
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

CITATION : SALARIES AND ALLOWANCES TRIBUNAL -v-
WEST AUSTRALIAN NEWSPAPERS LTD [2008]
WASC 39

CORAM : MARTIN CJ

HEARD : 7 MARCH 2008

DELIVERED : 20 MARCH 2008

FILE NO/S : GDA 1 of 2008

BETWEEN : SALARIES AND ALLOWANCES TRIBUNAL
Appellant

AND

WEST AUSTRALIAN NEWSPAPERS LTD
First Respondent

CIVIL SERVICE ASSOCIATION OF WA INC
Second Respondent

ON APPEAL FROM:

For File No : GDA 1 of 2008

Jurisdiction : INFORMATION COMMISSIONER OF WESTERN
AUSTRALIA

Coram : ACTING INFORMATION COMMISSIONER C P
SHANAHAN SC

Citation : RE WEST AUSTRALIAN NEWSPAPERS LTD &
ANOR AND SALARIES AND ALLOWANCES
TRIBUNAL [2007] WAICmr 20

Catchwords:

Appeal - Respondent sought access to documents used in the determination of salary reviews by the appellant - Appellant refused access to those documents - Appellant contended that the document was received whilst exercising its judicial or quasi-judicial functions - Respondent successfully appealed to Information Commissioner - Whether the Salaries and Allowances Tribunal is a 'court' within the meaning of the *Freedom of Information Act 1992 (WA)* - Whether the Tribunal is an adjudicative body

Legislation:

Corruption and Crime Commission Act 2003 (WA)

Freedom of Information Act 1982 (Cth), s 5

Freedom of Information Act 1992 (WA), s 3, s 4, s 10, s 13, s 23, s 65, s 85, s 87, sch 2

Interpretation Act 1984 (WA), s 18

Local Government Act 1995 (WA), s 5.39

Parliamentary Superannuation Act 1970 (WA)

Rules of the Supreme Court 1971 (WA), O 56 r 11

Salaries and Allowances Act 1975 (WA), s 5, s 5A, s 6, s 6A, s 6AA, s 6B, s 7, s 7A, s 8, s 9, s 10

Workers Compensation & Rehabilitation Act 1981 (WA)

Result:

Appeal dismissed

Category: A

Representation:

Counsel:

Appellant : Ms J C Pritchard
First Respondent : Mr K J Martin QC & Ms J Di Lena
Second Respondent : No appearance

Solicitors:

Appellant : State Solicitor for Western Australia
First Respondent : Edwards Wallace
Second Respondent : Ilberys Lawyers

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

Brandy v Human Rights and Equal Opportunity Commission (1994) 183 CLR 245
Information Commissioner for Western Australia v Ministry of Justice [2001] WASC 3
Kable v Director of Public Prosecutions (NSW) (1996) 189 CLR 51
Police Force of Western Australia v Kelly (1997) 17 WAR 9
Re Monger; Ex parte WMC Resources Ltd [2002] WASCA 129
Stoker v Adecco Gemvale Constructions Pty Ltd [2004] NSWCA 449
The Victorian Public Service Board v Wright (1986) 160 CLR 145; (1986) 64 ALR 206
Thomas v Mowbray [2007] HCA 33; (2007) 237 ALR 194

MARTIN CJ:

Summary

1 The Salaries and Allowances Tribunal (the Tribunal) appeals from a decision of the Acting Information Commissioner (the Commissioner) granting West Australian Newspapers Ltd (WAN) and the Civil Service Association of WA Inc (CSA) access to a report held by the Tribunal entitled 'Review of Grading and Remuneration Rates - Special Division Office Holders' (the Report) by Mercer Human Resource Consulting Pty Ltd (Mercer). The central issue in the appeal is whether the Commissioner was correct to conclude that the Tribunal is not a 'court' for the purposes of cl 5 of the Glossary to the *Freedom of Information Act 1992* (WA) (the Act). For the reasons which follow, the Commissioner was correct to conclude that the Tribunal is not a 'court' for the purposes of the Act, and his decision to grant access should be confirmed.

The facts

2 There were no facts in contention before the Commissioner or before this Court. What follows is taken from the documentary materials which were tendered on the appeal.

The applications for access

3 On 13 April 2006, the CSA applied to the Tribunal for access to the Report. A similar application was made by WAN on 20 April 2006. On 13 June 2006, the Executive Officer of the Tribunal notified each of WAN and CSA that he had determined that the Report was not 'a document of the Tribunal' within the meaning of the Act, and was not therefore a document to which there was a right of access under the Act. The Executive Officer included a formal statement of his reasons for that conclusion. He relied upon cl 1 and cl 5 of the Glossary to the Act which provide:

1. Definitions

...

'Court' includes a tribunal

...

5. Documents of a court

A document relating to a court is not to be regarded as a document of the court unless it relates to matters of an administrative nature.

4 The Executive Officer reasoned that the Tribunal was a 'court' for the purposes of the Act and that the Report is not a document 'relating to matters of an administrative nature', because it was not concerned with the administration of the Tribunal. Rather, in his view, the Report was a document received by the Tribunal for the performance of 'the Tribunal's judicial or quasi judicial functions under [the Act]' (Executive Officer's Notice of Decision, 13 June 2006).

5 By letters dated 20 June 2006 and 25 July 2006, Acting Information Commissioner D A Wookey advised the Executive Officer of the Tribunal that each of WAN and CSA (respectively) had complained against the decision to refuse access to the Report under s 65 of the Act.

6 Acting Information Commissioner Wookey formed the view that her determination of the complaint might give rise to a perception of bias, because the Report dealt with her remuneration. Consequently, on 10 April 2007, Acting Information Commissioner C P Shanahan SC was appointed for the purpose of dealing with the complaints by WAN and CSA. He delivered his decision upholding each complaint and granting access to the Report on 10 December 2007. This was almost one year and eight months after the applications for access had been lodged.

7 The relevance, value and utility of most information is dependent upon the timeliness with which it is provided. In this case, the Report had been relied upon by the Tribunal in making its determination in respect of the terms and conditions of the remuneration of the holders of Special Division positions and Prescribed Officers published on 7 April 2006. It can be inferred that WAN sought access to the Report for the purposes of providing information to its readers in relation to that determination of the Tribunal. It can also be inferred that CSA sought access to the Report for the purposes of providing advice and information to its members in relation to that determination, and also for the purposes of its future dealings with the Tribunal. Those purposes are within the public purposes served by the creation of a right of access to documents by the Act (subject, of course, to the terms of the Act) - see s 3 of the Act (in full below).

8 The legislature has expressly recognised that the achievement of the objects of the Act is dependent upon the timely determination of requests for access. Under s 13 of the Act, unless the Commissioner varies the time for determination of the request for access, or the applicant and the agency agree to vary that time, applications for access must be determined within 45 days. If an application for access is not determined within that

period, it is deemed to have been refused, and an applicant can complain to the Commissioner against the refusal of access pursuant to s 65 of the Act. However, there are no provisions in the Act limiting the time which can be taken to determine such a complaint.

- 9 Pursuant to s 8 of the *Salaries and Allowances Act 1975* (WA), the Tribunal is required to issue a determination in respect of the terms and conditions of remuneration of the holders of Special Division positions and Prescribed Officers at intervals of not more than 12 months. It is therefore reasonable to conclude that, since WAN and CSA lodged their requests for access, at least one more determination in relation to such officers has been made by the Tribunal, and that if another determination has not been made, it is imminent. In those circumstances, it is reasonable to infer that the relevance, value and utility of the information to which access was sought, and therefore the achievement of the legislative purpose served by the Act, have been substantially diminished by the length of time which has been taken to resolve these requests for access. If passed, the Freedom of Information Bill 2007 (WA) seeks to streamline the determination of complaints made under the *Freedom of Information Act* by removing the power of determining complaints from the Commissioner and vesting the State Administrative Tribunal with that power (see also Western Australia, *Parliamentary Debates*, Legislative Assembly, 4 December 2007, 8168 - 8169 (Ms Sue Ellery, Minister for Child Protection)). The Commissioner would still retain his or her conciliatory role in resolving the complaint under the proposals. It is hoped that these proposals will facilitate a timely disposition of disputed requests for access to documents.

The appeal

- 10 The Tribunal appealed from the decision of the Commissioner by a notice of appeal filed on 21 January 2008 (which is the last date upon which such an appeal could be filed without an extension of time being required). Following the filing of appearances by the respondents, the parties to the appeal were brought before the Court for directions on 6 February 2008. The question of whether there should be a stay upon the operation of the decision of the Commissioner pending determination of the Tribunal's appeal was raised during the course of that hearing. The need to determine that question was averted by the Court offering to the parties a hearing date for the appeal as soon as they had had time to prepare their arguments and exchange written submissions, and directions were made to enable that to occur.

The Salaries and Allowances Act 1975 (WA)

11 A significant aspect of this appeal concerns the proper characterisation of the Tribunal, and in particular, the question of whether or not it is a 'court' for the purposes of the Act. It is therefore appropriate to consider the nature and functions of the Tribunal by reference to the legislation which created it - the *Salaries and Allowances Act 1975 (WA)* (the SAA Act) - (references to sections in this portion of my reasons are references to sections in that Act).

12 As the Commissioner pointed out in his determination, the SAA Act contains no express statement of its objects. Accordingly, those objects are to be inferred from the terms of the SAA Act itself. Assistance in the ascertainment of those objects can also be obtained from the long title to the SAA Act, and the *Parliamentary Debates* at the time of its enactment.

13 The original long title of the SAA Act was:

An Act to establish a Tribunal to determine or report upon the salaries and certain allowances payable to holders of ministerial, parliamentary, judicial and certain other public offices, to repeal the Parliamentary Salaries and Allowances Act, 1967 - 1975, and for incidental and other purposes.

14 As the Commissioner observed in his reasons, it is clear from the *Parliamentary Debates* at the time of enactment of the SAA Act, that at least one of its purposes was to avert the need for legislation to be passed at regular intervals giving effect to recommendations for changes in the terms and conditions of remuneration of the various office holders covered by the SAA Act.

15 The fact that the Tribunal was created by the legislature to perform a function which it had previously performed at periodic intervals is of considerable significance in the disposition of this appeal. It assists in the characterisation of the functions of the Tribunal.

16 The Tribunal is established by s 5 of the SAA Act. It consists of three members appointed by the Governor, each holding office for a period of three years. One of the members is to chair the Tribunal.

17 Section 5A deals with the determination of the terms of remuneration of the Governor. Under its terms, before an appointment is made to the office of Governor, the Premier is to request the Tribunal to inquire into and determine the remuneration to be paid. The determination is to specify a method of altering from time to time the remuneration payable

to the Governor during the subsistence of the appointment. The determination is to be given to the Premier who is obliged, within 14 days of receipt of the determination, to inform the Tribunal that he agrees or does not agree with the determination, and if he does not agree, to give the grounds for his disagreement, and make recommendations as to the alterations that he believes should be made. After considering the Premier's recommendations, the Tribunal is required to either amend or reaffirm the determination, which is thereafter to be published in the *Government Gazette*.

18 Section 6 provides that, from time to time as required by the SAA Act, the Tribunal shall inquire into and determine the remuneration to be paid to Ministers of the Crown, Parliamentary Secretaries, officers and members of the Parliament, officers of the Public Service holding offices included in the Special Division of that service, and other office holders prescribed for the purposes of the section (Prescribed Officers). Determinations made by the Tribunal are to be published in the *Government Gazette*.

19 Section 6A empowers the Tribunal to inquire into and determine any matter that is required to be determined by the Tribunal under the *Parliamentary Superannuation Act 1970* (WA).

20 Section 6AA empowers the Tribunal to inquire into and determine the entitlements and benefits to be paid or provided to a member of Parliament if the member ceases to be a member.

21 Section 6B requires the Tribunal to inquire into and determine the entitlements and benefits to be paid or provided to former Premiers, former Ministers, and former members of Parliament.

22 Section 7 requires the Tribunal to inquire into and report upon the question of whether any alterations are desirable in the remuneration to be paid to Judges and other judicial officers, and the Commissioner and the Parliamentary Inspector appointed under the *Corruption and Crime Commission Act 2003* (WA). Reports of the Tribunal made pursuant to that section are to be laid before each House of Parliament within five sitting days after the report is received by the Minister. Either House of Parliament may, within 15 sitting days of tabling, resolve to disallow the recommendation made by the Tribunal, in which event, if the recommendation has not yet come into operation, it does not come into operation, or if it has already come into operation, its operation ceases. Accordingly, unlike the provisions of the SAA Act relating to the

remuneration of members of Parliament and senior public servants, in relation to judicial officers, the report of the Tribunal is not final and conclusive, but is subject to disallowance by either House of Parliament.

23 Section 7A requires the Tribunal to inquire into and make a report containing recommendations as to the remuneration to be paid to chief executive officers of local governments. The SAA Act makes no provision for the effect of such a report. It is therefore to be inferred that the terms of such a report are recommendatory only. However, s 5.39 of the *Local Government Act 1995* (WA) provides that such recommendations are to be taken into account by a local government before entering into, or reviewing, a contract of employment with a Chief Executive Officer.

24 Section 8 requires that not more than a year is to elapse between the performance of the Tribunal's functions in respect of the remuneration of ministers, members of parliament and senior public servants, judicial officers and chief executive officers of local governments.

25 Section 9 governs meetings of the Tribunal. Questions before the Tribunal are to be decided by a majority of the votes of the members present and voting, with the member presiding being given a deliberative vote.

26 Section 10 provides:

Method of inquiry by Tribunal

- (1) In the performance of the functions of the Tribunal -
 - (a) the Tribunal may inform itself in such manner as it thinks fit;
 - (b) the Tribunal may receive written or oral statements;
 - (c) the Tribunal is not required to conduct any proceeding in a formal manner; and
 - (d) the Tribunal is not bound by the rules of evidence.
- (2) For the purposes of the exercise and performance of its powers and functions under this Act, the Tribunal has all the powers, rights and privileges that are specified in the *Royal Commissions Act 1968*, as appertaining to a Royal Commission and the provisions of that Act have effect as if they were enacted in this Act and in terms made applicable to the Tribunal.

- (3) The Minister may, if he thinks fit, appoint a person or persons to assist the Tribunal in an inquiry.
- (4) Without limiting the provisions of subsection (3) the Minister shall -
 - (a) appoint a person nominated from time to time in writing by the President of the Legislative Council and the Speaker of the Legislative Assembly to assist the Tribunal in an inquiry in so far as it relates to the remuneration of Ministers of the Crown, a Parliamentary Secretary appointed under section 44A(1) of the *Constitution Acts Amendment Act 1899*, the Parliamentary Secretary of the Cabinet and officers and members of the Parliament;
 - (b) appoint a person nominated from time to time in writing by the chief executive officer of the department principally assisting the Minister in the administration of the *Public Sector Management Act 1994* to assist the Tribunal in an inquiry in so far as it relates to the remuneration to be paid or provided to the officers and persons referred to in section 6(1)(d) and (e); and
 - (c) appoint a person nominated from time to time in writing by the chief executive officer of the department principally assisting the Minister in the administration of the *Local Government Act 1995* to assist the Tribunal in an inquiry in so far as it relates to the remuneration to be paid or provided to chief executive officers of local governments referred to in section 7A.

27 Because the Tribunal has all the powers, rights and privileges that are specified in the *Royal Commissions Act 1968* (WA), it would be possible for the Tribunal to issue a summons to a witness, to administer an oath to that witness, and to permit the witness to be examined and cross-examined. However, it was common ground that the Tribunal does not, in practice, proceed in that manner. Rather, in practice, the Tribunal proceeds informally. It requests and receives written submissions from persons or parties who may be interested in its determinations or recommendation and will, on occasions, meet with such persons or parties. However, those meetings are not conducted as formal hearings. The extent to which submissions received from a person or party interested in a determination or recommendation is made available to other persons or parties interested in that determination or recommendation is a matter determined by the Tribunal from time to time. It therefore appears that the Tribunal does not consider itself bound by the requirements of procedural fairness. Because the Tribunal is required, in

most cases, to perform its functions according to a timetable established by the legislation, its proceedings are not generally initiated by a person or party. While it might be theoretically possible for the Tribunal to conduct its processes on an adversarial basis, with representatives of the office holders and representatives of the State being regarded as adversaries, in practice it does not do so. In practice, the Tribunal does not convene hearings which are adversarial in nature. Rather, it proceeds upon an inquisitorial basis. The legal capacity for the Tribunal to exercise all the powers of a Royal Commission, which is, of course, also inquisitorial in nature, is not inconsistent with those practices.

The determination of the Tribunal

28 As I have observed, WAN and CSA lodged their requests for access to the Report following the publication on 7 April 2006 of a determination made by the Tribunal in respect of the terms and conditions of remuneration of holders of offices in the Special Division of the Public Service and Prescribed Office holders. That determination was put in evidence on the appeal. Its terms provide some insight into the processes and operations of the Tribunal, and the role of the Report which was the subject of the requests for access.

29 In its determination the Tribunal noted that it had last issued a determination dealing with the relevant office holders on 7 April 2005. It pointed out that the positions covered by the determination had not been thoroughly assessed for their work value and classification since 1989. The Tribunal observed that over the intervening years, successive governments had made legislative changes to the responsibilities of some positions and had made many structural alterations to the public sector, which had an impact on work value.

30 The Tribunal noted that the Director General of the Department of Premier and Cabinet had undertaken an internal review of positions following the recommendations made in 2001 in the report *Government Structures for Better Results*, which reviewed the machinery of government in Western Australia. The Tribunal had awaited the implementation of that review before deciding to commission 'an independent, external and comprehensive review of all 84 positions under its jurisdiction'.

31 In its determination, the Tribunal described its processes. It recorded that it had collected information from several sources, including previous submissions from individual holders of positions, one submission received in response to an advertisement placed in *The West Australian*, material

provided by the Director General of the Department of Premier and Cabinet, a range of economic indices, and the Report. The Tribunal described the Report in the following terms:

Mercer was engaged to assess the work value of all 84 positions under the Tribunal's jurisdiction. The consultants were to compare these positions in the Western Australian (WA) public sector with positions of similar work value and remuneration levels in other Australian public sectors and in the private sector. To do this, Mercer used a recognised and reliable job evaluation methodology and assessed the value of each position in relation to its current scope and responsibilities. The consultants described this as a 'clean sheet' approach.

All office holders were invited to participate in interviews with the consultants. Most of the officers did so. Position descriptions, budget information, staffing numbers and current organisational structures were provided to the consultants to enable each position to be assessed according to its current responsibilities.

32 In its determination, the Tribunal recorded that meetings were also held with the Department of Premier and Cabinet to enable the Tribunal to consider the views of the employer on the work value assessments of the positions under review. There is no suggestion in the Determination that the information provided in those meetings was given to the affected office holders for their response, as would, of course, be required if the Tribunal considered itself bound by the requirements of procedural fairness.

33 The Tribunal summarised the conclusions which it had drawn from the Report in the following terms:

The analysis by Mercer based on work value points indicated the following:

- The overall remuneration levels in WA were 28 percent lower than those in New South Wales (NSW), 15 percent lower than those in South Australia (SA) and 10 percent above those in Queensland. The remuneration of the most senior positions in WA was further below those in NSW and SA. Trend lines showed that, compared with other states, WA had a flat remuneration structure that compressed the remuneration distance between the lowest and the highest valued positions. Additionally, the WA positions under review were remunerated in the lowest 25 percentile of the general market. The data are shown in the attached graph, Figure 1.
- All positions were remunerated at levels significantly below those in the private sector where positions were of similar work value.

- The differences in remuneration between positions in WA and those in NSW and SA were progressively greater the more senior the position. Sixty-one positions up to 1572 work-value points were remunerated slightly lower than positions of the same work-value in SA, further below NSW but above those in Queensland. Twenty-three positions from 1653 work value points to 3458 work value points were remunerated at levels up to a maximum of 39.6 percent below positions of the same work-value in NSW and SA but above those in Queensland.

The assessments made by Mercer demonstrated that a number of positions had declined in work value or had increased when compared to their existing classification level. These positions were given special scrutiny by the Tribunal. It determined that ten positions would be reclassified downwards and eight would be reclassified upwards.

34 The Tribunal recorded its determination in the following terms:

DETERMINATION

The Tribunal has determined increases, which establish a new base line for remuneration. The new base line progressively increases the differences in remuneration between positions classified as Group 1 minimum through to Group 4 maximum. The determination moves remuneration in WA towards the trend line for remuneration in SA. This is shown in the attached graph, Figure 2. The Tribunal has resolved to determine that remuneration for the 37 positions classified in Group 1 be increased by 7 percent; the 16 positions classified as Group 2 minimum be increased by 8 percent; the 8 positions classified as Group 2 maximum be increased by 10 percent; the 16 positions classified as Group 3 be increased by 17 per cent and the 7 positions classified as Group 4 be increased by 24 percent.

The total cost to the salary budget of this determination is estimated at \$1.5 million.

The resulting levels of remuneration are set out in the First Schedules, which follow.

35 There follows a lengthy schedule setting out the precise terms of remuneration for the particular officers covered by the determination.

36 It can be seen from the terms of the Determination that, assuming this determination is characteristic of its processes, the Tribunal does not provide reasons for its decision in the same way as reasons would be provided by a court or a tribunal resolving a contested issue between parties. Although the determination describes the processes followed by the Tribunal, and, in very general terms, the information which it took into account and the outcome of its deliberations, the process of evaluation and

the reasons for the particular conclusions were not elucidated. For example, although the Tribunal determined that 10 positions would be reclassified downwards and eight would be reclassified upwards, the Tribunal provided no reasons, in its determination, for the conclusion at which it arrived in respect of those 18 positions. Nor did the Tribunal provide any reasons for its conclusion that, for example, the 37 positions classified in Group 1 should be increased by 7%, whereas the 16 positions classified as Group 3 should be increased by 17% and so on.

The Freedom of Information Act

37 Sections 3, 4 and 10 of the Act are in the following terms:

3. Objects and intent

- (1) The objects of this Act are to -
 - (a) enable the public to participate more effectively in governing the State; and
 - (b) make the persons and bodies that are responsible for State and local government more accountable to the public.
- (2) The objects of this Act are to be achieved by -
 - (a) creating a general right of access to State and local government documents;
 - (b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and
 - (c) requiring that certain documents concerning State and local government operations be made available to the public.
- (3) Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents (including documents containing exempt matter), or the amendment of personal information, otherwise than under this Act if that can properly be done or is permitted or required by law to be done.

4. Principles of administration

Agencies are to give effect to this Act in a way that -

- (a) assists the public to obtain access to documents;

- (b) allows access to documents to be obtained promptly and at the lowest reasonable cost; and
- (c) assists the public to ensure that personal information contained in documents is accurate, complete, up to date and not misleading.

...

10. Right of access to documents

- (1) A person has a right to be given access to the documents of an agency (other than an exempt agency) subject to and in accordance with this Act.
- (2) Subject to this Act, a person's right to be given access is not affected by -
 - (a) any reasons the person gives for wishing to obtain access; or
 - (b) the agency's belief as to what are the person's reasons for wishing to obtain access.

38 By cl 1 of the Glossary to the Act, the expression 'agency' is defined to mean:

- (a) a Minister; or
- (b) a public body or office ...

39 The expression 'public body or office' is defined by cl 1 of the Glossary to the Act to include:

- (e) a body or office that is established for a public purpose under a written law.

40 Accordingly, the Tribunal is an 'agency' for the purposes of the Act. As it is not specified in Sch 2 to the Act, it is not an exempt agency for the purposes of s 10 of the Act, and therefore, a person has a right to be given access to the documents of the Tribunal subject to and in accordance with the Act (s 10). Pursuant to s 23 of the Act, an agency may refuse access to a document if 'the document is not a document of the agency'. By cl 4 of the Glossary to the Act, a reference in the Act to 'a document of an agency' is a reference to 'a document in the possession or under the control of the agency including a document to which the agency is entitled to access'. Accordingly, but for cl 5 of the Glossary (which I have set out above), there is no doubt that the Report would be a document of the

Tribunal to which any person (including WAN and CSA) would be entitled to access, subject to and in accordance with the other provisions of the Act (which include provisions relating to exemptions from access). Although the Commissioner made determinations in respect of the application of other provisions of the Act relating to exemption from access, no challenge has been made to those determinations in this appeal.

41 Neither 'court', nor 'tribunal' are defined by the Act.

42 Clause 3 of the Glossary to the Act is in the following terms:

3. Courts are agencies but judges etc are not.

For the purposes of this Act -

- (a) a court is an agency;
- (b) a registry or other office of a court and the staff of such a registry or other office are part of the court;
- (c) a person holding a judicial office or other office pertaining to a court, being an office established by the written law establishing the court, is not an agency and is not included in an agency.

43 Section 85 of the Act provides that '[a]n appeal lies to the Supreme Court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application'. There is no doubt that the issues raised on this appeal are questions of law, as they involve the application of provisions of the Act to facts which are not in contention.

44 Section 87 of the Act provides that upon the determination of an appeal, the Supreme Court may confirm, vary or set aside the decision of the Commissioner.

The issues in the appeal

45 Several grounds of appeal have been enunciated. They all come down to the central question of whether the Commissioner was correct to conclude that the Tribunal was not a 'court' for the purposes of the Act, and therefore cl 5 of the Glossary to the Act had no application to the Tribunal, or to the Report.

46 WAN has contended that if the Commissioner was wrong to conclude that the Tribunal was not a 'court' for the purposes of the Act, he should nevertheless have concluded that the Report related 'to matters of

an administrative nature' and therefore fell outside the scope of cl 5 of the Glossary. WAN contends that the Commissioner's determination should be upheld on this alternative basis.

47 CSA took no part in the appeal, and through its solicitors, advised that it would abide by any orders made by the Court.

Is the Tribunal a 'court'?

48 The Commissioner concluded that the question of whether or not the Tribunal was a 'tribunal' included within the meaning of the word 'court' for the purposes of the Act, depended upon whether the Tribunal was properly characterised as:

A person or body exercising judicial or quasi judicial functions outside the regular judicial system

using the language of Anderson J (which was in turn taken from the *Dictionary of English Law*) in *Re Monger; Ex parte WMC Resources Ltd* [2002] WASC 129. I respectfully agree with that conclusion, but for somewhat different reasons to those expressed by the Commissioner. In the reasons for his determination, the Commissioner relies upon a number of lines of argument including:

- (a) the question of whether the word 'tribunal' is being used as a 'legal technical word' or a 'non legal technical word' (reasons at [33]);
- (b) whether the Act should be construed with a bias towards a wide interpretation of the access provisions (compare *Police Force of Western Australia v Kelly* (1997) 17 WAR 9 with *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 at [21] and *The Victorian Public Service Board v Wright* (1986) 160 CLR 145; (1986) 64 ALR 206 at 212 (Commissioner's reasons at [42]); and
- (c) the use of extrinsic material as an aid to interpretation of the Act (reasons at [43]).

49 For the reasons which follow, in my opinion it is unnecessary to approach the question by reference to those issues. In my opinion, the question at issue is sufficiently answered by applying the primary approach to statutory construction, which is the application of the natural and ordinary meaning of the words used in the statute to the particular provision of the statute, having regard to that provision in the context of the statute read as a whole, and the objects and purposes of the statute to be inferred from the statute as a whole.

50 In my opinion, the construction to be given to the word 'tribunal' in the Act can be resolved by adopting precisely the same approach as that taken by Anderson J in *Re Monger*. That case concerned the question of whether the Director of Conciliation and Review, being an office created by the *Workers' Compensation & Rehabilitation Act 1981* (WA), was a 'tribunal' for the purposes of O 56 r 11 of the *Rules of the Supreme Court* (WA), when determining whether a dispute between a worker and an employer had been properly referred to him under s 93D(5) of that Act. Order 56 r 11 relevantly provided:

- (1) An order nisi for a writ of Certiorari to remove a judgment, order, conviction or other proceeding of an inferior court or tribunal, or of a magistrate or justices, for the purpose of its being quashed, shall not be granted unless the application for the order is made within 6 months after the date of the judgment, order, conviction or other proceeding, or within such other period as may be prescribed by any enactment, or except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court to which the application is made.

51 In that context, Anderson J held at [76]:

I would accept Mr Zelestis' submission that the Director, exercising his statutory duty to decide whether a dispute has been properly referred to him under s 93D(5), is a not 'tribunal'. The word in its ordinary meaning signifies something more than an official performing this function. The dictionaries tell us that, in its primary sense, 'tribunal' means a place or seat of judgment (Shorter Oxford Dictionary), a body appointed to adjudicate disputes (Butterworths Australian Legal Dictionary) and (according to the Dictionary of English Law) a person or body exercising judicial or quasi-judicial functions outside the regular judicial system, and, in these senses, the word is quite inapt to describe the office of Director in the performance of the essentially administrative task of examining doctors' reports for compliance with the medical evidence requirements of s 93D(6) of the *Workers' Compensation and Rehabilitation Act* and deciding whether they do or do not comply. To my mind, confirmation that 'tribunal' is intended to have its primary meaning in O 56 r 11(1) is to be found in the syntactical arrangement of that rule; the word 'tribunal' appears between the words 'inferior court' and 'or of a magistrate or justice'. I would accept the submission made on behalf of the applicants that the arrangement of the words and phrases in the rule strongly suggests that the word 'tribunal' is intended to signify a body of the same genus as 'inferior court', 'magistrate' and 'justices'.

52 Scott J agreed with Anderson J. Murray J agreed that the word 'tribunal' should be construed as meaning 'a person or body exercising judicial or quasi judicial functions outside the regular judicial systems' (at

[25]), but disagreed with the majority on the question of whether the Director was exercising a judicial or quasi judicial function when making a determination under s 93D(6) of the relevant Act.

53 The provisions of the Act which specifically relate to documents in the possession of a 'court' are cl 3 and cl 5 of the Glossary. Those provisions use only the word 'court'. In my opinion, their purpose and effect is clear. Judicial officers are expressly excluded from the definition of an 'agency'. However, a court is expressly included, and the registry or other office of the court is expressly stated to be part of the court. In that context, the purpose and effect of cl 5 of the Glossary is to provide that a document within the registry of a court (such as documents held by the registry pertaining to individual cases before the court) are not to be regarded as documents of the court, unless they relate 'to matters of an administrative nature'.

54 The objects of the Act are specified by s 3. They are to enable the public to participate more effectively in the government of the State, and to make the persons and bodies who are responsible for State and local government more accountable to the public. Those objects are served if documents relating to the administration of a court, such as documents identifying the caseload of the court, any backlog of cases within the court, the clearance of cases by the court, and the efficiency with which the court is dealing with its business are made accessible under the Act. However, those objects and purposes are not served in any material way by providing a right of access to documents held by a court for the purpose of the resolution of a particular case, such as documents filed by the parties to that case or tendered in evidence. The legislature can be taken to have been aware, at the time the Act was passed, that there were, and are, established regimes and protocols for the provision of limited access to documents relating to particular cases held by courts and their registries. In my opinion, it is quite clear from the provisions of cl 3 and cl 5 of the Glossary to the Act that the legislature was intending to preserve those regimes and protocols, but at the same time provide a right of access to documents in the possession of a court which related to the administration of the court itself, and therefore to the discharge of its governmental functions. That approach is entirely consistent with the objects and purposes of the Act as specified in s 3.

55 A similar approach was taken in s 5 of the *Freedom of Information Act 1982* (Cth), which was, of course, enacted well before the WA Act.

56 A commentary on that Act, published well before the enactment of the State Act, made it clear that the object of the Commonwealth legislation was to create a right of access to documents relating to the administration of a court, without providing access to documents filed with a court by parties to litigation (see Bayne PJ, *Freedom of Information Act: an overview and commentary and a guide to its use* (1984) 53 - 54).

57 This general approach to the meaning to be given to the word 'tribunal' when included within the meaning of the word 'court' within the Act, can be applied to assess whether that construction would advance the objects or purposes of the Act if applied to the Tribunal. The Tribunal is not an agency created for the purpose of determining disputes or cases between private parties, or between the State and a private party. Rather, it is an agency created to perform functions in respect of the remuneration of State office holders. That is a function which is integral to the function of government. A construction of the Act which would provide a right of access to documents created in the performance of that function would serve the objects and purposes specified in s 3 of the Act. Such a construction is therefore to be preferred (*Interpretation Act 1984* (WA), s 18).

58 At the time of the passage of the Act in 1992, there was a plethora of bodies and tribunals which performed judicial or quasi judicial functions outside the regular judicial system, including functions which involved the making of determinations in the context of an adversarial dispute between parties (although since the Act was passed in 1992, many of those bodies have been amalgamated into the State Administrative Tribunal). In that historical context, where, in cl 1 of the Glossary to the Act, the legislature has defined the word 'court' to include 'tribunal', to borrow from the words of Anderson J the structure of the Act 'strongly suggests that the word "tribunal" is intended to signify a body of the same genus as ... court', being any of the many bodies having that characteristic at the time the Act was passed.

59 In my opinion, it is significant that the legislature has not, in cl 3 and cl 5 of the Glossary, extended those provisions to all courts and tribunals, by using the phrase 'court or tribunal'. Rather, the legislature has expressed those provisions using only the word 'court'. So, when in cl 1 in the Glossary the legislature defines the word 'court' to include the word 'tribunal', and when regard is had to the evident purpose and effect of cl 3 and cl 5 of the Glossary, it is, I think, clear that the word 'tribunal' is to be taken to include within the meaning of the word 'court', a body performing judicial or quasi judicial functions of the same genus as a court.

60 The Commissioner did not accept this approach to the construction of the Glossary (reasons at [59]), when he held that:

The Legislature by employing the word 'tribunal' can be construed as doing no more than including in references to 'courts' bodies that come within the description of 'tribunal' used in its ordinary and natural sense.

61 However, with respect, this approach fails to take due account of the evident purpose and effect of cl 3 and cl 5 of the Glossary, and the grammatical structure of those clauses and cl 1, and the objects and purpose of the Act.

62 The appellant submits that the word 'tribunal' should be construed as meaning 'an adjudicative body'. In that context, it submits that the meaning of 'adjudicate' encompasses 'to award judicially', 'to try and determine (an issue or dispute) judicially', 'to sit in judgment', 'to pass judgment on', and 'to act as a judge in a court, a tribunal, a competition' (relying upon the *Macquarie Dictionary* (2001) and the *New Shorter Oxford English Dictionary* (2003)). I agree with those submissions. They seem to me to be entirely consistent with the proposition that the word 'tribunal' should be construed as meaning an adjudicative body which sits to resolve and determine disputes between parties, or between the State and a party, and which is of the same genus as, or analogous to a court.

63 The question then becomes whether the Tribunal is a body of that kind. The strict separation of governmental functions between the legislative, the administrative and the judicial is not implied into the constitution of the State (see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51). Under the *Australian Constitution*, where such a separation is to be implied, the exhaustive definition of judicial power is an elusive objective. Perhaps the most that can be said is that there are some common indicia of the exercise of the judicial function. The appellant, in its submissions, draws attention to four such indicia being:

- (a) the ability to make binding and authoritative decisions of controversies between parties (*Brandy v Human Rights and Equal Opportunity Commission* (1994) 183 CLR 245 at 268);
- (b) the determination of 'existing rights and liabilities according to law', that is, 'by the application of a pre-existing standard rather than by the formulation of policy or the exercise of an administrative discretion' (*Brandy* at 268);

- (c) the enforceability of decisions given in the exercise of judicial power (*Brandy* at 268 - 269);
- (d) the procedures of the body involve the taking of evidence, the right to legal representation, cross-examination, a generally open hearing and addresses (*Thomas v Mowbray* [2007] HCA 33; (2007) 237 ALR 194 at [599] per Callinan J).

64 These four indicia should not be taken to be exhaustive. There may be others - for example:

- (e) the availability of an appeal to a court;
- (f) the obligation to provide procedural fairness;
- (g) the obligation to provide reasons for decision (*Stoker v Adecco Gemvale Constructions Pty Ltd* [2004] NSWCA 449 at [41])

and so on.

65 However, taking the four indicia advanced by the appellant as providing some guide to the question of whether or not the Tribunal is performing a judicial or quasi judicial function in making determinations and recommendations in respect of remuneration of office holders, it can be seen that all of them point against that conclusion.

66 The Tribunal does not resolve controversies between parties. As I have observed, the performance of the functions of the Tribunal is not initiated by parties, but is predicated by the legislature. In most cases, the functions must be performed not less than annually. Their performance is not dependent upon the existence of a controversy or dispute between the office holder and the State in respect of the terms and conditions of remuneration.

67 Nor does the Tribunal make binding and authoritative decisions in all cases. As I have observed, the extent to which the decisions of the Tribunal are binding and determinative depends upon the function being performed. In the case of judicial office holders, the recommendations of the Tribunal are subject to disallowance by either House of Parliament. In the case of chief executive officers of local governments, the function of the Tribunal is recommendatory only. Those functions are significant amongst the various functions performed by the Tribunal. The limited effect of the performance of those functions by the Tribunal points strongly against the conclusion that it is exercising judicial or quasi judicial functions.

68 The Tribunal does not determine existing rights and liabilities according to law, by the application of a pre-existing standard. It formulates policy and exercises discretions. In some cases, its determination creates rights in the future. In other cases, the creation of those rights is dependent upon the actions of others. The Tribunal has taken over a role previously performed by the legislature. Viewed as a whole, the functions performed by the Tribunal are properly characterised as lying somewhere on the spectrum between the legislative and administrative functions of government. No aspect of the Tribunal's functions is characteristic of, or analogous to, the judicial function.

69 The Tribunal has no capacity to enforce its own decisions, although such a capacity is not essential to the conclusion that judicial power is being exercised (see *Brandy* at 268 - 269). As I have observed, in respect of significant areas of its functions, the views of the Tribunal are recommendatory only, or depend upon the failure of others to take steps to set aside its recommendations.

70 Finally, as I have observed, while it would be theoretically possible for the Tribunal to take evidence in a formal way, provide the right to legal representation, cross-examination and an open hearing and addresses, in practice it does not do so, nor is there anything in the Act which suggests it should do so. Nor does the Tribunal provide reasons for its determinations which elucidate the process of reasoning which it has adopted and applied to particular offices. Nor does the Tribunal proceed in a way which suggests it is bound by the obligations of procedural fairness.

71 For these reasons, the Tribunal is not an adjudicative body in the sense in which that term was used by the appellant in its submissions, nor is it 'a person or body exercising judicial or quasi judicial functions outside the regular judicial system' in the sense in which that expression was used by Anderson J in *Re Monger* and by the Executive Officer of the Tribunal in refusing access to the documents.

72 There are three submissions made by counsel for the appellant with which I should specifically deal. The first concerns the significance of nomenclature, and in particular, the fact that the legislature has named the Tribunal as such, and has used the word 'tribunal' in the meaning to be given to the word 'court' in the Glossary to the Act. However, it would, I think, be fanciful to suggest that when passing the Act in 1992, the legislature was paying attention to each and every one of the myriad of bodies and agencies which had been created under State legislation and

which were largely later unified in the State Administrative Tribunal. The fact that the functions of the Tribunal have not been conferred upon the State Administrative Tribunal reinforces my conclusion that its functions are fundamentally different in character to the adjudicative and quasi judicial functions performed by that Tribunal.

73 For the reasons I have given, in my opinion it is clear that the word 'tribunal' is used in the Act to connote a body which performs judicial or quasi judicial functions which are analogous to those performed by a court. Thus, the application of the Act will be determined by reference to the proper characterisation of the substantive function being performed by any particular body or agency, rather than by nomenclature.

74 Next, the appellant pointed to the fact that some courts do not always exercise powers that are strictly categorised as judicial powers. One example cited was the Coroner's Court. There are, I think, two answers to this submission. The first is that in order to come within the proper meaning of the expression 'court' under the Act, it is not necessary that the only functions performed by that body be properly characterised as the exercise of judicial power, in the sense in which that expression is used in cases involving Ch III of the *Australian Constitution*. It is sufficient if the functions are judicial or quasi judicial in nature. It is also to be noted that the process of characterisation is one which applies to the body or agency in question, not to the particular function which has given rise to the request for access. So, the fact that a particular body or agency performs some functions which are not properly characterised as the exercise of judicial power will be relevant, but not necessarily determinative of the question of the proper characterisation of the body itself, depending upon the relative extent of those functions when compared to the body's judicial or quasi judicial functions.

75 These observations answer the third submission made by the appellant, which rhetorically asks how the Act is to be applied to a body which performs mixed functions. The answer I would give to that question, which does not directly arise in this case, is that the process of characterisation is to be undertaken by reference to the functions and activities of the body viewed as a whole, unless the body is created in such a way, and its functions can be regarded as so separate and discrete that the body could be regarded as being in substance bifurcated - being a 'court' for some purposes but not for others. The latter possibility is, I think, more theoretical than real, as I cannot presently envisage any agency or body which could be characterised in this way.

WAN's Contention

76 As I have noted, WAN contended that if the Commissioner was wrong to conclude that the Tribunal was not a 'court', his decision should nevertheless be affirmed because he should have concluded that the Report related to 'matters of an administrative nature'. WAN contended that because the functions performed by the Tribunal were properly characterised as administrative in nature, and because it obtained the Report in the performance of those functions, the Report should be characterised in that sense, for the purposes of cl 5 of the Glossary.

77 Because of the view which I have formed in relation to the primary question of whether the Tribunal is a 'court' for the purposes of the Act, it is unnecessary to resolve this question. However, it will be apparent from the reasons I have given, that I would reject WAN's contention. In my view, it is clear that the words 'relates to matters of an administrative nature' in cl 5 of the Glossary mean documents which relate to the administration of the court and do not have the broader meaning for which WAN contends.

Conclusion

78 For these reasons, in my opinion, the Commissioner was correct to conclude that the Salaries and Allowances Tribunal is not a 'court' for the purposes of the Act, and was therefore correct to conclude that cl 5 of the Glossary to the Act had no application to the requests for access to the Report. It follows that the Tribunal's appeal should be dismissed, and the decision of the Acting Information Commissioner confirmed.