have regard to any such reason(s) in determining the consequences of any failure to comply.

4. Under clause 5 of Schedule 4 of the Act, the validity of this Notice is not affected, and you are not excused from compliance with the requirements of this Notice, on the ground that:

   4.1. the giving of the information or access to information may tend to incriminate you; or

   4.2. you or your law practice has a lien over a particular document or class of documents.

5. Under section 95C of the Act, if you object to answering a question or to producing a document on the ground of legal professional privilege, the answer or document will not be admissible in civil or criminal proceedings against the person who would, but for that section, have the benefit of the legal professional privilege.

SCHEDULE

DESCRIPTION OF WRITTEN INFORMATION REQUIRED:-

1. Mr Grant has lodged one Complaint against you dated 11 March 2015.

2. This Complaint was provided to you in hard copy and with supporting documents on 31 July 2015.

3. You have not provided a response to Mr Grant's Complaint.

4. By letter dated 27 January 2017 you were formally requested to provide a response to Mr Grant's Complaints, noting specific concerns:

   4.1. That you had during the course of family law and related proceedings filed documents, pleadings and affidavits that were not tailored to the specific issues at bar, and further that these documents were often irrelevant, scandalous and unprofessional.

   4.2. That by lodging documents as described above you failed in your duty to the court as an officer of the Court and abused court processes.

   4.3. That on 20 March 2013 during submissions before Magistrate Fisher on an application to dismiss the restraining order you were ordered to pay costs. Costs were taxed at $16,352.44. Those costs remain outstanding.

   4.4. That on 8 May 2013 in Court before Justice Strickland you alleged that Ms Nelson QC could no longer continue to represent your former husband in the proceedings as she had a conflict of interest. The matter became protracted and Justice Strickland ordered that the matter be adjourned but at the same time made an order for costs. He ordered you to pay legal costs set at $3,700 by 30 July 2013. This remains unpaid.

   4.5. On 1 September 2014 the Full Family Court dismissed appeals you had lodged and ordered that you pay legal costs in the sum $5,000 plus a further $1,247 within 28 days. Those costs remain unpaid.

   4.6. On 6 February 2015 in the Western Australian Magistrates Court you sought an adjournment of the taxing of costs in the restraining order

proceedings. The Registrar refused your application and ordered that you pay legal costs in the sum of $16,352. These costs remain unpaid.

4.7. On 4 March 2015 in a hearing before Judge Kelly you were ordered to pay legal costs in the sum of $13,913 by 10 April 2015. Those costs remain unpaid.

5. You were asked to specifically respond to these concerns in light of the decision of Judge Kelly in the matter of ADC 491 of 2010 delivered on 1 November 2016. You were provided with a copy of the decision.

6. Certain passages from Judge Kelly's decision in ADC 491 of 2010 delivered on 1 November 2016 were brought to your attention and you were invited to provide a response.

7. The passages from that decision that were drawn to your attention are as follows:

7.1. Paragraph 9: His Honour Strickland J on 9 December 2013 ordered you to pay the husband's legal costs of and incidental to paragraph 1 of the application in an appeal filed by you on 5 July 2013, the hearing being on 31 July 2013. It was ordered that such costs be agreed but in default of agreement as taxed on an indemnity basis.

7.2. Paragraph 10: you filed a further appeal in SOA 60 of 2013 in relation to that costs order. Each of these appeals delayed finalisation of your original appeal in relation to an application to dismiss your section 79 application.

7.3. Paragraph 11: the appeals SOA 50 of 2013 and SOA 80 of 2013 were both dismissed. The Court ordered you pay the husband's costs of and incidental to preparing the appeal books and the appeal. The costs of the preparation of the appeal books were fixed at $1,247 and further costs of and incidental to the appeals were fixed in the sum of $5,000.

7.4. Paragraphs 3 and 4: that on 19 June 2014 you filed a further application seeking to set aside the consent property orders pursuant to section 79A of the *Family Law Act*. There were a number of subsequent applications and on 25 January 2013 the Court ordered you to pay the sum of $20,000 towards the husband's legal costs. The order was stayed pending finalisation of the appeal proceedings.

8. You were asked to respond to all of these concerns, especially as these costs all remain outstanding. You have failed to do so

SPECIFIED MANNER OF ASSISTANCE AND CO-OPERATION REQUIRED:-

9. You are required to respond to all of the concerns referred to in paragraph 4 to 7 in a written format by **4:00pm on Friday 24 March 2017**

Annexure 2

[redacted]

NOTICE TO LEGAL PRACTITIONER

Pursuant to Clause 4(1) of Schedule 4 of the *Legal Practitioners Act*, 1981 (as amended)

Date:	**1 March 2017**
Name of practitioner:	**Ms Roxanne McCardle**
Investigation:	**Complaint by Ms Frances Nelson QC** **File No. 201503095X**

Any term used in this Notice that is defined in the *Legal Practitioners Act, 1981* (Act) has the same meaning in this Notice as it has in the Act

For the purpose of carrying out a complaint investigation in relation to your conduct, you are required:

(a) to provide written information as specified in the attached Schedule;

(b) to assist in, or cooperate with, the investigation of the complaint as specified in the attached Schedule

by 4.00pm on 24 March 2017.

Any documents or information required by this Notice must be provided to the Legal Profession Conduct Commissioner at his offices at Level 10, 30 Currie Street, Adelaide SA 5000 unless advised otherwise by the terms of the Schedule to this Notice.

Signed

.....

Greg May
Legal Profession Conduct Commissioner

legal profession conduct commissioner

Level 10, 30 Currie Street, Adelaide SA 5000
GPO Box 230 Adelaide SA 5001
T (08) 8212 7924 or 1800 337 570
F (08) 8231 0747
E lpcc@lpcc.sa.gov.au
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TAKE NOTE THAT:

1. Under clause 4(3) of Schedule 4 of the Act, you must comply with the requirements of this Notice. Failure to do so may constitute an offence for which a maximum penalty is prescribed of $50,000 or imprisonment for one year.

2. Under clause 5 of Schedule 4 of the Act:

   2.1. a failure to comply with a Notice is capable of constituting unsatisfactory professional conduct or professional misconduct as defined at sections 68 and 69 of the Act (Clause 5(6)); and

   2.2. the Supreme Court may, on application or on its own initiative, suspend your practising certificate while a failure to comply continues (Clause 5(7)).

3. Clause 4(4) of Schedule 4 of the Act says that this Notice must specify a reasonable time for compliance. The Commissioner considers that the time specified in this Notice is reasonable. If you are unable to comply within the specified time you should contact the Commissioner prior to the time specified to advise of the reason(s) why you are unable to comply. The Commissioner will have regard to any such reason(s) in determining the consequences of any failure to comply.

4. Under clause 5 of Schedule 4 of the Act, the validity of this Notice is not affected, and you are not excused from compliance with the requirements of this Notice, on the ground that:

   4.1. the giving of the information or access to information may tend to incriminate you; or

   4.2. you or your law practice has a lien over a particular document or class of documents.

5. Under section 95C of the Act, if you object to answering a question or to producing a document on the ground of legal professional privilege, the answer or document will not be admissible in civil or criminal proceedings against the person who would, but for that section, have the benefit of the legal professional privilege.

SCHEDULE

DESCRIPTION OF WRITTEN INFORMATION REQUIRED:-

1. Ms Nelson QC has lodged two Complaints against you dated 16 March 2015 and 14 August 2015.

2. You were provided with a hard copy of the 16 March 2015 Complaint and supporting documents on 31 July 2015.

3. You were provided with a hard copy and electronic version of the 14 August 2015 Complaint and supporting documents on 7 September 2015.

4. You have not provided a response to either of those Complaints.

5. By letter dated 25 January 2017 you were formally requested to provide responses to the following specific concerns that were raised in those Complaints:

   5.1. That you lodged applications that had no chance or possibility of success;

   5.2. That you made scandalous allegations for which you produced no evidence;

   5.3. That your submissions on some occasions were nonsensical and lacked understanding;

   5.4. That you had a cavalier attitude to orders of the court.

6. You were asked to specifically respond to these concerns in light of the decision of Judge Kelly in the matter of ADC 491 of 2010 delivered on 1 November 2016. You were provided with a copy of the decision.

7. You were advised that you were not obliged to respond only to the concerns raised in the letter of 25 January 2017 but that you could respond to any and all of Ms Nelson QC's Complaints.

8. You have failed to respond to the questions we have asked you as a consequence of Ms Nelson QC's Complaints.

SPECIFIED MANNER OF ASSISTANCE AND CO-OPERATION REQUIRED:-

9. You are required to respond to all of the concerns referred to in paragraphs 5 and 6 in a written format by **4:00pm on Friday 24 March 2017.**