

---

**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA  
IN CIVIL

**CITATION** : LEE -v- DEPARTMENT OF HEALTH [2020] WASC  
103

**CORAM** : ARCHER J

**HEARD** : 19 MARCH 2020

**DELIVERED** : 31 MARCH 2020

**FILE NO/S** : GDA 7 of 2019

**BETWEEN** : JEFFREY STEWART LEE  
Appellant

AND

DEPARTMENT OF HEALTH  
Respondent

---

**ON APPEAL FROM:**

**Jurisdiction** : INFORMATION COMMISSIONER OF WESTERN  
AUSTRALIA

**Coram** : ACTING INFORMATION COMMISSIONER  
C FLETCHER

**File Number** : F2018369

---

*Catchwords:*

Appeal - Freedom of information - Procedural fairness - Reasonableness - Turns  
on its own facts

*Legislation:*

*Freedom of Information Act 1992 (WA)*

*Result:*

Appeal dismissed

*Category:* B

**Representation:**

*Counsel:*

Appellant : D W Thompson  
Respondent : J D Berson

*Solicitors:*

Appellant : Bayview Legal  
Respondent : State Solicitor for Western Australia

**Case(s) referred to in decision(s):**

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte  
Lam [2003] HCA 6, 16  
A v Corruption and Crime Commissioner [2013] WASCA 288  
Commissioner for Consumer Protection v Carey [2014] WASCA 7  
Connected IO Limited v Paterson [2019] WASCA 70  
Department of State Development v Latro Lawyers [2016] WASC 108  
Erujin Pty Ltd v Jacob [2018] WASCA 212  
Minister for Immigration and Border Protection v Eden [2016] FCAFC 28;  
(2016) 240 FCR 158  
Minister for Immigration and Citizenship v Li [2013] HCA 18; (2013) 249 CLR  
332  
Minister for Immigration and Citizenship v SZQHH [2012] FCAFC 45  
Waite v Alcoa of Australia Ltd [2020] WASCA 1  
Western Australian Planning Commission v The Board of Valuers [2018]  
WASCA 145

**ARCHER J:****Background**

1           The appellant, Mr Lee, appeals against a decision of the Acting Information Commissioner (Commissioner) to confirm a decision made by the respondent (Department) to refuse him access to documents under the *Freedom of Information Act 1992* (WA) (the Act).

2           Mr Lee is the director of a company (Kingsfield) which ran a café on Rottneest Island. Following an inspection of the café by officers of the Department on 23 January 2012, Kingsfield was charged, and later convicted, of an offence under the *Food Act 2008* (WA).

3           Mr Lee has made a number of applications for access to documents in connection with this offence. This appeal concerns an application he made for access to emails (including attachments) that were sent or received between 23 January 2012 and 31 January 2012 and recorded in the mailboxes of any of four named officers of the Department concerning, relating or referring to the inspection of the café (Access Application).

4           On 18 September 2018, the Department advised Mr Lee that all reasonable steps had been taken to find such documents and it was satisfied that there were no such documents.<sup>1</sup> This advice took the form of a notice under s 26(1) of the Act, which permits such advice to be given in these circumstances. Under s 26(2) of the Act, such a notice is deemed to be a decision to refuse access.

5           After further exchanges between the Department and Mr Lee, Mr Lee asked the Department to conduct an internal review of its decision.<sup>2</sup>

6           The internal review was undertaken by the Acting Principal Integrity Officer (Internal Reviewer). On 11 October 2018, the Internal Reviewer advised Mr Lee that he confirmed the Department's original decision. Again, the advice took the form of a notice under s 26(1).<sup>3</sup>

---

<sup>1</sup> See the materials filed with the appeal notice (Materials) pages 7 - 9.

<sup>2</sup> Materials page 20.

<sup>3</sup> Materials page 34.

7 After further exchanges between the Department and Mr Lee, Mr Lee applied to the Office of the Information Commissioner (OIC) for an external review of the Department's decisions.<sup>4</sup>

8 Section 65(1)(d) of the Act provides that a complaint may be made against an agency's decision to refuse access to a document. As the Department's decisions were made under s 26(1), and therefore deemed to be decisions to refuse access, the Commissioner decided to deal with Mr Lee's application as a complaint under s 65(1)(d).

### **Preliminary View**

9 On 17 April 2019, the Commissioner sent Mr Lee a letter setting out her preliminary view on the Department's decision to refuse access (Preliminary View Notice).<sup>5</sup>

10 In the Preliminary View Notice, the Commissioner identified the various submissions that had been made and the information she had received.

11 The Commissioner summarised Mr Lee's submissions as follows:<sup>6</sup>

#### **Your submissions**

Your submissions are set out in your letter to me seeking external review dated 7 November 2018, your email to my Complaints Coordinator dated 22 January 2019 and your email to my Legal Officer, dated 22 February 2019. In summary you submit:

- It would be highly unusual for inspectors from the agency to carry out health inspections on 23 January without generating some form of email correspondence.
- The agency has not discharged its onus in relation to the sufficiency of its searches.
- In the transcript you provided to this office there appears to be some discussion between Counsel for the agency and the Hon. Justice Kenneth Martin in relation to obtaining access to the archived emails.
- The discussion in the transcript is different from the advice provided by the agency in relation to searching for the emails.

---

<sup>4</sup> Materials pages 46, 49.

<sup>5</sup> Materials pages 167 - 173.

<sup>6</sup> Materials page 170.

- You consider it is necessary to recreate the server and tapes dealing with emails in order for proper searches for emails from 2012 to be carried out.

12 The Commissioner summarised the Department's submissions as follows:<sup>7</sup>

**The agency's submissions**

In its notice of decision dated 18 September 2018 the agency submitted as follows:

- Searches were undertaken by the Environmental Health Directorate, Public and Aboriginal Health Division, Department of Health
- A request was submitted to HSS for access to all emails sent and received by the named individuals during the specified timeframe.
- No documents were identified within the scope of the access application.

In its internal review of decision dated 11 October 2018, the agency confirmed to you:

- HSS provided access to a 'read only' Outlook file of each of the officers named in the access application.
- The emails were not from a 'backup' disc.
- HSS is able to view all emails sent and received, even those that have been deleted, as they are all recorded through the exchange.

13 The Commissioner advised that her legal officer had contacted the Department to obtain additional information about the electronic searches undertaken to identify documents. She advised that the Department had referred her legal officer to a member of the Health Support Services (HSS) team, 'who was able to provide additional general information as well as the specific information in relation to the searches carried out for this particular matter'.<sup>8</sup>

14 The Commissioner set out the information the Department had provided in relation to the retrieval of the emails. This included both

---

<sup>7</sup> Materials pages 170 - 171.

<sup>8</sup> Materials page 169.

the general information and the specific information. The Commissioner wrote:<sup>9</sup>

### **General Retrieval**

- The process for restoring email from the period before the implementation of Exchange 2010 and Enterprise Vault in 2014 requires the restoring of mailbox databases from monthly tape backups from the requested time period.
- Once a request has been received the location of the mailbox at the particular time is identified. This information comprises the mailbox database information, name and server.
- The monthly backup details for the mailbox database are identified from the backup logs.
- A request is made to HSS to locate the backup tape and place it in the appropriate tape drive for the restore process to take place.
- The mailbox database is restored to the restore server and the database is mounted so that the mailboxes in the database can be accessed.
- The required mailbox is exported to a PST file from the database, including deleted and junk items.
- The exported PST files are copied to the Security Team's server.
- HSS performs this style of recovery on behalf of the agency on a regular basis from either the legacy email server platform, or the new platform as required.
- HSS undertakes this work for a variety of uses including internal HR investigations, state and federal police investigations, and the CCC.
- Given the volume of requests processed, and the nature of the requests, the process is a robust one.

### **Specific retrieval**

- Requests for access were made in relation to this information on three occasions; namely on 12 April 2018, 9 July 2018 and 28 August 2018.
- As the requested time period for the recovery was from the 2012 date range, this was performed as a 'historical recovery' from the legacy email server platform, using the method set out above.

---

<sup>9</sup> Materials pages 171 - 172.

- The specific search terms and the short time frame may account for the fact that no items were identified within the scope of the application.

### Searches Conducted

From the information contained in the agency's FOI file, access was provided to the mailboxes of the 4 names employees, for the period 23 January 2012 to 31 January 2012, using the following search terms:

- Rottnest
- Island
- Inspection
- Quokka
- Joes
- Café
- Lee
- Inspection

15 The Commissioner then set out her consideration and conclusion:<sup>10</sup>

### CONSIDERATION

The first question for my consideration is whether there are reasonable grounds to believe that further documents exist or should exist in the possession or under the control of the agency, within the scope of your access application.

I have examined the agency's file in relation to the matter, as well as the submissions made by both parties and the additional information that has been provided by both parties during the external review.

In your email of 22 January 2019 you submit that 'it would be highly unusual for inspectors from the DOH at Shenton Park to carry out health inspections on Rottnest Island on 23 January 2012 without some emails concerning the trip and the outcome of that inspection.' In my view it is reasonable to consider that emails may have been generated by the process of arranging a health inspection.

As I consider there are reasonable grounds to believe that documents exist within the scope of your access application I am required to consider whether the agency has taken all reasonable steps to find documents.

---

<sup>10</sup> Materials pages 172 - 173.

As noted by the Information Commissioner in *Re Boland and City of Melville* [1996] WAICmr 53 at [27], the question is not whether an agency has taken every possible step to locate documents, but whether it has taken all reasonable steps.

The adequacy of an agency's efforts to locate documents is to be judged by having regard to what was reasonable in the circumstances: see the decisions in *Re Leighton and Shire of Kalamunda* [2008] WAICmr 52 at [85] and *Re Veale and City of Swan* [2012] WAICmr 12.

My legal officer made enquiries of the agency and the HSS in order to understand the process of retrieval used by the agency to identify electronic documents that have been archived. The agency's processes are outlined above. From the information provided it would appear that the agency recreated the mailboxes of the named individuals for the period in the scope of your access application, but that no emails were identified.

You submit that the recording of the transcript you provided to my Legal Officer contradicts the response of the agency to your access application; however, I do not accept that submission. In my view the transcript merely confirms that it would require a particular process to recreate the mailboxes from the server, and the submissions of the agency are that it undertook such a process to recreate the mailboxes in order to identify any documents within the scope of your application. For the purposes of this external review, if I am satisfied that the agency has taken all reasonable steps to identify documents, then that is all that is required.

Based on all the information presently before [me], I am satisfied that all reasonable steps have been taken by the agency and I do not propose to require the agency to conduct further searches for documents within the scope of your access application.

## CONCLUSION

On the information currently before me I consider that that the agency's decision to refuse you access to documents on the basis that the documents cannot be found, or do not exist, as described in [s 26] is justified.

16 The Commissioner invited Mr Lee to make further submissions if he did not accept her preliminary view.<sup>11</sup>

### **The Further Submissions (attaching the Letter)**

17 Mr Lee did provide further submissions (Further Submissions).<sup>12</sup> The Further Submissions drew the Commissioner's attention to a letter

---

<sup>11</sup> Materials pages 167 - 168. See also page 173.

sent by the Department on 31 January 2012 to Kingsfield (Letter). The Letter set out the code<sup>13</sup> violations that had been identified during the inspection of the café.

18 In his Further Submissions, Mr Lee pointed out that the Letter contained an email address that appeared to be a private email address. Mr Lee also referred to the file number (F-A-A-00300) that appeared on the top of the Letter, and asked the Commissioner to obtain a copy of that file. He also pointed out that there was a vertical number written on the bottom right hand corner of the Letter.

19 The email address was contained in the final paragraph of the Letter as the email address for a Ms Chen. Ms Chen was named in the Letter as the person Mr Lee should contact if he wished to discuss anything arising from the Letter. The vertical number appeared on the bottom right hand margin of the Letter in extremely small font.

20 The Commissioner's legal officer made inquiries of the Department in relation to the personal email address and the vertical number. The Department's response was provided to Mr Lee, and he commented on it.<sup>14</sup>

### Final Decision

21 The Commissioner provided her final decision on 19 June 2019 (Final Decision). She confirmed the decision of the Department to refuse access.<sup>15</sup>

22 In the Final Decision, the Commissioner referred to her preliminary view that the Department's decision to refuse access on the ground that no documents exist was justified. She referred to her invitation to Mr Lee to provide additional submissions if he did not accept her preliminary view. She said that he had provided further submissions as follows:<sup>16</sup>

You referred me to a letter from the Health Department dated 31 January 2012 (**the letter**), that related to a 'Food Assessment of Quokka Joe's'. The letter contained a contact email address for any queries, that did not appear to be a work email address. You considered that searches for documents should be made of that mailbox. Additionally, you referred me to a vertical number on the letter,

---

<sup>12</sup> Materials pages 175, 177 - 180.

<sup>13</sup> *The Australian New Zealand Food Standards Code*.

<sup>14</sup> Materials pages 181 - 182.

<sup>15</sup> Materials page 184.

<sup>16</sup> Materials page 183.

submitting that this could represent another file that should be searched by the agency.

23 The Commissioner continued:<sup>17</sup>

The letter was dated 31 January 2012 and any responses to it were likely to be outside the scope of the access application, given that you had requested correspondence between 23 January 2012 and 31 January 2012. However, my Legal Officer made further enquiries of the agency. The agency submitted that the email address in the letter had been inserted in error by the officer who prepared the letter. That email address was the personal email account of that officer and not an email account of the agency. In any event, that the officer had searched that personal mailbox but no documents within the scope of your application were identified.

The agency advised that the vertical number on the letter was the letterhead re-order code.

You have subsequently submitted that you do not think it appropriate for the officer herself to search the mailbox. However, in all the circumstances I am not persuaded that there are reasonable grounds to believe that documents exist within the scope of your application. Further, I consider that the agency has taken all reasonable steps to identify documents within the scope of your application.

24 The Commissioner said that, for the reasons stated in the Preliminary View Notice and in the Final Decision, she confirmed the Department's decision to refuse access.

### **The appeal**

25 Mr Lee filed an appeal notice in this court on 9 July 2019. The essence of his complaints were that the Commissioner failed to afford him procedural fairness in two respects and that her Final Decision was 'unreasonable and/or failed to take into account relevant considerations'.

26 The nature of the procedural fairness grounds were clarified by counsel for Mr Lee as follows:

Ground 1 is that the Commissioner failed to afford the appellant procedural fairness because she did not alert him before providing her final decision that she was minded to change the conclusion she had reached in her preliminary view that there were reasonable grounds to believe that documents existed that fell within the scope of the appellant's Application. Had she indicated the possibility to the appellant, he would have made submissions and provided further

---

<sup>17</sup> Materials pages 183 - 184.

material on that point. As she did not, he restricted himself to the issue of the adequacy of the searches the respondent agency undertook.<sup>18</sup>

Ground 2, which is related to ground 1, is that the Commissioner denied the appellant procedural fairness by failing to give him copies of adverse material produced by the respondent agency.<sup>19</sup>

27 Ground 3 alleges that the Commissioner's Final Decision was unreasonable and/or failed to take into account relevant considerations, as particularised. Counsel for Mr Lee clarified that ground 3 sought only to allege unreasonableness and that it was not alleged that any of these considerations were mandatory considerations.<sup>20</sup> Rather, it was alleged that, if the Commissioner had had proper regard to the considerations, she would not have concluded that the Department's decision was justified.<sup>21</sup>

28 Counsel for Mr Lee also clarified<sup>22</sup> that the particulars to be relied on in relation to this ground could be better expressed as asserting that the Commissioner should have but did not take into account:

1. the likely existence of paper records of emails sent in the respondent's file F-A-A-0300, as referred to in the appellant's submissions in response to the Commissioner's preliminary view;
2. the fact that various statements conveyed to the appellant in the course of the Application and complaints as to what had actually been done to access emails from the period stated in his Application, particularly (although not exclusively) as regards restoration or reconstruction of the respondent's email system from the relevant period, were divergent and even contradictory; and
3. the appellant's concerns, expressed in the course of the Application process and the complaint process, that the searches for emails necessitated by his Application should not be carried out by the persons named in that application.

29 Later, I will say more about Mr Lee's specific allegations in relation to ground 3. However, in short, he alleges as follows:

---

<sup>18</sup> Appellant's Outline of Submissions filed 21 February 2020 (Appellant's Submissions) [42].

<sup>19</sup> Appellant's Submissions [48].

<sup>20</sup> Appellant's Submissions [57].

<sup>21</sup> ts 7.

<sup>22</sup> Appellant's Submissions [58] - [59]. During the hearing, counsel confirmed that ground 3(h) was withdrawn - see ts 4 - 5.

1. If the Commissioner had paid 'sufficient attention' to the Further Submissions, she would 'almost inescapably have been led to the inference' that documents within the scope of the Access Application might exist.
2. The Commissioner would *not* have found the Department's decision to be justified if she had had proper regard to the allegedly different and sometimes contradictory information given to Mr Lee as to what had been done to access emails from the period stated in his Access Application.
3. The Commissioner illogically reasoned that, because there were no reasonable grounds to believe that documents existed, it did not matter who did the searches aimed at finding them.

### Application to adduce evidence

30 Mr Lee made an application to adduce evidence that was not before the Commissioner. In related proceedings, I had raised with the parties whether I had the power to accept such evidence in light of the Court of Appeal's decision in *Commissioner for Consumer Protection v Carey*.<sup>23</sup> During the hearing of this appeal, counsel for Mr Lee advised that he agreed that I did not have the power to accept such evidence. He withdrew those parts of his written submissions that dealt with the evidence sought to be adduced.<sup>24</sup>

### The issues

31 The issues can be summarised as follows:

1. In relation to ground 1:
  - (a) Did the Commissioner change her mind?
  - (b) If so, did the Commissioner fail to afford procedural fairness to Mr Lee in relation to the change of mind?
2. In relation to ground 2, did the Commissioner's failure to give Mr Lee copies of any materials or submissions provided to her by the Department constitute a failure to afford procedural fairness?

<sup>23</sup> *Commissioner for Consumer Protection v Carey* [2014] WASCA 7 [71] (McLure P, with Murphy JA agreeing), [167] (Buss JA). This is discussed in more detail under the heading 'Appeals from decisions of the Commissioner'.

<sup>24</sup> ts 2 - 3.

3. In relation to ground 3:
- (a) If the Commissioner had paid 'sufficient attention' to the Further Submissions, would she 'almost inescapably have been led to the inference' that documents within the scope of the Access Application might exist?
  - (b) Would the Commissioner *not* have found the Department's decision to be justified if she had had proper regard to the allegedly different and sometimes contradictory information given to Mr Lee as to what had been done to access emails from the period stated in his Access Application?
  - (c) Did the Commissioner reason that, because there were no reasonable grounds to believe that documents existed, it did not matter who did the searches aimed at finding them?

### **The legislative framework**

#### **The Act**

32 The long title of the Act provides that, among other things, it is an Act to provide for public access to documents. The objects of the Act are to enable the public to participate more effectively in governing the State, and make the persons and bodies that are responsible for State and local government more accountable to the public.<sup>25</sup> One of the means by which those objects are to be achieved is by creating a general right of access to State and local government documents.<sup>26</sup>

33 Section 10(1) of the Act gives a person a right to access the documents of an agency subject to and in accordance with the Act. An agency is a minister, a public body or office.<sup>27</sup> The Department is an agency.

34 By s 10(2) of the Act, a person's right to access is not affected by the person's reasons for wanting access.

---

<sup>25</sup> Section 3(1) of the Act.

<sup>26</sup> Section 3(2)(a) of the Act.

<sup>27</sup> Glossary in the Act.

35 As s 10 foreshadows, there are provisions in the Act which  
condition the general right of access. Relevantly to this appeal, s 26 is  
one of those provisions.<sup>28</sup>

36 Under s 26 of the Act, an agency may advise an applicant that it is  
not possible to give access to a document if all reasonable steps have  
been taken to find the document, and the agency is satisfied it cannot be  
found or does not exist.

37 Under s 65(1)(d) of the Act, a complaint may be made against an  
agency's decision to refuse access to a document. An advice under s 26  
is deemed to be a decision to refuse access to the document. It may  
therefore be the subject of a complaint to the Commissioner under  
s 65(1)(d) of the Act.

38 Section 70 sets out the procedure for dealing with a complaint. It  
relevantly provides:

**Complaint, procedure for dealing with**

- (1) In order to deal with a complaint the Commissioner may obtain information from such persons and sources, and make such investigations and inquiries, as the Commissioner thinks fit.
- (2) Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commissioner permit, and the Commissioner is not bound by rules of evidence.
- (3) The Commissioner has to ensure that the parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner.
- (4) The Commissioner may determine the procedure for investigating and dealing with complaints and give any necessary directions as to the conduct of the proceedings.
- (5) For example, the Commissioner may -
  - (a) deal with the complaint without holding formal proceedings or hearings;

...

---

<sup>28</sup> Other examples are the provisions dealing with exempt documents and s 20.

39 Section 76 relevantly sets out what the Commissioner must do if the Commissioner decides to confirm an agency's decision. Section 76 relevantly provides that such a decision must be in writing and the Commissioner must 'include in the decision the reasons for the decision and the findings on material questions of fact underlying those reasons, referring to the material on which those findings were based'.

### Appeals from decisions of the Commissioner

40 Under s 85(1) of the Act, an appeal lies to the Supreme Court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application.

41 Appeals under s 85 of the Act are in the nature of judicial review.<sup>29</sup> However, the questions of law are not confined to jurisdictional errors, and extend to non-jurisdictional questions of law.<sup>30</sup>

42 Section 87 of the Act lists the appeal court's powers. It provides:

- (1) On the determination of an appeal under section 85(1), (2)(a) or (4) the Supreme Court may by order -
  - (a) confirm the Commissioner's decision; or
  - (b) vary the Commissioner's decision; or
  - (c) set aside the Commissioner's decision and -
    - (i) make a decision in substitution for that decision; or
    - (ii) remit the matter to the Commissioner for reconsideration with any direction or recommendation the Supreme Court thinks fit.
- (2) On the determination of an appeal under section 85(2)(b) the Supreme Court may order that an exemption certificate no longer apply to a document.
- (3) If it is established that a document is an exempt document the Supreme Court does not have power to make a decision to the effect that access is to be given to the document.

43 The powers of the appellate court must be 'exercised with restraint to avoid an appeal on a question of law opening the door to an appeal by way of rehearing. The reasons of an administrative decision-maker

<sup>29</sup> *Department of State Development v Latro Lawyers* [2016] WASC 108 [34].

<sup>30</sup> *Carey* [72].

are not to be construed minutely and with an eye "keenly attuned to the perception of error"'.<sup>31</sup>

44 In *Carey*, the Court of Appeal was considering an appeal on a question of law under s 105(2) of the *State Administrative Tribunal Act 2004* (WA) (SAT Act). The court<sup>32</sup> held that there was no power to accept additional evidence on such an appeal, referring in particular to s 105(2) and s 105(9) of the SAT Act. Those subsections are in materially the same terms as s 85(1) and s 87(1) of the Act.

45 *Carey* is not distinguishable. Accordingly, the appellate court in an appeal under the Act does not have the power to receive additional evidence that was not before the decision-maker.

### Procedural fairness

46 It was common ground that the Commissioner was required to exercise her statutory powers in a way that afforded procedural fairness to Mr Lee.

47 A failure to afford a party procedural fairness will constitute an error of law.<sup>33</sup>

48 In *Erujin Pty Ltd v Jacob*,<sup>34</sup> Buss P and Beech JA said:

The determination of what is required, in a particular case, for compliance with an obligation to accord procedural fairness and of whether, in a particular case, any such obligation has been met, must be made having regard to the following observations of Gleeson CJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam*:<sup>35</sup>

'Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice [37].'

49 In *Department of State Development v Latro Lawyers*,<sup>36</sup> Beech J set out the relevant principles in the context of the Act:

<sup>31</sup> *Department of State Development v Latro Lawyers* [35].

<sup>32</sup> See *Carey* [71] (McLure P, with Murphy JA agreeing), [167] (Buss JA).

<sup>33</sup> *Waite v Alcoa of Australia Ltd* [2020] WASCA 1 [107].

<sup>34</sup> *Erujin Pty Ltd v Jacob* [2018] WASCA 212 [162].

<sup>35</sup> *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1.

<sup>36</sup> *Department of State Development v Latro Lawyers* [37] - [47].

The fundamental principle is that an opportunity to be heard would 'ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material', and then ... to put information and submissions to the decision-maker.

[G]enerally, procedural fairness does not require the decision-maker to reveal a proposed conclusion to a person to whom procedural fairness must be accorded but, in a particular case, it may be necessary for an adverse conclusion to be disclosed with an opportunity to make submissions, if the proposed conclusion could not reasonably have been anticipated.

[T]he contents of requirements of procedural fairness [under the Act] is informed by div 3 of pt 4, namely s 65 - 78, and especially, s 70. While, generally speaking, the Commissioner may determine the procedure for investigation and dealing with complaints, and need not hold any formal hearings, the Commissioner has to ensure that parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner (s 70(3)). That statutory requirement defines, at least in part, the content of the requirement of procedural fairness that a party is given a reasonable opportunity to present his or her case.

50 The requirement that the party affected be informed of the nature and content of adverse material requires the decision-maker to ensure that the party is informed of the nature and content of any material adverse to the interests of a party that is 'credible, relevant and significant' to the decision to be made.<sup>37</sup> The point is not to ensure that the party is given a copy of every document that contains adverse material. The point is to ensure that the party has a meaningful opportunity to be heard on the issues. The point is to avoid practical injustice.

### Legal unreasonableness

51 In *Minister for Immigration and Border Protection v Eden*,<sup>38</sup> the Full Court of the Federal Court summarised the relevant principles (citations omitted):

First, the concept of legal unreasonableness concerns the lawful exercise of power. Legal reasonableness, or an absence of legal unreasonableness, is an essential element in the lawfulness of decision-making.

<sup>37</sup> See the summary in *Connected IO Limited v Paterson* [2019] WASCA 70 [66].

<sup>38</sup> *Minister for Immigration and Border Protection v Eden* [2016] FCAFC 28; (2016) 240 FCR 158 [58] - [60], [62] - [65], cited by Buss P in *Western Australian Planning Commission v The Board of Valuers* [2018] WASCA 145 [172].

Second, the Court's task in determining whether a decision is vitiated for legal unreasonableness is strictly supervisory. It does not involve the Court reviewing the merits of the decision under the guise of an evaluation of the decision's reasonableness, or the Court substituting its own view as to how the decision should be exercised for that of the decision maker. Nor does it involve the Court remaking the decision according to its own view of reasonableness.

Third, there are two contexts in which the concept of legal unreasonableness may be employed. The first involves a conclusion after the identification of a recognised species of jurisdictional error in the decision making process, such as failing to have regard to a mandatory consideration, or having regard to an irrelevant consideration. The second involves an 'outcome focused' conclusion without any specific jurisdictional error being identified.

...

Fourth, in assessing whether a particular outcome is unreasonable, it is necessary to bear in mind that within the boundaries of power there is an area of 'decisional freedom' within which a decision-maker has a genuinely free discretion. Within that area, reasonable minds might differ as to the correct decision or outcome, but any decision or outcome within that area is within the bounds of legal reasonableness. Such a decision falls within the range of possible lawful outcomes of the exercise of the power.

Fifth, in order to identify or define the width and boundaries of this area of decisional freedom and the bounds of legal reasonableness, it is necessary to construe the relevant statute. The task of determining whether a decision is legally reasonable or unreasonable involves the evaluation of the nature and quality of the decision by reference to the subject matter, scope and purpose of the relevant statutory power, together with the attendant principles and values of the common law concerning reasonableness in decision-making. The evaluation is also likely to be fact dependant and to require careful attention to the evidence.

Sixth, where reasons for the decision are available, the reasons are likely to provide the focus for the evaluation of whether the decision is legally unreasonable. Where the reasons provide an evident and intelligible justification for the decision, it is unlikely that the decision could be considered to be legally unreasonable. However, an inference or conclusion of legal unreasonableness may be drawn even if no error in the reasons can be identified. In such a case, the court may not be able to comprehend from the reasons how the decision was arrived at, or the justification in the reasons may not be sufficient to outweigh the inference that the decision is otherwise outside the bounds of legal reasonableness or outside the range of possible lawful outcomes.

Seventh, and perhaps most importantly, the evaluation of whether a decision is legally unreasonable should not be approached by way of the application of particular definitions, fixed formulae, categorisations or verbal descriptions. The concept of legal unreasonableness is not amenable to rigidly defined categorisation or precise textural formulary. That said, the consideration of whether a decision is legally unreasonable may be assisted by reference to descriptive expressions that have been used in previous cases to describe the particular qualities of decisions that exceed the limits and boundaries of statutory power. ... The expressions that have been utilised include decisions which are 'plainly unjust', 'arbitrary', 'capricious', 'irrational', 'lacking in evident or intelligible justification', and 'obviously disproportionate'. It must be emphasised again, however, that the task is not an *a priori* definitional exercise. Nor does it involve a 'checklist' exercise. Rather, it involves the Court evaluating the decision with a view to determining whether, having regard to the terms, scope and purpose of the relevant statutory power, the decision possesses one or more of those sorts of qualities such that it falls outside the range of lawful outcomes.

52 It has been observed that 'the requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decision maker'.<sup>39</sup>

## Analysis

### **Ground 1: failure to alert to change of mind**

53 Mr Lee alleges that the Commissioner failed to afford him procedural fairness<sup>40</sup>

because she did not alert him before providing her final decision that she was minded to change the conclusion she had reached in her preliminary view that there were reasonable grounds to believe that documents existed that fell within the scope of the appellant's Application.

54 In effect, Mr Lee submits as follows:

1. the Commissioner concluded, and expressed in the Preliminary View Notice, that there were reasonable grounds to believe that documents existed that fell within the scope of the Access Application;

<sup>39</sup> *Minister for Immigration and Citizenship v Li* [2013] HCA 18; (2013) 249 CLR 332 [30] (French CJ), cited in *A v Corruption and Crime Commissioner* [2013] WASCA 288 [123] (Martin CJ & Murphy JA).

<sup>40</sup> Appellant's Submissions [42].

2. the Commissioner concluded in her Final Decision that there were not reasonable grounds to believe that such documents existed;
3. therefore, the Commissioner had changed her mind<sup>41</sup> between the Preliminary View Notice and the Final Decision;
4. before making the Final Decision, the Commissioner did not alert Mr Lee to the fact that she intended to change her mind;
5. this was a failure to afford procedural fairness.

55 Applying the proper approach to the Commissioner's reasons,<sup>42</sup> I am not satisfied that the Commissioner changed her mind in this way.

56 On a fair reading of the Final Decision, the Commissioner's statement that she was not persuaded there were reasonable grounds to believe that documents existed within the scope of the Access Application was confined to Mr Lee's submissions in relation to the Letter. In my view, the Commissioner's Final Decision was to the following effect:

1. For the reasons given in the Preliminary View Notice and the Final Decision, the Department's decision was confirmed.
2. The Commissioner's preliminary view had been that the Department's decision to refuse access was justified. In the Preliminary View Notice, the Commissioner said that it was reasonable to consider that emails may have been generated by the process of arranging a health inspection. There were therefore reasonable grounds to believe that documents within the scope of the Access Application existed.<sup>43</sup> However, the Department had taken all reasonable steps to identify any such documents, had not found any, and its decision was therefore justified.<sup>44</sup>
3. Mr Lee was invited to make further submissions if he did not accept the Commissioner's preliminary view.
4. Mr Lee's Further Submissions attached, and referred to, the Letter.

---

<sup>41</sup> See the Appellant's Submissions [45].

<sup>42</sup> That is, by not construing them minutely and with an eye 'keenly attuned to the perception of error'.

<sup>43</sup> Materials page 172.

<sup>44</sup> Materials page 173. See also Materials page 183 [2].

5. This prompted the Commissioner to make further inquiries. Self-evidently, despite the fact that the Letter was dated 31 January 2012, the Commissioner did not simply conclude that the Letter did not give rise to reasonable grounds to believe documents existed within the scope of the Access Application.
6. Having obtained information about the personal email address and the vertical number in the Letter, the Commissioner was not persuaded that the Letter should cause her to change her preliminary view that the Department's decision was justified. That is, having obtained that information, she was not persuaded that *the Letter* gave rise to reasonable grounds to believe documents existed within the scope of the Access Application, and therefore she had no cause to depart from her preliminary view.
7. In any event, the Commissioner was satisfied that the Department had taken all reasonable steps to identify documents within the scope of the Access Application, so again she had no cause to depart from her preliminary view.

57 Accordingly, I am not satisfied that the Commissioner changed her mind in the way alleged.

58 Rather, the Commissioner's *starting point* in the Preliminary View Notice had been that it was reasonable to consider that emails may have been generated by the process of arranging a health inspection and there were therefore reasonable grounds to believe that documents within the scope of the Access Application existed. However, the Commissioner was satisfied on the information before her that the Department had taken all reasonable steps to find such documents. In light of that finding, and the fact that the Department had not been able to find any documents, the Commissioner concluded that the Department's decision was justified.

59 Nothing the Commissioner said in the Final Decision was inconsistent with the starting point. It was always going to be reasonable to consider that emails may have been generated by the process of the inspection. However, this possibility had effectively been rebutted by the Commissioner's finding that the Department had taken reasonable steps to find documents, yet had not found any.

60 In the Final Decision, the Commissioner was considering whether the matters Mr Lee raised in his Further Submissions should cause her

to depart from her preliminary view. She was dealing only with whether the Letter gave rise to reasonable grounds to believe documents existed. Having obtained further information, the Commissioner found it did not. She also found that the Department had taken all reasonable steps to find documents within the scope of the Access Application.

61 For these reasons, ground 1 fails.

## **Ground 2: failing to give adverse materials**

62 Ground 2, as clarified, alleges that the Commissioner denied Mr Lee procedural fairness by failing to give him copies of adverse material produced by the Department.

63 I will assume that there was such material produced by the Department. From the nature of the information provided by the Department, it is likely that at least some of that information was provided in writing.

64 Mr Lee relies on Beech J's statement in *Department of State Development v Latro Lawyers*<sup>45</sup> to the effect that procedural fairness requires, among other things, that the party affected 'be informed of the nature and content of adverse material'.

65 Procedural fairness does not require the party affected to be given copies of adverse material,<sup>46</sup> nor do Beech J's remarks say otherwise. During the hearing, I raised with counsel for Mr Lee whether he accepted that proposition. He was hesitant to do so. In light of that, I referred counsel to a decision of the Full Court of the Federal Court,<sup>47</sup> by way of an example, in which that proposition was expressed and a decision of the High Court was referred to on the same point. I gave counsel leave to file submissions indicating whether he sought to challenge that proposition. Counsel filed submissions accepting the proposition, but arguing that, on the facts in this case, procedural fairness required copies to be given.<sup>48</sup>

66 Mr Lee submits that he was not given copies of any of the material the Commissioner or her staff relied upon in dealing with his

---

<sup>45</sup> *Department of State Development v Latro Lawyers* [42].

<sup>46</sup> See, for example, *Minister for Immigration and Citizenship v SZQHH* [2012] FCAFC 45 [27] - [31].

<sup>47</sup> *Minister for Immigration and Citizenship v SZQHH*.

<sup>48</sup> The submissions were contained, with leave, in an email from Mr Thompson to my associate on 20 March 2020.

complaint. He says he was only given 'selected information'.<sup>49</sup> He submits:<sup>50</sup>

The prime example of this is to be found in the Commissioner's preliminary view. On page 5 of that document ... the Commissioner sets out some quite specific information regarding the retrieval of historical emails under the heading 'General Retrieval.' On its face, that information contradicts other information conveyed to the appellant in the course of the Application and complaint processes, such as the information that restoration or reconstruction of the relevant mailboxes was not required ... This deprived the applicant of the opportunity to make his own assessment of the information in question. For instance, it is not clear from the 'General Retrieval' points in the Commissioner's preliminary view whether that information came from someone who was personally involved in the processes described, or who was in a position to have current information, or had actually taken part in the search for emails pursuant to the appellant's Application. Had the appellant been able to address these matters, his submissions might have been very different. However, he was denied that opportunity.

67 As noted earlier, procedural fairness requires the decision-maker to ensure that the party is informed of the nature and content of any material adverse to the interests of a party that is credible, relevant and significant to the decision to be made. The point is to ensure that the party has a meaningful opportunity to be heard on the issues. The point is to avoid practical injustice.

68 Procedural fairness did not require, on the facts in this case, the Commissioner to give Mr Lee copies of all material and submissions provided to her by the Department.

69 The Commissioner clearly disclosed in the Preliminary View Notice, and in considerable detail, the substance of the Department's advice to her as to the retrieval process. The Commissioner set out the specific information she had been given which led to her preliminary view that the Department's decision was justified.

70 The Commissioner identified the source of the information as being a member of the HSS team.<sup>51</sup> The HSS team was the team within the Department which dealt with requests for access to historical emails.<sup>52</sup>

---

<sup>49</sup> Appellant's Submissions [50].

<sup>50</sup> Appellant's Submissions [51].

<sup>51</sup> See Materials page 169.

<sup>52</sup> Materials page 171.

71 Procedural fairness did not require the Commissioner to do more.

72 In the Preliminary View Notice, the Commissioner invited Mr Lee to make further submissions if he did not accept her preliminary view.

73 It was open to Mr Lee, if he disputed any of that information, to make submissions as to why it should not be accepted. Mr Lee was not left in ignorance of the information that the Department had provided to the Commissioner. He was not denied the opportunity to challenge that information or make submissions about it. He chose not to do so.<sup>53</sup>

74 I am not satisfied that the Commissioner failed to afford procedural fairness. On the contrary, I am positively satisfied that the Commissioner discharged her obligation to afford procedural fairness. The clear purpose and effect of the Preliminary View Notice was to discharge this obligation.

75 For these reasons, ground 2 fails.

### **Ground 3: unreasonableness**

76 As noted in the Background, ground 3 is intended to allege unreasonableness. Mr Lee contends that the Commissioner should have taken into account the three alleged considerations, and that her failure to do so was unreasonable. However, it was not alleged that any of the three were *mandatory* considerations. In essence, Mr Lee contends that the *outcome* was unreasonable - that is, he contends that, if the Commissioner had had proper regard to these three considerations, she could not have concluded that the Department's decision was justified.<sup>54</sup>

### ***The likely existence of paper records of emails***

77 The first alleged consideration is 'the likely existence of paper records of emails sent in the respondent's file F-A-A-0300, as referred

---

<sup>53</sup> In his Further Submissions, Mr Lee specifically referred to the passage in the Preliminary View Notice in which the Commissioner summarised the information that had been received from HSS as to the general process of retrieval and the specific retrieval that had been undertaken in this case. However, he did not suggest the information was wrong or that more information as to the retrieval process or the source of the information was required. He did not complain that the information contradicted what he had been told by the Internal Reviewer. On the contrary, the tenor of his Further Submissions was that he accepted the accuracy of the information. See, for example, the Further Submissions [5] on page 177 of the Materials. See also the further email sent by Mr Lee, which also does not challenge the retrieval information, on page 182 of the Materials.

<sup>54</sup> ts 7.

to in the appellant's submissions in response to the Commissioner's preliminary view'.<sup>55</sup>

78 Mr Lee submits, in effect, that, if the Commissioner had paid 'sufficient attention' to the submissions and materials he provided in his Further Submissions, 'she would almost inescapably have been led to the inference that the [Department's file F-A-A-0300] might contain printed copies of email messages, and that those copies might fall within the date range stated in the appellant's Application'.<sup>56</sup> Although expressed only in terms of 'might', I understand the submission to be that she ought to have found that this was a *reasonable* possibility. The obligation to act reasonably would not require a decision-maker to have regard to speculative and remote possibilities.

79 The Further Submissions drew the Commissioner's attention to the Letter. Mr Lee submits that the very existence of the Letter led to the distinct possibility that there was a paper file in existence. The Letter was apparently sent to Mr Lee in hard copy, rather than email.<sup>57</sup> Further, the Letter contained a file reference number. Mr Lee submits that, therefore, the Department ought to have searched the contents of the file, whether the file was in hard copy or not.<sup>58</sup>

80 I do not accept this submission. The Commissioner's starting point was that there *were* reasonable grounds to believe that there were documents within the scope of the Access Application. However, she was satisfied with the searches that had been made. The Letter was not found in the searches, but there is no reason to assume it should have been. The Access Application, and the searches, related to the electronic mailboxes of four people. The Letter was sent to Kingsfield in hard copy. There is nothing to suggest the Letter was emailed, or attached to an email, to or from any of those four people.

81 Mr Lee then submitted that, despite the scope of the Access Application, there was still a need to search any hard copy file as emails can disappear from systems and a hard copy may have been printed off and placed in a hard copy file before that happened.<sup>59</sup>

82 I do not accept this. The Department's advice was to the effect that it recreated the mailboxes of the named individuals for the period

---

<sup>55</sup> Appellant's Submissions [58.1].

<sup>56</sup> Appellant's Submissions [60].

<sup>57</sup> ts 8. See also the Letter itself, which bears a 'copy' stamp.

<sup>58</sup> ts 9.

<sup>59</sup> ts 10 - 11.

in the scope of the Access Application, but that no emails were identified. The Department's advice was that it was able to view all emails, including those that had been deleted. There was no reason whatsoever to doubt the explanation. There was no reason to suppose the Department's email system was unreliable. Reasonableness did not require the Commissioner to consider such a speculative and remote possibility.

83 Accordingly, I do not accept the premise of the first alleged consideration. That is, I do not accept that it *was* likely that there would be paper records of emails in the Department's file F-A-A-0300 within the scope of the Access Application.

84 I am also not satisfied that the Letter 'almost inescapably' compels the conclusion for which Mr Lee contends. The hypothetical possibility that the Department's file contained printed copies of email messages within the scope of the Access Application is speculative and remote.

85 For these reasons, I am not satisfied that the existence of the Letter and the file number meant that it was not open to the Commissioner to conclude that the Department's decision was justified.

### *Different explanations*

86 The second alleged consideration is the different and sometimes contradictory information Mr Lee says he was given as to what had been done to access emails from the period stated in his Access Application.

87 Mr Lee submits that he made it clear to the Commissioner 'that his complaint centred around his contention that the email system needed to be restored before it could be searched adequately'.<sup>60</sup> He says that the Commissioner stated in the Preliminary View Notice that the email system had been restored in order to perform the searches required by his Access Application, but did not 'resolve the contradictory accounts' Mr Lee says he was given on this issue.<sup>61</sup>

88 During the hearing, Mr Lee's counsel clarified that this component of ground 3 did not seek to allege that the Commissioner should have *written* something about this issue. Rather, it sought to allege that, if

---

<sup>60</sup> Appellant's Submissions [66]. And see Materials page 132 [13].

<sup>61</sup> Appellant's Submissions [68].

she had had sufficient *regard* to the different information, she would not have found the Department's decision to be justified.<sup>62</sup>

89 In his written submissions in this appeal, Mr Lee set out the information he had received over time. Much of that information appeared to be consistent. His counsel confirmed during the hearing that, with the exception of what the Internal Reviewer had said, the information was either consistent or it was ambiguous and inadequate. The only inconsistency was the Internal Reviewer's statements to the effect that the electronic mailboxes he had accessed had not been produced by a 'reconstruction from a source'.<sup>63</sup>

90 The officer who made the Department's original decision had advised Mr Lee:<sup>64</sup>

HSS explained the response, in that the file is not from a backup disc, if that's what you mean.

There is no such thing as an 'original' email, as it's an 'electronic blackboard', with multiple users able to see a view of the transaction.

All emails sent and received are recorded through the exchange, and therefore even if a staff member 'deletes' an email, HSS have a recording of exactly what was sent and received.

91 In his decision, the Internal Reviewer wrote:<sup>65</sup>

After receipt of the initial decision, you requested further information from the Senior Integrity Officer - FOI, and the following was advised:

- For review of the emails during the relevant timeframe, Health Support Services (HSS) has provided access to a 'read only' Outlook.pst file of each of the officers listed in your application.
- The emails were not from a 'backup disc'.
- HSS are able to view all emails sent and received, even those that have been deleted, as the emails are all recorded through the exchange.

Your additional request of, 'Did the HSS restore the Health Department's electronic email system as it was in 2012 in order to provide the read only emails?', was not answered, however I can

---

<sup>62</sup> ts 13. This was consistent with the ground of appeal, and clarified that, contrary to what appeared to be suggested by the Appellant's Submissions [69], this ground did not relate to a failure to give reasons.

<sup>63</sup> ts 11 - 12 and 15.

<sup>64</sup> Materials page 13. See also Materials pages 12 - 19.

<sup>65</sup> Materials page 35.

confirm that the review did have access to the email system as it was in 2012, for the purposes of identifying emails that would fall within the scope of the review.

92 After further exchanges with Mr Lee, the Internal Reviewer advised:<sup>66</sup>

I can confirm that the source of the emails is not a reconstruction from a source.

All emails sent and received by Department of Health employees sit on an exchange server. As the reviewer I was given access to the inboxes (sent and received) of the individuals named in the application for the period of time specified. I reviewed these inboxes and confirmed there were no emails that fell within the scope of the application.

93 After still more exchanges with Mr Lee, the Internal Reviewer advised:<sup>67</sup>

To clarify, there is no reconstruction needed to access/view emails that were sent and received in 2012.

For example as I understand it, there is no difference between emails sent yesterday and emails sent in 2012. In fact there is no difference between this email I sending you now and emails sent in 2012. They are all captured and remain (sit) on the exchange server. Even if I delete this email after sending it to you, it will remain on the server and can be viewed at any point.

94 Mr Lee then contacted HSS directly, and was advised:<sup>68</sup>

You have queried the storage and access to emails sent and received by the WA health system back to 2012.

Upon initial investigation I have been informed that the backup system used for the email exchange system in 2012 has a retention of at least seven (7) years, so mailbox databases may be retrievable from that period. With regards to the length of time to retrieve emails from this period this would depend on what the time span is for the request and how many mailboxes are being restored and it usually takes a few days up to several weeks depending on the number of restores required and which backup system is being used.

---

<sup>66</sup> Materials page 39.

<sup>67</sup> Materials page 40.

<sup>68</sup> Materials page 47.

95 After Mr Lee complained to the OIC, the Commissioner's legal officer advised Mr Lee:<sup>69</sup>

For your information the agency provided me information about the way it accesses electronic information that has been archived and confirmed that the process had been followed to identify any documents falling within the scope of your access application.

96 As set out earlier, in the Preliminary View Notice, the Commissioner set out the detailed information her legal officer had obtained from HSS in relation to how emails were retained, how searches could be conducted and the specific searches that were done in this case. The Commissioner explained the test she was applying as to whether the Department had taken reasonable steps to find documents. She set out what she had gleaned from the information she had been given, namely that the Department had recreated the mailboxes of the named individuals for the period in the scope of the Access Application, but that no emails were identified.

97 I do not accept Mr Lee's contention that, if the Commissioner had had proper regard to the information *he* had been given, she would not have found the Department's decision to be justified.

98 First, the extent of any inconsistency was limited to the Internal Reviewer's statement that 'the source of the emails [he had accessed was] not a reconstruction from a source' and his statement to the effect that no reconstruction was needed to access emails sent in 2012.

99 Second, viewing those statements in the context of the Internal Reviewer's communications as a whole, it is apparent that the Internal Reviewer was seeking to make the point that it did not matter if emails had been deleted, as they could still be viewed, whether they had been sent in 2012 or in 2018. Further, consistently with the other information provided, the Internal Reviewer confirmed that he was given access to the electronic mailboxes of the four named people.

100 Third, it is apparent that the Internal Reviewer was passing on *his understanding* of what he had been told *by HSS*. The Commissioner's information had come from HSS, and it had been provided in great detail.

101 There was no reason for the Commissioner to consider what the Internal Reviewer had told Mr Lee. It could not possibly have caused

---

<sup>69</sup> Materials page 159.

her to doubt the information her office had received directly from HSS. I do not accept that, if she had considered it, she would not have concluded that the Department's decision was justified.

102 I note that the Commissioner *did* address why she did not accept Mr Lee's submission that some transcript he had provided contradicted the Department's response to his Access Application.

103 I am not satisfied that, if the Commissioner had had proper regard to the different information, she would not, or should not, have found the Department's decision to be justified.

***The identity of the searcher***

104 The third alleged consideration is Mr Lee's concern that Ms Chen should not have been the one to search her own personal email account. In the Final Decision, the Commissioner acknowledged this concern, but then said 'However, in all the circumstances I am not persuaded that there are reasonable grounds to believe that documents exist within the scope of your application'.

105 Mr Lee submits this was unreasonable because:<sup>70</sup>

It seems that the Commissioner's reasoning was that as there were no reasonable grounds to believe that documents exist it did not matter who did the searches aimed at finding them. That is simply illogical - it uses an assumed result to justify not taking the steps needed to determine whether or not that assumed result is the case.

106 Applying the proper approach to the Commissioner's reasons,<sup>71</sup> I am not satisfied that this was her reasoning.

107 In the Final Decision, the Commissioner first set out the fact that the Letter was dated 31 January 2012. She noted that, given the Access Application related to emails between 23 January 2012 and 31 January 2012, responses to the Letter were likely to be outside the scope of the Access Application.

108 Second, the Commissioner noted that she had been told that the personal email address had been inserted in error.

---

<sup>70</sup> Appellant's Submissions [72].

<sup>71</sup> That is, by not construing them minutely and with an eye 'keenly attuned to the perception of error'.

109 Third, the Commissioner noted that she had been told that  
Ms Chen had searched her personal mailbox but that no documents  
within the scope of the Access Application had been found.

110 After then explaining the vertical number on the Letter, and  
acknowledging Mr Lee's concern that Ms Chen should not have been  
the one to search her own personal email account, the Commissioner  
said 'However, in all the circumstances I am not persuaded that there  
are reasonable grounds to believe that documents exist within the scope  
of your application'.<sup>72</sup>

111 Clearly, 'all the circumstances' were the three matters she had  
identified in relation to the personal email account in addition to the  
explanation for the vertical number. I do not accept she reasoned in the  
manner Mr Lee contends.

112 This is sufficient to dispose of this aspect of ground 3 as it was  
framed in the hearing. However, I make the following additional  
observations.

113 The Commissioner clearly had regard to the fact that Ms Chen had  
checked her own personal email account. Mr Lee's complaint is, in  
essence, that she failed to give *sufficient weight* to this fact. In my  
view, the fact that Ms Chen had checked her own personal email  
account did not mean it was not open to the Commissioner to conclude  
that the Department's decision was justified.

***Conclusion on ground 3***

114 I have explained why I do not accept that any of the alleged  
considerations rendered the Commissioner's Final Decision  
unreasonable.

115 Therefore, ground 3 fails.

**Conclusion**

116 I am not satisfied that the Commissioner made any of the alleged  
errors of law. I would dismiss the appeal and hear from the parties as  
to costs.

---

<sup>72</sup> Materials page 184.

*ARCHER J*

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

SW

Associate to the Honourable Justice Archer

31 MARCH 2020