JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	PEARLMAN -v- THE UNIVERSITY OF WESTERN AUSTRALIA [2018] WASC 245
CORAM	**:**	SMITH J
HEARD	**:**	5 APRIL 2018
DELIVERED	**:**	15 AUGUST 2018
FILE NO/S	**:**	GDA 16 of 2017
BETWEEN	**:**	PATRICK W PEARLMAN Appellant AND THE UNIVERSITY OF WESTERN AUSTRALIA Respondent

ON APPEAL FROM:

For File No	**:**	GDA 16 of 2017
Jurisdiction	**:**	OFFICE OF THE INFORMATION COMMISSIONER
Coram	**:**	COMMISSIONER S H BLUEMMEL
File Number	**:**	F2016337

Catchwords:

Freedom of information - Whether the expression of a preliminary view is a 'decision' within meaning of s 85(1) of the *Freedom of Information Act 1992* (WA) - Did the expression of a preliminary view constitute pre-judgment

What constitutes a 'decision' - Determination of substantive rights test applied

Finding of fact that the access complaint had been resolved by conciliation resulted in error of law as Commissioner exceeded his authority not to make a final decision

Scope of Commissioner's powers to make a decision in relation to an access complaint considered

Legislation:

Aboriginal Heritage Act 1972 (WA), s 18
Commercial Arbitration Act 1985 (WA), s 38(2)
Corporations Law 2001 (Cth), s 829, s 830
Freedom of Information Act 1992 (WA), s 3, s 4(b), s 12, s 20, s 23(1), s 23(1)(b), s 30, s 31, s 63(1), s 64, s 65, s 65(1), s 65(1)(d), s 67(1), s 67(2), s 70, s 71, s 71(1), s 75, s 76, s 76(1), s 76(1)(b), s 76(2), s 76(5), s 76(7), s 77(3), s 85, s 85(1), s 85(2), s 85(3), s 85(4), s 85(5), s 110, sch 1 cl 3, sch 1 cl 4(1), sch 1 cl 4(2), sch 1 cl 4(3), sch 1 cl 7

Result:

Appeal allowed in part

Category: B

Representation:

Counsel:

Appellant : Mr N M H Kirby
Respondent : Ms K A T Pedersen

Solicitors:

Appellant : In person
Respondent : Minter Ellison

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

Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2] [2011] WASC 283
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321
Australian Securities and Investments Commission v Donald [2003] FCAFC 318; (2003) 136 FCR 7
Corporation of the City of Enfield v Development Assessment Commission [2000] HCA 5; (2000) 199 CLR 135
Director-General of Social Services v Chaney [1980] 47 FLR 80
Forsayth NL v Australasian Gold Mines NL (No 3) (1992) 8 WAR 176
HB v His Honour Judge T Sharp [2016] WASC 317
Ninan v Valuer General (WA) [No 2] [2016] WASCA 170
Paridis v Settlement Agents Supervisory Board (2007) 33 WAR 361
S v Department for Child Protection and Family Support [2017] WASC 305
Shanahan v Scott (1957) 96 CLR 245
Stonnington City Council v Roads Corporation [2010] VSC 454; [2010] 30 VR 303
Waterford v The Commonwealth of Australia (1987) 163 CLR 54
Western Australian Museum v Information Commissioner (1994) 12 WAR 417

SMITH J:

Background to the appeal

1 By letter dated 30 June 2016, the appellant made an access application to the respondent under s 12 of the *Freedom of Information Act 1992* (WA) (the FOI Act).[1] The application requested access to all materials relating to communications or correspondence, written or electronic, between or involving named representatives of the Environmental Defender's Office of Western Australia (Environmental Defender's Office) from 1 January 2015 to 30 June 2016.

2 The respondent identified 414 documents that came within the scope of the appellant's access application.

3 On 26 August 2016, pursuant to s 30 of the FOI Act, the respondent gave the appellant notice that it refused access to all 414 documents on grounds that all documents relating to the appellant's application for disclosure were exempt matter, as prescribed in cl 4(3) of sch 1 of the FOI Act.[2]

4 In the notice it was stated that all of the documents pertaining to the application were exempt from disclosure on the basis that:

(a) the content of all documents relate to the management of the business of the Environmental Defender's Office, including confidential human resource matters. The disclosure of this information would reveal business or professional affairs of the Environmental Defender's Office; and

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[1] In this matter the respondent is the relevant agency under the FOI Act.

[2] Schedule 1 clause 4 relevantly reads:

4. Trade secrets, commercial and business information

(1) Matter is exempt matter if its disclosure would reveal trade secrets of a person.

(2) Matter is exempt matter if its disclosure -

(a) would reveal information (other than trade secrets) that has a commercial value to a person; and

(b) could reasonably be expected to destroy or diminish that commercial value.

(3) Matter is exempt matter if its disclosure -

(a) would reveal information (other than trade secrets or information referred to in subclause (2) about the business, professional, commercial or financial affairs of a person; and

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

(b) if the information was disclosed, this would be expected to prejudice the future supply of the business and professional affairs of charitable or non-for-profit organisations to University staff, a significant number of whom regularly volunteer their time in Board or community roles.

5 The notice also stated that a number of the documents were the subject of exemption on additional grounds, being exempt from disclosure in accordance with cl 3 of sch 1 (personal information) or cl 7 of sch 1 (matter that is the subject of legal professional privilege).

6 Attached to the notice was a schedule of each of the documents. The schedule contained a description of the documents and the exemption relied upon by the respondent in respect of each document.

7 On 19 September 2016, the appellant made an application for an internal review of the respondent's decision to refuse access.

8 On 3 October 2016, the respondent issued a decision on the internal review. In the decision given on the internal review, the respondent determined that the initial decision should be varied. In particular, access was refused in accordance with s 23(1)(b) of the FOI Act, on grounds that the documents sought were not 'documents of an agency'.

9 The reasons given on the internal review were that the Environmental Defender's Office is a non-profit, non-government community legal centre[3] which is not affiliated with, or part of, the University of Western Australia.

10 On 1 December 2016, the appellant applied to the Information Commissioner for external review of the respondent's decision on the internal review.

11 By letter to the appellant dated 2 December 2016, the Commissioner notified the appellant that he had decided to deal with the appellant's application for external review against the decision on the internal review, as a complaint made under s 65(1)(d) of the FOI Act.

12 By letter dated 14 June 2017, the Commissioner provided the appellant and the respondent with a preliminary view of whether the

[3] Specialising in public interest environmental law, whose services include providing community groups and individuals with free legal advice and representation on environmental issues, promoting environment law reform, and undertaking community legal education.

appellant should be given access to the documents sought by him (the preliminary letter). The preliminary letter contained a summary of the initial decision and the decision of the respondent on the internal review.

13 The preliminary letter recorded that the respondent had initially refused access to the appellant under cl 4(3) of sch 1 of the FOI Act. The respondent then varied its decision on the internal review and refused access in accordance with s 23(1)(b) of the FOI Act on grounds that the 414 documents (originally identified as coming within the scope of the application) were not documents of an agency.

14 In the preliminary letter, the Commissioner also recorded the following discussions with the Commissioner's principal legal officer, acting investigations officer, the appellant and the respondent after the appellant had applied for an external review of the respondent's decision on the internal review and the result of those discussions as follows:

(a) On 30 January 2016, the principal legal officer and acting investigations officer met with the respondent to discuss the complaint. At this meeting, the acting investigations officer informed the respondent that it was the Commissioner's opinion at that time that:

(i) the documents in dispute were documents of an agency for the purposes of the FOI Act;

(ii) it was unlikely that a blanket claim of a cl 4(3) of sch 1 exemption (disclosure of business, professional, commercial or financial affairs of a person) on all the documents in dispute would be accepted by the Commissioner; and

(iii) each document must be considered individually as to whether it is exempt from release taking into account the provisions of the FOI Act.

(b) The respondent informed the Commissioner's officers that reviewing all of the documents in dispute individually (which consisted of a large amount of documents involving a third party organisation) would be difficult and time consuming.

(c) It was agreed that the respondent would review the disputed documents and liaise with the appellant to try to identify the documents that could be removed from the scope of the appellant's

access to reduce the respondent's work involved in dealing with the application. Once the scope had been reduced the respondent could then consider whether any of the remaining documents were exempt.

(d) The acting investigations officer contacted the appellant and advised him of the outcomes in (a) to (c) and informed him that the respondent would contact him directly.

(e) On 14 and 15 February 2017, the respondent provided the appellant with a revised document schedule and a schedule of screenshots. The document schedule identified 192 documents in dispute that the respondent proposed to remove from the scope of the application. The respondent asked the appellant to confirm that he was willing to remove from the scope the documents it had identified. It also asked the appellant to consider any additional ways in which the scope of the access application could be further reduced.

(f) The categories of documents suggested by the respondent for removal from scope were:

(i) C1 - documents or emails already provided to the appellant;

(ii) C2 - duplicates of documents or emails;

(iii) C3 - documents involving logistical arrangements;

(iv) C4 - publicly available documents;

(v) C5 - Environmental Defender's Office administration activities;

(vi) C6 - Environmental Defender's Office human resources and payroll arrangements; and

(vii) C7 - correspondence between Environmental Defender's Office management committee and Slater and Gordon.

(g) After further discussions between the appellant, the respondent and the acting investigations officer, on and between 16 February 2017 and 13 March 2017, the total number of documents remaining that came within the scope of the appellant's application, after agreement was reached to reduce the number of documents, was 299.

(h) The respondent considered that dealing with the remaining 299 documents in dispute would still divert a substantial and unreasonable portion of the respondent's resources away from its other operations and therefore it sought to deal with the appellant's access application pursuant to s 20 of the FOI Act.

15 In the preliminary letter, the Commissioner observed that attempts had been made during the external review process to informally conciliate the matter by reducing the scope of the access application, however, informal conciliation was unsuccessful and that accordingly he intended to review the respondent's decision to refuse to deal with the appellant's application, pursuant to s 20 of the FOI Act.

16 Under the heading 'Consideration' in the preliminary letter the Commissioner stated:

> Section 20 is designed to ensure that the operations of government agencies are not unduly impeded by agencies having to deal with unreasonably voluminous access applications. It is one of a number of provisions aimed at striking a balance between on the one hand, the public interest in open and accountable government, and on the other hand the public interest in the ongoing effective operations of agencies.
>
> As the agency has refused to deal with your [the applicant's] access application pursuant to section 20 of the FOI Act, when considering a complaint about an agency's refusal to deal with an access application in accordance with section 20, I must decide whether the agency:
>
> (1) took reasonable steps to help you to change an application to reduce the amount of work needed to deal with it; and
>
> (2) was justified in deciding that the work involved in dealing with your application in its present form would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

17 After considering the submissions made on behalf of the appellant and the respondent, the Commissioner stated that his preliminary view was that:

(a) the respondent had taken reasonable steps to help the appellant to change the access application to reduce the amount of work needed to deal with it; and

(b) the respondent's decision to refuse to deal with the appellant's application pursuant to s 20 of the FOI Act was justified.

18 The Commissioner clearly stated that the purpose of the preliminary letter was to provide the appellant with his (the Commissioner's) preliminary view of the complaint, based on the information currently before him. Further, his preliminary view was not his final determination of the complaint. The Commissioner went on to state that if the parties accepted his preliminary view, there would be nothing remaining in dispute that he was required to determine, and he would consider the matter resolved by conciliation. In the event that the complaint could not be resolved by conciliation, the Commissioner invited the parties in the preliminary letter to correct any factual errors and to provide him with any new and relevant submissions in support of their respective positions before he finalised the matter, if necessary, by way of a published decision.

19 On 29 June 2017, the appellant provided further submissions in respect of the matters set out in the preliminary letter. In his further submissions, the appellant advised the Commissioner that he did not agree with the preliminary 'determination'. He urged the Commissioner to reconsider the course of decision-making outlined in the preliminary 'determination' on grounds that it fundamentally misconceived the nature of his complaint and the powers of the Commissioner to resolve the parties' access dispute under pt 4 of the FOI Act. The appellant informed the Commissioner that he proposed to further reduce the scope of documents to seek access to in order to facilitate resolution of the external review.

20 In the further submissions, the appellant set out a summary of his submissions as follows:

> (1) The Commissioner's preliminary determination is misconceived because it fundamentally mischaracterises the entire context of this external review proceeding and the parties' access dispute.
>
> (2) In his preliminary determination, the Commissioner misconceives and fails to properly exercise his powers and functions under Part 4 of the FOI Act.
>
> (3) To the extent the Commissioner purports to permit the agency to adopt a preliminary refusal to deal under s 20 in the context of a Part 4 external review, again the Commissioner has misconceived Parts 2 and 4 of the Act and the limits on agency decision-making authority once external review has commenced.
>
> (4) Even if the agency could make a s 20 refusal to deal determination in the context of a Part 4 external review, the

> Commissioner errs as a matter of law in considering that the agency has discharged its onus of proof to satisfy the conditions of either ss 20(1) or 20(2), both of which are required to justify a refusal to deal.
>
> (5) The Commissioner appears to have violated principles of natural justice in proceeding to resolve this proceeding as he proposes to do in his 14 June 2017 preliminary determination.
>
> (6) Rather than proceeding on the course outlined in the Preliminary Determination, the Commissioner should adopt the complainant's proposal for reducing the scope of his access application in order to facilitate the informal resolution of this proceeding.

21 After setting out lengthy submissions in respect of each of points (1) to (5), the appellant put forward a proposal that the parties and the Commissioner proceed with his external review complaint, in part, as follows:

(a) by an offer to reduce the scope of his request to 175 documents, as specified in a table in [130] of the submissions; and

(b) in turn, the Commissioner would:

(i) issue a final determination regarding whether access to documents nominated in accordance with the table in [130] should be disclosed in whole, or redacted in part, or withheld, within 30 days; and

(ii) direct the respondent to retain the remainder of the documents identified in the two schedules attached to its 26 August 2016 decision, and ensure that they are not destroyed or deleted.

22 In an email on 31 August 2017 to the appellant sent by a legal officer employed by the Commissioner, the appellant was informed that the Commissioner had had an opportunity to consider the appellant's response to his preliminary view and had noted the proposal to reduce the scope of the access application to the listed 175 documents, and the additional points made in the appellant's submissions.

23 The email informed the appellant that the Commissioner had agreed that the appellant's proposal to reduce the scope of the access application should be put to the respondent and that if the respondent agreed to deal with the matter in its reduced scope then the external

review would be finalised on the basis that the respondent had agreed to deal with the matter. The email further outlined that in such a circumstance:

(a) the Commissioner would not issue a final determination about access to the documents; and

(b) there would be the usual right of review following the respondent dealing with the application, if it accepted the appellant's proposal.

24 The appellant was also informed by that email that s 110 of the FOI Act provides that it is an offence to dispose of documents to prevent access being given to a document. After referring to s 110, the legal officer stated that there was no need for the Commissioner to issue a direction to the respondent in the terms sought by the appellant and that the Commissioner would not do so. The appellant was also informed that if the respondent did not accept the appellant's proposal, the Commissioner would proceed to publish his decision on the matter, taking into account all the information before him.

25 In a subsequent email sent on 1 September 2017 by an officer of the Commissioner to the respondent, the respondent was:

(a) informed that the Commissioner had considered all of the submissions made by the appellant in response to the Commissioner's preliminary view;

(b) asked whether it was able to deal with the matter on the basis of the reduced number of the 175 documents identified by the appellant in his further submissions; and

(c) informed that if it agreed to deal with the matter (on this basis) the Commissioner would close his file on the basis that the issue (that the agency had refused to deal with the application on grounds of s 20 of the FOI Act) had been resolved.

26 The email sent to the respondent on 1 September 2017 also contained a statement to the effect that the practicalities of dealing with the matter (in this way) was that the respondent would treat the application as a new application and be required to provide to the appellant with a notice of decision in relation to dealing with the matter, offering the appellant internal review, etc, of that decision if the appellant was not satisfied with the access given.

27 The respondent subsequently accepted the proposal (as put to it) by the Commissioner.

28 In a letter to the appellant dated 8 September 2017, the Commissioner informed the appellant:

> I refer to previous correspondence in relation to this matter and in particular the email sent to you on 1 September 2017 by my Legal Officer.
>
> I am pleased to advise you that the University of Western Australia (**the agency**) has agreed to deal with the reduced scope proposed in your letter to me of 29 June 2017.
>
> As advised in my Legal Officer's email to you of 1 September 2017, the agency will now deal with the matter and provide you with a notice of decision in relation to those documents listed in your revised scope. The usual right to review applies if you are not satisfied with the access you are given to the documents, after the agency has dealt with the matter.
>
> As the current matter before me relates to the agency's refusal to deal with your application, I now consider the matter has been resolved by conciliation. I will write to parties to formally notify them that my file has been closed, on Friday 15 September 2017.

29 In a letter written to the appellant by the Commissioner dated 15 September 2017, the appellant was informed that as there was nothing remaining in dispute that he (the Commissioner) was required to determine, he (the Commissioner) considered the complaint resolved by conciliation, and the file on the matter was now closed.

The appeal

30 Pursuant to s 85(1) of the FOI Act, an appeal lies to the court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application.

31 The first issue that arises in the appeal is whether the Commissioner made a 'decision' from which an appeal will lie under s 85(1) of the FOI Act.

32 Whilst the appellant in his submissions filed in the appeal refers to the Commissioner's preliminary view as a 'decision' and claims it and all of the Commissioner's subsequent 'decisions' were infected by errors of law (and a misapprehension about the nature of the decisions of the respondent under review), the appellant's grounds of appeal only identify

one 'decision' from which an appeal is sought to be instituted under s 85(1).

33 The appeal notice particularises the decision details as closure of the appellant's external review proceeding on 15 September 2017.

34 Broadly, the grounds of appeal assert that the Commissioner made errors of law by:

(a) mischaracterising and impermissibly recasting the complaint and decision made by the respondent as being a refusal to provide access under s 20 of the FOI Act, rather than a refusal of access on the merits of the access application under s 31 and s 30 of the FOI Act (grounds 1, 2, 4, 5, 10);

(b) misconstruing the appellant's proposal to reduce the scope of documents as an effort to reach conciliation with the respondent (ground 5);

(c) incorrectly applying s 76(2) of the FOI Act, identifying the wrong issue, asking the wrong question and failing to consider the relevant factors and questions put in the appellant's complaints (grounds 3 and 6);

(d) failing to consider the respondent's access decision, which resulted in the decision to close the file being manifestly unreasonable as it was not based on a rational consideration of the evidence and did not logically flow from the facts before the Commissioner (ground 9); and

(e) failing to afford the appellant procedural fairness by making a decision to close the file in disregard of the appellant's complaint and submissions objecting to the Commissioner's 14 June 2017 preliminary 'determination'. In particular, the Commissioner demonstrated prejudgment, or a closed mind to the appellant's complaint and submission, and failed to make findings on a substantial, clearly articulated argument set forth in the appellant's 29 June 2017 submissions (grounds 7 and 8).

The power of the Commissioner to deal with an access complaint

35 The power of the Commissioner to conduct an external review of a decision of an agency is contained in pt 4 of the FOI Act.

36 The main function of the Commissioner is to deal with complaints made under s 65 of the FOI Act about decisions made by agencies in respect of access to information and applications for amendment of personal information.[4] The Commissioner has other functions which are not relevant to the disposition of this appeal.

37 Section 65(1) of the FOI Act provides:

> (1) A complaint may be made against an agency's decision -
>
> (a) to give access to a document; or
>
> (b) to give access to an edited copy of a document; or
>
> (c) to refuse to deal with an access application; or
>
> (d) to refuse access to a document; or
>
> (e) to defer the giving of access to a document; or
>
> (f) to give access to a document in the manner referred to in section 28 or withhold access under that section; or
>
> (g) to impose a charge or require the payment of a deposit.

38 The power of the Commissioner to deal with an access complaint made under s 65 is as follows:

(a) The Commissioner may, at any time after receiving a complaint, decide not to deal with the complaint, or to stop dealing with the complaint, because it does not relate to a matter the Commissioner has power to deal with or it is frivolous, vexatious, misconceived or lacking in substance.[5]

(b) The Commissioner's power to conduct proceedings to deal with the complaint is broad. The Commissioner may:[6]

(i) obtain information from such persons and sources and make such investigations and inquiries, as the Commissioner thinks fit. The proceedings are to be conducted with little formality and technicality;

[4] FOI Act s 63(1).
[5] FOI Act s 67(1).
[6] FOI Act s 70.

(ii) determine the procedure for investigating and dealing with complaints and give any necessary directions as to the conduct of the proceedings;

(iii) deal with the complaint without holding formal proceedings or hearings;

(iv) direct that all submissions be in writing; and

(v) require parties to attend compulsory conferences.

(c) The Commissioner may, at any stage, suspend inquiries, investigations or other proceedings so that efforts can be made to resolve the complaint by conciliation or negotiation between the parties. In order to facilitate the resolution of the complaint by negotiation or conciliation the Commissioner may give such directions and do such other things as the Commissioner thinks fit.[7]

(d) In dealing with the complaint, the Commissioner has (in addition to any other power) power to review any decision that has been made by the agency in respect of the access application, and decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency.[8]

39 Pursuant to s 64, the Commissioner has power to do all things that are necessary or convenient to be done for or in connection with the performance of the Commissioner's functions. The power granted in s 64 is general and broad. It requires only that a rational cause or relationship exist between the functions and powers created by the FOI Act and the Commissioner's functions.[9] However, the scope of the power in s 64 does not extend the scope of the Commissioner's functions.[10]

40 When exercising his or her powers, the Commissioner is expressly required to make a decision (that has finality in that it disposes of the access complaint) by:

(a) deciding not to deal with the complaint or to stop dealing with the complaint on the grounds set out in s 67(1); or

[7] FOI Act s 71.
[8] FOI Act s 76(1).
[9] See ***Stonnington City Council v Roads Corporation*** [2010] VSC 454; [2010] 30 VR 303 [107] (Osborn J).
[10] ***Shanahan v Scott*** (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb & Fullagar JJ).

(b) reviewing any decision that has been made by the agency in respect of the access application pursuant to s 76(1).

41 If the Commissioner decides not to deal with the complaint, or to stop dealing with the complaint pursuant to s 67(1), the Commissioner has to inform the complainant, in writing, of the decision and the reasons for the decision.[11] This duty would necessarily require the Commissioner to set out the grounds upon which a finding is made that the complaint does not relate to a matter the Commissioner has power to deal with or is frivolous, vexatious, misconceived or lacking in substance.

42 Where the Commissioner deals with the complaint under s 76(1) of the FOI Act by reviewing a decision made by the agency and making a decision in respect of the access application, the Commissioner, pursuant to s 76(2), has to make a decision in writing:

(a) confirming the agency's decision to which the complaint relates; or

(b) varying the agency's decision to which the complaint relates; or

(c) setting aside the agency's decision to which the complaint relates and making a decision in substitution for that decision.

43 Where the Commissioner makes a decision under s 76(1) the Commissioner has to 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.[12] A decision made by the Commissioner under s 76 is to be regarded as a decision of the agency and has effect accordingly.[13]

44 An access complaint can otherwise be finally disposed of (not by a decision of the Commissioner) by resolution of the complaint by negotiation or conciliation pursuant to s 71.

45 It is clear that when the powers conferred in s 71 are read in the context of the other powers of the Commissioner, where a matter is resolved by negotiation or conciliation the Commissioner would not be required to make any findings of fact or make any assessment of the

[11] FOI Act s 67(2).
[12] FOI Act s 76(5).
[13] FOI Act s 76(7).

veracity of subject matter of the complaint relating to the access application in question.

An appeal to the court - in the nature of judicial review

46 The right of appeal to the court arising out of 'a decision' of the Commissioner arises solely from s 85 of the FOI Act. Importantly, a right of appeal is only conferred in respect of a question of law arising out of a decision on a complaint relating to an access application.

47 Section 3 of the FOI Act provides that the objects of the Act are to enable the public to participate more effectively in governing the State and to make persons and bodies that are responsible for State and local government more accountable to the public.

48 Public access to documents of government agencies is not untrammelled. Access by the public is subject to a number of exceptions which includes, among other exceptions, the power of an agency to refuse access to an exempt document, or to documents that are not documents of the agency.[14]

49 Section 4(b) of the FOI Act imposes a duty on agencies to give effect to the FOI Act in the way that allows access to documents to be obtained promptly and at the lowest reasonable cost. This provision is to be read together with the exemption in s 20 of the FOI Act which enables an agency to refuse to deal with an application for access if the work involved would divert a substantial and unreasonable portion of the agency's resources away from its other operations.

50 In ***Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2]***, Edelman J observed that the proper approach to an appeal from the Commissioner is that:[15]

> Section 85 of the FOI Act creates a right of appeal to this court 'on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application'. The FOI Act aptly uses the description 'review proceedings' to describe the proceedings brought under s 85: see s 88 FOI Act. In the context of a similar provision concerning appeals from decisions made under s 50(4) of the *Freedom of Information Act 1982* (Vic), French CJ, Gummow and Bell JJ explained in ***Osland v Secretary to the Department of Justice*** [2010] HCA 24; (2010) 241 CLR 320, 331 - 332 [18] (***Osland*** [2010]) that '[d]espite the description of proceedings under the section as an

[14] FOI Act s 23(1).
[15] ***Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2]*** [2011] WASC 283 [28].

> "appeal", it confers original not appellate jurisdiction; the proceedings are "in the nature of judicial review"'. See also ***Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue*** [2001] HCA 49; (2001) 207 CLR 72, 79 [15] (Gaudron, Gummow, Hayne & Callinan JJ).

Does the expression of a preliminary view of the Commissioner constitute a 'decision' within the meaning of the FOI Act and did the expression of a preliminary view constitute pre-judgment?

51 The Commissioner set out his preliminary view of the appellant's complaint in the preliminary letter. The Commissioner plainly stated that the views he expressed were not final or determinative of the appellant's complaint unless the appellant did not accept the preliminary view or did not wish to continue with the complaint. The Commissioner properly invited the appellant, should he not accept the preliminary view, to provide any further submissions in writing provided they were relevant and additional to the information or submissions previously provided by the appellant to the Commissioner.

52 It is entirely proper for a court or tribunal to express a preliminary view so that a litigant can address the issues and problems thereby identified in a preliminary view and attempt to persuade the court or tribunal otherwise.[16] The mere expression of a preliminary view does not constitute prejudgment of an issue.[17]

53 This point is illustrated by the decision in ***HB v His Honour Judge T Sharp***.[18] In that matter, the applicant made a recusal application. Prior to the hearing of the application, through an email sent to counsel by his associate, the judge expressed a preliminary view that having reviewed transcript of a directions hearing he did not 'at this stage, having reviewed the "transcript", consider that he should recuse himself'. The associate also stated in the email that the judge would hear the application for recusal in the presence of the other parties. In the application for judicial review seeking a writ of prohibition against Judge Sharp, Banks-Smith J found that it could not be said that, by the content of the email, the judge evinced a predetermination of the issue or evinced any indication that he would not bring an impartial mind to the question of the recusal application.[19] After having regard to the observations made by the Court

[16] ***Ninan v Valuer General (WA) [No 2]*** [2016] WASCA 170 [20].
[17] ***Ninan v Valuer General (WA) [No 2]*** [2016] WASCA 170 [20].
[18] ***HB v His Honour Judge T Sharp*** [2016] WASC 317.
[19] ***HB v His Honour Judge T Sharp*** [2016] WASC 317 [23].

of Appeal in ***Ninan v Valuer General (WA) [No 2]***,[20] Banks-Smith J observed:[21]

> Judges often form tentative or preliminary opinions, and counsel are usually assisted by hearing those opinions and being given an opportunity to deal with them: ***Johnson v Johnson*** [2000] HCA 48; (2000) 201 CLR 488, 493.
>
> The rule against bias is directed to prejudgment incapable of being altered, rather than predisposition capable of being swayed by evidence or argument: ***Minister for Immigration and Multicultural Affairs v Jia Legeng*** [2001] HCA 17; (2001) 205 CLR 507, 531 - 532 [71] - [72] (Gleeson CJ & Gummow J).

54 In this matter the preliminary view expressed by the Commissioner is not a 'decision' as the expression a mere 'view' of the matter is no more than that and did not of itself have any binding effect.

55 The effect of the content of the Commissioner's preliminary letter was an expression that on the information before the Commissioner, in the absence of any further submission that could persuade him otherwise, he was of the view that the respondent was justified in refusing access to the documents.

56 If the Commissioner had subsequently issued a decision that complied with the requirements of s 76(2) and (5) of the FOI Act by dealing with and finally determining the matter, it is clear that the view of the Commissioner expressed in the preliminary letter would not constitute a 'decision' within the meaning of s 85(1) of the FOI Act. However, if the preliminary view of the Commissioner was incorporated into a subsequent final decision, to the extent incorporated, the matters expressed in the preliminary view could be regarded as reasons and/or facts found in a decision within the meaning of s 85(1) of the FOI Act.[22] This, however, did not occur in this matter, as the Commissioner did not deal with the complaint pursuant to s 76 of the FOI Act.

[20] ***Ninan v Valuer General (WA) [No 2]*** [2016] WASCA 170.
[21] ***HB v His Honour Judge T Sharp*** [2016] WASC 317 [14] - [15].
[22] See the discussion in ***S v Department for Child Protection and Family Support*** [2017] WASC 305 [10] - [19].

Did the Commissioner make a 'decision' within the meaning of s 85(1) of the FOI Act on 15 September 2017?

57 In part, the answer to this question turns upon whether the appellant's complaint had in fact been resolved by conciliation or negotiation.

58 Whilst it may appear to be obvious, if it were the case that the appellant's complaint had in fact been resolved by conciliation or negotiation, it is clear that no appealable decision would arise out of an administrative action by the Commissioner to close the file on a complaint. This is because it must necessarily be implied from the text of s 71 of the FOI Act that the resolution of a complaint by conciliation or negotiation between parties results, as a matter of fact and law, in the subject matter of the complaint ceasing to exist having been merged into a consensual agreement. In these circumstances, the administrative action of the Commissioner to close a file would not alone constitute a decision within the meaning of s 85(1) of the FOI Act.

59 However, it is clear from the correspondence that passed between the parties, the Commissioner's office and the Commissioner that the appellant's complaint was not resolved by negotiation or conciliation.

60 The appellant's complaint on the external review was simply that he was denied access to seven categories of documents in the respondent's possession. Whilst the respondent's reasons for denying the appellant access to the documents changed from the initial decision to the internal review and through the conciliation process that occurred prior to the issue of the preliminary view of the Commissioner, the appellant's complaint remained the same. That was, he sought access to documents that the respondent refused to provide.

61 For reasons that follow, I am of the opinion that the fact that there was a change to the grounds upon which the respondent relied in denying the appellant access to the requested categories of documents is immaterial to the proper disposition of this appeal.

62 What emerges from all of the correspondence is that the appellant's complaint had not been resolved. Although the Commissioner wrote to the appellant on 15 September 2017 informing him that there was nothing remaining on the dispute that he (the Commissioner) was required to determine, that was not, in fact, the case as:

(a) the appellant had not agreed that the respondent would review whether access could be given to a reduced number of documents; and

(b) all that the respondent had agreed to do at that time was to review the reduced number of documents referred to in the appellant's further submissions and provide the appellant with a notice of decision in relation to each of those documents.

63 As counsel for the appellant points out, the proposal put to the respondent by the Commissioner's office and agreed to by the respondent did not reflect the proposal the appellant had put to the Commissioner as the basis upon which he would agree to reduce the scope of his request for access to the seven categories of documents to a total number of 175 documents.

64 It is said to follow, therefore, that an error of law arises in the 'decision' to close the file on the complaint because there was no evidence before the Commissioner upon which a finding could be made that the complaint had been successfully conciliated, that is, there was no evidence that there was an agreement between the parties resolving the complaint.

65 Whilst the notice of appeal identifies the closure of the complainant's external review proceeding (in effect the closing of the complaint file) as the decision which is the subject of this appeal, the operative 'decision' was a decision of the Commissioner not to issue a final decision in the sense of determining the merits of the appellant's complaint (as provided for in s 76) on grounds that there was nothing remaining of the dispute to determine as the matter had been successfully conciliated, and, as counsel for the appellant points out, the natural conclusion and corollary of the decision was the administrative action to close the file.

66 It is clear that the Commissioner decided that he would not issue a final determination about access to the documents sought by the appellant on grounds that the appellant's complaint had been resolved by conciliation. I agree that the consequence of that decision was that the appellant's complaint on the external review was that it was to be treated as finally concluded.

67 The next question that arises is whether the decision of the Commissioner not to issue a final decision can be characterised as a decision within the meaning of s 85(1) of the FOI Act.

68 What constitutes a 'decision' is not defined in the FOI Act.

69 Section 85 of the FOI Act contemplates that there are certain categories of decisions of the Commissioner that cannot be reviewed by the court in an appeal. Section 85(1) to (5) provides:

> **85. What may be appealed etc.**
>
> (1) 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.
>
> (2) An appeal lies to the Supreme Court from a decision -
>
> (a) of the Commissioner refusing or failing to make a decision of the kind mentioned in section 77(3); and
>
> (b) by the Premier confirming an exemption certificate pursuant to section 77(4).
>
> (3) There is no appeal under subsection (1) in relation to a decision of the Commissioner as to -
>
> (a) the deferral of the giving of access to a document;
>
> (b) the charges to be imposed for dealing with the access application;
>
> (c) the payment of a deposit under section 18.
>
> (4) An appeal lies to the Supreme Court on any question of law arising out of a decision of the Commissioner on a complaint relating to an application for amendment of personal information if the effect of the decision is that information is not to be amended in accordance with the application.
>
> (5) There is no appeal under subsection (4) in relation to a decision of the Commissioner as to whether or not to deal with a complaint or in relation to any other decision of the Commissioner not mentioned in subsection (4).

70 It is notable that an appeal lies to the court under s 85(1) from a decision of the Commissioner not to deal with or to stop dealing with a complaint relating to an access application on the grounds set out in s 67(1) (in relation to which reasons for decision must be given).[23]

71 An appeal also lies to the court pursuant to s 85(2) of the FOI Act from a decision of the Commissioner refusing or failing to make a

[23] FOI Act s 67(2).

decision of the kind mentioned in s 77(3) which deals expressly with a review of grounds upon which an exemption certificate has been given by the Premier in respect of a document. However, s 85(2) of the FOI Act has no application to the issues raised in this matter.

72 Pursuant to s 67(2), if the Commissioner decides not to deal with a complaint, or to stop dealing with a complaint on grounds it does not relate to a matter the Commissioner has power to deal with or is frivolous, vexatious, misconceived or lacking in substance the Commissioner has to inform the complainant, in writing, of the decision and the reasons for the decision.

73 It is notable that pursuant to s 85(4) and s 85(5) an appeal to the court will not lie against a decision of the Commissioner as to whether or not to deal with a complaint relating to an application for amendment of personal information. However, the restriction imposed on the right of appeal in s 85(4) by the operation of s 85(5) does not apply to an appeal instituted under s 85(1) of the FOI Act.

74 The word 'decision' has, as Mason CJ in ***Australian Broadcasting Tribunal v Bond*** observed, a variety of potential meanings and where the relevant context is not that of a decision reached in curial or judicial proceedings, the meaning must be determined by reference to the text, scope and purpose of the statute itself.[24]

75 In legislation creating a right of review, the word 'decision' can, depending upon the context of the word, be interpreted broadly or narrowly. In ***Director-General of Social Services v Chaney***, Deane J observed:[25]

> The word 'decision' is a word of indeterminate meaning. In some contexts, it can refer to the mental process of making up one's mind. In the context of judicial or administrative proceedings, the word will ordinarily refer to an announced or published ruling or adjudication. In such a context, the word 'decision' may be apt to include the determination of any question of substance or procedure, including, for example, rulings on procedural questions such as whether particular evidence should be received, or the meaning of the word may be limited to a determination effectively resolving an actual substantive issue. When the word 'decision' has the last mentioned limited meaning, it can refer to any such determination whether final or intermediate (see, for example, ***Registrar of Workers' Compensation Commission (NSW) v FAI Insurances Ltd*** (12)) or be limited to referring only to a

[24] ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321, 335.
[25] ***Director-General of Social Services v Chaney*** [1980] 47 FLR 80, 100.

> determination which effectively disposes of the matter in hand (see, for example, ***Winter v Winter*** (13) and ***Penniel v Driffill*** (14)).

76 On the one hand, in interpreting the words 'any decision' in s 85(1) it could be said that the right of appeal created in this provision is to apply only in the narrow sense, that is, only to action taken by the Commissioner to review and decide a complaint in the sense of determining a claim to access to documents in the manner contemplated by s 76 of the FOI Act.

77 It should be noted that pursuant to s 85(3), there is no appeal in relation to particular decisions of the Commissioner which can plainly be characterised as decisions of an administrative nature. These are the decisions given on complaints seeking an external review of decisions of deferral of the giving of access to a document, the charges to be imposed for dealing with the access application and the payment of a deposit under s 18 of the FOI Act.[26]

78 The exclusion of the right of an appeal against particular administrative decisions under s 85(3) make it clear that certain decisions that can be characterised as those made as preparatory to finally disposing of an application for external review are to be excluded, but not those decisions which are acts which plainly have the effect of finally disposing of a complaint for external review of a decision relating to access to documents in a practical sense.

79 Whilst the exclusions in s 85(3) may suggest an inference that the scope of the words 'any decision' should not be construed narrowly, perhaps what could be said to be determinative is that the FOI Act contemplates that an appeal is only to lie against a decision of the Commissioner under s 85(1) where a statutory obligation is imposed on the Commissioner to provide written reasons for the grounds for making a decision. However, I think the better view is to construe the words 'any decision' to mean a decision that affects rights in a substantive way.

80 Such a construction is consistent with the observations made by White J in ***Western Australian Museum v Information Commissioner*** when considering an application for a writ of certiorari quashing a decision of the Commissioner directing disclosure of documents pursuant to s 75 of the FOI Act (in relation to which disclosure had been refused following a notice filed by the property developer pursuant to

[26] Complaints made pursuant to s 65(1)(e), (f) and (g) of the FOI Act.

s 18 of the *Aboriginal Heritage Act 1972* (WA)).[27] In the course of determining the application for a writ, White J found:[28]

> In my opinion, the Commissioner's requirement that the documents in question be produced to her was not a decision on a complaint from which an appeal lies under s 85 of the FOI Act. The decision was one preliminary to any decision on a complaint and was designed to put the Commissioner in a position where she could make a decision on a complaint.
>
> The question whether an appeal lies is one of construction of the statute and is to be determined having regard to the text, scope and purpose of the Act: see ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321; ***Director-General of Social Services v Chaney*** (1980) 47 FLR 80; ***Ralph M Lee (WA) Pty Ltd v Fort*** (unreported, Supreme Court, WA, Anderson J, Library No 8719, 22 February 1991).
>
> Having regard to the provision of ss 63, 70, 76, 77(3), 78 and 85 of the FOI Act, it is clear that the extent of appeals permitted under the Act is restricted. In my opinion, those provisions do not indicate that an appeal will lie to this court in relation to intermediate decisions which are not decisions determining the rights of the parties to a complaint before the Commissioner.

81 Plainly a decision made under s 76 or s 67(1) is a final decision. When a 'substantive rights' test is applied, a decision not to issue a final decision on grounds that an application for external review has been disposed of by an agreement through conciliation can also be characterised as a substantive and final decision as such a decision irrevocably disposes of the external review access complaint.

82 For these reasons, I am satisfied that the Commissioner made a decision within the meaning of s 85(1) of the FOI Act on 15 September 2017.

Does an error of law arise in the decision made by the Commissioner on 15 September 2017?

83 The next question that is to be answered in this appeal is whether a question of law arises in the decision made by the Commissioner. It is notable that where an impugned decision of the Commissioner is properly a decision within the meaning of s 85(1) of the FOI Act, an appeal to this court is not at large or unconfined.

[27] ***Western Australian Museum v Information Commissioner*** (1994) 12 WAR 417.
[28] ***Western Australian Museum v Information Commissioner*** (1994) 12 WAR 417, 435.

84 In ***Paridis v Settlement Agents Supervisory Board***,[29] Buss JA set out the principles for determining whether an appeal arises on a question of law. His Honour importantly observed:[30]

> An appeal 'on a question of law' is narrower than an appeal that merely 'involves a question of law'. Where an appeal lies 'on a question of law' the subject matter of the appeal is the question or questions of law. If a question raised by a litigant, properly analysed, is not a question of law, linguistic gymnastics in the formulation of the grounds of appeal cannot convert it into a question of law. A question of mixed law and fact is not a question of law within s 105(2). See, in the context of s 44(1) of the *Administrative Appeals Tribunal Act 1975* (Cth), the observations in ***TNT Skypak International (Aust) Pty Ltd v Federal Commissioner of Taxation*** (1988) 19 ATR 1067 at 1069 - 1070; ***Birdseye v Australian Securities and Investments Commission*** (2003) 38 AAR 55 at 58 - 60 [10] - [18]; ***Comcare v Etheridge*** (2006) 149 FCR 522 at 527 [13] - [17]. Section 44(1) of the *Administrative Appeals Tribunal Act* provides that an appeal from a decision of the Administrative Appeals Tribunal may only be made 'on a question of law'. That provision is not materially different from the provisions of s 105(1) and (2) of the Western Australian Act.
>
> A ground of appeal which asserts that a decision is against the evidence and the weight of the evidence does not raise a question of law. See ***Collins v Minister for Immigration and Ethnic Affairs*** (1981) 58 FLR 407, where Fox, Deane and Morling JJ said, at (410):
>
> > ' … the concepts of a decision being against the evidence and of being against the weight of the evidence belong to appeals from courts of law and have particular application to jury verdicts. Even in that context, they do not involve questions of law. They certainly have no place when the appeal, or review, is of proceedings of an administrative tribunal which is not bound by the rules of evidence and which, subject to the obligation to observe the requirements of natural justice, can inform itself as it chooses … An appellant who attacks a conclusion of the [Administrative Appeals Tribunal] because of deficiency of proof said to amount to error of law must show, if he is to succeed, that there was no material before the Tribunal upon which the conclusion could properly be based.'
>
> Also see ***Australian Broadcasting Tribunal v Bond*** (1990) 170 CLR 321 at 355 - 356 per Mason CJ (with whom Brennan J agreed); ***Comcare Australia v Lees*** (1997) 151 ALR 647 at 652 - 653; ***Townsend v Minister for Immigration and Multicultural Affairs***

[29] ***Paridis v Settlement Agents Supervisory Board*** (2007) 33 WAR 361.
[30] ***Paridis v Settlement Agents Supervisory Board*** (2007) 33 WAR 361 [53] - [56].

> [2001] FCA 492 at [4] - [7]; ***Hill v Repatriation Commission*** (2005) 40 AAR 500 at [92] - [93].
>
> A tribunal does not commit an error of law merely because it finds facts wrongly or upon a doubtful basis. See ***Waterford v Commonwealth*** (1987) 163 CLR 54 at 77; ***Minister for Immigration and Multicultural Affairs v Rajalingam*** (1999) 93 FCR 220 at 257 [146].
>
> A ground of appeal that a tribunal has made a finding which is manifestly unreasonable, in the sense that no reasonable tribunal could have made that finding, alleges an error of law: see ***Minister for Aboriginal Affairs v Peko-Wallsend Ltd*** (1986) 162 CLR 24 at 39 - 40.

85 It first should be noted that whilst s 85(1) creates a right of appeal that is confined to 'any question of law', it could be said that the right conferred by s 85(1) is broad as an appeal lies 'arising out of any decision of the Commissioner' on a complaint relating to an access application. The words 'arising out of' in this context can be construed to encompass a broad causal connection between the decision and the question of law.

86 In ***Forsayth NL v Australasian Gold Mines NL (No 3)***,[31] Ipp J was called upon to interpret the expression in s 38(2) of the *Commercial Arbitration Act 1985* (WA) which provided from appeal on a question of law 'arising out of an award' (of an arbitrator). His Honour observed:[32]

> Section 38(2) of the Act provides for an appeal on a question of law 'arising out of an award'. The expression 'arising out of' may be the equivalent of the expression 'arising under,' or that of the wider expression 'connected with': see ***Samick Lines Co Ltd v Owners of Antonis P Lemos*** ('***The Antonis P Lemos***') [1985] AC 711 at 727.
>
> In my opinion, despite views which have been expressed to the contrary, I consider that the wider meaning is intended. The limited meaning has been adopted in England: see ***Universal Petroleum Co Ltd v Handels und Transport GmbH*** [1987] 1 WLR 1178; [1987] 2 All ER 737; and in this State ***Minenco Pty Ltd v Abigroup Contractors (WA)*** (supra). In my opinion, with respect, the views expressed by Kirby P in his minority judgment (the point not being dealt with in the majority judgment) in ***Warley Pty Ltd v Adco Constructions Pty Ltd*** (unreported, Court of Appeal, NSW, 30 November 1988) are, nevertheless, compelling:
>
> > 'It would seem curious, following the abolition of the restriction to errors of law "on the face of the award", effectively to reintroduce such a requirement, by the necessity

[31] ***Forsayth NL v Australasian Gold Mines NL (No 3)*** (1992) 8 WAR 176.
[32] ***Forsayth NL v Australasian Gold Mines NL (No 3)*** (1992) 8 WAR 176, 182.

> to show that the impugned question of law arose out of the award in the limited sense of out of the award document.'
>
> Taking into account, also, that errors of law do not amount to misconduct (see ***Forsayth (No 1***)) injustice could well arise if there were to be no appeal on significant errors of law, connected with the award, but which do not appear from the face of the award.
>
> The wider meaning has frequently been applied in Australia: see the authorities cited in M Jacobs, *Commercial Arbitration Law and Practice*, pars 34.360-382.

87 Prima facie it could be said in this matter no error of law arises as the decision of the Commissioner not to issue a final decision on grounds of a finding that the appellant's complaint had been resolved by an agreement between the parties was an error of fact.

88 As Buss JA pointed out in ***Paradis***, an appeal does not lie simply because of a finding of fact wrongly made. Whilst an appeal under s 85(1) does not generally lie to correct errors of fact, a question of law can arise when a finding of fact is made in the absence of any evidence to support the finding of fact, which on the facts found, causally gives rise to an error of law. In ***Waterford v The Commonwealth of Australia***, Brennan J explained:[33]

> A finding by the AAT on a matter of fact cannot be reviewed on appeal unless the finding is vitiated by an error of law. Section 44 of the AAT Act confers on a party to a proceeding before the AAT a right of appeal to the Federal Court of Australia 'from any decision of the Tribunal in that proceeding' but only 'on a question of law'. The error of law which an appellant must rely on to succeed must arise on the facts as the AAT has found them to be or it must vitiate the findings made or it must have led the AAT to omit to make a finding it was legally required to make.

89 Consequently, the question of whether facts found fall within the power conferred by a statutory enactment (to act on such facts) is a question of law. In particular, if facts found affect the decision-maker's exercise or purported exercise of power which results in the decision-maker exceeding his or her authority or power to act, an error of law will arise.

90 Buss JA also points out in ***Paradis*** a question of whether a decision-maker has made a finding which is manifestly unreasonable, in

[33] ***Waterford v The Commonwealth of Australia*** (1987) 163 CLR 54, 77. Approved by Gleeson CJ, Gummow, Kirby and Hayne JJ in ***Corporation of the City of Enfield v Development Assessment Commission*** [2000] HCA 5; (2000) 199 CLR 135 [44].

the sense that no reasonable decision-maker could have made that finding, also raises an error of law.[34]

91 It is plain from the appellant's further submissions made to the Commissioner, and the email correspondence sent to the appellant and the respondent that followed the appellant's further submissions, that the appellant's external review complaint had not been resolved by conciliation or negotiation. In the absence of a concluded agreement between the parties, the Commissioner was not empowered by s 71 of the FOI Act, or any other provision of the FOI Act, to make a decision not to issue a final decision that complied with s 76 of the FOI Act.

92 For these reasons, I am of the opinion that an error of law arises in the decision made by the Commissioner on 15 September 2017.

The effect of the error of law in the decision of the Commissioner

93 Plainly, the decision of the Commissioner should be set aside and the matter remitted to the Commissioner.

94 The respondent informed the Commissioner that it was willing to review a revised scope of documents.

95 After issuing his preliminary view and after receiving the appellant's further submissions, the Commissioner was empowered under s 71 of the FOI Act to continue the conciliation process, as the power to conciliate can be exercised by the Commissioner at any stage after the access complaint is received by the Commissioner.

96 When a conciliation process is undertaken, the Commissioner is to suspend inquiries, investigations or other proceedings whilst efforts of conciliation or negotiation are made.[35]

97 If, after receiving the appellant's further submissions, the Commissioner had simply suspended the proceedings, the Commissioner could have, as he did, invited the respondent to reconsider its position by undertaking a review of a reduced number of documents referred to in the appellant's further submissions. If that step had been taken by the respondent, and if further conciliation had proven to be unavailing and the Commissioner concluded at that point in time that negotiating processes between the parties had been exhausted, the Commissioner

[34] ***Paridis v Settlement Agents Supervisory Board*** (2007) 33 WAR 361 [56].
[35] FOI Act s 71(1).

would necessarily be required to make a final decision in the manner prescribed by s 76.

98 Since the appeal to this court was heard, the respondent, after conferring with the appellant, agreed to consider (in three tranches - the first being 59 documents in total) whether the 175 documents listed in the appellant's further submissions to the Commissioner could be disclosed to the appellant, after regard is had to a number of issues.[36]

99 The respondent informed this court on 2 July 2018 that it had completed its review of the first tranche of documents and provided the appellant with the conclusions of the review. However, following conferral, the appellant informed the respondent that he did not wish the respondent to engage in any further review of the documents and the parties agreed that the court should deliver its judgment on the appeal.

100 Given the large number of documents in relation to which access is sought and the willingness of the respondent to further review a large number of documents within the scope of the access complaint, I am of the opinion that once the matter is remitted by the court it will be open to the Commissioner to consider whether further conciliation or negotiation between the parties would be availing.

101 Whilst it is not strictly necessary to determine the point in this appeal, I do not, however, agree that if conciliation or negotiation between the parties is exhausted the Commissioner would then, in making the decision pursuant to s 76 of the Act, be bound to determine the external review complaint without regard to s 20 of the FOI Act, if that was an issue the respondent indicated through further conciliation or negotiations it still wished to press as an objection to the access application.

102 Pursuant to s 76(1)(b) of the FOI Act, the Commissioner is empowered to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency. Further, under s 76(2) the Commissioner has to make a decision in writing whereby the Commissioner is expressly empowered, amongst other powers, to vary the agency's decision to which the complaint relates or to set aside the agency's decision to which the complaint relates and to make a decision in substitution for that decision.

[36] These include the application of legal professional privilege, application of exemptions and third party interests.

103 When regard is had to s 76(1) and s 76(2), it is clear that the Commissioner is entitled to determine a complaint for denial of access to a document by regard to any of the powers conferred upon an agency to refuse access. Further, the grounds upon which the agency relied when making an initial decision or a decision on the internal review to refuse access do not restrict the Commissioner in making a decision whether access should or should not be denied.

104 Thus, the Commissioner's powers to refuse access are not limited to the provisions of the FOI Act that the agency relied upon in refusing access to the documents in making its initial decision or internal review decision.

105 This point was made plain in the decision of the Full Court of the Federal Court in ***Australian Securities and Investments Commission v Donald***.[37] Despite the valiant submissions of counsel on behalf of the appellant, the observations made by the Full Bench in ***Donald*** do not support the appellant's argument to the contrary on this point.

106 In ***Donald***, Kenny J considered the power conferred on the Administrative Appeals Tribunal to review an order imposed pursuant to s 829 and s 830 of the *Corporations Law 2001* (Cth) banning Donald from acting as a representative of a dealer or investment advisor for four years. On the review, the Administrative Appeals Tribunal substituted the orders made by the Australian Securities and Investments Commission (ASIC) which reduced the length of the ban and accepted an undertaking from Donald as to his continuing education and other conduct. Whilst ASIC had power to accept a written undertaking from Donald, a decision was not made by ASIC to do so and such an order would not be otherwise reviewable by the Administrative Appeals Tribunal. The Full Court of the Federal Court found that it was open to the Administrative Appeals Tribunal, just as it was open to ASIC, to treat the power to accept a written undertaking as amongst the powers available to it, providing the Administrative Appeals Tribunal only did so for the purpose of reviewing the reviewable decision that was made by ASIC.

107 Kenny J observed:[38]

> When the Tribunal stands in the stead of the Commission [ASIC], it is no less favourably placed than the Commission. The Tribunal has all

[37] ***Australian Securities and Investments Commission v Donald*** [2003] FCAFC 318; (2003) 136 FCR 7.
[38] ***Australian Securities and Investments Commission v Donald*** [2003] FCAFC 318; (2003) 136 FCR 7 [30] (Gray J agreeing).

> the powers and discretions that are vested in the original decision-maker, provided that their exercise is only for the purpose of reviewing a decision that the Tribunal has power to review.

108 Her Honour then went on to state:[39]

> Of course, the Tribunal is not entitled to exercise a power conferred on a decision-maker for some purpose unrelated to the decision under review. What this means in a given case must be determined by reference to the nature of the decision that the original decision-maker was required to make.

109 In ***Donald***, Downes J also observed that the question was not whether the power to accept written undertaking was the subject of an express right of appeal, but whether the Administrative Appeals Tribunal had jurisdiction over the relevant decision-making process, and second, if it did whether ASIC could have done what the Administrative Appeals Tribunal proposed to do.[40]

110 Downes J then went on to say:[41]

> Arguments relating to the jurisdiction of the Tribunal such as those presented in this matter are not new. In ***Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 2)*** (1981) 3 ALD 88 at 92 President Davies J said of s 43(1) of the AAT Act:
>
> > '[T]he provision "For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision …" is not concerned to confer upon the Tribunal authority to limit its function but rather to confer upon it an amplitude of powers so that the Tribunal may exercise, if it is convenient and useful to do so, not only the decision-making power upon which the decision-maker relied, but all relevant powers and discretions which were conferred by the enactment upon the decision-maker. The provision extends the authority of the Tribunal so that it may more adequately exercise its function of reviewing on the merits the subject decision.'

111 In the matter before me, leaving aside the issue of whether as a matter of fact the respondent would be justified to refuse access under s 20 of the FOI Act (that is, the merits of whether s 20 could be relied

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[39] ***Australian Securities and Investments Commission v Donald*** [2003] FCAFC 318; (2003) 136 FCR 7 [33].
[40] ***Australian Securities and Investments Commission v Donald*** [2003] FCAFC 318; (2003) 136 FCR 7 [56].
[41] ***Australian Securities and Investments Commission v Donald*** [2003] FCAFC 318; (2003) 136 FCR 7 [57].

upon) given the large number of documents covered by the scope of the appellant's request for access, clearly it would have been open for the respondent to rely upon s 20 in making its decision on the initial decision, and on internal review. In these circumstances, it would be open to the Commissioner to consider whether access should be denied under s 20.

Conclusion

112 For these reasons, other than part of ground 5 and the whole of ground 9 of the appeal, I am not satisfied the grounds of appeal have been made out.

113 I will now hear the parties as to the orders I should make to give effect to these reasons for decision.

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

VV
ASSOCIATE TO THE HONOURABLE JUSTICE SMITH

15 AUGUST 2018