JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	PEARLMAN -v- WA A/INFORMATION COMMISSIONER [2019] WASC 257
CORAM	**:**	SMITH J
HEARD	**:**	10 JUNE 2019
DELIVERED	**:**	19 JULY 2019
FILE NO/S	**:**	GDA 17 of 2018
BETWEEN	**:**	PATRICK W PEARLMAN Appellant AND WA A/INFORMATION COMMISSIONER First Respondent THE UNIVERSITY OF WESTERN AUSTRALIA Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	OFFICE OF THE INFORMATION COMMISSIONER
Coram	**:**	ACTING INFORMATION COMMISSIONER C FLETCHER
File Number	**:**	F2018292

Catchwords:

Freedom of information - Refusal to deal with access application - Whether Information Commissioner mischaracterised the agency's decision to refuse access to documents - Unreasonable burden upon agency - Jurisdictional error - Error of fact causally giving rise to error of law - Whether Information Commissioner erred in her determination that there was nothing remaining in dispute

Freedom of information - Statutory construction - Whether Information Commissioner made a 'decision' within the meaning of s 85(1) of the *Freedom of Information Act 1992* (WA) - Whether Information Commissioner has power to 'remit' an external review complaint to an agency and instruct the agency to 'deal with' the access application

Procedural fairness - Apprehended bias - Whether decision of the Information Commissioner invalid on grounds of bias - Whether membership of agency sports team could on the facts give rise to a reasonable apprehension of bias in ordinary informed member of public

Review under s 85(1) of the *Freedom of Information Act 1992* (WA) - Whether court can engage in merits review - Whether court can substitute decision of Information Commissioner with decision of the court - Whether court can refer to referee

Legislation:

Freedom of Information Act 1982 (Vic), s 50(4)
Freedom of Information Act 1992 (WA), s 12, s 20, s 31, s 33, s 63(1), s 64, s 65, s 67(1), s 70, s 71, s 72, s 73, s 75, s 76, s 83, s 85(1), s 89, s 91, s 92, s 93
Rules of the Supreme Court 1971 (WA), O 35
Supreme Court Act 1935 (WA), s 50

Result:

Information Commissioner's decisions vitiated by jurisdictional error
Remitted to Information Commissioner for determination

Category: B

Representation:

Counsel:

Appellant	:	In person
First Respondent	:	Ms C Taggart
Second Respondent	:	Mr R F Humphreys

Solicitors:

Appellant	:	In person
First Respondent	:	In person
Second 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
Bulong Operations Pty Ltd v Computercorp Pty Ltd [2005] WASC 147
Department of State Development v Latro Lawyers [2016] WASC 108
Dimes v Grand Junction Canal Co (1852) 3 HL Cas 759; (1852) 10 ER 301
Ebner v Official Trustee in Bankruptcy [2000] HCA 63; (2000) 205 CLR 337
Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum [2017] WASCA 153; (2017) 51 WAR 525
Frugtniet v Australian Securities and Investments Commission [2019] HCA 16; (2019) 93 ALJR 629
Highway Construction Pty Ltd v Commissioner of Main Roads [2011] WASCA 27
Hird v Chief Executive Officer of Australian Sports Anti-Doping Authority [2015] FCAFC 7; (2015) 227 FCR 95
Hossain v Minister for Immigration and Border Protection [2018] HCA 34; (2018) 92 ALJR 780
I v Department of Agriculture and Food [2016] WASC 26
Kirk v Industrial Court of New South Wales [2010] HCA 1; (2010) 239 CLR 531
Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission (1993) 40 FCR 409
Minister for Immigration and Multicultural Affairs v Jia Legeng [2001] HCA 17; (2001) 205 CLR 507

Morton v The Union Steamship Co of New Zealand Ltd [1951] HCA 42; (1951) 83 CLR 402

Northern Land Council v Quall [2019] FCAFC 77

Osland v Secretary, Department of Justice [No 2] [2010] HCA 24; (2010) 241 CLR 320

Paridis v Settlement Agents Supervisory Board [2007] WASCA 97; (2007) 33 WAR 361

Pearlman v The University of Western Australia [2018] WASC 245

Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82

S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd (1988) 12 NSWLR 358

Shanahan v Scott [1957] HCA 4; (1957) 96 CLR 245

Stonnington City Council v Roads Corporation [2010] VSC 454; [2010] 30 VR 303

Tallott v City of Stirling [2017] WASCA 126

Waterford v The Commonwealth of Australia [1987] HCA 25; (1987) 163 CLR 54

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SMITH J:

1.0 The appeal and the result

1 This is an appeal from:

(a) a decision of the Acting Information Commissioner, C Fletcher, (Acting Information Commissioner) on 26 October 2018, on remittal from the court,[1] directing the second respondent, The University of Western Australia (University) to deal with the appellant's access application, 'purportedly in negotiation or conciliation' of the appellant's external review complaint; and

(b) a decision of the Acting Information Commissioner, on 8 February 2019, determining to cease dealing with the appellant's external review complaint, pursuant to s 67(1) of the *Freedom of Information Act 1992* (WA) (FOI Act), on grounds it lacked in substance.

2 Pursuant to s 85(1) of the FOI Act, an appeal lies to the court on a question of law arising out of any decision of the Information Commissioner.

3 The University has not directly participated in this appeal. It filed a notice to abide the decision of the court. Whilst counsel appeared at the hearing to assist the court, counsel made no submissions on behalf of the University in support of, or in opposition to, the appeal.

4 For the reasons that follow, I am not satisfied that on 26 October 2018 the Acting Information Commissioner made a 'decision' within the meaning of s 85(1) of the FOI Act.

5 The appeal against the decision given on 8 February 2019 is a decision upon which an appeal does lie to this court pursuant to s 85(1).

6 I am satisfied that an error of law arises out of the decision made on 8 February 2019 on grounds that the Acting Information Commissioner acted in excess of jurisdiction.

7 I am not satisfied that the decision made on 8 February 2019 was infected by the reasonable apprehension of bias.

[1] ***Pearlman v The University of Western Australia*** [2018] WASC 245.

2.0 Background

2.1 Relevant facts leading to the remittal to the Information Commissioner from the court by order made on 15 August 2018

8 This is the appellant's second appeal to the court arising out of an access application made by the appellant under s 12 of the FOI Act to the University on 30 June 2016.[2]

9 The history of this matter is set out at some length in my reasons in ***Pearlman v The University of Western Australia***.[3] The history of the appellant's access application, the resulting proceedings in the external review by Commissioner S H Bluemmel (former Information Commissioner), and the proceedings in this court can be summarised as follows.

10 In his application, made on 30 June 2016, the appellant 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 from 1 January 2015 to 30 June 2016. The University identified 414 documents that came within the scope of the appellant's access application.

11 On 26 August 2016, pursuant to s 30 of the FOI Act, the University 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 (initial decision).

12 In the notice, the University's initial decision-maker 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 and the disclosure of this information would reveal business or professional affairs of the Environmental Defender's Office; and

[2] Book of relevant records, pages 1 - 4.
[3] ***Pearlman v The University of Western Australia*** [2018] WASC 245 [1] - [29].

(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.

13 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 the subject of legal professional privilege).

14 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 University in respect of each document.

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

16 On 3 October 2016, the University issued a decision on the internal review. In the decision given on the internal review, the University determined that the initial decision should be varied. Access was refused on grounds that the documents sought were not 'documents of an agency', pursuant to s 23(1)(b) of the FOI Act (internal review).

17 On 1 December 2016, the appellant applied to the former Information Commissioner for an external review of the University's decision on the internal review by filing a complaint pursuant to s 65 of the FOI Act (external review application).

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

19 After discussions between the appellant, the University and the acting investigations officer, on and between 16 February 2017 and 13 March 2017, the total number of documents in dispute was reduced to 299.

20 The University had during the discussions formed the view that dealing with the large number of documents in dispute would 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.

21 Section 20 of the FOI Act provides:

> **20. Agency may refuse to deal with application in certain cases**
>
> (1) If the agency considers that the work involved in dealing with the access application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency has to take reasonable steps to help the applicant to change the application to reduce the amount of work needed to deal with it.
>
> (2) If after help has been given to change the access application the agency still considers that the work involved in dealing with the application would divert a substantial and unreasonable portion of the agency's resources away from its other operations, the agency may refuse to deal with the application.
>
> (3) If, under subsection (2), the agency refuses to deal with the access application, it has to give the applicant written notice of the refusal without delay.
>
> (4) The notice has to give details of -
>
> (a) the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings are based; and
>
> (b) the rights of review under this Act and the procedure to be followed to exercise those rights.

22 By letter dated 14 June 2017, the former Information Commissioner provided the appellant and the University with a preliminary view of whether the 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 on the internal review.

23 In the preliminary letter, the former Information 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, as informal conciliation was unsuccessful he intended to review the University's decision to refuse to deal with the appellant's application, pursuant to s 20 of the FOI Act.

24 After considering the submissions made on behalf of the appellant and the University, the former Information Commissioner stated that his preliminary view was that:

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

25 After setting out lengthy submissions, the appellant put forward a proposal that the parties and the former Information Commissioner proceed with his external review application, 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 appellant's submissions (to the Information Commissioner); and

(b) in turn, the former Information 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 University to retain the remainder of the documents identified in the two schedules attached to its initial decision (26 August 2016) and ensure that they are not destroyed or deleted.

26 In an email sent to the appellant on 31 August 2017 by a legal officer employed by the Office of the Information Commissioner, the former Information Commissioner notified the appellant that he had agreed that the appellant's proposal to reduce the scope of the access application should be put to the University and that if the University agreed to deal with the matter (in its reduced scope) then the external review would be finalised on the basis that the University had agreed to deal with the matter. The email further outlined that in such a circumstance:

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

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

27 In a subsequent email sent on 1 September 2017 by an officer of the Office of the Information Commissioner to the University, the University was:

(a) informed that the former Information Commissioner had considered all of the submissions made by the appellant in response to the former Information 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 former Information 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.

28 The email sent to the University on 1 September 2017 also contained a statement to the effect that the practicalities of dealing with the matter (in this way) were that the University 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.

29 The University subsequently accepted the proposal (as put to it) by the former Information Commissioner.

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

31 On 15 August 2018, the court found:[4]

(a) 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 be characterised as a substantive and final decision and as such a decision that irrevocably disposes of the external review access complaint;

(b) the appellant's complaint had not been resolved. In particular:

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

(ii) all that the University 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.

(c) there was no evidence that there was an agreement between the parties resolving the complaint;

(d) while the 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;[5]

(e) a question of whether a decision-maker has made a finding which is manifestly unreasonable, in the sense that no reasonable decision-maker could also make that finding, also raises an error of law;[6] and

(f) in the absence of a concluded agreement between the parties, the former Information 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.

[4] ***Pearlman v The University of Western Australia*** [2018] WASC 245.
[5] ***Waterford v The Commonwealth of Australia*** [1987] HCA 25; (1987) 163 CLR 54, 77 (Brennan J).
[6] ***Paridis v Settlement Agents Supervisory Board*** [2007] WASCA 97; (2007) 33 WAR 361 [56] (Buss JA).

32 On 15 August 2018, an order was made by the court:

(a) allowing the appeal (in part);

(b) setting aside the decision of the former Information Commissioner made on 15 September 2017; and

(c) to remit the matter to the Information Commissioner for further proceedings on the appellant's 1 December 2016 complaint for external review, consistent with the reasons of the court.

2.2 Background - remittal to the Information Commissioner from the court

33 On 23 August 2018, the acting principal legal officer of the Office of the Information Commissioner wrote to the appellant by email seeking advice from the appellant as to whether he wished to proceed with his application for external review.[7]

34 The appellant replied by email the same day and stated that he wished to proceed, and requested that in light of the time that had elapsed (since the application for access was made) that resolution of the application proceed as a matter of priority. He also stated that the number of documents sought by him could be further reduced to 163 and listed the documents that could be excluded by number.[8]

35 In the decision in ***Pearlman v The University of Western Australia***, direction was given to the Information Commissioner (whose office was, at the time of the decision that is the subject of this appeal, held by the Acting Information Commissioner) as to how the appellant's access complaint could be dealt with as follows:[9]

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

[7] Book of relevant records, page 224.
[8] Book of relevant records, page 225.
[9] ***Pearlman v The University of Western Australia*** [2018] WASC 245 [94] – [100].

> When a conciliation process is undertaken, the Commissioner is to suspend inquiries, investigations or other proceedings whilst efforts of conciliation or negotiation are made.
>
> 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 would necessarily be required to make a final decision in the manner prescribed by s 76.
>
> 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.
>
> 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.
>
> 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.

36 In a letter to the appellant, dated 13 September 2018, the Acting Information Commissioner recorded that the matter had been remitted to her office for further consideration and after referring to some observations that were made in the judgment in ***Pearlman v The University of Western Australia*** (about the effect of s 20 of the FOI Act) the Acting Information Commissioner stated:[10]

> Accordingly, I consider it is open to me to follow the decision expressed in the Commissioner's preliminary view, that the agency was justified to refuse to deal with your application pursuant to section 20 of the FOI Act, and publish my decision to that effect.

[10] Book of relevant records, page 226 – 228.

> …
>
> In your particular matter the agency did not refuse you access to documents because it considered the documents were exempt, but instead refused to deal with your application because of the number of documents and the resources of the agency.
>
> When an application comes to this office for an external review of a section 20 decision by an agency, that complaint is considered to be resolved if, as a result of the intervention of this office, the agency then agrees to deal with the application.
>
> Although, as stated above, it was open to me to publish a decision reflecting the view expressed in the preliminary view, discussions have taken place with the agency in an attempt to resolve the matter. I can inform you that the agency has agreed that it will deal with your application on the basis of your reduced scope.
>
> …
>
> In light of the agency agreeing to withdraw its claim on section 20 grounds (i.e. to deal with your application would divert an unreasonable portion of its resources from its other operations) the agency will now deal with your application in accordance with the provisions of the FOI Act in that you will be provided with a notice of decision by the agency regarding access to the documents. You will be afforded the usual right to review internally and externally if you are not satisfied with the access you are given to the documents.
>
> As the agency has reversed its decision and agreed to deal with your application, there is now nothing remaining in dispute for me to determine.
>
> If you have any submissions you wish to make in response to this letter, please provide them to me by no later than **4:00 pm** on **Thursday 27 September 2018**. After that time, I will consider any further submissions and proceed to finalise the matter.

37 Despite valiant submissions made by counsel for the Acting Information Commissioner in this appeal, it is not entirely clear to me why, when the matter was remitted to the Acting Information Commissioner, she took the view at that time that the University had refused to deal with the appellant's application pursuant to s 20 of the FOI Act.

38 Whilst an objection to the appellant's access application on this basis had been raised informally by the University during the course of the investigation by officers of the Office of the Information Commissioner prior to the first appeal, it was abundantly clear from the

judgment in ***Pearlman v The University of Western Australia*** that the University was no longer pressing this point.

39 When regard is had to the history of objections raised by the University over time, it is clear that the University denied the appellant access to the documents:

(a) initially on grounds that the disclosure of the information would reveal business or professional affairs of the Environmental Defender's Office;

(b) on the internal review on grounds that the documents sought were not documents of an agency; and

(c) subsequently, by expressing an opinion (but without making an informal decision on this basis) during the investigation process by officers of the Office of the Information Commissioner, on grounds of s 20 of the FOI Act.

40 The Acting Information Commissioner contemplated in the letter dated 13 September 2018 a 'remittal' to the agency (by in effect giving a direction to the University to deal with the access application as if it had never been made). Such a course, if authorised by the FOI Act, would provide the appellant with a further internal and external review (in accordance with the provisions of the FOI Act).

41 There is, however, no power conferred by the FOI Act for an Information Commissioner to remit a complaint. I return to this point below.

42 On 27 September 2018, the appellant responded by letter to the Acting Information Commissioner. The appellant made lengthy and comprehensive submissions which need not be repeated in these reasons. Importantly, the appellant put a clear submission that because the University had reversed its decision, and agreed to 'deal with' the application, the proposed finding (by the Acting Information Commissioner) that there was nothing to decide was wrong.

43 The appellant pressed the Acting Information Commissioner to resolve the access dispute and put the following proposal:[11]

> Since there are still 163 documents that are subject to my external review complaint, I am prepared to relieve any purported burden on the

[11] Book of relevant records, page 237.

> Commissioner or her staff associated with concluding this external review. Accordingly, I propose that the Commissioner proceed to conclude my external review complaint, in accordance with s 76(2) of the FOI Act, in the following manner:
>
> a. By issuing a preliminary determination on each tranche of documents, *seriatim* (tranche one to tranche three), providing the applicant and the agency with 2 weeks' opportunity to make submissions on each preliminary determination;
>
> b. To make a preliminary determination on each tranche within 30 days (ie, 30 days per tranche), allowing 14 days for submissions to be lodged by either party;
>
> c. Your next preliminary determination on a subsequent tranche (within 30 days) would only be due after the conclusion of the 14-day submissions period on the preceding tranche; and
>
> d. You would publish a final - appealable - decision on all three tranches of documents within 30 days after the close of submissions on the third and final tranche.

44 In his letter dated 27 September 2018, the appellant also put a submission that the Acting Information Commissioner should recuse herself from further participation in the external review proceedings on the ground of a reasonable apprehension of bias. I return to this submission below when considering ground 5 of the appellant's amended grounds of appeal.

45 On 18 October 2018, the Acting Information Commissioner wrote to the Vice Chancellor of the University in the following terms:[12]

> I refer to the Supreme Court judgment in *Pearlman v The University of Western Australia* [2018] WASC 245, in which the Information Commissioner's decision was remitted to me, for further proceedings.
>
> By email dated 10 September 2018 Mr Jeremy Rigg advised my Legal Officer that the University of Western Australia (**the agency**) agreed to deal with the access application of Mr Pearlman (**the complainant**) in light of the reduced scope proposed by the complainant.
>
> The Schedule of Documents that the agency has agreed to deal with is attached as an appendix to this letter.
>
> It is important that the agency complies with the requirements of the *Freedom of Information Act 1992* (**the FOI Act**) in dealing with the application.

[12] Book of relevant records, pages 411 – 412.

> Section 13(1) provides that the agency has to deal with an access application as soon as is practicable and before the end of the permitted time. The permitted time is defined as 45 days. The agency should ensure that it is sufficiently resourced to meet the timescales set out in the FOI Act. Given that work has already commenced on this application and the stage the matter is at, it is unlikely that any extension to that timeframe will be granted.
>
> The agency is required to review the documents set out in the appendix, and decide on the access that can be given, taking into account the exemptions in Schedule 1 of the FOI Act.
>
> If, after reviewing the documents, the agency proposes to disclose personal information about individuals other than the access applicant, then it is required to take reasonable steps to obtain the views of those individuals, pursuant to section 32 of the FOI Act, before making its decision. Any consultation should be carried out within the permitted period.
>
> Section 30 of the FOI Act sets out the requirements of what information the decision should contain. In particular, section 30(f) provides that if a decision is made to refuse access, then the decision must set out the reasons for the refusal and the findings on any questions of fact underlying those reasons; it is not sufficient to simply assert that a document is exempt under a particular clause of Schedule 1.
>
> In light of the above please confirm that agency understands its obligations in dealing with the access application and that it is able to do so in its reduced scope. Please provide a response in writing by **12:00 noon** on **Thursday 25 October 2018**.

46 On 25 October 2018, the Acting Information Commissioner formally directed the University to 'deal with' the appellant's application. In a letter to the Vice Chancellor of the University dated 25 October 2018 the Acting Information Commissioner stated:[13]

> Further to my email of 18 October 2018, Mr Jeremy Rigg has confirmed to me that the University of Western Australia (**the agency**) understands its obligations under the *Freedom of Information Act 1992* (**the FOI Act**) in dealing with the above matter.
>
> In light of this advice, I now formally direct the agency to deal with Mr Patrick Pearlman's (**the complainant's**) application in accordance with the provisions of the FOI Act. Please note that the timeframe provided in section 13(1) of the FOI Act is 'as soon as is practicable (and in any event, before the end of the permitted period)'; accordingly the agency must ensure that a decision on access to the documents is

[13] Book of relevant records, page 420.

> provided to the complainant by no later than 45 days from the date of this letter.
>
> Please provide a copy of what is sent to the complainant, to this office.

47 On 26 October 2018, the Acting Information Commissioner wrote to the appellant and responded to each of the issues raised by the appellant in his letter dated 27 September 2018.[14] In the letter, after summarising her advice to the appellant in her letter of 13 September 2018, the Acting Information Commissioner made the following statements which are material to the disposition of this appeal:[15]

(a) The letter of 13 September 2018 did not provide the appellant with a preliminary view, a preliminary determination or a final view that would affect his substantive rights under the FOI Act.

(b) The letter dated 13 September 2018 proposed a course of action which is available to the Information Commissioner under the FOI Act at this stage of the proceedings, namely a suspension of the external review proceedings so that efforts can be made to resolve the complaint by conciliation or negotiation between the parties as described by s 71 of the FOI Act.

(c) The Information Commissioner is empowered by s 64 of the FOI Act to do all things that are necessary or convenient to be done for or in connection with the performance of his or her functions under the FOI Act, and to determine the procedure for investigating and dealing with the complaint and also to give any necessary directions as to the conduct of the proceedings pursuant to s 70(4).

(d) The Information Commissioner is empowered under s 71 of the FOI Act, to give such directions and do such other things as he or she thinks fit in order to facilitate the resolution of the complaint by negotiation or conciliation.

(e) Subsequent to the decision in ***Pearlman v The University of Western Australia***, the University was again asked by the legal officer, from the Office of the Freedom of Information Commissioner, if it would deal with the application in light of the reduced scope and it has agreed to do so. The Information

[14] Book of relevant records, page 316.
[15] Book of relevant records, pages 317 – 319.

> Commissioner's legal officer has been particularly careful to recently confirm with the University their understanding of the obligations under the FOI Act in dealing with the matter. The University has indicated they intend to examine each document in the reduced scope access application and consider whether any exemptions under the FOI Act apply to that document.
>
> (f) Accordingly, the University has been directed to deal with the appellant's reduced scope application as soon as practicable and in any event by no later than 45 days from 25 October 2018.
>
> (g) At this stage, pending further negotiation and conciliation of this matter, the Acting Information Commissioner was not required to make a final decision on the appellant's complaint.
>
> (h) It is understood that the appellant did not want the University to further deal with his access application for a variety of reasons. However, it was expressly contemplated by her Honour in ***Pearlman v The University of Western Australia*** that further negotiation and conciliation between the parties could take place upon the matter being remitted. Accordingly, the Acting Information Commissioner did not accept the appellant's submission that he was entitled to insist that the matter be determined in effect, at this stage, by a formal decision of the Information Commissioner.

48 In her letter dated 26 October 2018, the Acting Information Commissioner then went on to reject the appellant's submission that she should disqualify or recuse herself from any further role in these proceedings including ruling on the appellant's submissions or determining the external review on grounds of apprehended bias.[16]

49 Despite the fact that the Acting Information Commissioner stated in the letter on a number of occasions that she was not ceasing to deal with the appellant's external review application, she then went on to state under the heading 'Conclusion':[17]

> As the agency has agreed to deal with your application on the basis of the documents listed in the schedule below, I have directed the agency to deal with the revised scope application in accordance with the provisions of the FOI Act by no later than 45 days from yesterday's date.

[16] Book of relevant records, pages 319 – 320.
[17] Book of relevant records, page 321.

> Thereafter you will be afforded the usual right to review internally and externally if you are not satisfied with the access you are given to the documents.

50 I am not satisfied that the statements made by the Acting Information Commissioner in the letter to the appellant dated 26 October 2018 constituted a decision within the meaning of s 85(1) of the FOI Act. At that point in time, whilst the Acting Information Commissioner had issued a direction to the University, the Acting Information Commissioner had not, in fact, finally determined the external review complaint.

51 By letter dated 7 December 2018, the University informed the appellant that it had 'dealt with' the appellant's access application with the reduced scope[18] (as agreed by the appellant in his letter to the Acting Information Commissioner on 23 August 2018). In the letter dated 7 December 2018, the 'decision-maker', Mr Jeremy Rigg, University lawyer, stated that 155 of the 175 documents were exempt from disclosure on a number of grounds as follows:[19]

> UWA has determined the documents pertaining to your application are exempt from disclosure in accordance with clause 4(3) of Schedule 1 of the FOI Act, on the basis that:
>
> - the content of all documents relate to the management of the business of EDO WA, including confidential human resource matters. The disclosure of this information would reveal business affairs of EDO WA;
>
> - 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.
>
> UWA has determined, based on consideration of the views of EDO WA, that a number of documents are subject to exemption from disclosure in accordance with clause 3(1) of Schedule 1 of the FOI Act, as its disclosure would reveal personal information about an individual. The individuals concerned are not officers of UWA and to disclose the matter would reveal details that result in their identity being readily discernible.

[18] Book of relevant records, page 325 – 326.
[19] Book of relevant records, pages 328 – 329.

> UWA has also determined, based on consideration of the views of EDO WA, that some of the documents (as marked in the following Schedule of Documents) are the subject of legal professional privilege and disclosure would reveal matter the subject of legal professional privilege.
>
> UWA has further determined, based on consideration of the views of EDO WA, that the documents are exempt under clause 8(2) of Schedule 1 of the FOI Act, on the basis that:
>
> - the content of the·documents are relate to information of a confidential nature obtained in confidence pertaining to the management affairs of the EDO WA; and
>
> - 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.
>
> Disclosable documents
>
> In addition to the documents provided to you on 25 June 2018, I have also determined that a further two documents are disclosable however have identified some exempt matter, being personal information of third parties, pursuant to clause 3 of Schedule 1 of the FOI Act.
>
> Pursuant to section 24 of the FOI Act, any such exempt matter has been deleted from these documents.
>
> UWA has determined the relevant matter to be exempt by reason of its finding that the individuals concerned are not officers of UWA and to disclose the matter would reveal details that result in their identity being readily discernible.
>
> All findings were based on the documents themselves and no further material questions of fact arose from these materials.

52 The letter dated 7 December 2018 annexed a schedule of documents which provided particulars of each of the clauses relied upon in Schedule 1 to deny access in respect of each of the 155 documents.[20]

53 On 4 January 2019, the appellant notified the Acting Information Commissioner and the University that he did not accept the University's

[20] Book of relevant records, pages 331 – 338.

notice of 'decision', given on 7 December 2018, as satisfactory or legally effective.[21]

54 For reasons I will return to, a direction given to the University to reconsider its opinion as to the access that the appellant could be given to the documents would have been within the power of the Acting Information Commissioner, if the direction was given pursuant to s 71(2) of the FOI Act.

55 However, the direction given to the University to make a 'decision' and to afford the appellant with an 'internal review' and further 'external review' was not (in the absence of the appellant's consent) within jurisdiction, nor could it be otherwise effective at law.

3.0 The decision given on 8 February 2019

56 On 8 February 2019, the Acting Information Commissioner issued a decision in which she purported to rely upon the power to do so in s 67(1) of the FOI Act.

57 Section 67 of the FOI Act provides:

> **67. Commissioner may decide not to deal with complaint**
>
> (1) 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 -
>
> (a) it does not relate to a matter the Commissioner has power to deal with; or
>
> (b) it is frivolous, vexatious, misconceived or lacking in substance.
>
> (2) If the Commissioner decides not to deal with the complaint, or to stop dealing with the complaint, the Commissioner has to inform the complainant, in writing, of the decision and the reasons for the decision.

58 After setting out what the Acting Information Commissioner regarded as relevant background facts (which substantially referred to a 'decision' by the University to deal with the appellant's access application pursuant to s 20 of the FOI Act) the Acting Information Commissioner made the following findings:

[21] Book of relevant records, page 342.

Consideration

37. In considering a claim under section 20, it is necessary to decide whether an agency's decision to refuse to deal with a matter is justified. In doing so, I am required to consider information about the amount of work involved in dealing with the application and the resources of the agency required to deal with the application.

38. Given the number of documents in dispute and the resources the agency requires to deal with the access application, I consider that the agency could have decided to refuse to deal with the access application under section 20.

39. However, given the complainant's reduction in the scope of his access application, the agency withdrew its claim under section 20 that to deal with the application would divert a substantial and unreasonable portion of its resources from its other operations and has now agreed to deal with the application.

40. As the agency agreed to deal with the application, there is nothing remaining in dispute in relation to section 20 for me to determine.

41. Under section 67(l)(b), I may decide to stop dealing with a complaint, as follows:

> *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 -*
>
> *(b) it is frivolous, vexatious, misconceived or lacking in substance.*

CONCLUSION

42. Given the matters set out above, I find that the complaint is now lacking in substance and I have decided to stop dealing with it pursuant to section 67(1)(b) of the FOI Act.

4.0 The grounds of appeal

59 The amended grounds of appeal are as follows:[22]

Errors of Law

The first respondent committed the following errors of law or jurisdictional errors in her 26 October 2018 and/or 8 February 2019 decisions (or actions) under appeal:

l. The first respondent's 26 October 2018 and/or 8 February 2019 decisions, including prior decisions incorporated in those decisions, were misconceived and otherwise outside or in excess of her jurisdiction and were made without lawful authority because they proceeded from her errant view that:

(i) the agency decision(s) to which the appellant's 1 December 2016 complaint for external review related was a 'refusal to deal' under s 20 of the FOI Act and not a decision refusing to grant access on the basis documents sought were exempt from disclosure, and

(ii) that the matter could be resolved by remittal to the agency if it agreed 'to deal' with the appellant's original access application.

2. The first respondent's 26 October 2018 and/or 8 February 2019 decisions, including prior decisions incorporated in those decisions, were misconceived and otherwise outside or in excess of her jurisdiction and were made without lawful authority in that they were in contravention of the FOI Act generally, including ss 63, 71 and 76 of that legislation because:

(i) the first respondent failed to discharge her main function to deal with the complaint, made under Part 4 of the FOI Act, about the agency decision made in respect of the appellant's access application;

(ii) the first respondent exceeded or failed to act within her authority under s 71 of the FOI Act by remitting the matter to the second respondent for a fresh decision and characterising that action as 'negotiation' or 'conciliation'; and

(iii) the first respondent failed to act in accordance with her duty under s 76 of the FOI Act to make a decision, in writing, regarding the agency decision to which the appellant's external review complaint related.

[22] Amended appeal notice, filed 7 March 2019.

3. The first respondent's 26 October 2018 and/or 8 February 2019 decisions, including prior decisions incorporated in those decisions, were misconceived in that the respondent asked the wrong question and identified the wrong issue in her application of the FOI Act, including ss 71 and 76 of that legislation, specifically:

    (i) whether the decision to which the appellant's complaint for external review related was a 'refusal to deal' under s 20 of the FOI Act;

    (ii) whether the second respondent could, in the context of an external review under Part 4 of the FOI Act, 'refuse to deal' after having twice previously refused access on grounds the documents sought were exempt from disclosure; and

    (iii) whether the appellant's complaint for external review could be resolved by remittal to the second respondent for a fresh decision notwithstanding the appellant's objections to that course of action.

4. The first respondent's 26 October 2018 and/or 8 February 2019 decisions, including prior decisions incorporated in those decisions, were otherwise manifestly unreasonable.

5. The first respondent's 26 October 2018 and/or 8 February 2019 decisions, including prior decisions incorporated in those decisions, were infected by reasonably apprehended bias and denied the appellant procedural fairness.

6. The first respondent's 8 February 2019 decision was outside or in excess of her jurisdiction and was made without lawful authority in that it was premised on the second respondent's 7 December 2018 purported notice of decision, which the second respondent had no jurisdiction or authority to make once external review proceedings had begun under Part 4 of the FOI Act.

5.0 Is error established?

5.1 Jurisdictional error

60 The concepts of jurisdiction and jurisdictional error are understood to refer to the scope of the decision-maker's authority and whether a decision-maker makes a decision within the bounds of that authority.

61 A decision will be vitiated by jurisdictional error in circumstances where there is an error in the statutory decision-making process,

corresponding to a failure to comply with one or more statutory pre-conditions or conditions to an extent which results in a decision which has been made in fact lacking characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it. To describe a decision as involving jurisdictional error is to describe that decision as having been made outside jurisdiction.[23]

62 Jurisdictional error of law is to be contrasted with non-jurisdictional error of law (an error within jurisdiction). The latter, though an error of law, is within the limits of the powers conferred on the decision-maker. In ***Re Refugee Review Tribunal; Ex parte Aala***, Hayne J explained the difference between an error within jurisdiction and jurisdictional error in the following way:[24]

> In deciding whether writs of prohibition and certiorari (and analogous forms of relief) should be granted, a distinction is drawn between jurisdictional error and error within jurisdiction. This Court has not accepted that this distinction should be discarded. As was noted in ***Craig v South Australia***, that distinction may be difficult to draw. The difficulty of drawing a bright line between jurisdictional error and error in the exercise of jurisdiction should not be permitted, however, to obscure the difference that is illustrated by considering clear cases of each species of error. There is a jurisdictional error if the decision maker makes a decision outside the limits of the functions and powers conferred on him or her, or does something which he or she lacks power to do. By contrast, incorrectly deciding something which the decision maker is authorised to decide is an error within jurisdiction. (This is sometimes described as authority to go wrong, that is, to decide matters within jurisdiction incorrectly.) The former kind of error concerns departures from limits upon the exercise of power. The latter does not.

63 The passage of Hayne J in ***Re Refugee Review Tribunal; Ex parte Aala*** was quoted with approval by the plurality in ***Kirk v Industrial Court of New South Wales***.[25] In ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum***, the Court of Appeal observed that the determination of the question of whether a decision-maker exercised power within the

[23] ***Hossain v Minister for Immigration and Border Protection*** [2018] HCA 34; (2018) 92 ALJR 780 [24] (Kiefel CJ, Gageler & Keane JJ).
[24] ***Re Refugee Review Tribunal; Ex parte Aala*** [2000] HCA 57; (2000) 204 CLR 82 [163].
[25] ***Kirk v Industrial Court of New South Wales*** [2010] HCA 1; (2010) 239 CLR 531 [66] (French CJ, Gummow, Hayne, Crennan, Kiefel & Bell JJ).

boundaries of the power conferred by the statute is a question of statutory construction:[26]

> It follows from this definition of the concept that, where action taken in the purported exercise of a statutory power is sought to be impugned for jurisdictional error, the only question will be whether what was done was authorised by the empowering legislation. The answer to that question will turn on the identification of the limits of the authority conferred by the relevant statutory provision, and an analysis of the facts to ascertain whether those limits have been exceeded. This may also be described as identifying the conditions for the valid exercise of the statutory power.
>
> The identification of the conditions for the valid exercise of the relevant statutory power is entirely a question of statutory construction. That construction of the relevant statute is 'reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy'.
>
> Those rules require primary attention to be directed to the text of the relevant provisions. There must be regard to the language of the statutory instrument viewed as a whole, considered in its context. An important part of that context will be the purpose of the legislation, ascertained from what the legislation says (rather than any assumption about the desired or desirable reach or operation of the relevant provisions). Once the purpose of the legislation is established, a construction that would promote that purpose shall be preferred to a construction that would not promote the relevant purpose.
>
> Some rules of statutory construction concern what are often referred to as grounds of judicial review. For example, common law rules of statutory construction will start with the assumption that the rules of procedural fairness condition the valid exercise of certain statutory powers. Grounds of review such as taking irrelevant considerations into account, or failing to take relevant considerations into account, are based on a construction of legislation as either prohibiting or requiring that regard be had to those matters. A ground of review which asserts improper purpose asserts that a power was exercised for a purpose not authorised by the relevant Act. A ground which asserts misapprehension of the nature or limits of the relevant statutory power may be seen to reflect a requirement of the law that a decision-maker understand his or her statutory powers and obligations.
>
> An assertion of jurisdictional error in relation to the exercise of a statutory power therefore involves a contention that the decision-maker has purportedly exercised his or her power otherwise than in accordance with the conditions for the valid exercise of the relevant power. The

[26] ***Forrest & Forrest Pty Ltd v The Honourable William Richard Marmion, Minister for Mines and Petroleum*** [2017] WASCA 153; (2017) 51 WAR 525 [88] - [92] (Murphy, Mitchell & Beech JJA).

> identification of those conditions which mark the limits of the decision-maker's authority to decide is purely a matter of statutory construction. Those limits are to be identified by the application of common law and statutory rules of construction to the language which Parliament has chosen, understood in the context in which it appears.

5.2 Characterisation of the refusal of access to the disputed documents as a refusal pursuant to s 20 of the FOI Act

64 The first question for determination in this appeal is whether the Acting Information Commissioner mischaracterised the University's decision to refuse access to documents.

65 The short answer to this question is 'yes'. The appellant's complaint made under s 65(1) of the FOI Act for an external review by the Information Commissioner did not arise out of a refusal by the University to deal with the application under s 20 of the FOI Act.

66 Unfortunately, it appears that the Acting Information Commissioner has misunderstood the observations made in ***Pearlman v The University of Western Australia*** about the powers and functions of the Information Commissioner in dealing with an external review complaint.[27]

67 The reason why I made the observations I did about s 20 of the FOI Act in ***Pearlman v The University of Western Australia*** was because of the issues raised in the grounds of appeal. In ***Pearlman v The University of Western Australia***, I summarised the appellant's grounds 1, 2, 4, 5, and 10 as raising an argument that the former Information Commissioner erred in law by:[28]

> (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).

68 One of the arguments put in the first appeal on behalf of Mr Pearlman was that in determining the external review complaint the Information Commissioner was prohibited from considering whether access should or could be denied pursuant to s 20 of the FOI Act. In particular, it was argued that the Information Commissioner could only determine a denial of access complaint by having regard to the basis for

[27] ***Pearlman v The University of Western Australia*** [2018] WASC 245.
[28] ***Pearlman v The University of Western Australia*** [2018] WASC 245 [34(a)].

the denial given by the agency prior to the external review complaint being made to the Information Commissioner. Consequently, the argument was that the Information Commissioner could only determine whether access should or should not be denied by having regard to the grounds in s 23(1)(b) (refusal of access on grounds that the document is not a document of the agency) or s 31 and s 33 of the FOI Act (that the documents contained exempt matter under cl 1, 2 or 5 of schedule 1).

69 This argument was squarely rejected in the first appeal in ***Pearlman v The University of Western Australia*** on the following grounds:[29]

> 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.
>
> 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.
>
> This point was made plain in the decision of the Full Court of the Federal Court in ***Australian Securities and Investments Commission v Donald***. 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.
>
> 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

[29] ***Pearlman v The University of Western Australia*** [2018] WASC 245 [103] - [111].

Appeals Tribunal only did so for the purpose of reviewing the reviewable decision that was made by ASIC.

Kenny J observed:

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

Her Honour then went on to state:

> '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.'

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.

Downes J then went on to say:

> '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."

> 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 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.

70 It appears the Acting Information Commissioner misapprehended these observations. Perhaps this point was not as clear as it could have been.

71 It is also unfortunate that the Acting Information Commissioner overlooked the fact that I unequivocally recorded in my reasons that the University had, during the course of the appeal, abandoned any objection to disclosure by regard to s 20 of the FOI Act.

72 I did, however, observe in ***Pearlman v The University of Western Australia***, that if on remittal, during further conciliation or negotiation (convened by the Information Commissioner, pursuant to s 71 of the FOI Act), an objection under s 20 of the FOI Act might be an issue that the University may wish to revisit in light of the large number of documents remaining in dispute within the scope of the access complaint.[30]

73 I also observed that if further conciliation and negotiation failed, an objection on grounds of s 20 of the FOI Act (if made) was a matter that the Information Commissioner could have regard to when making a decision to finally dispose of the external review complaint under s 76 of the FOI Act.[31] This is because pursuant to s 76(1)(b), when dealing with the complaint, the Information Commissioner has, in addition to any other power, power to decide any matter in relation to the access application that could, under the FOI Act, have been decided by the agency.

74 Although the power conferred by s 76(1)(b) of the FOI Act has been described as a power to 'stand in the shoes' of the agency, such a description of merits review is not entirely correct. In ***Frugtniet v Australian Securities and Investments Commission***, the plurality of the High Court very recently observed in respect of the powers of the

[30] ***Pearlman v The University of Western Australia*** [2019] WASC 245 [100] – [101].
[31] ***Pearlman v The University of Western Australia*** [2019] WASC 245 [101].

Administrative Appeals Tribunal (AAT) on a review of an administrative decision, that the AAT is expressly required to determine whether the decision is the correct and preferable decision:[32]

> That question is required to be determined on the material before the AAT, not on the material as it was when before the original decision-maker. As Bowen CJ and Deane J held in ***Drake v Minister for Immigration and Ethnic Affairs***, however, and has since been affirmed by this Court in ***Shi v Migration Agents Registration Authority***, the AAT is not at large. It is subject to the same general constraints as the original decision-maker and should ordinarily approach its task as though it were performing the relevant function of the original decision-maker in accordance with the law as it applied to the decision-maker at the time of the original decision.
>
> Depending on the nature of the decision the subject of review, the AAT may sometimes take into account evidence that was not before the original decision-maker, including evidence of events subsequent to the original decision. But subject to any clearly expressed contrary statutory indication, the AAT may do so only if and to the extent that the evidence is relevant to the question which the original decision-maker was bound to decide; really, as if the original decision-maker were deciding the matter at the time that it is before the AAT. The AAT cannot take into account matters which were not before the original decision-maker where to do so would change the nature of the decision or, put another way, the question before the original decision-maker. As Kiefel J observed in ***Shi***, identifying the question raised by the statute for consideration will usually determine the facts that may be taken into account in connection with the decision. The issue is one of relevance, to be determined by reference to the elements of the question necessary to be addressed in reaching a decision.

75 The Information Commissioner is required to do much more than the AAT on a merits review and is not confined to making a determination of what is the correct and preferable decision. The Information Commissioner has an inquisitorial function, to investigate and make inquiries as the Information Commissioner thinks fit.[33] For this purpose, the Information Commissioner may compel persons to provide information or produce documents.[34] He or she may also

[32] ***Frugtniet v Australian Securities and Investments Commission*** [2019] HCA 16; (2019) 93 ALJR 629 [14] - [15] (Kiefel CJ, Keane & Nettle JJ).
[33] *Freedom of Information Act* 1992 (WA), s 70(1).
[34] *Freedom of Information Act* 1992 (WA), s 72, s 75; and under s 83 failure to provide such information is an offence.

require a person to attend before the Information Commissioner to answer questions and be examined under oath or affirmation.[35]

76 The power conferred by s 76 of the FOI Act to review and decide an access application in dealing with a complaint (made under s 65) is to be construed by regard to the inquisitorial powers of the Information Commissioner. Consequently, when deciding any matter in relation to an access complaint, the Information Commissioner should have (and is entitled to have) regard to his or her own investigations and is not bound to determine the access complaint by having regard only to the reasons given by the original decision-maker.

77 On remittal, the University did not revisit s 20 of the FOI Act. In these circumstances, the Acting Information Commissioner should not have had regard to s 20 of the FOI Act other than to observe that the University had withdrawn its previously indicated objection made during the course of investigation and/or conciliation or negotiation of the external review application under s 20 of the FOI Act.

78 The Acting Information Commissioner clearly erred in determining that the ambit of the dispute between the parties was confined to s 20 of the FOI Act. This error was plainly material. Whilst it was an error of fact, this error causally gave rise to an error of law as it led the Acting Information Commissioner into error in determining that there was nothing remaining in dispute, and thus in finding that the complaint was lacking in substance so as to invoke the power of the Information Commissioner to stop dealing with the complaint pursuant to s 67(1)(b) of the FOI Act.

79 In any event, it should have been clear to the Acting Information Commissioner and her advisers that the matters in dispute in the external review complaint had not been resolved by an agreement by the parties to recommence a review of the documents in dispute.

6.0 Did the Acting Information Commissioner fall into jurisdictional error by relying upon the power to direct the University pursuant to s 70(4) and s 71(2) to reconsider its decision to deny access?

80 The answer to this question is not straightforward. In part, I agree that it could have been open to the Acting Information Commissioner, as she did, to direct the University to 'deal with' the appellant's reduced scope of documents in the sense that the University could be directed to

[35] *Freedom of Information Act* 1992 (WA), s 72(3) and s 73.

reconsider its position. Such a direction could be given during the course of conciliation or negotiation proceedings convened under s 71. However, such a direction could only properly extend to a direction to the University to review each of the disputed documents and provide its view on each of the documents as to the access that it would agree to be given and the basis of any objections it wished to maintain in accordance with the provisions of the FOI Act.

81 It is argued on behalf of the Acting Information Commissioner that the power to cease dealing with the appellant's complaint pursuant to s 67(1)(b) and remit the appellant's complaint to the University arises from the power conferred by s 64, s 70(2) and (4) of the FOI Act.

82 The Information Commissioner has procedural powers to deal with an external complaint against an agency's decision. Section 70 provides:

> **70. 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;
>
> (b) direct that all submissions are to be in writing;
>
> (c) require parties to attend compulsory conferences.

> (6) If a party is required or permitted to appear before the Commissioner the party may be represented by a legal practitioner or by any other person.

83 In giving a direction to the University to deal with the appellant's reduced scope of documents and to provide the appellant with the usual internal and external review, the Acting Information Commissioner also relied upon the power conferred by s 64 of the FOI Act which provides:

> **64. Powers**
>
> 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.

84 In particular, the Acting Information Commissioner argues that:[36]

(a) Part 4, div 3 of the FOI Act is concerned with the making of complaints to the Information Commissioner and the procedure for dealing with those complaints.

(b) The statutory language which prescribes the Information Commissioner's functions is that the Information Commissioner is required to 'deal with' complaints. The Information Commissioner may elect not to deal with a complaint at all, or may elect to stop dealing with a complaint, where relevant circumstances arise.

(c) In this appeal, it is of some relevance to understand what it means to 'deal with' a complaint. Plainly enough, 'dealing with' a complaint may involve the Information Commissioner reviewing a decision of an agency. However, it is not an essential requirement of 'dealing with' a complaint that the Information Commissioner review such a decision.

(d) Once it is understood that 'deal with' is wider than undertaking a review of an agency's decision, it can be understood that a power to direct an agency to do (or not do) a particular thing is able to be exercised by the Information Commissioner. So much is confirmed by s 64 of the FOI Act.

(e) Further, assume an agency decides at first instance it will not deal with an application. The appellant's case would appear to suggest that the Information Commissioner could not determine

[36] First respondent's outline of submissions, filed 31 May 2019 [49] – [58].

that such a decision was to be set aside and the agency be required to deal with the application. That would be an unusual result.

(f) In 'dealing with' a complaint, the Information Commissioner must conduct proceedings with as little formality and technicality, and with as much expedition, as the requirements of the FOI Act and a proper consideration of the matters before the Information Commissioner permit.

(g) The Information Commissioner must ensure that procedural fairness is afforded to all parties to a complaint.

(h) The Information Commissioner is empowered to decide any matter in relation to an access application that could, under the FOI Act, have been decided by the agency. Critically, however, the Information Commissioner is not limited to exercising her powers in that way. That is, there is no provision which would cause the power in s 64 of the FOI Act to be read down.

(i) If a complaint is 'dealt with', then unless s 67 of the FOI Act applies, the Information Commissioner must confirm, vary or set aside a decision of an agency. If the agency's decision is set aside then the Information Commissioner must substitute the agency's decision with their own decision.

(k) Having set out those matters, it is submitted that there is no prohibition in the FOI Act on the Information Commissioner 'remitting' a matter to an agency in appropriate circumstances. Further, the Information Commissioner is not obliged to 'review' a decision of an agency and reach a view as to the correctness or otherwise of that decision.

85 Upon the remittal by the court, following the first appeal, the Acting Information Commissioner was required to determine whether the appellant's access complaint was to be the subject of further conciliation and negotiation, pursuant to s 71 of the FOI Act.

86 Section 71 provides:

71. Complaint, conciliation etc of

(1) 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.
>
> (2) The Commissioner may give such directions and do such other things as the Commissioner thinks fit in order to facilitate the resolution of a complaint by negotiation or conciliation.
>
> (3) Without limiting subsection (2), the Commissioner may nominate a person to act as a conciliator in relation to a complaint.
>
> (4) A person nominated as a conciliator -
>
> (a) may require the parties to the complaint to attend compulsory conferences; but
>
> (b) does not have power to require the production of the requested documents or to require the provision of information.

87 Conciliation and/or negotiation is a process whereby, as contemplated by s 71 of the FOI Act, conciliation proceedings are to be conducted by either the Information Commissioner or a delegate of the Information Commissioner for the purpose of facilitating an agreement between the parties. The nature of conciliation and negotiation proceedings are such that they should be conducted with a great deal of informality. Any directions given by the Information Commissioner pursuant to s 71(2) of the FOI Act must be directions for the purpose of facilitating a possible resolution of a complaint between the parties.

88 In conducting proceedings under s 71 of the FOI Act the Information Commissioner has no power to impose a 'resolution' on a party. Consequently, directions made pursuant to s 71(2) of the FOI Act can only be made to assist the parties to reach an agreement to resolve an access complaint. The only coercive power enabled by s 71 of the FOI Act is the power conferred in s 71(4) of the FOI Act, which is that a person nominated as a conciliator may require the parties to a complaint to attend a compulsory conference (breach of which constitutes an offence).[37]

89 The Information Commissioner also has a power to give directions pursuant to s 70(4) of the FOI Act to give any 'necessary directions' as to the conduct of the proceedings. By the use of the words 'conduct of the proceedings' in s 70(4) of the FOI Act, it necessarily follows that any directions given by the Information Commissioner under this

[37] *Freedom of Information Act 1992* (WA), s 83.

provision must be procedural in nature, so as to assist the Information Commissioner in the exercise of his or her powers under the FOI Act.

90 The scope and purpose of the power conferred by s 70(4) of the FOI Act is informed by the examples of procedures and directions that can be given under s 70(4) of the FOI Act which include, pursuant to s 70(5) of the FOI Act, dealing with the complaint without holding formal proceedings or hearings, to direct that all submissions are to be in writing, or require parties to attend compulsory conferences. Similar to the powers conferred by s 71 of the FOI Act, the only coercive power in s 70(4) of the FOI Act is the power to convene compulsory conferences, breach of which also constitutes an offence.[38]

91 The procedural powers in s 70 of the FOI Act do not enable the Information Commissioner to make a final determination on a complaint.

92 As the appellant points out, following the remittal by the court no negotiation or conciliation proceedings took place between the appellant and the University; despite the statement made by the Acting Information Commissioner to the contrary in her letter to the appellant dated 26 October 2018. This point appears to now be accepted by the Acting Information Commissioner.

93 The Acting Information Commissioner had no power to direct, as she indicated in her direction, that once the University had provided its decision on each of the disputed documents, such a decision would constitute a 'decision' made by an agency that could be subject to the 'usual (internal and external) review rights' if the appellant was not satisfied by the University's 'decision'.

94 The powers conferred upon the Information Commissioner are limited. The Information Commissioner has no implied or inherent power to effectively 'remit' a complaint to an agency decision-maker.

95 As counsel for the Acting Information Commissioner points out, the main function of the Information Commissioner is, pursuant to s 63(1) of the FOI Act, to deal with complaints made under pt 4, div 2 about decisions made by agencies in respect of access applications and applications for amendment of personal information.

[38] *Freedom of Information Act 1992* (WA), s 83.

96 In ***Pearlman v The University of Western Australia***, I observed that the power conferred by s 64 of the FOI Act is general and broad. I also observed that the power conferred by s 64 of the FOI Act only requires that a rational causal relationship exists between the functions and powers created by the FOI Act and the Information Commissioner's functions.[39] I then went on to observe, however, that the scope of the power in s 64 does not extend the scope of the Information Commissioner's functions. In making this observation I had regard to the principle espoused by the High Court in ***Shanahan v Scott***.[40]

97 The Information Commissioner's functions and powers are entirely conferred by statute. There is a distinction between functions, purposes or activities of an administrative body on the one hand, and the powers conferred upon it to perform or execute those functions, purposes and activities on the other.[41]

98 In ***Shanahan v Scott***, in the context of a power conferred on an authority to make regulations that are 'necessary or convenient' for giving effect to the provisions of an Act, the plurality said that such a power does not enable the authority to extend the scope or general operation of the enactment but is strictly ancillary.[42]

99 As the appellant points out, the Full Court of the Federal Court in ***Northern Land Council v Quall*** very recently observed that:[43]

> The following general points emerge from the passage in ***Shanahan v Scott*** and the authorities referred to therein:
>
> (a) 'Necessary or convenient' powers are 'strictly ancillary' powers.
>
> (b) This means they do not extend the general operation or scope of an enactment. The scope of their operation is tied to the specific functions conferred on the repository under other parts of the enactment (see Ryan J in ***Anthony Lagoon Station Pty Ltd v Aboriginal Land Commissioner*** (1987) 15 FCR 565 at 585)).

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[39] ***Pearlman v The University of Western Australia*** [2018] WASC 245 [39]; applying ***Stonnington City Council v Roads Corporation*** [2010] VSC 454; [2010] 30 VR 303 [107] (Osborn J).
[40] ***Shanahan v Scott*** [1957] HCA 4; (1957) 96 CLR 245.
[41] ***Mercantile Mutual Life Insurance Co Ltd v Australian Securities Commission*** (1993) 40 FCR 409, 422 (Lockhart J).
[42] ***Shanahan v Scott*** [1957] HCA 4; (1957) 96 CLR 245, 250 (Dixon CJ, Williams, Webb & Fullagar JJ); applied in ***Tallott v City of Stirling*** [2017] WASCA 126; see also ***Morton v The Union Steamship Co of New Zealand Ltd*** [1951] HCA 42; (1951) 83 CLR 402, 410, 412 (Dixon, McTiernan, Williams, Webb, Fullagar & Kitto JJ).
[43] ***Northern Land Council v Quall*** [2019] FCAFC 77 [107] (Griffiths & White JJ).

> (c) By definition, incidental or ancillary powers provide a source of power that is in addition to the existing powers conferred on a repository under an enactment. However, the power provided is supplementary to some other existing object or function conferred by the enactment.
>
> (d) Ancillary powers are not a freestanding source of power to expand the objects of the enactment, or to circumvent the means provided for in the enactment for pursuing the relevant statutory objects.
>
> (e) In summary, when one asks whether a person or body has statutory power to engage in an activity, the starting point is the powers and functions conferred on that person by the legislation - not the presence of a 'necessary or convenient' power or any other collocation used to describe incidental or ancillary powers conferred on the person or body.

100 As I observed in ***Pearlman v The University of Western Australia***, the scope of the power in s 64 of the FOI Act does not extend the scope of the Information Commissioner's functions. The power conferred under that section is an incidental power, designed to enable the Information Commissioner to effectively administer his or her powers. It is not a separate or stand alone head of power.

101 In ***Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority***, the Full Court of the Federal Court was called upon to consider whether the Chief Executive Officer had power to conduct a joint investigation with the Australian Football League (AFL); whereby the Australian Sports Anti-Doping Authority took advantage (with the assistance of the AFL) of the AFL's contractual powers to compel Mr Hird and the players to produce documents and attend at interviews and answer questions.

102 In conducting the joint investigation, the CEO relied upon a statutory power 'to do all things necessary and convenient to be done for, or in connection with the performance of his or her functions'.[44]

103 The Full Court in ***Hird*** observed that that particular case was not a case where the principle in ***Shanahan v Scott*** applied, because it was not a case where the respondent sought to extend the scope or general

[44] ***Hird v Chief Executive Officer of Australian Sports Anti-Doping Authority*** [2015] FCAFC 7; (2015) 227 FCR 95; *Australian Sports Anti-Doping Authority Act 2006* (Cth), s 22.

operation of its governing legislation by any particular act of its own, for example, by purporting to exercise some coercive power.[45]

104 Their Honours in ***Hird*** went on to make the following general observations about the effect of a 'necessary or convenient' power (of the kind conferred by s 64 of the FOI Act):[46]

> The Parliament has commonly used provisions like s 22 of the ASADA Act to ensure that a statutory body has sufficient power to discharge its functions in circumstances that the Parliament could not practically set down, although they lie within the contemplation of its enactment. The authorities that have discussed the scope of a 'necessary' or 'convenient' power such as that in s 22 of the ASADA Act support the general proposition that s 22 is to be construed in conformity 'with the width of the language in which it is expressed': ***Leon Fink*** at 679 (Mason J; Barwick CJ and Aickin J agreeing). As Ryan J stated in ***Anthony Lagoon*** at 585 '[t]he language of a grant of power to do "all things necessary or convenient to be done for or in connexion with the performance of" an enumerated list of functions is of considerable width'. (Although Ryan J was in dissent in the result of the case, Sweeney J agreed with this point: 567. Plainly enough, the scope of a grant of power of this kind should be interpreted in light of the functions that the Parliament has conferred on the body in question: see ***Leon Fink*** 677 - 679; ***Kathleen Investments*** at 143, 145 – 146 (Stephen J) and 153 – 155 (Mason J); ***Botany Municipal Council v Federal Airports Authority*** (1992) 175 CLR 453 at 462; and ***Anthony Lagoon*** at 585 (Ryan J). Where, as here, the legislature confers a function in general terms, a grant of power in the terms of s 22 will, generally speaking, have a commensurably wide scope: ***Anthony Lagoon*** at 590 (Ryan J) and ***Morton v Union Steamship Company of New Zealand Ltd*** (1951) 83 CLR 402 at 410. In this case, the functions given to the CEO in s 21(1) of the ASADA Act (relevantly in s 21(1)(b) and (o)) and in cl 3.27 of the NAD Scheme are conferred in general terms, and the CEO is given a wide discretion as to the means by which these functions are fulfilled, including in relation to the conduct of investigations into possible anti-doping rule violations. Having regard to the foregoing, we are confirmed in our conclusion that s 22 is to be construed broadly, and should not be read as subject to an implied prohibition against collaborating or cooperating with a SAB in the interviews conducted with sports participants during an anti-doping investigation.

105 In ***Quall***, the plurality of the Full Court observed that this passage in ***Hird*** emphasises that the scope of provisions (such as s 64 of the FOI

[45] ***Hird v Chief Executive Officer of Australian Sports Anti-Doping Authority*** [2015] FCAFC 7; (2015) 227 FCR 95 [201] (Kenny, Besanko & White JJ).
[46] ***Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority*** [2015] FCAFC 7; (2015) 227 FCR 95 [210] (Kenny, Besanko & White JJ).

Act) is determined by the substantive power or function to which the incidental power attached.[47]

106 Applying the observations in ***Hird*** to s 71(2), when read with s 63 and s 64 of the FOI Act, it emerges that the Information Commissioner can give any direction that is for the purpose of facilitating the resolution of a complaint by negotiation or conciliation. Any direction given must be capable of being characterised as a direction necessary or appropriate as the Information Commissioner or his or her authorised delegates subjectively think fit for the purpose of facilitating resolution of a complaint by negotiation or conciliation. Providing such a direction is made for the requisite purpose, the wide and broad ancillary power conferred by s 64 of the FOI Act assists the Information Commissioner and his or her delegates in determining what directions, and on what terms, should be given in any particular case.

107 Similarly, if a direction is given under s 70(4), when read with s 64, the Information Commissioner has wide and broad ancillary powers to determine procedures for investigating and dealing with complaints, and making directions as to the conduct of proceedings. In making such directions, regard is to be had to s 70(2) which enables the Information Commissioner to conduct proceedings with as little formality and technicality, and with as much expedition as the requirements of the FOI Act and a proper consideration of matters before the Information Commissioner permit.

108 In addition, the Information Commissioner is not bound by the rules of evidence and can make investigations and inquiries as the Information Commissioner thinks fit as well as obtain information from such persons and sources as the Information Commissioner thinks fit. Pursuant to s 70(3) of the FOI Act, the Information Commissioner is required to comply with the rules of procedural fairness by giving each party to a complaint reasonable opportunity to make submissions.

109 The informality of the way in which an Information Commissioner may deal with a complaint is affirmed by s 70(5), which provides for examples of the way in which the Information Commissioner may determine the procedure for investigating and dealing with complaints, and some of the directions that the Information Commissioner may make.

[47] ***Northern Land Council v Quall*** [2019] FCAFC 77 [128] (Griffiths & White JJ).

110 However, there is nothing in s 70 or s 71 of the FOI Act, when read with s 64 of the FOI Act, that enables the Information Commissioner to make a direction that necessarily by its terms, has the effect of determining an access complaint. The power to 'deal with' a complaint in s 70 cannot be construed as a power to finally determine a complaint. An Information Commissioner can only finally determine a complaint by making a decision pursuant to s 76, or by ceasing to deal with a complaint only when the preconditions set out in s 67(1)(a) and (b) are met. A complaint may otherwise be finally resolved by consent of the parties (either through negotiation and conciliation pursuant to s 71 or through their own independent efforts).

111 Unfortunately, on 8 February 2019, the Acting Information Commissioner determined that there was nothing left for her to determine, and dismissed the access complaint as now lacking in substance. This decision was foreshadowed in her advice to the appellant in her letter to the appellant dated 26 October 2018.

112 With respect, it should have been clear to the Acting Information Commissioner that the appellant's complaint should not be confined to a position put by the University during earlier investigation or conciliation and negotiation proceedings in 2017, that access should be denied pursuant to s 20 of the FOI Act.

113 The fact that the objection on this ground had not been maintained by the University was referred to in ***Pearlman v The University of Western Australia***, and it was clear that by 2 July 2018 during the course of the first appeal the University had reconsidered and reviewed 59 of the 175 documents in question. The appellant made this point clear in his letter to the Acting Information Commissioner on 27 September 2018.[48]

114 The appellant was insisting, in his letter dated 27 September 2018, that the Acting Information Commissioner now resolve the dispute by examining each of the disputed documents and making a decision in writing as required by s 76(2) of the FOI Act.

[48] Book of relevant records, page 236.

115 At that point in time, the proper course would have been for the Acting Information Commissioner to either accede to the appellant's request or to inform the appellant that:

(a) she intended to wait until the University had provided its advice regarding its view in respect of all and each of the disputed documents it would agree to the appellant having access to (or redacted access to);

(b) once the advice was received from the University she intended to direct the appellant to review that advice, including the particulars provided in respect of the documents and to invite the appellant to provide further submissions;

(c) if after receipt of any further submissions by the appellant there was no prospect of any further conciliation or negotiation being availing, or no agreement could be reached at that point in respect of all of the disputed documents (with or without the assistance of the officers of the Office of the Information Commissioner); and

(d) the Information Commissioner would be then required (in the absence of agreement by the parties) to determine the access complaint in respect of all remaining disputed documents, pursuant to s 76 of the FOI Act.

116 In any event, having regard to the advice provided by the University on 7 December 2018, in its purported 'decision', in particular to the matters stated in the schedule to that 'decision', on the face of that document alone (and in the absence of any agreement of the appellant that his complaint had been resolved) it was not open to the Acting Information Commissioner to decide not to deal with the appellant's access complaint pursuant to s 67(2) on grounds that it is frivolous, vexatious, misconceived or lacking in substance.

117 It is clear that once an access complaint is made by a person pursuant to s 65 of the FOI Act, an access complaint cannot be disposed of by remittal to an agency to 'deal with' the complaint ab initio in circumstances where it is clear, as in this case, that such a course would not resolve the complaint.

118 There may be scope, however, for an agreement on the question and for an access complaint to be dealt with on such a basis. However,

in the absence of consent to such an arrangement the Information Commissioner has no power to direct such a course of action.

7.0 Was the decision made on 8 February 2019 infected by a reasonable apprehension of bias?

7.1 Relevant background

119 The appellant made a submission to the Acting Information Commissioner on 27 September 2018 that she should disqualify herself from dealing with his external review complaint on grounds that the Acting Information Commissioner had a strong pecuniary interest and close long-lasting personal relationship with, and emotional ties to, the University such that a reasonable and an informed bystander may suspect that she may be biased.[49]

120 The Acting Information Commissioner rejected the appellant's submission in her letter to the appellant dated 26 October 2018. In her letter, the Acting Information Commissioner stated:[50]

> This submission is premised on your assertion that I have a 'strong relationship … both pecuniary and otherwise' with UWA arising from the following 'facts':
>
> i) that I am a former student of UWA;
>
> ii) that I am a former employee of UWA;
>
> iii) that I might seek future employment at UWA;
>
> iv) that I have two children who currently attend and study at UWA;
>
> v) one of those children has an involvement in the UWA Student Guild including running for UWA Guild President in September 2018; and
>
> vi) I am acquainted, through my past involvement on the Council and a sub-committee of the Law Society of WA, with two lawyers from law firm Minter Ellison (Kate Pedersen and Emma Cavanagh) who represented UWA in the Supreme Court appeal in this matter.

121 Prior to the hearing of the appeal, the appellant filed an affidavit annexing copies of web pages from Water Polo Australia which are

[49] Book of relevant records, pages 238 – 241.
[50] Book of relevant records, page 320.

said to identify the fact that the Acting Information Commissioner was, between 31 October 2018 and 20 March 2019, a member of the UWA City Beach Water Polo Club (University water polo club) and had played water polo for one of the teams at that club during that period.[51]

122 The Acting Information Commissioner objects to the admissibility of the web pages on grounds of hearsay, but has no objection to the web pages being adduced into evidence on grounds that they are not sought to be adduced as to the truth of the matter stated in the web pages, but as to the fact that they have been made. The Acting Information Commissioner also contends that the statements contained in the web pages are not relevant and should not be accorded any weight.

123 The appellant also annexed to his affidavit a copy of the rules of the '2019 UWA City Beach Water Polo Club Rules of Association' (University club rules).[52] The Acting Information Commissioner objects to the admissibility of this document on grounds of relevance.

124 I do not agree that the information in the web pages that indicate that the Acting Information Commissioner is an active water polo player for the University water polo club and has been an active player during the period she has dealt with the appellant's access complaint is irrelevant.

125 It is not in dispute that the Acting Information Commissioner is an active water polo player. For this reason, to the extent that the web pages record that the Acting Information Commissioner was a member of the University water polo club during the period of time she dealt with the appellant's external review complaint is relevant and admissible as to whether a hypothetical informed and reasonable observer would suspect that the Acting Information Commissioner would not bring an impartial mind to the appellant's complaint.

126 For the same reason, the University club rules are also relevant and admissible for this purpose.

127 I have not, however, found it necessary to have regard to any of the other documents annexed to the appellant's affidavit.

[51] Affidavit of Patrick William Pearlman, sworn 22 May 2019, annexure PWP-8.
[52] Affidavit of Patrick William Pearlman, sworn 22 May 2019, annexure PWP-10.

7.2 Reasonable apprehension of bias - principles

128 In ***Ebner v Official Trustee in Bankruptcy***, the plurality observed:[53]

> Where, in the absence of any suggestion of actual bias, a question arises as to the independence or impartiality of a judge (or other judicial officer or juror), as here, the governing principle is that, subject to qualifications relating to waiver (which is not presently relevant) or necessity (which may be relevant to the second appeal), a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide. That principle gives effect to the requirement that justice should both be done and be seen to be done, a requirement which reflects the fundamental importance of the principle that the tribunal be independent and impartial. It is convenient to refer to it as the apprehension of bias principle.
>
> The apprehension of bias principle may be thought to find its justification in the importance of the basic principle, that the tribunal be independent and impartial. So important is the principle that even the appearance of departure from it is prohibited lest the integrity of the judicial system be undermined. There are, however, some other aspects of the apprehension of bias principle which should be recognised. Deciding whether a judicial officer (or juror) *might* not bring an impartial mind to the resolution of a question that has not been determined requires no prediction about how the judge or juror will in fact approach the matter. The question is one of possibility (real and not remote), not probability. Similarly, if the matter has already been decided, the test is one which requires no conclusion about what factors *actually* influenced the outcome. No attempt need be made to inquire into the actual thought processes of the judge or juror.
>
> The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps. First, it requires the identification of what it is said might lead a judge (or juror) to decide a case other than on its legal and factual merits. The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an 'interest' in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and the asserted connection with the possibility of departure from impartial decision making, is articulated. Only then can the reasonableness of the asserted apprehension of bias be assessed.

[53] ***Ebner v Official Trustee in Bankruptcy*** [2000] HCA 63; (2000) 205 CLR 337 [6] - [8] (Gleeson CJ, McHugh, Gummow & Hayne JJ).

129 Statutory adjudicators should take care that their decisions are not only not influenced by their personal interest, but to avoid the appearance of labouring under such an influence.[54]

130 However, the suspicions of the ultra-sensitive, paranoid or cynical must not be allowed to determine the legal standard of impartiality.[55] Apprehended bias must be firmly established. A vague sense of unease or disquiet is not enough.[56]

131 The subjective perception of a person who makes an application for recusal is irrelevant. Consequently, I have not had regard to the appellant's submissions which go to his subjective perceptions of what motivated the former Information Commissioner and the Acting Information Commissioner to make the decisions that they did.

132 The appellant agrees that after the matters that might lead a decision-maker to decide a case other than on legal and factual merits are identified, the logical connection between the matter and the feared deviation from deciding the case on its merits must be articulated, as provided for in ***Ebner***. The next step is that an assessment must be made whether, having regard to the identified matter and its logical connection with the case being decided other than on its merits, a fair-minded observer might reasonably apprehend that the case might not be decided impartially.

133 The appellant properly points out that an application should also take into account the nature of the proceeding and the decision-maker's role, whether they are curial or non-curial in nature. The appellant says where, as in this case, the decision-maker undertakes a quasi-judicial role in determining the outcome of the proceeding, and takes an oath similar to that of a judge, there should be a heightened expectation of impartiality.

134 The grounds of disqualification relied upon by the appellant are that the Acting Information Commissioner, by association that she has (such as a direct or indirect relationship, experience or contact with anyone interested in, or otherwise involved) with the University, should have disqualified herself from dealing with his external review complaint.

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[54] ***Dimes v Grand Junction Canal Co*** (1852) 3 HL Cas 759, 793 - 794; (1852) 10 ER 301, 315 (Campbell LJ).
[55] ***S & M Motor Repairs Pty Ltd v Caltex Oil (Australia) Pty Ltd*** (1988) 12 NSWLR 358, 374 (Kirby P).
[56] ***Minister for Immigration and Multicultural Affairs v Jia Legeng*** [2001] HCA 17; (2001) 205 CLR 507 [135] (Kirby J).

135 The appellant also claims that a reasonable apprehension of bias also arises on grounds that the Acting Information Commissioner, like her predecessor, had prejudged the outcome of his external review complaint on grounds of an unreasonable belief that his external review complaint arose from the University's refusal to deal with his complaint under s 20 of the FOI Act.

7.3 Would a reasonable observer apprehend that the Acting Information Commissioner might not bring an impartial mind to the appellant's access complaint?

136 In circumstances where the Acting Information Commissioner had a relationship with the University, whereby she undertook paid academic work for the University over ten years ago, is too distant in time to cause or lead a fair-minded lay observer with this knowledge to reasonably apprehend that the Acting Information Commissioner might not bring an impartial and unprejudiced mind to dealing with the appellant's external review complaint.

137 Nor would a fair-minded observer be concerned that two of her children are studying at the University and at least one member of the Acting Information Commissioner's immediate family is studying law. The fact that members of the Acting Information Commissioner's family are current students of the University would not give rise to an apprehension of bias by an informed lay observer.

138 In the absence of any evidence that the Acting Information Commissioner was at any time in 2018, or currently, involved in activities at the University that involved interaction with officers or agents of the University who are in any way engaged in dealing directly or indirectly with freedom of information applications, it is difficult to see that a fair-minded lay observer may be concerned that the Acting Information Commissioner may not be able to bring an impartial and unprejudiced mind to the appellant's complaint.

139 Further, the fact that Acting Information Commissioner had in the past, and well prior to her appointment, served on committees connected with lawyers who acted for the University in the first appeal, is not sufficient to raise apprehended bias in the minds of a reasonable observer.

140 Past professional associations with counsel or a solicitor should not be regarded as a sufficient reason for disqualification, unless the statutory decision-maker was involved in the subject matter of the

action in question prior to his or her appointment, or for some other good reason.

141 I turn now to the Acting Information Commissioner's connection with the University water polo club, which the appellant claims is a sporting body that is clearly part of the University. In particular:[57]

(a) membership of the club is comprised of, among other persons, members of the University's senate, current and former University students and graduates, University staff, and associates of the University's sport and recreation association;

(b) the club is closely affiliated with the University student council representing the University's sporting clubs and UWA Sports Pty Ltd;

(c) the club's objects include affiliating with UWA Sports and promoting the club's representation in 'all interfaculty and intervarsity activities' and its 'co-operation [with] other affiliated societies representative of interests of the University'; and

(d) the captain of the club must be a current University student and represents the club's interest on the University Sports Council.

142 Consequently, it is argued that the Acting Information Commissioner's membership of the University water polo club provides her with a continuing, frequent opportunity to form strong relationships with the University's faculties, staff and senate members.[58]

143 A question that I must ask in this appeal is what a reasonable member of the public would think if they knew that the appellant's external review complaint had been remitted by the court to the Information Commissioner to determine, and that that member of the public had read (by accessing the internet) that the holder of that office at the time of considering the appellant's external access complaint was a member of the University water polo club and was playing water polo for a team that was part of the club.

[57] Appellant's outline of submissions, filed 26 May 2019 [52].
[58] Appellant's outline of submissions, filed 26 May 2019 [52].

144 In considering this question, I must also have regard to whether the reasonable member of the public had also read on the internet the University club rules, which provide that: [59]

(a) membership of the water polo club is not confined to the classes of person referred to by the appellant, and is open to all persons interested in water polo;

(b) the objects of the University's water polo club include:

(i) to promote and develop the sport of water polo;

(ii) to affiliate and co-operate with WPWA and abide by its Rules and By-laws;

(iii) to affiliate with UWA Sport or the controlling sporting body of the University;

(iv) to promote and develop elite level competition;

(v) to foster and encourage a culture within the Club of fair play and good sportsmanship; and

(vi) to promote and develop social interaction amongst members, players and supporters.

145 The reasonable member of the public would also have regard to the fact that the internet searches reveal that the Acting Information Commissioner may be a member of the University water polo club and plays on one of the teams for the club, but there is no evidence that she is a committee member or holds any office in the University water polo club.

146 In these circumstances, a reasonable and dispassionate observer would conclude that in the absence of any evidence of involvement in the University water polo club other than as a member and a player there is not a real probability or suspicion that the Acting Information Commissioner could not bring a detached impartial mind to the appellant's external review complaint.

147 As to the appellant's claim that a reasonable apprehension of bias arises on the Acting Information Commissioner's part by forming the view that the appellant's external review complaint arose from a refusal

[59] Affidavit of Patrick William Pearlman, affirmed 22 May 2019, annexure PWP-10, pages 59 – 61.

by the University to deal with the access application under s 20 of the FOI Act, an error of law as to a mistaken view as to jurisdiction cannot in the circumstances of this matter constitute a form of prejudgment.

148 Prejudgment of matters that can be properly described as a state of mind of bias cannot arise in this context. Disqualification cannot be made out on the finding that the Acting Information Commissioner misunderstood the jurisdiction conferred upon her. If it were otherwise, in any matter where such an error is found to arise, an argument could be properly put that there was a reasonable apprehension of bias on behalf of a decision-maker.

149 For these reasons, I am not satisfied that the Acting Information Commissioner should have disqualified herself from dealing with the appellant's external review complaint.

8.0 Should the appellant's external review complaint be remitted to the Information Commissioner for reconsideration?

150 The appellant argues that rather than remitting the external review complaint to the Acting Information Commissioner the court should resolve the external review complaint or appoint an independent and suitably qualified person to determine the external review complaint.[60] It is said that the court is empowered to determine the merits of the appellant's external review complaint.[61]

151 As authority for his assertion the appellant relies upon s 87(1)(c)(i) of the FOI Act. Section 87(1) provides:[62]

> **87. Courts powers on appeal**
>
> (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**

[60] Appellant's outline of submissions, filed 26 May 2019 [63].
[61] Appellant's supplemental submissions, filed 20 June 2019 [5].
[62] *Freedom of Information Act 1992* (WA), s 87(1).

> (ii) remit the matter to the Commissioner for reconsideration with any direction or recommendation the Supreme Court thinks fit. (my emphasis)

152 The appellant submits that there is no express or implied limitation upon the court's power to fashion a decision in substitution for the Acting Information Commissioner's decision (other than it must not be legally unreasonable).[63] It is suggested that the FOI Act elsewhere supports the appellant's contention, in particular, in the context of s 89, s 91, s 92 and s 93 of the FOI Act. Finally, the appellant relies upon the *Rules of the Supreme Court 1971* (WA) and their interaction with the provisions of the FOI Act as the rules govern the conduct of the review proceedings under s 85(1) of the FOI Act and otherwise apply where the FOI Act is silent. The appellant also relies upon s 50 of the *Supreme Court Act 1935* (WA), for the alternative proposition that his external review complaint be referred to a referee for consideration.

153 Leaving aside, for one moment, the fact that the Acting Information Commissioner did not make a decision on the merits of the external review application on 8 February 2019, even if the Acting Information Commissioner had so made a decision I do not agree that it is open to this court to substitute that decision by considering its merits.

154 Insofar as the appellant seeks to rely on the provisions of the FOI Act more broadly, that is s 89, s 91, s 92, and s 93; as the Acting Information Commissioner points out, those provisions do not assist the appellant. Section 89 relates to the power of the court to impose orders as to costs; s 91 empowers the court to request a document held by an agency; s 92 excludes any other law that would prevent the disclosure of a document to the court; and, finally, s 93 empowers the court to otherwise determine the procedure to the extent that it is not provided for in the FOI Act.

155 The attention that the appellant draws to the decision of Corboy J in ***I v Department of Agriculture and Food***, with respect is misguided.[64] In ***I***, Corboy J was determining whether a third party access applicant should be joined to the review proceedings.

[63] Appellant's supplemental submissions, filed 20 June 2019 [9].
[64] ***I v Department of Agriculture and Food*** [2016] WASC 26.

156 His Honour found that the *Rules of the Supreme Court* 1971 (WA) are intended to fill any 'gap' in the procedure for the conduct of an appeal under the FOI Act.[65]

157 The questions that arise in this matter are whether the court is empowered to review the merits of the external review application and, if so, whether it is appropriate for the court to do so in this case. For the following reasons, the answer to both of those questions is 'no'.

158 Pursuant to s 85(1) of the FOI Act, an appeal lies to the court from a decision of the Information Commissioner only on a question of law arising out of any decision of the Information Commissioner on a complaint relating to an access application.[66]

159 Under s 85(1) of the FOI Act, review proceedings are in the nature of judicial review, rather than a conventional appeal.[67]

160 In the decision of ***Osland v Secretary, Department of Justice [No 2]***,[68] referred to by both the appellant and the Acting Information Commissioner, the High Court considered s 50(4) of the *Freedom of Information Act 1982* (Vic) which provided that on a hearing of an application for review the Victorian Civil and Administrative Tribunal had power to decide that access to an exempt document should be granted where the Tribunal was of the opinion that the public interest required that access to the document should be granted under the Act. Section 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) enabled a party to a proceeding in the Tribunal to appeal on a question of law from an order of the Tribunal to the Supreme Court by leave of the Court. Section 148(7) empowered the court to make orders on the appeal as the case required, including (par (b)) an order that the Tribunal could have made in the proceeding.

161 The plurality in ***Osland*** found that although the language of s 148(7) was broad enough to contemplate the court substituting a decision for the decision of the tribunal, the court could only exercise

[65] ***I v Department of Agriculture and Food*** [2016] WASC 26 [27].
[66] ***Department of State Development v Latro Lawyers*** [2016] WASC 108 [32], [34] (Beech J).
[67] ***Department of State Development v Latro Lawyers*** [2016] WASC 108 [34] (Beech J); ***Apache Northwest Pty Ltd v Department of Mines and Petroleum [No 2]*** [2011] WASC 283 [28] (Edelman J); applying ***Osland v Secretary, Department of Justice [No 2]*** [2010] HCA 24; (2010) 241 CLR 320 [18] (French CJ, Gummow & Bell JJ).
[68] ***Osland v Secretary, Department of Justice [No 2]*** [2010] HCA 24; (2010) 241 CLR 320.

the power to do so by having regard to the limited nature of the appeal.[69] In that context, the plurality went on to say:[70]

> Where there is a factual matter that has to be determined as a consequence of the appeal, it may be that it is able conveniently to be determined by the Court of Appeal upon uncontested evidence or primary facts already found by the Tribunal. When the outstanding issue involves the formation of an opinion which is, as in this case, based upon considerations of public interest, then it should in the ordinary case be remitted to the body established for the purpose of making that essentially factual, evaluative and ministerial judgment.

162 It is well established that the powers of an appellate court in proceedings of this nature must be exercised with restraint to avoid an appeal on a question of law opening the door to an appeal by way of rehearing.[71]

163 Although the Information Commissioner engages in an assessment of whether documents are or are not to be disclosed according to the exemptions under the FOI Act, the inquisitorial powers (referred to and outlined earlier in this decision) effectively empower the Information Commissioner to engage in merits review of the agency's decision. It is not open to the court to do the same. The court is empowered only to review a 'decision' of the Information Commissioner for error of law.

164 The appellant made a submission that alternatively the court could appoint a referee pursuant to s 50 of the *Supreme Court Act 1935* (WA). Section 50 provides:

> **50. Question in civil matter may be referred to referee etc.**
>
> (1) Subject to the rules of court, and to any right to have particular cases tried by jury, the Court or a judge may refer to a master or a registrar or to a referee for inquiry or report any question arising in any cause or matter, other than a criminal proceeding.
>
> (2) The report of the master, registrar or referee may be adopted wholly or partially by the Court or a judge, and, if so adopted, may be enforced as a judgment or order to the same effect.

[69] ***Osland v Secretary, Department of Justice [No 2]*** [2010] HCA 24; (2010) 241 CLR 320 [20] (French CJ, Gummow & Bell JJ).
[70] ***Osland v Secretary, Department of Justice [No 2]*** [2010] HCA 24; (2010) 241 CLR 320 [20] (French CJ, Gummow & Bell JJ).
[71] ***Department of State Development v Latro Lawyers*** [2016] WASC 108 [32], [34] (Beech J); applying ***Osland v Secretary, Department of Justice [No 2]*** [2010] HCA 24; (2010) 241 CLR 320 [20] (French CJ, Gummow & Bell JJ).

165 Pursuant to s 50 of the *Supreme Court Act*, a judge may refer to a master or a registrar or a referee for inquiry or report any question arising in any cause or matter. Such a course is appropriate in certain circumstances.[72] However, it is inappropriate in this matter. As the Court of Appeal made clear, in ***Highway Constructions Pty Ltd v Commissioner of Main Roads***, a referee does not dispose of the action or determine any matter between the parties:[73]

> A referee appointed to report does not dispose of the action nor does he or she determine any matter in issue between the parties. The referee's duty is not to determine issues of fact or law, but to define the materials on which the court is to act: ***Mullin v Monico*** (1877) 3 CPD 142 (Bramwell LJ). The judge exercises a judicial discretion as to whether or not he or she will adopt the report of a referee. See, generally, ***Super Pty Ltd v SJP Formwork (Aust) Pty Ltd*** (1992) 29 NSWLR 549; ***Wenco Industrial Pty Ltd v WW Industries Pty Ltd*** [2009] VSCA 191.

166 In this case, if the court were to refer the matter to a referee it would not resolve the dispute and the court would still be required to determine the merits of the external review complaint (a course which I have already indicated is not open). Further, even if such a course was open to the court, it would be inappropriate for the court to refer a matter to a referee in circumstances where there is a specialised commission established for the specific purpose of determining the merits of Freedom of Information requests via external review.

167 Accordingly, it is not open to this court to substitute a decision of the Information Commissioner with a decision of this court.

168 It is also clear, from the authorities cited above, that it is also not open to this court to substitute a decision of the Information Commissioner with a decision of this court where the court would be required to proceed in circumstances where the factual matters underpinning the decision are in dispute. Where the court is not proceeding upon uncontested evidence or primary facts already found by the tribunal, it is not open to the court to substitute the decision of the tribunal in review proceedings.

169 Finally, in this case, there has been no external review complaint determined by the Acting Information Commissioner in respect of the documents in dispute. The decision of the Acting Information

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[72] See the comments of Jenkins J in ***Bulong Operations Pty Ltd v Computercorp Pty Ltd*** [2005] WASC 147 [117] – [119].

[73] ***Highway Construction Pty Ltd v Commissioner of Main Roads*** [2011] WASCA 27 [25] (Pullin & Murphy JJA & Allanson J).

Commissioner, made on 8 February 2019, was (as I have said) in effect a remittal of the matter back to the agency in order that the agency 'deal with' the access application.

170 In any event, the position occupied by the Acting Information Commissioner is a specialist position and it would be inappropriate for this court to make a decision for which the Office of the Information Commissioner is established and performs a statutory function.

9.0 Conclusion

171 For these reasons, grounds 1, 2 and 3 of the appeal are made out insofar as the grounds seek to impugn the decision of the Acting Information Commissioner made on 8 February 2019. I am also satisfied that ground 6 of the appeal is made out.

172 On the basis that I have determined that the Acting Information Commissioner did not make a 'decision', I do not find it necessary to deal with ground 4 of the grounds of appeal.

173 I am not satisfied that ground 5 of the appeal is made out.

174 Accordingly, I would allow the appeal and remit the matter to the Information Commissioner for reconsideration.

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

EH
Research Associate/Orderly to the Honourable Justice Smith

19 JULY 2019