SUPREME COURT OF SOUTH AUSTRALIA

(Court of Appeal: Civil)

LEGAL PROFESSION CONDUCT COMMISSIONER v DAVEY

[2021] SASCA 2

Judgment of the Court of Appeal

(The Honourable President Kelly, the Honourable Justice Livesey and the Honourable Justice Bleby)

12 February 2021

PROFESSIONS AND TRADES - LAWYERS - COMPLAINTS AND DISCIPLINE - PROFESSIONAL MISCONDUCT AND UNSATISFACTORY PROFESSIONAL CONDUCT - GENERALLY

PROCEDURE - STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY - JURISDICTION

The respondent was admitted to practice in South Australia in 1994. He was subsequently admitted in Victoria in 1995 and in the Australian Capital Territory in 2002. The respondent has not, at any time, held a practising certificate in South Australia.

In 2013, the Law Society of the Australian Capital Territory commenced disciplinary proceedings against the respondent. Those proceedings culminated in 2019 when the Full Court of the Supreme Court of the Australian Capital Territory ordered that the respondent's name be removed from the roll maintained by the Supreme Court.

Following that decision, the applicant applied to this Court for a corresponding order without further inquiry into the respondent's conduct, pursuant to s 89(6) of the Legal Practitioners Act 1981 (SA).

Held:

1. By the Uniform Civil Rules 2020 (SA), the admission and disciplinary jurisdiction of the Supreme Court is to be exercised by the Court sitting in banco, rather than by the Court of Appeal.

2. The Court of Appeal has, by rule 213.3. of the Uniform Civil Rules 2020 (SA), jurisdiction over appeals from final decisions made by the Legal Practitioner Disciplinary Tribunal.

Applicant: LEGAL PROFESSION CONDUCT COMMISSIONER Counsel: MS S HURREN - Solicitor: LEGAL PROFESSION CONDUCT COMMISSIONER

Respondent: JOHN PATRICK DAVEY No Attendance

Hearing Date/s: 01/02/2021

File No/s: SCCIV-19-1379

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3. Members of the Court of Appeal may sit as part of the Court sitting in banco for the purposes of admission and disciplinary proceedings.

4. The name of the respondent is to be struck from the roll of legal practitioners maintained by this Court.

Legal Practitioners Act 1981 (SA) ss 81(1), 89(6), 89, 88A; *Uniform Civil Rules 2020* (SA) rr 261.2, 261.3, 11.1, 257.8, 212.3; *Supreme Court (Court of Appeal) Amendment Act 2019* (SA) cl 89(a), Schedule 1, Part 2; *Supreme Court Act 1935* (SA) s 50, referred to.
Craig v South Australia (1995) 184 CLR 163; *Davey v Council of the Law Society of the ACT* [2019] FCA 263; *Engbretson v Bartlett* (2007) 16 VR 417; *Fox v Percy* (2003) 214 CLR 118; *Hocking v Bell* (1945) 71 CLR 430; *Kirk v Industrial Relations Commission* (2010) 239 CLR 531; *Practitioner D3 v Council of the Law Society of the ACT* [2018] FCA 2080; *The Council of the Law Society of the ACT v Davey* [2019] ACTSCFC 2, considered.

LEGAL PROFESSION CONDUCT COMMISSIONER v DAVEY [2021] SASCA 2

Court of Appeal – Civil: Kelly P, Livesey and Bleby JJA

1 **THE COURT:** The applicant seeks an order that the respondent's name be struck from the roll of practitioners pursuant to section 89(6) of the *Legal Practitioners Act 1981* (SA).

2 The basis for the present application is that, on 16 August 2019, the respondent's name was struck from the roll of practitioners in the Australian Capital Territory.

3 The applicant asked that we determine the application without a hearing and to make final orders based on affidavit evidence placed before the Court. The applicant submitted that no hearing is required because the respondent has neither filed a Notice of Acting nor suggested (whether by an affidavit or otherwise) that he wishes to take part in these proceedings. The applicant relies upon rr 102.2(5) and 261.2(1)(a) of the *Uniform Civil Rules 2020* (SA).

4 The respondent eventually appeared at the callover on 22 January 2021. He did not oppose strike off, but sent an email on 1 February 2021 opposing the making of any costs order against him.

Jurisdiction

5 There is a preliminary issue as to whether the jurisdiction of the Court is to be exercised "in banco" (that is to say, by the Full Court) or by the Court of Appeal.

6 On 1 January 2021, the *Supreme Court (Court of Appeal) Amendment Act 2019* (SA) commenced. By clause 89(a), Schedule 1, Part 2 of that Act, a reference to the Full Court of the Supreme Court will be construed as a reference to the Court of Appeal Division of the Supreme Court.

7 However, the *Legal Practitioners Act 1981* (SA) refers generally to "the Supreme Court". For example, s 88A within Part 6, Division 5 emphasises the ongoing role of the Court's inherent jurisdiction:

> **88A—Supreme Court's inherent jurisdiction**
>
> (1) This Part does not derogate from the inherent jurisdiction of the Supreme Court to control and discipline legal practitioners.
>
> (2) Without limiting the operation of subsection (1), the Court may act under its inherent jurisdiction to control and discipline legal practitioners on the application of the Attorney General, the Commissioner or the Society.

8 Likewise, s 89 refers only to "the Supreme Court", and provides:

89—Proceedings before Supreme Court

(1) Where the Tribunal after conducting an inquiry into the conduct of a legal practitioner recommends that disciplinary proceedings be commenced against the legal practitioner in the Supreme Court, the Commissioner, the Attorney-General or the Society may institute disciplinary proceedings in the Supreme Court against the legal practitioner.

(1a) If the Commissioner is of the opinion that the name of a legal practitioner should be struck off the roll of legal practitioners maintained under this Act or the roll kept in a participating State that corresponds to the roll maintained under this Act because the practitioner has been found guilty of a serious offence, or for any other reason, the Commissioner may, without laying a charge before the Tribunal, institute disciplinary proceedings in the Supreme Court against the practitioner.

(1b) If—

(a) —

(i) a recommendation is made by the Tribunal that disciplinary proceedings be commenced against a legal practitioner in the Supreme Court; or

(ii) the Commissioner has advised a legal practitioner in writing of his or her intention to institute disciplinary proceedings against the legal practitioner in the Supreme Court; and

(b) the legal practitioner informs the Court in writing that he or she would consent to an order that his or her name be struck off the roll of legal practitioners maintained under this Act or the roll kept in a participating State that corresponds to the roll maintained under this Act,

the Court may, despite the fact that disciplinary proceedings have not been instituted, order that the name of the legal practitioner be struck off the roll maintained under this Act or kept in the other State (as appropriate).

(2) In any disciplinary proceedings against a legal practitioner (whether instituted under this section or not) the Supreme Court may exercise any one or more of the following powers:

(a) it may reprimand the legal practitioner;

(b) it may make an order imposing conditions on the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising certificate)—

(i) relating to the practitioner's legal practice; or

(ii) requiring that the legal practitioner, within a specified time, complete further education or training, or receive counselling, of a specified type;

(c) it may make an order suspending the legal practitioner's practising certificate (whether a practising certificate under this Act or an interstate practising

certificate) until the end of the period specified in the order or until further order;

(d) it may order that the name of the legal practitioner be struck off the roll of legal practitioners maintained under this Act or the roll kept in a participating State that corresponds to the roll maintained under this Act;

(e) it may make any other order (including an order as to the costs of proceedings before the Court and the Tribunal) that it considers just.

(4) In any disciplinary proceedings the Supreme Court may refer any matter to a Judge or Master, or to the Tribunal, for investigation and report.

(5) In any disciplinary proceedings—

(a) the Supreme Court may, without further inquiry, accept and act on any findings of the Tribunal or of a Judge or Master to whom a matter has been referred for investigation and report under subsection (4); and

(b) the Supreme Court may—

(i) receive in evidence a transcript of evidence taken in any proceedings before a court of any State and draw any conclusions of fact from the evidence that it considers proper;

(ii) adopt, as in its discretion it considers proper, any findings, decision, judgment or reasons for judgment of any such court that may be relevant to the proceedings.

9 It can be seen that disciplinary proceedings may be commenced against a legal practitioner in the Supreme Court. In this case, the Commissioner seeks an order for striking off or disqualification and relies upon s 89(6) of the *Legal Practitioners Act 1981* which provides:

(6) Where the Supreme Court is satisfied, on the application of the Commissioner, the Attorney-General or the Society, that a legal practitioner is disqualified or suspended from practice under the law of any other State (whether or not that State is a participating State), it may, without further inquiry, impose a corresponding disqualification or suspension under the provisions of this section.

10 Again, it can be seen that the reference is to the Supreme Court. No reference is made to the Full Court or, as now applies, to the Court of Appeal.

11 A disciplinary proceeding under s 89 of the *Legal Practitioners Act 1981*, or in the inherent jurisdiction of the Court, is commenced pursuant to rule 261.1 and heard and determined pursuant to r 261.2 of the *Uniform Civil Rules 2020*. That rule gives the Court the discretion to determine an application and make orders on the basis of the affidavit evidence and written submissions before it or, alternatively, to convene a hearing in order to determine the matter.

12 That is similar to the procedure available where a strike off order is to be by consent, r 261.3(4):

> (4) The Court may, if it thinks fit, make an order that the name of the lawyer be struck off the Roll of Practitioners—
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> (a) in chambers; or
>
> (b) at the next convenient sitting of the Court.

13 Pursuant to the *Uniform Civil Rules 2020*, and subject to s 48(2)(a) of the *Supreme Court Act 1935* (SA), the jurisdiction of the Supreme Court may be exercised by a single Judge in all proceedings, r 11.1(1). However, by r 11.1(6) of the *Uniform Civil Rules 2020*, the jurisdiction of the Supreme Court to finally hear and determine admissions and disciplinary proceedings is addressed in the following way:

> (6) The jurisdiction of the Supreme Court to finally hear and determine—
>
> (a) an application to admit a person as a solicitor and barrister of the Court under section 15 of the Legal Practitioners Act; or
>
> (b) a disciplinary proceeding under section 89 of the Legal Practitioners Act or in the inherent jurisdiction of the Court,
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> is to be exercised by 3 Judges of the Court sitting in banco.

14 For completeness, it should be observed that by r 11.1(7), a Judge may order that the jurisdiction of the Supreme Court to hear and determine all or part of the proceeding exercisable by a Judge is to be exercised instead "by 3 Judges of the Court sitting en banco". Likewise, by r 257.8(2) of the *Uniform Civil Rules 2020* the admission of practitioners is also determined "by 3 Judges of the Court sitting en banco":

> (2) If an objection is filed or the Board recommends that the applicant not be admitted, the Registrar will convene a directions hearing before a Judge to give directions about the listing and preparation of the application for hearing before 3 Judges of the Court sitting en banco.

15 It would appear that the terms "in banco" and "en banco" used in rr 11.1 and 257.8 of the *Uniform Civil Rules 20202* are interchangeable.

16 The terms "en banc" and "in banco" are variously described in dictionaries as being of Latin or French origin and meaning, literally, "the bench" or "on a bench".[1] Conventionally, terms such as these refer to the Judges of a Court sitting

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[1] Black's Law Dictionary (11th ed, 2019); Oxford English Dictionary (Online); *Macquarie Dictionary (Online);* Encyclopaedic Australian Legal Dictionary (Online).

as a group or a full bench, principally as an appeal court of a particular Court. See the helpful discussion by Bell J in *Engebretson v Bartlett*:[2]

> … What does it mean that Stawell CJ, Williams and Molesworth JJ sat in banc? The sitting of the Supreme Court "in banc" or "in banco" in its earliest days reflects the history of the English courts. The two expressions do not appear to have any relevant difference of meaning so I will only refer to the sitting of a court "in banc" from now on.
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> Originally the common law courts of King's Bench, Common Pleas and Exchequer functioned as courts only during term times, which were short. The judges did, however, sit alone under various commissions or in nisi prius. The judicial power of the courts was exercised not by single judges but by the court sitting collectively in banc. This is how Lord Parker CJ explained it in *In re Hastings (No 2)*:
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> > … In considering the early history of the matter it is relevant to bear in mind that the common law courts of King's Bench, Common Pleas and Exchequer functioned as courts only in term time, and that each of the four legal terms was of brief duration. Consequently, the greater part of the year fell during the legal vacations, although the judges of the courts might be sitting under commissions of assize, oyer and terminer and general gaol delivery or hearing cases in Middlesex at nisi prius. Furthermore, each of the common law courts sat in banc and no individual judge of the court had any general power to act for the court. Even a decision at nisi prius only became a judgment of the court upon motion to the court upon the fourth day of the term next following the verdict at nisi prius.
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> In consequence, in England, special procedures were followed for confirming and questioning the verdicts of civil juries. These have been fully described in several Australian cases,33 including one of this court,34 and I need not go into that subject here. Similar procedures were adopted in relation to criminal juries. In the criminal context, sitting in banc was a way of describing the meeting of all judges of the Court for Crown Cases Reserved that occurred at Westminster in the nineteenth century. As there were no formal means for conducting criminal appeals, the trial judges would meet together to advise judges on important questions. So the term "in banc" referred to the practice of a number of judges sitting collectively to determine judicial questions.
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> …
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> In those early days, the term "in banc" or "in banco" were often used interchangeably with the term "Full Court", for a Full Court was a sitting of the whole court, or so many of the judges who were available and brought together for the purpose, and the court so constituted and sitting was the Full Court in banc. We see this very clearly in both the general and specialist dictionaries. The *Oxford English Dictionary* defines "banco" to mean "on the bench: applied to sittings of a Superior Court of Common Law as a full court, as distinguished from the sittings of the judges at Nisi Prius, or on circuit." *Jowitt's Dictionary of English Law* explains that the words "banc" and "banco" were from the Latin word "bancus" meaning "a seat or bench of justice", and referred to "the sittings of a superior court of common law as a full court as distinguished from the sittings of the judges at Nisi Prius or on circuit." The *Oxford Companion to Law* defines "in banco" or "in banc" to mean "[s]ittings of one of the pre-1875 courts of common law (Queen's Bench, Common Pleas or Exchequer) as a full court, as distinct from the sittings of single judges …". The

[2] *Engebretson v Bartlett* (2007) 16 VR 417, [41]-[44], [46].

Butterworths Concise Australian Legal Dictionary defines "in banco" to mean "a court sitting as a full bench".

17 The High Court has preferred the term "in banco", no doubt because that is how the term appeared in the *Supreme Court Procedure Act 1900* (NSW).[3] The term "in banco" has been preferred by Australian courts as a whole, appearing in 192 judgments, whereas the term "en banc" has appeared in only 70.[4] The term "en banco" has not appeared in any Australian cases. It only appears in the *Uniform Civil Rules 2020* (SA). It might be thought more accurate to use the terms "en banc" or "in banco" rather than "en banco".

18 In this State, the term "in banco" has traditionally applied to the Full Court which comprises any three or, less commonly, five puisne Judges of the Supreme Court, to whom an appeal is allocated for hearing by the Chief Justice.

19 By contrast, under r 212.3(1)(a)(iii) of the *Uniform Civil Rules 2020*, the appellate jurisdiction of the Supreme Court is to be exercised by the Court of Appeal if the appellate proceeding is an appeal against a final decision of the Legal Practitioners Disciplinary Tribunal. The notes to that rule refer to s 86(1) of the *Legal Practitioners Act 1981*:

> **86—Appeal**
>
> (1) Subject to subsection (2), a right of appeal to the Supreme Court lies against a decision of the Tribunal made in the exercise or purported exercise of powers or functions under this Act.
>
> (2) An appeal must be instituted within one month of the date on which the appellant is notified of the decision unless the Supreme Court is satisfied that there is good reason to dispense with the requirement that the appeal should be so instituted.

20 Accordingly, it seems clear enough that by the *Uniform Civil Rules 2020*, rather than the *Supreme Court Act 1935* or the *Legal Practitioners Act 1981*, the striking off or disqualification jurisdiction is to be exercised by the Supreme Court sitting "in banco" – that is, by the Full Court rather than the Court of Appeal, unless an appeal is taken from a final decision of the Legal Practitioners Disciplinary Tribunal, in which case the appeal is heard by the Court of Appeal.

21 That does not, of course, rule out members of the Court of Appeal from sitting as part of the Court "in banco", and it indicates that, at least for the purposes of admissions and disciplinary proceedings, there is to be no sharp division between the Judges of the Court of Appeal and those of the General Division of the Supreme Court of South Australia.

22 Finally, it should be noticed that no appeal lies from the Supreme Court sitting "in banco". The most obvious reason for that is that any right of appeal is

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3 *Hocking v Bell* (1945) 71 CLR 430.
4 According to a search of each term in case citator LexisAdvance.

a creature of statute and the scope of that right depends on the terms of the statute.[5] Reference has already been made to the facility for appeals from final decisions of the Tribunal to be heard by the Court of Appeal pursuant to s 86 of the *Legal Practitioners Act 1981* (SA). Aside from this provision, s 50 of the *Supreme Court Act 1935* (SA) only confers a right of appeal from "a judgment of the court constituted of a single judge", not from the Court sitting "in banco":

> **50—Appeals**
>
> (1) Subject to this section—
>
> (a) an appeal lies to the Court of Appeal against a judgment of the court constituted of a single judge; and
>
> (b) an appeal lies against a judgment of the court constituted of a master.
>
> (2) An appeal against a judgment of a master or judicial registrar lies, if the rules so provide, to the Court of Appeal and otherwise to the court constituted of a single judge.
>
> (2a) Subject to the rules, subsections (3) and (4)(a)(i) do not apply to an appeal against a judgment of a judicial registrar.
>
> (3) No appeal lies against—
>
> (a) an order allowing an extension of time to appeal from a judgment; or
>
> (b) an order giving unconditional permission to defend an action; or
>
> (c) a judgment that is, by statute, under the rules, or by agreement of the parties, final and without appeal.
>
> (4) An appeal lies only with the permission of the court—
>
> (a) from a judgment of any of the following classes:
>
> (i) a judgment given by consent of the parties;
>
> (ii) a judgment given by a single judge on appeal from a judgment of the Magistrates Court; or
>
> (b) if the rules provide that the appeal lies by permission of the court.
>
> (5) The rules cannot, however, require the court's permission for an appeal if the judgment under appeal—
>
> (a) denies, or imposes conditions on, a right to defend an action; or

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[5] *Fox v Percy* (2003) 214 CLR 118, [20] (Gleeson CJ, Gummow and Kirby JJ), citing *Attorney-General v Sillem* (1864) 10 HLC 704, 720-721; *South Australian Land Mortgage and Agency Co Ltd v The King* (1922) 30 CLR 523, 552-553; *CDJ v VAJ* (1998) 197 CLR 172,[91]-[95], [184]; *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, [72]; *DJL v Central Authority* (2000) 201 CLR 226, [40]; *Allesch v Maunz* (2000) 203 CLR 172, [20]-[22], [44].

(b) deals with the liberty of the subject or the custody of an infant; or

(c) grants or refuses relief in the nature of an injunction or the appointment of a receiver; or

(d) is a declaration of liability or a final assessment of damages under section 30B; or

(e) makes a final determination of a substantive right.

Exception—

If a judgment is given by a single judge on appeal from some other court or tribunal, the rules may require the court's permission for a further appeal to the Court of Appeal even though the judgment makes a final determination of a substantive right.

(6) In this section—

judgment includes—

(a) an order or direction; and

(b) a decision not to make an order or direction.

23 To summarise, admissions or disciplinary proceedings in the Supreme Court are, by virtue of the *Uniform Civil Rules 2020*, heard by the Full Court, that is, a multi-member panel of Supreme Court Judges sitting "in banco". Those hearings are not appeals and there is no right of appeal conferred by statute from any decision or determination made by the Full Court.[6]

The resolution of the present application

24 By an order made by Bleby J on 4 December 2020, the application to strike the name of the respondent from the roll of practitioners was referred to the Full Court to be dealt with "on the papers".

25 That order obviated any need for an oral hearing. At the callover of this matter on 22 January 2021, the respondent emphasised that he did not oppose an order for striking off, but he requested an opportunity to put written submissions to the Court. He was given that opportunity.

26 The Court has considered the submissions in his email correspondence. The Court decided that it is appropriate to convene in open Court in order to announce

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[6] Indeed, it may be doubted whether there is any avenue for the judicial review of the decision of the Supreme Court – whether from a single Judge or from the Full Court – because it is a superior court of record, exercising supervisory jurisdiction, see *Craig v South Australia* (1995) 184 CLR 163, [7] (Brennan, Deane, Toohey, Gaudron and McHugh JJ), although "the exercise of that supervisory jurisdiction is ultimately subject to the superintendence" of the High Court as the "Federal Supreme Court", see *Kirk v Industrial Relations Commission* (2010) 239 CLR 531, [114]-[115] (Heydon J).

its decision and to make the appropriate orders. Before doing so, the circumstances leading to this hearing should be noted.

27 The affidavit evidence before the Court demonstrates that the respondent was admitted to practice in South Australia on 5 September 1994, and subsequently, in Victoria on 31 May 1995. Pursuant to mutual recognition provisions, the respondent was admitted to practice in the Australian Capital Territory on 1 May 2002.

28 Though the respondent's name is on the roll of legal practitioners maintained by this Court, he has not, at any time, held a practising certificate in South Australia. The respondent practised in the Australian Capital Territory until 30 June 2012 when he relocated to Victoria.

29 In 2013, the Council of the Law Society of the Australian Capital Territory commenced disciplinary proceedings against the respondent in the Australian Capital Territory Civil and Administrative Tribunal. Those proceedings were protracted. They were eventually concluded on 19 July 2018 by consent orders. Pursuant to those consent orders, there was a finding that the respondent was guilty of professional misconduct, together with a recommendation that his name be removed from the roll of legal practitioners maintained in each of the Australian Capital Territory, South Australia and Victoria.

30 In accordance with the consent orders, proceedings were commenced in the Australian Capital Territory Supreme Court on 8 August 2018. An order was sought that the respondent's name be removed from the roll maintained by that Court pursuant to s 431(3) of the *Legal Profession Act 2006* (ACT).

31 At that stage, the respondent intervened, filed an appeal and sought a transfer to the Federal Court. The transfer application was refused. The respondent subsequently issued proceedings in the Federal Court, seeking a declaration that the consent orders were invalid for want of jurisdiction. Those proceedings were dismissed by O'Callaghan J on 21 December 2018 as an abuse of process.[7]

32 On 10 January 2019, the respondent filed a Notice of Appeal in the Federal Court. On 5 March 2019, that too was dismissed.[8]

33 On 14 August 2019, the Australian Capital Territory Law Society's application was heard before the Full Court of the Australian Capital Territory Supreme Court and, on 16 August 2019, the Court delivered its decision, ordering that the respondent's name be removed from the roll maintained by the Australian Capital Territory Supreme Court.[9]

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7 *Practitioner D3 v Council of the Law Society of the ACT* [2018] FCA 2080.
8 *Davey v Council of the Law Society of the ACT* [2019] FCA 263 (Kerr J).
9 *The Council of the Law Society of the Australian Capital Territory v Davey* [2019] ACTSCFC 2.

34 Following that decision, the Commissioner commenced disciplinary proceedings on 19 November 2019 by way of originating application supported by affidavit evidence.

35 The affidavit evidence recites the history to which we have referred and reveals that the Commissioner relies upon the decision of the Full Court of the Australian Capital Territory Supreme Court and the admissions made by the respondent in the consent orders to which we have already referred.

36 In particular, the Commissioner emphasises that s 89(6) of the *Legal Practitioners Act 1981* permits this Court to make a corresponding order to that made by the Australian Capital Territory Supreme Court without further inquiry into the respondent's conduct.

37 As mentioned, the respondent has only belatedly participated in these proceedings and does not oppose striking off.

38 In all of these circumstances, we are of the opinion that it is appropriate to accede to the application and to strike the respondent's name from the roll of legal practitioners maintained by this Court.

39 On the question of costs, the primary burden of the investigation was shouldered interstate. These proceedings are adjunct to the Australian Capital Territory proceedings and it was necessary for the Commissioner, in the discharge of his statutory obligations, to prosecute the respondent. The respondent has never, as best as we can tell, opposed an order. Accordingly, in the exercise of our discretion in the particular circumstances of this case we make no order as to costs.

Orders of the Court

40 The Court orders:

1. That the name of the respondent, John Patrick Davey, be struck off the roll of legal practitioners maintained by this Court.

2. That there be no order as to the costs of these proceedings.