THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 1923 of 2014
CIV 2527 of 2014

THE SHIRE OF SERPENTINE JARRAHDALE
and
THE CITY OF SUBIACO
and
THE CITY OF SOUTH PERTH
and
IAN KER

and

THE LOCAL GOVERNMENT ADVISORY BOARD
and
ANTHONY JAMES SIMPSON MLA

(Draft Judgment)

MARTIN CJ

EXTRACT OF PROCEEDINGS

AT PERTH ON TUESDAY, 25 NOVEMBER 2014, AT 3.18 PM

MR C.P. SHANAHAN SC, with him MR N.J. LANDIS, appeared for the applicants.

MR C.S. BYDDER appeared for the respondents.

**MARTIN CJ:** All right. Well, I will give the reasons for the views to which I have come in relation to these two proceedings, obviously reserving the right to amend those reasons in due course for matters of grammar, detail and to add legal authorities, but plainly not as to substance. There are two applications for judicial review before the court. They're interrelated, but I will deal with each of them separately and I will deal first with the application that was brought first in point of time. That is, the application in matter 1923 of 2014.

The applicants to those proceedings are the City of Subiaco, the City of South Perth, and the Shire of Serpentine Jarrahdale, each of whom are local governments created by the Local Government Act 1995, which I will refer to as the Act. The respondents to these proceedings are the Minister responsible for the administration of the Act and the Local Government Advisory Board, which I will refer to as the board, which is constituted by section 2.44 of the Act. That board has filed a submitting appearance and has not actively participated in these proceedings.

Relief sought in the proceedings is declaratory and injunctive, and as the proceedings were instituted, were concerned with three things. Firstly, the validity or proposals made by the Minister to the board, which in combination would have had the effect of significantly

reducing the number of local government districts within the metropolitan area of Perth by a process of abolition of some districts, amalgamation of others and boundary changes.

Secondly, the validity of proposals made by various local governments for boundary changes and which preceded the Minister's proposals, and thirdly, the validity of the actions taken by the board in response to those proposals, and in particular whether its actions were vitiated by a denial of procedural fairness in that one or more members of the board were affected by bias or, more accurately, by an apprehended perception of bias. The first issue has, however, fallen away because, for reasons that I will explain, the grounds relating to that issue were abandoned during the course of oral argument.

It's important at the outset to describe the general nature of legal proceedings which challenge administrative decisions and processes in which these proceedings exemplify. Such proceedings are not concerned with the merits of administrative processes or decisions, but only with their legality. So in this case it's not for the court to assess or express any view as to the merits or otherwise of the proposals for reform of the boundaries of the local government districts within the metropolitan area of Perth.

The court's only concern, and indeed the court's only function, is to determine whether the requirements of the Act have been met, and in particular whether the processes and procedures stipulated in the Act have been followed, or whether either the Minister or the board has exceeded the legal powers conferred upon them by the Act or whether either the Minister or the board has failed to perform legal obligations imposed upon them by the Act.

And if there has been a departure from the Act, before the court can intervene it must assess whether the consequence of that departure is such that as a matter of law the Minister or the Board has exceeded the jurisdiction conferred by the Act, because, generally speaking, the court can only act if the relevant administrative official has exceeded the jurisdiction conferred upon him, her or it by the legislature, in this case conferred pursuant to the Act.

There are limits upon intervention by the court which depend upon the nature of the relief sought. In the case of remedies described by their Latin names of mandamus, which is an order directing an official to do something, or by the Latin name certiorari, which is in effect an order quashing something done by an official, it must be shown that the actions of the official have had an effect upon legal rights and interests, legal duties or obligations or legal powers and in respect in which the party moving the

court has a relevant interest. It doesn't seem that relief of that character is sought in these proceedings, having regard to the minutes of relief which were served yesterday.

However, the applicants do seek injunctive relief which would prevent the Minister from acting upon any of the recommendations made to him by the board following its consideration of the various proposals for the amendment of local government boundaries in the metropolitan area. The law with respect to the entitlement to injunctive relief is complex, but for present purposes it's sufficient to observe that generally speaking and insofar as these proceedings are concerned, the applicants would have to demonstrate that the Minister or the board have acted or propose to act unlawfully and in a way which has or would prejudice their legal rights or interests in order to establish an entitlement to injunctive relief.

The same requirement doesn't apply to relief in the form of declarations, but there must be demonstrated some practical utility in the court making a declaration before it will be made. The principles applicable to this area are best described by the High Court of Australia in its decision in Ainsworth v the Criminal Justice Commission in the passage from the decision of the plurality commencing at the bottom of page 581, where their Honours observed:

> It’s now accepted that superior courts have inherent power to grant declaratory relief. It’s a discretionary power which it’s neither possible nor desirable to fetter by laying down rules as to the manner of its exercise. However, it is confined by the considerations which mark out the boundaries of judicial power. Hence, declaratory relief must be directed to the determination of legal controversies and not to answering abstract or hypothetical questions. The person seeking relief must have a real interest and relief will not be granted if the question is purely hypothetical, if relief is claimed in relation to circumstances that have no occurred and might never happen, or if the court’s declaration will produce no foreseeable consequences for the parties.

In addition, the granting of any relief is within the discretion of the court in proceedings of this kind. The grounds upon which the court can refuse relief are not confined and they include cases in which the relief would serve little or no practical purpose. There’s another general legal principle which is relevant to these proceedings. The courts don’t permit their limited publicly funded resources to be dissipated by busybodies who have no particular interest in the proceedings they have commenced. This principal is embodied in the rules

which require all parties to have sufficient standing to commence proceedings.

At the risk of oversimplification, in order to have standing, a person's legal rights and interests must be affected by the conduct of which they complain or they must have a special or particular interest in the subject matter of the proceedings over and above that of the public generally. So in this case the applicants have standing to challenge decisions or actions of the Minister or the board which relate to the abolition of their local government district or to alterations to its boundaries, but they don't have standing to challenge actions or decisions relating to other local government districts or boundaries unless they can establish that those decisions have had an effect on their district or its boundaries.

The focus of these proceedings is upon whether either or both of the Minister or the board have exceeded the jurisdiction conferred upon them by the Act. It's therefore appropriate to start with a review of the legal framework created by the Act. Section 1.3 of the Act sets out the general objectives of the Act, which include the provision for a system of local government by providing for the constitution of elected local governments in the state and describing the functions of local governments. In that context, subsection (2) of section 1.3 provides, and I quote:

This Act is intended to result in:

(a) better decision making by local government; and

(b) greater community participation in the decisions of affairs of local governments; and

(c) greater accountability of local governments to their communities; and

(d) more efficient and effective local government.

Section 2.1 of the Act provides that the Governor on the recommendation of the Minister may make an order declaring an area of the state to be a district, or changing the boundaries of a district or abolishing a district, or as to a combination of any of those matters. Schedule 2.1, to which I will come in due course, and which section 2.1 describes as dealing with the creation, changing the boundaries of and abolishing districts, has effect. And by subsection (3) of section 2.1, the Minister can only make a recommendation under subsection (1) if the Advisory Board has recommended under schedule 2.1 that the order in question should be made.

So digressing, the clear effect of section 2.1 is that the Minister's power to make a recommendation is conditional upon the receipt of a recommendation from the Advisory Board in terms of the recommendation which the Minister wishes to make. Relevant also is section 2.5 of

the Act, which provides that where an area of the state becomes a district, a local government is established for that district, that the local government is a body corporate with perpetual succession and common seal and the local government has the legal capacity of an natural person, so that once a district is created, then a local government is created in respect of that district.

Relevant also are the provisions of division 8 of part 2 of the Act which relate to the Local Government Advisory Board. Section 2.44 establishes the board and provides that schedule 2.5, which contains provisions about the Local Government Advisory Board, has effect. Section 2.45 provides that the functions of the Advisory Board include considering and, if required by this Act, inquiring into any proposal made to it under this Act that an order be made to do any or all of the matters in section 2.1 and various other sections, and also include making recommendations to the Minister on those proposals.

As I mentioned, section 2.1 of the Act provides that schedule 2.1 of the Act takes effect and much of the argument in this case has focused upon the terms in that schedule and it is therefore appropriate to give detailed consideration of those provisions. By clause 1 of the schedule, various terms used in the schedule are defined. They include the term “affected electors”, which is relevantly defined in relation to a proposal, to mean:

> electors whose eligibility as electors comes from residence, or ownership or occupation of property, in the area directly affected by the proposal.

"Affected local government" is another phrase defined by clause 1 to mean:

> a local government affected by a proposal.

And the term "proposal" is defined to mean:

> a proposal made under clause 2 that an order may be made as to any or all of the matters referred to in section 2.1.

Clause 2 of schedule 2.1 provides that:

> A proposal may be made to the Advisory Board by (a) the Minister; or (b) an affected local government; or (c) two or more affected local governments, jointly; or (d) affected electors who are at least 250 in number or at least 10 per cent of the total number of affected electors.

Subsection (2) of that clause provides that:

> A proposal is to set out clearly the nature of the proposal, the reasons for making the proposal and the effects of the proposal on local governments.

It must also:

> be accompanied by a plan illustrating any proposed changes to the boundaries of a district; and must also comply with any regulations about proposals –

although there's none relevant to proposals by a minister or local government. The only regulation concerns a proposal advanced by affected electors. Clause 3 of schedule 2.1 requires the Advisory Board to consider any proposal and requires that unless the board exercises the powers to, if you like, summarily dispose of proposals made to it – it requires the board to formally inquire into the proposal. Clause 4 provides that where a formal inquiry is required, the board is to give notice to various persons including affected local governments and affected electors.

And the notice and report must advise that submissions may be made to the board within the timeframe specified by the clause. Section 5 contains provisions relating to the conduct – clause 5, I'm sorry, contains provisions relating to the conduct of the inquiry and the matters into which the Advisory Board is to inquire. Clause 6 provides that after formally inquiring into a proposal, the board, in a written report to the Minister, is to recommend either that the Minister reject the proposal; or that an order be made in accordance with the proposal; or if it thinks fit after complying with provisions of the subclause, by making some other order that may be made under section 2.1.

And the relevant provisions of the clause go on to limit the circumstance in which the board may make some other recommendation by, effectively, requiring notice to be given to interested parties if there is a significant

departure from the proposal under consideration by the board. Clause 7 requires the Minister may require a poll of electors upon receiving the board – the board's recommendations. And clause 8 provides – and I quote:

> Where the Advisory Board recommends to the Minister the making of an order to abolish two or more districts (the districts) and amalgamate them into one or more districts, the board is to give notice to affected local governments, affected electors and the other electors of districts directly affected by the recommendation about the other recommendation.

Subclause (2) provides:

> The notice to affected electors has to notify them of their right to request a poll about the recommendation under subclause (3).

And subclause (3) provides that:

> If, within one month after the notice is given, the Minister receives a request made in accordance with regulations and signed by at least 250, or at least 10 per cent, of the electors of one of the districts asking for the recommendation to be put to a poll of electors of that district, the Minister is to require that the board's recommendations be put to a poll accordingly.

And clause (4) specifies, presumably, out of an abundance of caution, that the:

> ...clause doesn’t limit the Minister’s power under clause 7 to require a recommendation to be put to a poll in any case.

Clause 9 is concerned with the procedure for holding a poll and then clause 10 provides, and I quote:

> Subject to subclause (2), the Minister may accept or reject a recommendation of the Advisory Board made under clause 3 or clause 6.

Subclause (2) provides that:

> If a poll is held as required by clause 8 and at least 50 per cent of the electors of one of the districts vote, and of those electors of that district who vote, a majority vote against the recommendation, then the Minister is to reject the recommendation.

Subclause (3) provides that:

> If the recommendation is that an order be made and it’s accepted, the Minister can make an appropriate recommendation to the Governor under section 2.1.

It will be necessary to come back to this clause in more detail later, but it’s sufficient for present purposes to observe that its structure, generally, is to provide the Minister with the general discretion to either accept or a recommendation of the board, subject only to the constraint imposed by subclause (2). That constraint will apply if one of the two districts abolished, and which has triggered the right to a poll under clause 8, has been the subject of

a vote and if 50 per cent of the electors in that district vote, and of the electors who vote, the majority vote against the recommendation. Unless the circumstance comes within that subclause, the Minister retains a general discretion to either accept or reject the recommendation of the board.

The other provisions of the Act that are relevant are the provisions of schedule 2.5, which relate to the Local Government Advisory Board. Clause 2 of that schedule provides that the board is to consist of five members, and specifies the persons who are to comprise members. They include one person to be nominated by the Minister; two persons with experience as members of a council appointed from a list submitted to the Minister by a local government organisation; one person as – being a person having experience as the CEO of a local government – again, appointed from a list submitted by another organisation; and one person who is to be an officer of the department nominated by the Minister.

Clause 3 provides for the appointment of deputies to any member appointed under the provisions of clause 2 – other than as a nominee of the Minister, and also provides for the circumstances in which those deputies may act in place of the person appointed. Clause 7 provides for the meetings of the board and provides that the member appointed under clause 2(a) on the nomination of the

Minister is to provide at all – preside at all meetings of the board at which he or she is present.

Same clause provides that if the member appointed by the Minister – on the nomination of the Minister isn't present at the meeting, then the member appointed under clause 2(d), who is the member who's an officer of the department, is to provide – is to preside, I'm sorry. And the same clause provides that the quorum of a meeting is three, one of whom must be the member appointed by the Minister or the member appointed who is an officer of the department. The clause goes on to provide that – the manner in which members vote and also to specifically require that each member is to have regard to the general interests of local government in the state. Subclause (7) provides that:

> Subject to any order under subclause (8), a member is disqualified from acting where the matter being considered or inquired into by the Advisory Board is a matter relating to a local government of which the member is a member, employee or elector.

But subclause (8) provides:

> The Minister may, by order, declare that subclause (7) doesn't apply in relation to a matter or class of matters specified in the order –

and according to clause (8) –

> ...that order has effect according to its terms.

Although:

> An order under clause (8) can't be made unless the Minister considers the order to be necessary to enable the Advisory Board to perform its functions properly.

Clause 10 of schedule 2.5 provides that:

> The departmental CEO is to make an officer of the department available to the Advisory Board to act as its executive officer.

Again, it will be necessary for me to return to those provisions in more detail later. But it's sufficient to observe that it's clear from the face of schedule 2.5 that the legislature intended that there would be a significant degree of connection between the board and the department. It specifies that:

> The officer of the department who is a member of the board is to have significant responsibilities as a member of the board, including presiding in the absence of the nominee of the minister and the presence of that person is required to make up a quorum if the nominee of the minister is not present and also the board is to be supported by an executive officer who is an officer of the department.

I turn now to the facts which have been established by the evidence, mainly by way of an agreed statement of facts which has been tendered as exhibit 1. And I will refer to

the facts which are most relevant to the issues which have been ventilated. They include the membership of the board. It's not necessary to go into the details of all of the members of the board, as the way the argument – having regard to the way the argument has unfolded.

But it includes Counsellor Melvyn Congerton, who is the nominee of the minister, and therefore the chairman of the board when present, Ms Mary Adam, who is –holds the office of Director Legislation and Statutory Support with the minister's department, who was appointed on 7 October 2013, and others who it is unnecessary to identify at this stage. The agreed facts also identify the deputies of the persons appointed pursuant to schedule 2.5 of the Act, and they include Mr Timothy Derek Fowler, who is the deputy of Ms Adam and who holds the office as Special Adviser Legislation and Reform of the Department of Local Governments and Communities.

The job descriptions of each of Ms Adam and Mr Fowler have been tendered in evidence. In the case of Ms Adam, her precise job description is that of Director Legal and Legislative Services, and there is a detailed specification of her duties, which include the provision of leadership and management of the legislation branch, the provision of high level legal and policy advice to the minister, director general and senior executive of the department, participation in and contribution to the department's

strategic planning policy development processes, and liaising with State Solicitors Officer to obtain advice on specific legal matters, providing advice on legal aspects of the agency to the director general and senior executive.

In the case of Mr Fowler, the position which he holds is that of Special Adviser Legislation and Reform, and his duties include contribution to the executive of the department, the provision of strategic and expert advice to the director general on matters of local government structural reform and local government legislation, provision of advice and assistance to the minister in relation to the passage of reform legislation through the department, and the provision of strategic advice to the director general, directors and senior managers on a high level, local government issues affecting the department.

And the provision of advice on the implementation of legislative reforms initiative and the provision of strategic advice for departmental engagement with the local government sector in relation to sector reform issues and engagement in negotiations with local government, mayors, presidents and chief executive officers in relation to those sector reform issues, and the case management of specific high level structural reform initiatives impacting on selected local governments.

So he is specifically involved in the area of local government reform. Relevant also is the fact – agreed fact

that in August 2013, the Department of Local Government and Communities which I will describe as the department published an information kit which identified Mr Fowler as one of the departmental contacts he could provide information or assistance to local governments in implementing the government's reform model. It's also the case that during the board meeting on 6 August 2013, the minutes record – and there's no reason to doubt their accuracy:

> M. Congerton suggested T. Fowler now had a conflict of interest moving forward with the metropolitan reform process as he is providing advice and assistance to the metro review team. T. Fowler agreed and said that the new departmental member to be appointed in September 2013 would alleviate this problem.

It seems a fair inference from the agreed facts that the new departmental member to whom Mr Fowler was referring was Ms Adam, who was appointed to the board in early October 2013. It's relevant also that, by paragraph 17, a number of local governments submitted proposals to the board, including relevantly a proposal described by the board as proposal 5 which was submitted by the City of Armadale that affected the Shire of Serpentine Jarrahdale, a proposal by the City of South Perth and the town of Victoria Park jointly identified by the board as proposal 13 that affected the City of South Perth, and a proposal identified

by the board as proposal 17 which was submitted by the town of Cambridge that affected the City of Subiaco.

And it's of significance to the arguments that each of those proposals was submitted to the board prior to any ministerial proposal having been submitted to the board. Relevant also is the agreed fact at – to the effect that the minutes of the meeting of the board held on 31 October 2013 record that the minister wished to meet with the – I'm sorry, the minutes of an earlier meeting, the minutes of the meeting of 24 October record that the chairman advised members that the minister wished to meet with the board on 31 October 2013 in order to discuss policy issues associated with the reform.

There are no – that meeting took place, although there are no minutes of its terms. Nevertheless, the minutes of the meeting on 24 October record an officer of the department, in fact, the acting director general of the department advising the board that the general nature of the minister's proposals to the board and that the purpose of the meeting was in order to brief members on the development of the minister's proposal, the timeframes and to discuss the government's policy position. And, as I say, the evidence doesn't identify what was actually discussed at the meeting, but there's no reason to doubt that those words were an accurate description of what was proposed and what ultimately took place.

In the result the minister made 12 proposals to the board between 30 October and 12 November, and they were numbered by the board as proposals 01/2013 to 12/2013. At a meeting of the Swan division of the Liberal Party on 25 August, the minister said words to the effect that the Local Government Act allowed him to use boundary adjustments to avoid the need to hold binding polls, and that using a boundary adjustment saved time and allowed him to keep to his timetable. And in the period between October 2013 and the board's delivery of its report, in September 2014, Counsellor Congerton met with the minister to regularly brief the minister on the progress of the board's deliberations and other issues relating to local government reform on various dates that are specified in paragraph 26 of the agreed statement of facts. Those dates ranging between 31 October 2014 – I'm sorry, 2013, and 13 August 2014.

There are – there is limited information about the subject matter of those discussions, although they include discussion with respect to the timeline for completion of the board's deliberations, an over – the provision of an overview to the minister by Counsellor Congerton of intended recommendations, and the proposals which the board intended to progress, and an update on the board's progress and advice from the minister to the effect that he wanted to be provided with the board's recommendations by the end

of August. At the board's meeting of 3 December 2013, the board resolved to conduct a formal inquiry into each of the 32 proposals it had by then received for changes to Perth's metropolitan local government boundaries.

On a number of occasions, members of the board declared an interest of the kind to which reference is made in section – I'm sorry, clause 7, subsection (7) of schedule 2.5 of the Act, and did not participate in proceedings. An allegation was made in the proceedings to the effect that the provision of that clause of the Act had been infringed by members of the board was abandoned during the course of the hearing, so it's unnecessary to go into those matters in detail. It is, however, worthy of note as part of the chronology that, on 5 June 2014, the Minister made an order under clause 7, subclause (8) of schedule 2.5 in these terms.

After describing his role and function, he referred to his consideration that the order was necessary to enable the Local Government Advisory Board to perform its functions properly within the meaning of subclause 7(9) of schedule 2.5 to the Act and, acting pursuant to subclause 7(8) of schedule 2.5 to the Act, he declared that subclause (7) of schedule 2.5 to the Act doesn't apply in relation to the matters which he defined as follows:

> The proposals it has received during the period 1 June 2013 and 30 April 2014 in relation to Local Government districts within the metropolitan region and which it may consider on and from the date on which this order comes into effect for the making of a possible recommendation under subclause 6(1)(b) of schedule 2.1 to the Act.

And that declaration was published in the Government Gazette on Monday, 9 June 2014. After that declaration was made, members of the board continued to declare interest in particular proposals in which they were a member, elector or employee of the relevant Local Government but, nevertheless, ultimately voted upon resolutions relating to the proposals pursuant to the power conferred by the Minister's declaration. I move now from the agreed statement of facts to some of the evidence, starting with the evidence that's said to go to the question of an apprehended perception of bias on the part of members of the members. That evidence is largely to be found within the agreed statement of facts, but also includes an email that went from the chairman of the board to somebody in the Minister's office in July 2013 which ends with the following sentence:

> Let the Minister know from me that he's doing a great job in the trenches. In the words of Churchill, "We will prevail."

The most I would infer from that email is that the chairman was supportive of the general steps that were then being taken by the Minister to encourage the process of Local Government reform. It's impossible to draw any inference with respect to any greater detail than that from that email. In addition, reference is made – reliance is placed upon the minutes of the meeting of 24 October, to which I've referred, and upon a later communication between Ms Adam and other members of the board, the subject of which is unidentified other than by its reference to structural reform.

It's difficult to see what, if any, inference could be drawn from that by either the court or by any fair minded lay observer. Continuing the factual sequence in chronological order, the board published its report and its recommendations to the Minister. The board recommended that the Minister reject all but one of the proposals made by the Minister. That one, the proposal numbered by the board as 05/2013, is unconnected with any of these applicants and relates to the City of Swan.

It follows that, pursuant to section 2.1, subsection (3), the Minister can't make a recommendation to the Governor to implement any of the proposals which he made to the board that are relevant to any of these three applicants. In relation to Subiaco, all the proposals except proposal 17, which was made by the Town of

Cambridge, were rejected and proposal 17 was recommended for acceptance. That proposal is described by the board in these terms when it recommends to the Minister that, pursuant to clause 6(1)(b) of schedule 2.1 to the Act, that:

> an order be made abolishing the district of Subiaco and changing the boundaries of the town of Cambridge to reflect those shown in section 1.10 of the appendices. Pursuant to schedule 2.1 of the Act, an order be made abolishing all of the wards into which the district of the Town of Cambridge was divided and changing the name of the Town of Cambridge to the City of Subiaco.

In the case of South Perth, the Minister's proposal was rejected and proposal 13, which was made by the City of South Perth and the Town of Victoria Park, was recommended for acceptance. That proposal is summarised by the board in these terms, and it is:

> That an order be made abolishing the current districts of the Town of Victoria Park and the City of South Perth, declaring the area of the state comprising the former district of the Town of Victoria Park and the former district of the City of South Perth to be a district and changing the boundaries of the new district to reflect that shown in section 1.7 of the appendices and also recommending that an order naming

> the new district and designating the district name at the City of South Park and designate it a city.

In relation to Shire of Serpentine-Jarrahdale, all the proposals other than proposal 5 made by the City of Armadale were rejected, and that proposal was recommended for acceptance. That proposal was described by the board in these terms, where it recommended:

> The Local Government Advisory Board recommend that an order be made abolishing the district of Serpentine-Jarrahdale, changing the boundaries of the district of the City of Armadale and of the district of the Shire of Murray to reflect those shown in sections 1.8 and 1.9 of the appendices –

and other orders relating to the abolition of various wards and offices of councillor, etcetera. Now, although some of the Minster's earlier statements with respect to proposal 13, which relates to South Perth and Victoria Park may have been ambiguous and capable of more than one meaning, he now accepts and advises the court that he can only accept and acknowledges that he can only accept that recommendation after the opportunity of a poll has been provided to affected electors under clause 8 of schedule 2.1, and if 50 per cent of the electors of any district which requests a poll under that clause vote, and if a majority of those who vote vote against the proposal, clause 10, subclause (2) of

schedule 2.1 will prevent the Minister from accepting that recommendation.

In relation to the recommendations made with respect to each of Serpentine-Jarrahdale and Subiaco, the Minister has indicated that he will accept the board's recommendation and neither he nor the board considered the provisions of schedule 2.1, clause 8, relating to the convening of a poll are applicable. There are four grounds of review in these proceedings. Grounds 1 and 2 relate only to the proposals made by the Minister to the board, and it was accepted – I'm sorry. Only one of those recommendations was accepted, and that recommendation has no bearing or effect upon the rights or interests of either the local governments that are the parties to these proceedings, or upon the electors of Subiaco, South Perth or Serpentine-Jarrahdale.

All the Minister's proposals relating to those Local Government districts were rejected by the board, and they can't provide the basis for any further action by either the board or by the Minister. It follows that there's no basis upon which the court could grant relief of any kind in relation to those proposals because they have no continuing capacity to affect anybody's rights or interests and a declaration would serve no purpose whatsoever. Grounds 1 and 2 were, for those reasons, rightly abandoned during the course of argument earlier today.

Ground 3 turns upon the proper construction of clause 2.1 and essentially embodies the proposition that an affected Local Government in this clause means a Local Government affected by a proposal previously made by the Minister. It follows that local governments, in the applicants submissions, have no power to make a proposal to the board unless and until the Minister has made a proposal which directly affects those local governments, thus giving it – bringing those local governments within the description of “affected local governments”.

It’s therefore submitted that, because the board has recommended the acceptance of proposals made by local governments which preceded the recommendations made by the – I’m sorry – the proposals made by the Minister, those recommendations were not validly made to the board and the board did not have jurisdiction to inquire into them and to recommend their acceptance to the Minister. It must immediately be noticed that this is a very strained and artificial construction of the relevant provisions of the clause.

On its face, the provision limiting proposals to affected local governments would seem to relate to the proposal being made by the Local Government at the time and not to a proposal made at some time prior. The applicants proposition is that the word “affected” is an adjectival description of the local governments and electors referred

to in clause 2.2, has two operative effects. The first is, that it defines the local governments and electors, who are affected by a prime ministerial proposal. And, secondly, it limits the nature of the proposals that may be advanced by an affected local government or by affected electors to a proposal which has the required degree of affectation, namely, to directly affect them or their interests.

It follows that the applicants concede that the meaning for which the minister contends, which is effectively the second meaning, does apply. That is, that the use of the purpose of the word “affected” as a descriptor of the local governments and electors who can make proposal defines the nature of the proposals which can be advanced by them pursuant to clause 2.1. The applicants, however, say that that descriptor has – imposes implicitly an additional requirement. That is, that those persons must be affected by a previous ministerial proposal.

It will immediately be noticed that there are no words in clause 2.1 which suggest that the word or the descriptor “affected” has this purpose. As I understand the argument, the proposition relies significantly upon the failure to describe the minister as affected within clause 2.1. It’s said that this connotes the word “affected”, when used to describe local governments and electors, must mean local

governments and electors who have been affected by some prior proposal, and it is only the minister who can make such a prior proposal.

The reasoning process involved in this proposition is plainly wrong. The word “affected” is not applied to the minister, because he is responsible for the administration of the Act throughout the State. He plainly has an interest in every local government. It is used in relation to local governments and electors to ensure that they have a direct interest in every proposal they advance. It is, of course, well established that definitions are not to be viewed in isolation. Rather, the proper means of statutory construction is to read the definition into the operative provision for the purpose of giving meaning to the operative provision.

When that is done, in relation to the definition of affected electors and affected local government, the meaning becomes relatively – the meaning of clause 2 becomes relatively clear, so that it provides that a proposal may be made to the Advisory Board by an affected – by a local government directly affected by a proposal or by two or more local governments directly affected by a proposal, or by electors whose eligibility as electors comes from residents or ownership of occupation of property in the area directly affected by the proposal.

The meaning which would be connoted by those words is further expanded or elucidated more correctly by reading the word – the definition of the word “proposal” into clause 2.1 so that the introductory words of clause 2, subsection 1, I’m sorry, are:

> A proposal made under clause 2 that an order be made as to any or all of the matters referred to in section 2.1 may be made to the Advisory Board by, relevantly and affected local government – two or more affected local government’s affected electors.

So that the proposal is defined by the commencing words of section – clause 2, subsection (1), and then the degree of affectation of those who make the proposal can be assessed by reference to that proposal to which the clause relates. So the meaning, with respect, is implicitly clear. There is, perhaps, a slight drafting glitch in relation to the definition, in that the definition of “affected local government” uses the indefinite article referring to a proposal which suggests that it may not be referring to the proposal advanced by the affected local government.

There are, however, I think, a number of reasons why that should not provide any guide to the proper construction and operation of the section. The first is that the definite article is used in the definition of “affected electors”, whereas the indefinite article is used in the definition of “affected local government”. It’s

hard to suppose that the parliament intended that there would be a difference between the connection between an affected elector able to lodge a proposal under clause 2, subclause (1) and the degree of relationship between an affected local government and the proposal lodged under clause 2, subclause (1).

It rather suggests that the choice of the indefinite rather than the definite may have been inadvertent and shed no particular light on the meaning. Another reason for rejecting any conclusion drawn from the use of the indefinite article is that the use of the indefinite is perfectly consistent with later use of the expression “affected electors” and “affected local government” in later provisions of the clause, for example, clause 6 and clause 8, where references are made to people being affected, local governments or affected electors in relation to proposals which they have not themselves advanced, and that would explain the use of the indefinite article A rather than the definite article B.

The applicants also rely upon schedule 2.2, and an analogy which is said to be drawn between the provisions of that schedule which also refer – have a definition of affected electors, and the proper meaning given to that expression in schedule 2.1. The first point to note about that submission is that the two schedules are concerned with different subject matters, and similar but somewhat

different definitions of affected electors. The second schedule – I'm sorry, schedule 2.2 is concerned with submissions relating to the recomposition of wards within a local government district and involves quite a different process or procedure to the procedure contemplated by schedule 2.1.

Under schedule 2.2, if a procedure for changing of the ward is to be initiated by affected electors, in the first place those affected electors make their submission to the local government, not to the board. That is quite different to schedule 2.1, under which the procedure involves affected electors making a submission or, if you like, putting a proposal direct to the board. That explains the structure of clause 5 of schedule 2.2 which specifically refers to a local government having power to make a proposal to the Advisory Board whether or not it has received a submission from affected electors.

The fact that there's no equivalent provision in schedule 2.1 is plainly explicable by the fact that in schedule 2.1, there is no reference to affected electors making any submission to the local government. So there would be no occasion upon which a clause such as clause 5 would be found in clause 2.1. So there's no inference properly drawn from the terms of schedule 2.2 in relation to the construction of clause 2.1 of schedule – clause 2, subclause (1) of schedule 2.1. The other matter upon which

the applicant relies is the second reading speech for the bill, and in particular, a portion of the minister's speech in which he said:

> The Advisory Board will receive proposals to conduct an inquiry from a variety of sources, including the minister or local government or local governments jointly or affected electors if they number at least 250 people or 10 per cent of the total number of affected electors, whichever is the lesser. This provision means that the minister will be able to initiate change under the bill which is not currently the case, and that the number of electors required to initiate a review will be standardised for all circumstances. Further provisions outline the power of the minister to accept or reject but not change the Advisory Board's recommendations.

With respect to the applicants, I can see nothing in these observations which support the construction of the Act for which they contend. On a plain reading of the speech given by the minister, he referred to the possibility of a variety of sources initiating change, including the minister. The fact that the minister could initiate change under the bill, to which the minister made reference, does not support the proposition that it is only the minister who can initiate change under the bill, and so I don't find

any support for the applicant's argument in those provisions.

The applicants also say that their construction of clause 2, subclause (1) is consistent with the preservation of limited public resources by enabling the minister to control the areas of the State in which boundary change will be considered. There are, I think, two answers to this contention. Firstly, the public policy of constraining limited public resources is not evident to me from the language and ordinary meaning of the words used in the Act. But secondly, and in any event, the board has adequate power to summarily dispose of proceedings, proposals that lack merit, pursuant to the provisions to which I have briefly referred in clause 3 of schedule 2.1.

The construction of clause 2 of schedule 2.1 of the Act for which the minister contends conforms with the natural and ordinary meaning of the words used in the schedule and reveals an ordered and logical process. Under that process, the minister can advance a proposal relating to local government anywhere in the State, because he, of course, has plenary responsibility for all local government within the State. However, local governments or the requisite number of electors can only advance proposals for consideration by the board which directly affect their district.

For those reasons, the construction of the Act upon which ground 3 depends must be rejected from which it follows that ground 3 must be dismissed. Ground 4, as enunciated, relates to two matters, the disqualification of members of the board by reason of the operation of clause 7, subclause (7), on the basis that the member of the board was a member, employee or elector to which a proposal before the board related, or; secondly, that the member and deputy member, who were members of the department, were not disinterested in the Minister's proposal, and; thirdly, as amended by an amendment moved during the course of oral argument by a – the perception of bias which is said to arise between communications between members of the board and the Minister, to which I've referred in my reference to the facts.

That part of the ground 4 which related to disqualification by reason of clause 7, subclause (7), was abandoned during the course of the argument, quite properly given that there is no evidence that any member acted in respect of any proposal relating to a Local Government of which he was a member, employee or elector prior to the Minister's exercise of the power to make a declaration under subclause (8) of clause 7. It's also significant in assessing this ground that all the Minister's proposals relevant to the applicants were rejected.

There are various particulars and grounds given in support of ground 4. They overlap and are, to some extent, repetitious. It seems to me that all those particulars and matters of enunciation fail for one or more of the following reasons: firstly, there's no evidence, as I've mentioned, that any member acted contrary to subclause (7) of clause 7 prior to the Minister's order. It's conceded now that the evidence is all to the contrary. Secondly, despite reference in the written submissions to this, there's no suggestion the Minister's order purported to operate retrospectively.

Thirdly, and perhaps most significantly, the content of the precise rules of procedural fairness is well established to depend upon the circumstances of the case, the nature of the power which is under consideration and the relevant statutory provisions. Fourthly, in this case, the statutory provisions clearly display an intention on the part of the legislature that employment within the department will not, of itself, create a perception of bias, particularly given the important role which the representative of the department plays in the operation of the meetings of the board.

It's also clear from the relevant provisions that the department is to have a close connection with the board, particularly through the provision which requires the secretary of the board to be a departmental officer. It's

also clear from the legislative provision that the legislature has acknowledged that, in some circumstances, it may be necessary for a member to act in relation to a Local Government of which he or she is a member, elector or employee, and the Minister may authorise members to act notwithstanding that interest.

So, in summary, it seems to me to be clear from those provisions that a perception of bias or pre-judgment doesn't arise merely from the fact that a member is employed by the department or from communications with the Minister. I need to say a little more about the second subject because that is the alternative ground upon which it's said there has been apprehended perception of bias. Before doing so, however, I will refer briefly to the test which has to be applied.

I will set it out in more detail in my published reasons, but it has been enunciated, and I accept, for present purposes, the enunciation of the test by McLure J, as her Honour then was, in Re MacTiernan; ex parte Coogee Coastal Action Group, but, in very broad summary, it requires the court to apply the apprehension which a fair minded lay observer, informed of all relevant facts, would draw from the facts of which that observer was aware.

The point about communications with the Minister to note – there are a number of points, I think, to be noted. Firstly, that there is no embargo upon communications

between the Minister and the department and the board in any of the express provisions and, indeed, any such – the implication of any embargo upon communication would be entirely inconsistent with the legislative structure, which requires officers of the department to be members of the board and requires an officer of the department to be the secretary of the board.

It's also relevant that the process of inquiry connoted by schedule 2.1 to the Act is a process of inquiry which receives submissions from any interested party, and counsel for the applicants accepts there's no embargo upon the Minister putting a submission before the board or the department putting a submission before the board. It's also, I think, clear that the mere fact of employment by the Department doesn't create either a conflict or a perception of conflict.

It is significant that the departmental officers to whom I have referred are, by their duty statements, clearly given the obligation of advising the Minister in relation to relevant matters, including Local Government reform. They have the same obligation in relation to their duties as members of the board, and that is to provide advice to the board with respect to the issues under consideration by the board which, broadly speaking, relate to Local Government reform. There's no tension that I can see between those two roles.

Rather, the tension, as I apprehend it, by the applicants is said to lie in some improper use of the – or perception of improper use of the departmental officers' position as members of the board to somehow advance the interests of the Minister, notwithstanding their obligation to act in the general interests of Local Government. It's also significant, in my view, that there is no evidence of any improper communication between either the Minister or any member of the department or any other departmental officer and any member of the board.

The fact that there is communication does not, to my mind, induce a perception in the mind of the fair minded lay observer that the communication was, in any way, improper or involved any attempt by either the department or the Minister to suborn the board or to dictate the manner in which it should exercise its functions. The matters to which particular reference has been made in the evidence, including the chairman's general support of the Minister's attempts to generate Local Government reform in June or July of 2013, the fact that the Minister met with the board to discuss the way in which the board would proceed do not, to my way of thinking, create any inference that would cause any concern to the fair minded lay observer.

It's accepted by counsel for the applicants that the Minister could have put any submission he wished before the

board in the course of its inquiries, but the complaint seems to be that, by conducting a meeting without recording what was said during the course of that meeting, the fair minded lay observer would draw some perception of improper communication. That seems to me to be fanciful and entirely speculative and would not involve the – a lay observer acting with a fair mind. There are, of course, also the communications between the chairman of the board and the Minister.

Again, there is no evidence to the effect that there was any improper communication between those two at any time. Rather, the subjects that are known to have been discussed are all primarily related to procedural matters relating to the working of the board. I can see no reason why any fair minded lay observer would draw any adverse inference in relation to the partiality or impartiality of the board from the fact of those communications.

Perhaps the most significant evidence to which the applicants point is the reference in the minutes of 6 August 2013 to Mr Fowler, acknowledging that he had a conflict of interest. However, it is, I think, clear that that acknowledgement – while it is significant and should be taken into account by a fair minded lay observer, that acknowledgement does not determine whether or not Mr Fowler had an interest any more than a decision by a board member

that he didn't have an interest would determine the question of whether or not he had an interest.

There is no evidence as to the basis upon which Mr Fowler formed the view that he had an interest at the time. So it is a significant fact and properly taken into account, but it doesn't determine the court's view as to whether there is, in fact, a basis by which a fair minded lay observer would apprehend that the members of the board were not approaching their duties impartially. It seems to me that there is no basis upon which that fair minded lay observer would have observed that Mrs Fowler and Adam were doing other than providing impartial advice to the board for its consideration and expressing their views as to the best interests of Local Government generally.

There's no evidence of which I am aware that would result in the conclusion on the part of the fair minded lay observer that those officers were nothing more than instruments for the implementation of the Minister's policy. There is, in my view, no factual foundation for any inference of improper communication between the Minister or the board and no evidence that either Mr Adam or Mr Fowler acted as an instrument of the Minister or indeed in such a way as to give rise to any perception that they may have been acting as an instrument of the Minister.

The other point that is, I think, of the greatest significance to this ground is that the fair minded lay

observer could only draw an inference to the effect that the board would not bring a fair and unbiased mind to view the submissions before the board in relation to those which were advanced by the Minister.

There is no reason to think that the involvement of Mrs Adam and Fowler or the communications between the Minister and the board would, to the mind of a reasonable lay observer, create a perception that the board was assessing the proposals made by local government in any way other than by reference to their merits. It's therefore significant that none of the proposals made to the board by the Minister were accepted by the board and that the only proposal made by the Minister accepted by the board is unrelated to any of these three applicants.

It follows that to the extent that any fair-minded lay observer might have developed a perception of apprehended bias, it is not a perception that could reasonably apply to the board's consideration of any of the proposals that were ultimately accepted by it. It follows that that perception of bias, even if it did, contrary to my view, exist, could not vitiate the process by which those proposals were considered and which resulted in their recommendation to the Minister. So for those various reasons, ground 4 must also be dismissed as ground 3 and 4 both must be dismissed, and those proceedings must also be dismissed.

I turn now to the second action in point of time, which is action 2527 of 2014. The parties to that action are City of South Perth, City of Subiaco, Shire of Serpentine Jarrahdale and the Shire of Peppermint Grove, and the Shire of Peppermint Grove is, like the other three, a local government created by the Act. As with the other proceedings, the respondents are the Minister and the board and the board has filed a submitting appearance in these proceedings. The prefatory remarks which I made in relation to the first proceedings with respect to the legal nature of those proceedings and the constraints upon the grant of relief apply with equal force to these proceedings and can be taken to be incorporated by reference.

The facts that are relevant to these proceedings include the facts that I have related in the context of the earlier proceedings. The addition facts that are relevant essentially relate to the Shire of Peppermint Grove, and they are – in relation to that shire, the board accepted recommendation 24, which I will read. Just digressing to observe that that was not a recommendation made by the Minister. That recommendation was that the Local Government Advisory Board recommend the abolition of the current districts of the Town of Mosman Park, the Shire of Peppermint Grove, the Town of Cottesloe, the Town of Claremont and the City of Nedlands. That the area of the

state which previously comprised those local authorities be a new district with the name of City of Riversea.

The position is that the Minister has publicly stated that he rejects that recommendation and both the Minister and the board contend that in those circumstances there is no requirement to conduct a poll under clause 8, notwithstanding that recommendation cast in those terms plainly on its face triggers the entitlement to a poll under that clause. So the first question raised by these proceedings is whether, in the circumstances, the Minister had power to reject the recommendation prior to the conduct of a poll, or alternatively, whether having now rejected the recommendation, the obligation to conduct a poll falls away.

The second question is whether proposals 5 and 17, which were accepted by the board and recommended to the Minister, relating to the City of Subiaco and the Shire of Serpentine Jarrahdale, trigger clause 8 because they involve the abolition of one district and the amalgamation of that district into another. Although there may have been some doubt in relation to the City of South Perth's position at the time these proceedings were commenced, as I've indicated, that position is no longer contentious.

The Minister accepts and has accepted unequivocally through counsel that the provisions of clause 8 apply to the recommendation made with respect to South Perth and

Victoria Park and accepts that if a poll is conducted, the outcome of which falls within the terms of clause 10, subclause (2) of the Act, he can't recommend the proposal for acceptance by the Governor. In these proceedings the relief sought is declaratory and a mandatory injunction is sought requiring the Minister and the board to do certain things said to be necessary to correct the actions which are said to have been unlawful, and the same general principles apply to relief of that kind as I enunciated in the earlier matter and again can be taken to be incorporated by reference into these reasons.

In relation to the City of South Perth, the relief sought includes what is compelling the Minister to clarify statements he has made. In my view, relief of that kind is clearly premature. The poll hasn't yet been conducted and there is no way of assessing whether those statements will or may have any effect on the poll. These proceedings are concerned with the legal validity of the actions taken by the Minister, not with the propriety of conduct or the regularity of any poll that might be conducted.

If after the poll has been conducted the party wishes to argue that the conduct of the Minister has prevented the poll from being fair, that argument will have to be considered in all the evidence relating to the manner of conduct of the poll. So I don't accept that there is any basis for the grant of relief of that kind. I will deal

now with the question relating to the conduct of a poll in respect of the recommendation relating to the proposal with respect to the creation of the City of Riversea.

The applicants argue that the Minister had no power to reject the recommendation prior to the implementation of the provisions of clause 8 relating to a poll and describe compliance with that procedure as a jurisdictional fact upon which the Minister's jurisdiction to accept or reject the board's recommendation depends. Now, that characterisation of the provisions of clause 8 is, with respect, erroneous. A jurisdictional fact is an occurrence or event upon which jurisdiction depends, so that, for example, a deportation order can't be made unless its subject is not a citizen of Australia.

A different taxonomy is customarily used in relation to processes and procedures specified by legislation such as the procedure specified by clause 8, although ultimately, of course, the question is one of statutory construction and the question is whether the legislature intended that the consequence of non-compliance with the procedure or process would result in invalidity of any subsequent steps. And the process of construction to be followed is, of course, well set out by the decision of the High Court in the case Project Blue Sky. But in this case, there is an antecedent question of construction, and that is whether the Act requires a poll to be offered to

affected electors or the opportunity of a poll to be offered to affected electors even if the Minister has determined to reject the application – I'm sorry – to reject the proposal or the recommendation made to him by the board. That question arises in the context of clause 10.

And some of the features of that clause that I noticed earlier deserve repetition. Firstly, it's significant the Minister is generally not bound to observe the outcome of the poll, and the discretion conferred upon him by subclause (1) of clause 10 is unconstrained unless the circumstances specifically described in subclause (2) come to pass. So, put another way, the discretion – the Minister's discretion to accept or reject a recommendation made by the board is only constrained in one circumstance, being the circumstance described in subclause (2) of clause (10), which requires there – to have been a poll at which 50 per cent of the electors of the relevant district have voted and a majority have voted against acceptance of the proposal.

In that circumstance, the effect of the poll is to mandate rejection of the proposal by the Minister and to deprive him of any power to accept. The question which that poses is can the Minister reject, under the general discretion conferred by clause 10, subclause (1), a

recommendation to which clause 8 applies before the time for calling a poll has passed. It's relevant to note that if any proposal which does fall within clause 8 is reactivated at some time in the future, then, plainly, a poll would have to be offered to electors before the Minister could accept any recommendation in those terms.

It's significant in these – in this context that clause 10, subclause (1) confers an unconstrained discretion. Clause 10, subclause (2) does not expressly constrain the power to reject a recommendation; rather, it requires a recommendation to be rejected in certain circumstances. And the clause 8 process is not constrained either by, for example, a perquisite the Minister not have determined to reject the recommendation. There is a drafting anomaly evident on the face of these provisions, and there are, I think, three possible constructions that arise from the provisions, having regard to the drafting anomalies.

The first is that the Minister can reject a recommendation before a poll is conducted and clause 8 no longer applies. That's the construction for which the Minister contends. The second is that the Minister can't reject a recommendation until a poll procedure has been completed. And that is the construction for which the applicants contend. The third option is that the Minister can reject a recommendation but there must still be a poll

if anybody requires that poll. Neither party contends for that construction of the Act for good reason, because it would, I think, be absurd and could not be consistent with a rational legislative intention.

In the choice between the recommendations for which the party – constructions for which the parties contend, there are, I think, two significant problems with the applicants' construction: firstly, there are no words in clauses 8 or 10 which expressly support that construction; and, secondly, the construction doesn't appear to serve any apparent legislative objective. That is because the only effect of a poll is, in some circumstances, to mandate rejection. If the Minister has determined to reject the recommendation anyway, no point or purpose is to be served by a poll.

There's no way in which the Shire of Peppermint Grove or its ratepayers could be adversely affected by this construction of the Act, because before any proposal which comes within the scope of clause 8 could be accepted, the poll procedure would have to be followed. It's also significant – it's proper construction of this scheme of the Act that if the Minister would be assisted by a poll, clause 7 of the Act empowers him to call a poll. By contrast, it seems to me the applicants' construction would attribute to Parliament an intention to require a futile

poll at public expense in the circumstance in which the Minister was determined to reject the recommendation.

So for those various reasons, it seems to me that the Minister's construction of the interplay between clauses 8 and 10 is to be preferred, that it was open to him to determine to reject the recommendation prior to the implementation of the poll procedures, and having decided to reject the recommendation, there is no point or purpose to be served in implementing the poll procedures under clause 8, and that the board, in those circumstances, was correct not to give the notices suggesting to affected electors that they could implement those procedures. By way of completeness, I should observe that even if I had agreed with the applicants' construction of the Act in this respect, I would have refused relief in the exercise of my discretion because, in the circumstances before the court, no legal or practical point or purpose would be served by the conduct of a poll.

And so for that reason, the first issue raised by the applicants in the second set of proceedings fail – fails. The second legal issue raised by the second set of proceedings concerns the proper construction of clause 8 and, in particular, the applicants' contention that the abolition of one district and its amalgamation into another district, effectively, abolishes the second district as well, with the result that two districts are abolished and

clause 8 is triggered. A fundamental problem with this construction of clause 8 is, as I indicated to counsel during the course of argument – and that is that if that were the intention of the legislature, it is impossible to reconcile with the terms used by clause 8. Clause 8 provides, and I quote:

> Where the Advisory Board recommends to the Minister the making of an order to abolish two or more districts and amalgamate them –

that is, those districts –

> into one or more districts, the board is to give notice –

etcetera. The applicants' proposition is that where one district is abolished and it is amalgamated into one or more districts, then because those other districts are also, effectively, abolished, the clause applies. But, of course, if that was what Parliament had intended, then the number (2) in the clause would serve no purpose whatsoever. In any circumstance in which a district is abolished, unless the district is no longer to be subject to local government, because, for example, all the inhabitants have left, necessarily, that district will be amalgamated into one or more other districts.

So the requirement that there be the abolition of two districts can only serve to indicate a parliamentary intention that there must be more than one district which

is to be abolished and amalgamated into one or more other districts, because, as I've mentioned, by definition, every time a district is abolished, if it is to remain subject to the Act, it must be amalgamated into one or more other districts. The applicants rely, in support of their contention, upon section 1.3(2)(b) of the Act, which I mentioned earlier and which refers to the intended result of the Act in terms of greater community participation in the decisions and affairs of local governments. There are two reasons why that reliance is misplaced. Firstly, it appears to me to misconstrue the subsection.

The subsection is to be found in a paragraph of the Act – I'm sorry, the paragraph is to be found in a subsection of the Act which has four provisions, all of which appear to me by their natural and ordinary meaning to be concerned with the relationship between local government and the ratepayers or residents of the areas governed by local government. That is apparent from subclause (c), for example, which refers to the greater accountability of local governments to their communities.

The issue before the court is not concerned with the relationship between local government and their communities, but rather with the structure of local government in the State. The second reason – and it's therefore, in my view, that the provisions of clause 2,

subclause (b) shed no particular light on the proper construction to be given to clause 8 of schedule 2.1. The second reason that is so is because clearly parliament by clause 8 has chosen to limit the circumstances in which a poll can be required by affected electors.

Thus, if it were the intention of parliament to facilitate greater community participation in the decisions and affairs of local government by providing the opportunity of a poll in any circumstance in which one local government district was abolished, then plainly the parliament could have said so. It can't possibly be the parliamentary intention that every elector affected by the abolition of a district in which they reside will have an entitlement to request a poll, and that is clear from the use of the number 2 in clause 8.

The question then is what did parliament mean by the words which are used in clause 8. To my mind, the meaning of that clause is clear. Two districts have to be abolished, and both abolished districts must be amalgamated into one or more other district as the plain and ordinary meaning of the clause attests. Abolition of one district, as I have mentioned, will almost always require its amalgamation into one or more other districts, unless the area concerned is no longer to be the subject of local government. But parliament has clearly decided not to include that circumstance within clause 8.

That construction of the clause is reinforced by a number of aspects of schedule 2.1. Firstly, as I have noticed, the term “the district” is placed in parentheses to indicate clearly to the reader that it is a defined term where used elsewhere, and it is a term that is defined to refer to the two or more districts that are to be abolished by the making of an order. That defined term is used again in clause 8, subclause (3), which refers – and in the context, it’s clear that the reference is to the electors of one of the two districts to be abolished, and similarly, in clause 10(2)(a), where the use of the phrase “the district” is used again, it clearly connotes the electors of one of the two districts that are to be abolished.

So, plainly, the definition of that term connotes that there must be two or more districts which are to be abolished. The second consideration which points in favour of the construction for which the minister contends is in clause 8(1) itself, where it refers to the requirement of the board to give notice to affected local governments, affected electors and to the other electors of districts directly affected by the recommendation. Now, plainly in that context where there is a distinction drawn between affected electors and the other electors of districts directly affected by the recommendation, there must be a distinction between those two classes of elector.

It seems to me the distinction is clear from the structure of the clause itself, and that affected electors is a reference to the electors in the two or more districts that are to be abolished, and the other electors of districts directly affected by the recommendation are the districts into which one or more of the districts to be abolished is to be amalgamated. And that, again, is consistent with the notion that there must be two districts which are to be abolished, and those districts do not include districts into which the abolished districts are to be amalgamated.

It's also significant that the clause distinguishes between – I'm sorry, it's also significant the clause uses the word "abolish". That term is not defined, but it is – it draws its meaning, I think, in clause 8, from its reference – the way in which it is used in clause 2.1. As I mentioned earlier, clause 2.1 provides that the governor may make recommendations doing various things including changing the boundaries of a district which is separate and distinct from an order abolishing a district.

The distinction between those two things is, I think, relatively clear from the structure of the Act, because when a district is established, a local government is created in respect of that district by section 2.5. So when a district is abolished under clause 2.1, the local government body that previously existed in relation to that

district ceases to exist. On the other hand, when an order is made changing the boundaries of a district, the local government body continues to exist under clause 2.5, but in respect of a different area.

So there is, to my way of thinking, a clear distinction drawn by the structure of the Act between abolition on the one hand and a change of boundaries on the other. And the consequence of that distinction is whether or not the local government body relevant to the district continues to exist. So it seems to me to be clear that the Act does distinguish between abolition on the one hand, and boundary changes on the other for the various drafting indicators to which I have referred. That reinforces my view of the plain and ordinary meaning of clause 8.

That view reinforces the position taken by the minister, and it therefore follows that the recommendations made, being proposals 5 and 17, relating to the City of Subiaco and the Shire of Serpentine Jarrahdale do not come within clause 8 of the – of schedule 2.1, and no poll is required in relation to those recommendations. So for that reason, the second proposition embodied by the applicants within the second set of proceedings must also be dismissed with the result that those proceedings should be dismissed. So for those reasons, I would dismiss both sets of proceedings.

(End of extract at 4.27 pm)

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