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THE SUPREME COURT OF

WESTERN AUSTRALIA

CIV 1923 of 2014

CIV 2527 of 2014

THE SHIRE OF SERPENTINE JARRAHDALÉ

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

MARTIN CJ

TRANSCRIPT OF PROCEEDINGS

AT PERTH ON TUESDAY, 25 NOVEMBER 2014, AT 10.31 AM

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

MR C.S. BYDDER appeared for the respondents.

THE ASSOCIATE: In the Supreme Court of Western Australia: CIV 1923/2014, The City of Subiaco v the Minister for Local Government; and CIV 2527/2014, The City of South Perth v the Minister for Local Government.

MARTIN CJ: Mr Shanahan.

C.P. SHANAHAN SC, MR: May it please the court. I appear for the applicants with my friend MR LANDIS.

MARTIN CJ: Thank you, Mr Shanahan. Mr Bydder.

C.S. BYDDER, MR: May it please the court. I appear for the first respondent in both matters. And the second respondent has filed a submitting appearance in both matters.

MARTIN CJ: Yes. Thank you, Mr Bydder. Counsel, you will have noticed that there are cameras in court. That has been permitted because there is, of course, some public interest in these proceedings. My preference would have been to webcast these proceedings live as other courts around the country do, but, unfortunately, we continue to be denied the modest resources required to enable us to do that. We will, however, do the best we can with the resources that we have to make these proceedings accessible to the public, including by recording them audio-visually and we will place them on the court's website within the next day or so in chunks that are consistent with the capacity of that website. We will also place the transcript of these proceedings on the website, again, within the next day or so, so they will be publicly accessible. So those are the arrangements that we will be making in that respect. Mr Shanahan.

SHANAHAN, MR: Thank you, your Honour. Your Honour, the applicants challenge the process by which the Minister and the advisory board have sought to implement abolitions, amalgamations and changes to boundaries of metropolitan local governments. Such changes, as your Honour will be aware, require orders under section 2.1 of the Local Government Act 1995. And I will refer to that as "the Act". There are now two actions before your Honour as we've heard: 1923 of 2014; and the second, 2527 of 2014. Your Honour has directed that with the consent of all the parties that they be heard together today. I would like to start with a brief description of those actions, just so it's clear what they're about, before taking your Honour to the grounds.

And in dealing with each of the actions, I would like to tender some of the relevant evidence that will be before the court. In 1923 - and I will refer to the action as 1923. In the first matter, there are four grounds. The first is that the artificial decision, as the applicants characterise it, by the Minister to split the government plan for amalgamation into 12 pieces in order to avoid giving affected local governments or affected electors access to the binding poll provisions at clause 8 of schedule 2.1 of the Act. Your Honour, there's a description of the government plan in the heading on the application which I will take your Honour to in due course.

MARTIN CJ: Yes.

SHANAHAN, MR: The second ground - what I - what the applicants might characterise as a content ground, relates to the Minister's implementation of that decision by purporting to make 12 proposals to the Advisory Board in circumstances where the applicants contend that those proposals didn't satisfy the content requirements of clause 2, sub (2) of schedule 2.1 of the Act. The third ground is an important matter, and that is the applicants' contention, that properly construed, any attempt to obtain orders under section 2.1 of the Act must begin in the first instance with a lawful ministerial proposal.

Without which, the applicants say the Advisory Board has no power to make recommendations to the Minister for orders under section 2.1 of the Act. If the applicants succeed on ground 3, your Honour, you would have no need to deal with 1, 2 and 4. Ground 4, the last matter in the applicants' case in 1923 is the conflict of interest ground. I don't think I need to describe it with more specificity than that. In 1923, your Honour, the evidence is, essentially, the trial bundle and a statement of agreed facts. Can I make some amendments to the statement of agreed facts before tendering it.

MARTIN CJ: Yes.

SHANAHAN, MR: There are two areas that need amendment: paragraph 7 and paragraph 9. If I can take your Honour to paragraph 7 in the first instance.

MARTIN CJ: Yes.

SHANAHAN, MR: What has to happen at 7 is simply that the subparagraphs be renumbered. 7.1, 7.2 - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - et sequens.

MARTIN CJ: Yes.

SHANAHAN, MR: And in relation to paragraph 9, it's the same problem. It's the same vice. And 9.1 through 9.4.

MARTIN CJ: Right.

SHANAHAN, MR: Your Honour, I tender the statement of agreed facts.

MARTIN CJ: No objection, Mr Bydder?

BYDDER, MR: No, your Honour.

MARTIN CJ: The statement of agreed facts will be received as exhibit 1 in both proceedings, Mr Shanahan.

EXHIBIT 1 Applicants
 Statement of agreed facts in both
 proceedings

SHANAHAN, MR: Thank you.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour, the next matter is the trial bundle. It's in three lever arch files, numbered 1, 2 and 3. I hope that your copy is now properly tabbed - - -

MARTIN CJ: Yes, it is. Thank you.

SHANAHAN, MR: - - - and that the index records all pagination. I would tender the trial bundle.

MARTIN CJ: Yes. The trial bundle will be received as exhibits in - as a single exhibit in both proceedings.

EXHIBIT 2 Applicants
 Trial bundle in both proceedings

SHANAHAN, MR: Thank you.

BYDDER, MR: I should just say - - -

MARTIN CJ: Yes.

BYDDER, MR: I'm sorry to interrupt my friend. I should just say, in respect of that, your Honour, your Honour may have noted there are some objections - - -

MARTIN CJ: Yes. They're subject to relevance.

BYDDER, MR: Indeed, your Honour.

MARTIN CJ: Yes.

BYDDER, MR: May it please.

MARTIN CJ: Yes.

SHANAHAN, MR: Thank you, your Honour. In the second matter, 2527, there's a single issue, and that is whether the Minister's decision to accept and reject recommendations made by the advisory board in its report before the board gave any notice under clause 8(1) was an attempt to accept or reject those proposals without power.

MARTIN CJ: Well, whether or not there's an issue - single issue or two issues, rather, depends upon whether the issue about the operation of clause 8 is dealt with in 1923 or
- - -

SHANAHAN, MR: 2527.

MARTIN CJ: - - - this 2007. It seems more consistent with convention to deal with it in the second proceedings because, arguably, in the first proceedings it's premature because they are commenced in June before there was any recommendation by the board.

SHANAHAN, MR: Indeed. Your Honour, what I was proposing to do with 2527 is to deal with it as I move through the grounds in the first action, so that the context of 2527 is set out in the submissions, and then just take your Honour directly to that second action so we don't waste time.

MARTIN CJ: Yes. Yes. All right.

SHANAHAN, MR: Thank you. The evidence in 2527 is a collection of affidavits. There are four.

MARTIN CJ: Yes.

SHANAHAN, MR: There are two that are tendered by the applicants. They are the two affidavits sworn by Mr Stephen Tindale, the Chief Executive Officer of the City of Subiaco. And your Honour will see that there are two; the first dated 4 November 2014.

MARTIN CJ: Sorry. The - - -

SHANAHAN, MR: This is the affidavit of Mr Stephen Tindale, sworn 4 November 2014.

MARTIN CJ: All right. You're in the most recent matter now, are you?

SHANAHAN, MR: I'm sorry. I'm still in 252 - yes. 2527. Yes.

MARTIN CJ: 2527. Yes. All right. I'm not sure that I've got that, but, anyway, we will just check that we've got that.

SHANAHAN, MR: Filed on 5 November, your Honour. Certainly you won't need it immediately, your Honour, if somebody else can find it for you.

MARTIN CJ: I don't seem to have the affidavits in relation to the second matter up here. Yes. All right. (indistinct). All right. Well, we will need to find that affidavit. Are they not on the file?

SHANAHAN, MR: Your Honour, I've got some copies here. Perhaps that's the quickest thing. They are the two affidavits that the applicant seeks to tender, your Honour. And I think my friend also added in the affidavit of Mr Misso, which I will come to in a moment.

MARTIN CJ: Yes.

SHANAHAN, MR: If we could just deal with the applicant's affidavits first.

MARTIN CJ: All right. You tender the affidavit sworn 4 and 20 November?

SHANAHAN, MR: Yes. Yes, your Honour.

MARTIN CJ: Yes. All right. Well, they will be - no objection, Mr Bydder?

BYDDER, MR: None, your Honour.

MARTIN CJ: Those affidavits will be taken as read and received as evidence in matter 2527 of 2014.

SHANAHAN, MR: Thank you. And my friends seek to rely upon two affidavits; one by Julian Marcel Misso, sworn 18 November 2014, and a second affidavit of Emma Dickinson, sworn 11 November 2014, and I would invite my friend, if he wishes to, to tender those documents now.

MARTIN CJ: Yes. Mr Bydder, you rely on those affidavits?

BYDDER, MR: I do, and with the case of Ms Dickinson in 1923 and in the case of Mr Misso in 2527. But it may be convenient to have them dealt with in both.

MARTIN CJ: Yes. All right. Well, those affidavits will be read and received as evidence in both actions.

BYDDER, MR: Please your Honour.

MARTIN CJ: Yes. Mr Shanahan.

SHANAHAN, MR: Thank you, your Honour. Before commencing to deal with the grounds in 1923, I just want to make sure that your Honour has all the paper.

MARTIN CJ: Yes.

SHANAHAN, MR: So, in 1923, your Honour should have a minute of proposed amended substituted grounds - - -

MARTIN CJ: I do.

SHANAHAN, MR: - - - in support of the application, the applicant's submissions, dated 17 November.

MARTIN CJ: Yes.

SHANAHAN, MR: The first respondent's outline of submissions, dated 21 November.

MARTIN CJ: Yes.

SHANAHAN, MR: And the applicant's submissions in reply, dated 24 November.

MARTIN CJ: Yes.

SHANAHAN, MR: And then a minute of final relief sought, dated 24 November.

MARTIN CJ: Yes. I have that, thank you.

SHANAHAN, MR: And in 2527, your Honour, it's a similar list.

MARTIN CJ: Yes.

SHANAHAN, MR: The application dated 5 November. This is the application itself. Probably have a spare copy of that as well, your Honour.

MARTIN CJ: Well (indistinct) all papers I've got relating to that second matter have gone missing.

SHANAHAN, MR: Can I hand this up then. This is a copy of the application. I think my junior has a (indistinct) for double-sided photocopying, so - - -

MARTIN CJ: All right. Thank you.

SHANAHAN, MR: That's the application dated 5 November. Then you should have the applicant's submissions in 2527, dated 19 November.

MARTIN CJ: Yes.

SHANAHAN, MR: The first respondent's outline of submissions, dated 21 November.

MARTIN CJ: Yes.

SHANAHAN, MR: The applicant's submissions in reply, dated yesterday, 24 November.

MARTIN CJ: Yes.

SHANAHAN, MR: And the minute of final relief sought, dated 24 November.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour, that concludes the preliminary matters. I wish to start - sorry.

MARTIN CJ: Yes.

SHANAHAN, MR: I thought it might be useful just to sketch out what I propose to do.

MARTIN CJ: Yes.

SHANAHAN, MR: I would like to start with ground 3 and then move through the balance of 1923. So 3, 1, 2, 4.

MARTIN CJ: Yes.

SHANAHAN, MR: I envisage that the applicant's case will take two hours, depending upon your Honour's questions.

MARTIN CJ: Yes.

SHANAHAN, MR: So perhaps then we could turn to the construction of the Act. That seems to be the foundation of part of these proceedings. In Western Australia, your Honour, the abolition of a district, changing the boundaries of a district or declaring new districts requires an order by the Governor on the recommendation of the Minister for Local Government, pursuant to section 2.1 of the Act. Thus, any State Government plan - that's any State Government plan for the reduction in the number of Local Government districts requires orders pursuant to section 2.1. So what this case is about is essentially the process by which those orders are obtained.

MARTIN CJ: Yes.

SHANAHAN, MR: A large part of 1923 is concerned with process, and that's the process by which these orders are made. This is a case about process and the checks and balances that protect it. It's not about the merits of the State Government's policy, position on Local Government, amalgamation, nor is it about the reduction of the number of metropolitan local councils. The government's power to make orders under section 2.1 of the Act is expressly conditioned by the Minister's prior recommendation to the Governor, and your Honour will find that at section 2.1, sub (1). No orders can be made until first recommended to the Governor by the Minister. Section 2.1(1), a recommendation by the Minister to the Governor that such an order be made is, in turn, conditioned by the requirement that the Minister first receive a recommendation from the advisory board. So we're working backwards from the making of the order.

MARTIN CJ: Excuse me. Yes. Sorry, Mr Shanahan.

SHANAHAN, MR: That's okay. The advisory board can make such a recommendation to the Minister only if the advisory board has complied with the provisions of schedule 2.1 of the Act. And your Honour is going to be taken at some length to schedule 2.1 of the Act because that's where the heart of the process lies. What is required to comply with schedule 2.1 is at the heart of grounds 1, 2 and 3 in the action 1923. So if I can take your Honour to schedule 2.1 directly - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - of the Act. The Minister's power to make a recommendation to the Governor appears at clause 10,

so, again, we're working backwards. And your Honour will see at clause 10, page 339 of my Act, that clause 10 has three subclauses.

MARTIN CJ: Yes.

SHANAHAN, MR: And the important thing to note immediately is that the power that the Minister has under clause 1 to accept or reject a recommendation of the advisory board made under schedule 2.1 is subject to clause 2 - subclause (2). Your Honour can see that. And then, at subclause (2), this is where the provisions of 8 and 10 intersect; in other words, that the power of the Minister to accept or reject a proposal is subject to the holding of a poll, if a poll is required - if a poll is required under clause 8(1).

And then, at 10(3), if the recommendation is that an order be made and it is accepted, the Minister can make an appropriate recommendation to the Governor under section 2.1. So here we have, working backwards from the Governor actually making the order, we have the Minister with the power to make a recommendation that an order be made. That power to make a recommendation that an order be made is subject, where required, to a poll under clause 8(1) and clause 9, and there's some argument about whether that relates both to acceptance or rejection under clause 10(1), which I will take your Honour to in due course.

The Minister's power is conditioned by clause 10(2), as I've pointed out, which means that the Minister's power to accept or reject a recommendation is subject to the conduct of a poll under clause 8(1) where access to such a poll is granted by that provision. And perhaps whilst I'm doing it, it's worth taking your Honour to that provision because that's really at the heart of the debate around binding polls. Your Honour will see, at 8(1), that:

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

I have a bit more to say about that provision as we go on. If such a poll was held and held and rejects the advisory board's recommendation to the Minister, then the Minister is bound by that rejection. That's the effect of the provision at clause 10(1). Thus, access by affected electors to a binding poll under clause 8 is an important

and we would say significant check or balance to the exercise of the Minister's power under clause 10 to make a recommendation for an order under section 2.1 to the Governor. I'm sorry, your Honour, but that's got a lot of different parts in it.

MARTIN CJ: No. I understand the - I understand the process.

SHANAHAN, MR: It's the nature of the process. Another important check and balance to the Minister's power is the independence of the Advisory Board inquiring into proposals that are made to it. There seems to be some argument in the papers about whether or not - or what the status of the Advisory Board is in terms of independence. What the applicants say about that is were the Advisory Board not independent effectively where the Minister makes a proposal, then it may well end up with the Minister advising the Minister on the Minister's proposal as to the Minister's recommendation to the Governor. In the applicant's respectful submission, the role of the Advisory Board is clearly independent and must be seen as such.

MARTIN CJ: But there are degrees of separation, aren't there, Mr Shanahan?

SHANAHAN, MR: Indeed, your Honour. And no doubt those nuances will be teased out in the course of these proceedings. Certainly what the applicants don't do is rely upon Professor Saunder's paper for the proposition that the board is independent. The applicants say that that proposition emerges from the statute itself. But to the extent that the Advisory Board is for particular type, the applicants say that the comments by Professor Saunders in her paper, which is at paragraph 14 of the submissions, is apposite.

I return to the issue of the independence of the board, both in terms of grounds 1 and 4, because obviously they're interrelated. It's contended that the composition of the Advisory Board as legislated for at schedule 2.5 of the Act should be understood through the prism of Professor Saunders' observations in that were the board, as I say, not independent, then the system that's envisaged under schedule 2.1 in the applicant's submission wouldn't work. And I want to demonstrate that to your Honour as we move through.

We say that the Advisory Board is an independent advisory body to provide the Minister with impartial advice

and that the composition of the board which is set out in schedule 2.1 reflects that in the sense that it's - it draws from both the Department, from a chief - someone with experience of being a chief executive officer in local government, and it draws from experience within the local government area. In other words, it creates a body of expertise which is there to advise the Minister in relation to proposals.

So returning, then, to the process legislated for at schedule 2.1, the - the applicants say that the process starts with the making of a proposal, and this is where we start to move into ground three. The schedule provides that only certain people can make a proposal. And if I can take your Honour to that provision, you will find it at clause 2.1.

MARTIN CJ: Yes.

SHANAHAN, MR: Now, this is highly significant, the applicants say, for this reason. That if you look at that provision in paragraphs (a) through (d), there are - there are four situations in which a proposal can be made. One is the Minister, (b) and (c) relate to affected local governments, and (d) relates to affected electors. No one else can make a proposal. The board has got some limited powers under clause 6.1 and 6.2. I will take your Honour to those in due course, but effectively what - those powers can't be exercised by the board unless it already has a proposal before it. And perhaps I can take your Honour to that just whilst we're there.

MARTIN CJ: Yes.

SHANAHAN, MR: Did your Honour - your Honour has seen that?

MARTIN CJ: Yes. They're the provisions whereby if the board wants to modify the proposal - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - it has to give notice?

SHANAHAN, MR: That's so. But it has to be a proposal before the board already. So in terms of where the process begins, which is what I'm trying to establish - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - it has to be one of the entities that are described at 2.1 (a) to (d). Now, the important thing that the applicants point out in ground 3 is that of those parties or entities, however you wish to describe them, only one is not qualified by the expression affected. The only party that can make a proposal not qualified by the expression "affected" is the Minister.

MARTIN CJ: Well, you wouldn't expect him to be qualified in that way. He's responsible for the entire state.

SHANAHAN, MR: Absolutely not.

MARTIN CJ: The administration of the Act in the entire state.

SHANAHAN, MR: Absolutely not, your Honour. And that goes to the heart of the applicant's position. The applicant would absolutely accept what your Honour has just said. And I want to demonstrate why that must be so.

MARTIN CJ: Well, then no inference can be drawn from the failure to adjectively describe him as affected, because
- - -

SHANAHAN, MR: Well - - -

MARTIN CJ: - - - it would be a nonsense.

SHANAHAN, MR: - - - that would be so, your Honour, if there weren't definitions within the - within schedule 2.1 which would explain what "affected" is intended to mean, which is where I'm going to take you.

MARTIN CJ: (indistinct)

SHANAHAN, MR: And your Honour will see that that's at clause 1. So affected electors are described at paragraphs (a) and (b) in the definition. At paragraph (a):

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

So what's said by the applicants is that there must be a proposal before the board that must have been an antecedent proposal before the board, made to the board, received by the board, if you like, in writing, that identifies those affected electors.

MARTIN CJ: Why can't the affectation derive from the proposal itself being advanced by the electors?

SHANAHAN, MR: Because - - -

MARTIN CJ: That would be the obvious meaning of the clause, wouldn't it?

SHANAHAN, MR: Well, your Honour, the reason the applicants say that can't be so is that if you - if you look at several clauses - now I need to take your Honour to a couple of clauses to make the point. If affected electors could constitute themselves affected by making their own proposal, then that would have to assume that the proposal referred to in the paragraph (a) is made. It can't be made until it's provided to the board.

MARTIN CJ: But the word "affected" is an adjectival description of the relationship between the local government or the electors who are making the proposal and the subject matter of the proposal. That is, going back to the definition, they have to be either a local government or electors within an area directly affected by the proposal, so the - I would have thought the purpose of those provisions is clear, and that is that people making proposals to the board other than the Minister have to be affected by the proposals which they are making, so that you can't have a local government body in Kalgoorlie making a proposal about the metropolitan area of Perth.

SHANAHAN, MR: Well, the applicants say that's not right, your Honour, for this reason: that if that was so, then anybody of affected electors could qualify for making a proposal despite the provisions at 2.1(d)(i) and (ii) simply by the manner in which they constructed the proposal that they make.

MARTIN CJ: Well, they've got to make a proposal about an area in which they reside.

SHANAHAN, MR: Well, the point is this, your Honour: you will see that at 2.1(d)(i) and (ii) there are limits as to who can make a proposal. There have to be 250 affected electors or you have to be 10 per cent of the total number of affected electors.

MARTIN CJ: Yes.

SHANAHAN, MR: Well, if the affected electors are drafting the proposal they can make themselves 10 per cent of anything. It means nothing then.

MARTIN CJ: Well, you look at the area covered by the proposal - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - and then you say how many electors are within that area - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - and then you work out what 10 per cent is.

SHANAHAN, MR: And the problem with that, your Honour, is who sets the area that the proposal affects. It's the authors of the proposal.

MARTIN CJ: Yes.

SHANAHAN, MR: So the point that I'm - the point that the applicants are advancing is that it's self-referrable. In other words, it doesn't matter. The provision at clause 2.1(d)(ii) becomes meaningless.

MARTIN CJ: But it requires a connection between the electors who are advancing the proposal and their interests. That's its obvious purpose.

SHANAHAN, MR: Absolutely, your Honour. There's no doubt that "affected" has that meaning, that it does require a direct affectation affecting the electors or local government described at clause 1. The applicants don't resist that. What we say, though, is that the primary proposal is made by the Minister, which gives the Minister control of what proposals are made to the board, so that the definition of "affected" local government refers to a local government that is affected by the ministerial proposal.

In other words, the proposal that's referred to in the definition of affected local government is a prior proposal made by the Minister. Because the Minister is not qualified by the use of the term "affected", it has the point of giving the Minister control of initiatives to change the local government system in this state. Just as your Honour put to me at the start, that the position of the Minister is such that he has oversight - or he or she has oversight - - -

MARTIN CJ: Has responsibility for the administration
- - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - of the Act throughout the state, but that is a very different thing - - -

SHANAHAN, MR: That's so.

MARTIN CJ: - - - to saying that there can't be any boundary changes unless they are initiated by the Minister.

SHANAHAN, MR: No. That's not what - - -

MARTIN CJ: On the face of it - well, your construction of clause 2 - - -

SHANAHAN, MR: No.

MARTIN CJ: - - - would mean that unless and until the Minister initiates a boundary change by providing a proposal to the board, there is no capacity - - -

SHANAHAN, MR: No, your Honour.

MARTIN CJ: - - - on an affected local government - well - - -

SHANAHAN, MR: No.

MARTIN CJ: - - - why am I wrong, then?

SHANAHAN, MR: Well, let me explain.

MARTIN CJ: Yes.

SHANAHAN, MR: The applicants say that's wrong, your Honour, because if the Minister makes a - let's say the Minister makes a proposal for the City of Subiaco.

MARTIN CJ: Yes.

SHANAHAN, MR: And the proposal is for either boundary changes or for abolitions and - and/or amalgamations. As long as there's a proposal that's referable to the area in which an affected elector lives or, alternatively, the City of Subiaco, they can then advance their own proposal - - -

MARTIN CJ: But that's what I was just saying, Mr Shanahan. Unless - and on your argument, unless and until the Minister initiates a proposal for change in relation to an area, there is no capacity either for affected electors

or for affected local governments to initiate such a change.

SHANAHAN, MR: That's so. That's so.

MARTIN CJ: Well, why would you construe the Act that way?

SHANAHAN, MR: Because it gives - - -

MARTIN CJ: It places a very severe constraint upon the capacity of local governments to initiate change.

SHANAHAN, MR: Because it gives the Minister control of the number of inquiries that go to the board. It gives the Minister control of the amount of resources that are required by the board to conduct its business, and it's supported by clause 4 of the schedule 2.1. And if I can take your Honour to clause 4. You will see that, at 4.1:

Where a formal inquiry is required, the Advisory Board is to give (a) notice to affected local governments, affected electors and the other electors of districts directly affected by the proposal -

now, if the scenario advanced by your Honour was correct, what that would mean would be that an affected elector, making a proposal to the board would then receive notice under this provision from the board telling the affected elector that they were an affected elector.

MARTIN CJ: No. What it means is, that inquiry can be initiated by 250 affected electors and there might be 10,000 others - - -

SHANAHAN, MR: Indeed.

MARTIN CJ: So they have to be told.

SHANAHAN, MR: Indeed. But that doesn't mean that the persons advancing - the persons advancing the proposal must be affected electors on your Honour's scenario, because, otherwise, they wouldn't have the power to make the proposal.

MARTIN CJ: Of course, but all that clause 4 is identifying, in the interest of procedural fairness, is the parties who are to give - be given notice of an inquiry. And the ambit of affected electors for the purpose of clause 4 might be quite different to the ambit of the affected electors who have initiated the inquiry under

clause 2. So you can't use clause 4 to construe clause 2, can you?

SHANAHAN, MR: Well, with great respect, your Honour, if the effect of clause 4 is that the authors of a proposal, being affected electors, have to be notified by the board that they are affected electors, then it doesn't make sense. And to deal with your Honour's more - - -

MARTIN CJ: But they're different categories of people. The group under subclause (2) will, by definition, be much smaller than the group under clause 4, because it will be either over - everybody over and above 250 or it will be 90 per cent of the electorate.

SHANAHAN, MR: Your Honour, if that was the intention of the Parliament, the applicants say that clause 4 would say that, and it doesn't. But dealing with your Honour's more primary proposition, which I think is the important one, there's nothing to stop local governments or electors going to the Minister and seeking that the Minister put forward a proposal. The idea that you can have a situation where electors and local government seek to change the system of their own back, the applicants say it doesn't fit within the nature of the way in which local governments have developed or the way in which the Minister exercises his control in that regard. And I have an example for you, just to demonstrate the proposition. If I can use a local example.

If we were talking about electors who lived next door to Patersons oval, but they lived across a district line - so there's a local government district boundary that separates them from Patersons oval. And, say, five or six streets of people - because they followed the football team that is at Patersons and they were on the other side of a regional road - wanted to move the boundary to encompass the oval, then on your Honour's scenario, they could apply, under the Act, as affected electors, based on their own description of their proposal, in circumstances where the board, on the applicants' case, would have to notify them that they were affected electors and the board would be required to inquire into that proposal, because it's not a minor proposal - - -

MARTIN CJ: Well, if there were 250 of them, yes.

SHANAHAN, MR: Well - - -

MARTIN CJ: That's right. And it accords with the Act. And the 10 per cent would be the affected electors. So the

affected electors would be all the residents of the district from which the land was to be excised.

SHANAHAN, MR: Well, your - - -

MARTIN CJ: So the Act works perfectly logically. If you've got 250 people who want change, then they can put a proposal. Or if you've got 10 per cent of the district affected by the change, so that if you're going to take it out of Subiaco and put it into some other district - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - it would be 10 per cent of the electors of Subiaco, or 250, whichever is the lesser.

SHANAHAN, MR: The only problem with your Honour's scenario there is that it's not with the access. Because if you go to the definition of "affected electors", what you will see at paragraph (a) is not a reference to districts. It's a reference to the - - -

MARTIN CJ: The area directly (indistinct) - - -

SHANAHAN, MR: - - - area directly affected.

MARTIN CJ: - - - by the proposal.

SHANAHAN, MR: Indeed.

MARTIN CJ: If you're going to take six streets out of Subiaco, the area affected by the proposal is Subiaco.

SHANAHAN, MR: Indeed. I understand what your Honour says, but what the applicants are suggesting to your Honour is that the area affected by a proposal may be a district, may be part of a district, may be a combination of districts.

MARTIN CJ: Well, if you're interfering with the boundary of district, you're affecting the district.

SHANAHAN, MR: Well, that's a matter for argument regarding what - - -

MARTIN CJ: Why? What's contentious about that? Plainly, if you're proposing an alteration of the boundary of a local government district, you're affecting the entire district.

SHANAHAN, MR: Well, on one view, your Honour, if you're moving Patersons Stadium from one local government district into another, given its consequences, perhaps in terms of its management, you might be affecting football followers throughout the state. You might be affecting all sorts of interests that cross local government district boundaries. "Affected" is not a concept that is - lends itself to a simple account, as your Honour puts, in the sense that that's - well, that's why the applicants say the words "area directly affected by the proposal" were used, not "districts affected by the proposal", which is clearly an option that the draftsman had in relation to this clause. The structure and contents of the proposal made to the Advisory Board shape and limit the Advisory Board's powers. I think your Honour has seized of our argument in relation to the definition of "affected governments" and "affected local" - "affected electors".

MARTIN CJ: Yes.

SHANAHAN, MR: The structure and contents of the proposal is determined on the applicants' case by the Minister in the first instance. The making of a proposal is - or the receipt of a written proposal by the Advisory Board is therefore a jurisdictional fact which conditions the exercise by the board of the powers conferred at schedule 2.1 of the Act.

MARTIN CJ: So your proposition is that "affected" in clauses 2(b), (c) and (d) means people who are affected by a proposal made by the Minister, not necessarily people who are affected by the proposal which they are themselves advancing?

SHANAHAN, MR: Only in the first instance, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: So what's imagined is like - it's like a synergy, if you like. There's a primary proposal by the Minister. That affects local governments and it affects electors. The notice by the board under clause 4 identifies those individuals or entities. And they then have the right, if they fall within the description at clause 2(1)(d) to make their own proposals. So - - -

MARTIN CJ: Whether or not they're affected by their own proposals, because "affected" means - - -

SHANAHAN, MR: They're affected by the key proposal by the Minister.

MARTIN CJ: So once - to use your example, once they've received notice of a change in Subiaco, they could propose changes to Joondalup?

SHANAHAN, MR: No. No, your Honour. No.

MARTIN CJ: Well, then you say - - -

SHANAHAN, MR: No.

MARTIN CJ: - - - what "affected" means relates to their own proposal as well?

SHANAHAN, MR: No, no. I think your Honour is conflating two propositions that I'm putting. One - - -

MARTIN CJ: I'm just trying to work out what you - - -

SHANAHAN, MR: No, no.

MARTIN CJ: - - - say "affected" relates to.

SHANAHAN, MR: I appreciate that, your Honour. When your Honour said to me that "affected" must mean having a direct relation to the proposal, the area that's affected - the district - the place - that must be the case. The applicants don't resist that at all. All - - -

MARTIN CJ: So "affected" applies to two things then.

SHANAHAN, MR: Yes.

MARTIN CJ: It applies not only to the proposal which the local government or the electors advance, but it applies also to the previous proposal advanced by the Minister.

SHANAHAN, MR: The proposal - I think we're at cross-purposes. Can I just try and tease it out.

MARTIN CJ: Well, I'm just trying to work out what you say "affected" applies to.

SHANAHAN, MR: No, I understand that, your Honour. And I'm trying to explain it.

MARTIN CJ: Yes.

SHANAHAN, MR: The - there are two elements to the word "affected". What we say is that the ministerial proposal was put first. That means that there will be some electors and some local governments or government affected by that

proposal. They fall within the definition of clause 1. They then have the right to make their own proposal if they wish. When they make a proposal, that proposal has to relate to the manner in which they are affected, which

- - -

MARTIN CJ: Right. So "affected" - I was right then. You say "affects" relates to two things. First of all, the proposal lodged by the Minister which then authorises electors or local governments to lodge a proposal which has to be affected - they have to - in relation to which they have to be affected. That's right then?

SHANAHAN, MR: Yes. Thank you, your Honour. I misunderstood - - -

MARTIN CJ: All right. Well, if you've got - if - - -

SHANAHAN, MR: I misunderstood your Honour - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - when you said "affected" in the context of the Minister's proposal.

MARTIN CJ: Well, if "affected" has the second meaning, why does it have to have the first - - -

SHANAHAN, MR: Because if it - - -

MARTIN CJ: - - - when the - Parliament hasn't said that?

SHANAHAN, MR: Your Honour, my learned friend junior points out that if an affected local government was to make a proposal after the ministerial proposal which didn't relate to what the Minister had advanced in the proposal, it would be a frivolous proposal or it would be something that's not in the interests of good government and would all - - -

MARTIN CJ: Well, sorry. Does that mean you're saying then that affected doesn't - that the proposal made by the Local Government doesn't have to be affected in the terms used by the Act?

SHANAHAN, MR: The applicants say it does.

MARTIN CJ: All right. Well then, what - - -

SHANAHAN, MR: The applicants say it does. Yes.

MARTIN CJ: Well then, what you just said doesn't matter.

SHANAHAN, MR: Well, your Honour, the applicants say that "affected" has two meanings. One is that it locates the right of affected local governments and affected electors to make a proposal following a ministerial proposal, and it also locates the nature of the proposal that those affected electors or affected local governments can make.

MARTIN CJ: Yes. All right.

SHANAHAN, MR: Yes. Can I just make an observation about that argument before I leave it behind. Schedule 2.2 has a similar mechanism in it. Schedule 2.2 deals with changes to wards, but it also uses a definition of "affected elector". And, I think, in the submissions in reply that we filed in 1923, your Honour, you will see that, at one of the paragraphs, I've set out the two definitions side by side. And the point of doing that was to demonstrate to your Honour that they are essentially the same. That's at paragraph 66 on page 15. And your Honour will see, when you put those two paragraph - paragraph 66 on page 15.

MARTIN CJ: Yes. Yes, I have it.

SHANAHAN, MR: Your Honour will see, when you put those two - I've put the definition of "affected electors" at schedule 2.1, clause 1 and 2.1, clause 1 together. The only difference between them is that, in the first instance, clause - sorry - schedule 2.1, the definition relates to proposals but, in the second, it relates to a submission. Now, the point of that is - well, you might say, "Well, so what?" And the point is is that schedule 2.2 employs the same technique as the draftsman has employed in schedule 2.1. But where the draftsman in schedule 2.2 wishes to confer an independent power on Local Government to make submissions, it's done expressly at clause 5. And your Honour will note that that's in respect of what are described as proposed ward changes or minor proposals.

MARTIN CJ: But the structure of schedule 2.2 is rather different, because the affected electors in the first instance make a submission to the Local Government with respect to ward changes.

SHANAHAN, MR: It's about different things, your Honour; that's entirely true. The point - - -

MARTIN CJ: But the structure is different, so that's why you would anticipate a different drafting structure. So,

in other words, it starts with the electors, then goes to the Local Government and then on from there.

SHANAHAN, MR: Well - - -

MARTIN CJ: Whereas, under 2.1, the structure starts either with the Minister or with the Local Government or with two or more local governments or with the requisite number of electors.

SHANAHAN, MR: And so what your Honour's scenario at 2.1 envisages is that the affected electors and the affected local governments have an independent right to make proposals completely independent of the Minister. Where the draftsman - where the Parliament has conferred a right to make submissions at schedule 2.2, they've done it expressly, and the applicant draws from that that, had they intended to do so at schedule 2.1, they also would have conferred that power directly rather than to rely upon the web of definitions - - -

MARTIN CJ: Perhaps I didn't - - -

SHANAHAN, MR: - - - that I've taken your Honour to.

MARTIN CJ: Perhaps I didn't make my point clear enough. The explanation for clause 5 in schedule 2.2 is that the first step in the process is maybe the submission of a proposal for ward change by affected electors to the Local Government. The purpose of clause 5 is to make clear that the capacity of Local Government to itself propose ward changes is not dependent upon the receipt of that submission. There is no scope for a similar provision in clause 2.1 because there is no process by which electors can initiate change with the Local Government. Electors go straight to the advisory board.

SHANAHAN, MR: I understand what your Honour says, but the point - - -

MARTIN CJ: Well, there's just - you can't use clause 5 then of schedule 2.2, can you?

SHANAHAN, MR: Well, there's two points there, your Honour. The first is that, as I understand your Honour's scenario on schedule 2.1, it's said that the electors do have the right to advance a proposal of their own.

MARTIN CJ: Straight to the board.

SHANAHAN, MR: Yes. Straight to the board. The fact that schedule 2.2 is about the relationship between electors and local governments in the appellant's - applicant's submission is to no point. The proposition that's being put to your Honour is that, had the Parliament intended to confer on affected electors and effected local governments an independent power to make proposals to the board, it would have done so expressly, and where it - where the legislature has conferred a power to make minor proposals, as your Honour will see in the heading at clause 5 in schedule 2.2, that express mechanism has been employed.

And what the applicants say about that is that the statutory construction in relation to the provisions of schedule 2.1 has to be understood in the terms of the provisions of the Act as a whole. I won't take your Honour to the principles of statutory construction or anything like that; I'm sure you're very familiar with them. And the applicants say that it's the mechanism - the mechanism by which the independent power is conferred. It's not a question of trying to say that schedule 2.2 and 2.1 do the same things; plainly they don't. But when the Parliament came to confer an express - sorry - came to confer a power to make independent submissions on the Local Government, they did it in express terms.

What the applicants say about that is it seems illogical for the parliamentary draftsman to confer an express power in local governments to make minor proposals and then leave the position of local governments in relation to major proposals, if I can draw a distinction between clause 2.2 and 2.1, at large by reference to a web of ambiguous definitions. That just seems to be illogical in the applicant's very respectful submission. So, moving on. Because the proposals start the process, they have a significant impact on whether any ultimate recommendations by the board will satisfy clause 8(1).

So what I'm painting for your Honour is the picture that a proposal has been made - we will put aside who made it - a proposal has been made and that the structure of that proposal will have a significant impact on the nature of the orders that can be recommended by the board; the reason for that being that the board has limited powers at clause 6, as we've already identified, to make any changes. Thus, absent the board acting on an intermediary proposal in the applicant's submission - so what the applicant is envisaging, as I've pointed out, is a ministerial proposal and then intermediate proposals by affected local governments or affected electors.

So what's being said now is that, absent the board acting on one of those intermediate proposals by an affected Local Government or an affected elector, then the board will be faced with - squarely with dealing with the ministerial proposal, and the Minister would know that. What's said about that is that that means that the Minister has to take care in relation to the manner in which the proposal is made because, as I've said, it will limit the powers of the board going forward.

The applicants say that the Minister is in a different position from affected local governments or affected electors, in the sense that they represent sectoral interests, as your Honour has pointed out. We might have a small pocket of affected electors on the applicant's case making a proposal in relation to a ministerial proposal, or an affected Local Government representing its interests under - in relation to its district.

But the Minister's interest in relation to a proposal that's made by the Minister to the board is a far broader thing, because what it encompasses is an expression by executive government as to its intentions in relation to the development of the Local Government system in Western Australia and, with great respect, your Honour, that much must be obvious from the process that we've enjoyed over the last 12 to 24 months. The Minister's powers to make proposals under clause 2(1)(a) of schedule 2 is conditioned by the objects of the Act in the applicant's respectful submission.

Now, I know, your Honour, that this is a proposition that appears in the - appears in the authorities and it appears with some force in the authorities, but as Blow J, as he then was, said in the Tasmanian case that's cited in the papers, there seems to be some dearth of authority in relation to the extent of that proposition. So what I would like to do is just take your Honour through the basis for the applicant's submissions in that regard.

MARTIN CJ: Yes.

SHANAHAN, MR: I will be as quick as I can. The primary case that the applicants rely upon is the Woollahra Municipal Council v The Minister for Environment. And your Honour will find that these submissions begin at page 20 of the applicant's outline.

MARTIN CJ: Yes. Yes.

SHANAHAN, MR: In that case, your Honour, it was an appeal to the New South Wales Court of Appeal concerning a decision by the Director of National Parks and Wildlife Service to authorise the use of land at South Head, being part of the Sydney National Park, for the purpose of a school of business administration for a four period. Pursuant to the state environmental legislation, the director in respect of the relevant land had a statutory power to grant any development approval that might be granted by a local authority and, in this instance, permitted uses included any purpose authorised by the National Parks and Wildlife Act.

The Minister granted the school a license to use relevant land and buildings under a provision of the NPW Act, and the director granted the school a license to carry on its business pursuant to another provision of that Act. The question in that case was whether the use of the land as a school of business administration was a purpose authorised by the Act. Gleeson CJ stated, at 715A to B - this is at paragraph 89 of the submissions, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: Do you have that?

MARTIN CJ: I've got the case.

SHANAHAN, MR: Excellent. So this is at pages 715A to B.

MARTIN CJ: Yes.

SHANAHAN, MR: The question is not the same as but is closely linked to the question of whether the Minister and director acted within power in granting the licenses under the two provisions of the relevant Act. His Honour the Chief Justice summarised arguments put for both parties from page 715D and his Honour noted that the respondents contended that the licensing powers conferred by the relevant provisions were unconfined at that provided they were exercised in good faith, the only sanction for an inappropriate exercise of power is political.

In short, that the relevant powers were plenary. That's the applicant's submission, not part of the case. This position is not unlike, the applicant contends, the Minister's position in these proceedings in which the Minister rejects the contention that his power to make a proposal was conditioned by the objects of the Act. In

- - -

MARTIN CJ: Well, no. I don't think he - I don't think that's the Minister's position.

SHANAHAN, MR: Well, certainly the Minister resists the applicant's position that the exercise of the Minister's statutory powers under the Act are conditioned by the objects.

MARTIN CJ: Well, as you construe them.

SHANAHAN, MR: Indeed.

MARTIN CJ: Yes.

SHANAHAN, MR: And I'm happy to take your Honour to those in due course, but - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - if there's no argument - - -

MARTIN CJ: I don't - I don't understand - - -

SHANAHAN, MR: If there's no argument about - - -

MARTIN CJ: The Minister - the Minister - you accept that the Minister's powers are constrained by such constraints as can be inferred from the objects of the Act, don't you, Mr Bydder?

BYDDER, MR: We do, your Honour, and I believe that's said rather shortly pungently in our written submissions.

MARTIN CJ: Yes. So I think you're pushing on an open door on the general principle.

SHANAHAN, MR: I like pushing on open doors, your Honour.

MARTIN CJ: Which of course goes back to Mason J in Peko-Wallsend.

SHANAHAN, MR: Indeed. Indeed. And also to Dixon J in - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - Swan Corporation - - -

MARTIN CJ: Yes.

SHANAHAN, MR: Swan Hill Corporation v Bradbury. Thank you. Well, that's happy, so we move on. So then the question becomes whether, if the Minister's powers are conditioned by the objects of the Act, that means that the Minister need necessarily have regard to access to the binding poll provisions under clause 8.1 when the Minister makes the proposal to the board. That's the heart of these proceedings.

MARTIN CJ: Yes.

SHANAHAN, MR: And what the applicant says is yes. The Minister should have regard to that. Not to the degree, I think, that appears in my - our friend's submissions, that he's bound to make - to give access to the binding poll provisions under clause 8.1, but that he give consideration to it and that all things being equal and there being no lawful reason not to, that he should ensure that, to the extent possible, proposals do.

MARTIN CJ: Have we shifted to ground 1 now? Away from ground - - -

SHANAHAN, MR: I think that we're definitely in ground 1 now. Yes, your Honour.

MARTIN CJ: Yes. All right. All right.

SHANAHAN, MR: I'm sorry.

MARTIN CJ: I understand that. Well - - -

SHANAHAN, MR: When I stopped making submissions regarding the definitions of affected local governments and affected electors and clause - - -

MARTIN CJ: So - - -

SHANAHAN, MR: And schedule 2.2 - - -

MARTIN CJ: So now we're into ground 1. Just in - clarify for me that ground 1 only relates to proposals made by the Minister, doesn't it?

SHANAHAN, MR: Bear with me, your Honour.

MARTIN CJ: The only challenge in ground 1 is the - to the validity - - -

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: - - - of proposals made by the Minister.

SHANAHAN, MR: Yes.

MARTIN CJ: Now, just as a matter of fact, how many of those proposals - he made 12.

SHANAHAN, MR: 12.

MARTIN CJ: How many of those were accepted by the board?

SHANAHAN, MR: 1.

MARTIN CJ: And which - which proposal was that?

SHANAHAN, MR: That was the City of Swan, your Honour, and the number for that was 05 2013.

MARTIN CJ: So that's the City of Swan 05.

SHANAHAN, MR: Yes.

MARTIN CJ: And your clients aren't affected by that proposal, are they?

SHANAHAN, MR: No. That's so.

MARTIN CJ: So how does ground 1 have any continued relevance to your clients?

SHANAHAN, MR: Well, your Honour, the applicant's position is that the status of the ministerial proposal for the purpose of this process has been influential in terms of the outcome arrived at by the Advisory Board. Now, I'm not making ground 4 yet, but what we say in the submissions in reply - bear with me, your Honour. Well, perhaps before I do that, can I just take your Honour to the submissions in reply at page 20. Your Honour will see under the - under the legend "City of South Perth", "City of Subiaco" what the situation was in relation to the different proposals affecting the applicants in these proceedings.

MARTIN CJ: Yes. So there were before the board proposals made by local authorities which you say under ground 3 were invalid because there was no antecedent proposal by the Minister, but assuming that ground fails - - -

SHANAHAN, MR: Yes. Yes.

MARTIN CJ: - - - there are valid proposals before the board which - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - which the board was required to inquire into, then along came the Minister - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - with his other proposals - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - all of which the board rejected.

SHANAHAN, MR: Yes.

MARTIN CJ: So what does it matter - - -

SHANAHAN, MR: So - - -

MARTIN CJ: - - - what the Minister's proposals were?

SHANAHAN, MR: So the proposition - I've just been trying to find the passage in the submissions in reply. Could your Honour just give me a moment. Your Honour, the point is that in relation to the Shire of Serpentine Jarrahdale, for example - well, let me start with a first proposition. The board's recommendations were made during the course of these proceedings. In other words, these proceedings were on foot. The attack by the applicants on the - on the ministerial proposals was known to the board at the time that the board produced its recommendations in relation to these matters. That's the first point.

MARTIN CJ: What does that point go to? It's just irrelevant.

SHANAHAN, MR: Well - - -

MARTIN CJ: The question is whether there is any legal significance in the Minister's proposal remaining, because if there isn't, then you know as well as I do that I can't grant any relief in relation to it.

SHANAHAN, MR: Your Honour, if I can take you to paragraph 16 of the submissions in reply.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour, we accept that if the ministerial proposal - the ministerial proposals are out, we can't get any relief in relation to those matters in

relation to the applicants, but what is being said is that your Honour has to appreciate the way in which this process has developed. And this may be more relevant to the other grounds in the sense that during the course of these proceedings the - it's - the board's deliberations in relation to its inquiry were conducted during the course of these proceedings. The attack by the applicants on the ministerial proposals has seen almost all of the ministerial proposals rejected by the board, but that doesn't mean that the outcomes haven't been influenced by the ministerial proposals.

MARTIN CJ: Well, how - well, in the sense that the board took them into account as it was obliged to do, but it rejected them.

SHANAHAN, MR: Well - - -

MARTIN CJ: So why does the validity of the Minister's proposal - why would my ruling on the validity of the proposals that the board has rejected have any significance to anybody?

SHANAHAN, MR: I'm not going to that now, your Honour. I'm talking about the manner in which the board's process worked.

MARTIN CJ: Well, ground 1 seeks declarations of invalidity of the Minister's proposals.

SHANAHAN, MR: No. I accept that, your Honour. I've just accepted that.

MARTIN CJ: So why does - why would - why on earth would a court do that when they've been rejected?

SHANAHAN, MR: Well, I've just accepted that, your Honour. I don't - I don't press that.

MARTIN CJ: All right. So we don't need to worry about ground 1?

SHANAHAN, MR: Well, ground 1 has a number of different elements, your Honour.

MARTIN CJ: But they're all directed at the invalidity of the Minister's proposals.

SHANAHAN, MR: They are.

MARTIN CJ: So why are we bothering with it?

SHANAHAN, MR: I don't press it, your Honour.

MARTIN CJ: All right. The same goes for ground 2, doesn't it?

SHANAHAN, MR: Well, I think the - I think the issue in relation - well, let me say this: in relation to - can I just go back to ground 1 very briefly and say this: the fact of the decision to make those proposals is a fact. The fact that the Advisory Board didn't rely - ultimately accept them or rely upon them doesn't mean that a declaration in relation to the making of those proposals is otiose, because - - -

MARTIN CJ: Well, do you abandon ground 1 or not, Mr Shanahan?

SHANAHAN, MR: I've abandoned ground 1, your Honour.

MARTIN CJ: All right. Well, then - - -

SHANAHAN, MR: I don't - I don't - I withdraw that.

MARTIN CJ: I'm sorry. You?

SHANAHAN, MR: Just withdraw that last bit.

MARTIN CJ: You don't abandon ground 1?

SHANAHAN, MR: I just said I withdraw the last submission, your Honour.

MARTIN CJ: All right. Thank you.

SHANAHAN, MR: I think that - - -

MARTIN CJ: Well, ground 2 must fall too, mustn't it?

SHANAHAN, MR: Well, again what the - well, the applicant will say in relation to ground 2 that the contents of a proposal is a matter of significant public interest and that the nature of the submissions - sorry - the nature of the proposals made by the Minister in that regard is a matter of fact. Those proposals - - -

MARTIN CJ: But whether or not - the only effect of my accepting ground 2 would be to declare the proposals invalid because they didn't comply with the requirements of clause 2.2 - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - of schedule 2.1

SHANAHAN, MR: Yes. And that's not without - - -

MARTIN CJ: And that - that would serve no purpose at all because the proposals - all proposals relevant to your clients have been rejected. So why would - why would the court do that just because somebody is interested in knowing whether or not the proposals were valid at the time they were made.

SHANAHAN, MR: Well, given the - given the proposals to extend this process into other parts of Western Australia, your Honour, I think that there is a significant public interest in those matters.

MARTIN CJ: Well, you know that the law - the law - we don't decide things just because the public is interested in them - - -

SHANAHAN, MR: No.

MARTIN CJ: - - - Mr Shanahan.

SHANAHAN, MR: No, your Honour. I appreciate that.

MARTIN CJ: Well, do you press ground 2 or not?

SHANAHAN, MR: No.

MARTIN CJ: All right. So that's abandoned?

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: Yes. All right. Where do we go now?

SHANAHAN, MR: Ground - well, I think perhaps we could deal with 2527.

MARTIN CJ: Yes. Well, what about ground 4; do you want to say anything about ground 4?

SHANAHAN, MR: Well, I do, but that seems to be a separate - of a separate nature - - -

MARTIN CJ: All right.

SHANAHAN, MR: - - - to 2527. I'm happy to do ground 4 now if your Honour wishes.

MARTIN CJ: No. No. Whichever - I don't - you choose the sequence.

SHANAHAN, MR: Thank you. 2527.

MARTIN CJ: Yes.

SHANAHAN, MR: If your Honour would just give me moment to locate my place. Thank you, your Honour. 2527.

MARTIN CJ: Yes.

SHANAHAN, MR: If your Honour will just give me a moment to locate my place. The - your Honour, the point in 2527 is that the board made a report under schedule 2.1 to the Minister.

MARTIN CJ: Yes.

SHANAHAN, MR: The Minister upon receiving that report then purported to accept or reject recommendations by the board, and he did so in a public statement. I don't know if your Honour has had a chance to read that.

MARTIN CJ: Yes. I have.

SHANAHAN, MR: The Minister's power to accept or reject recommendations by the Advisory Board is - we've covered it. It's at clause. I've taken your Honour through those provisions.

MARTIN CJ: Well, the Minister has now said in the case of South Perth that whatever he said should be construed as being subject to the clause 8 procedure, which he accepts has to be followed.

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: And so there's no remaining issue in relation to South Perth, is there?

SHANAHAN, MR: Other than the fact that the Minister's - the Minister's expression of intent is still there. It hasn't been - - -

MARTIN CJ: Well, except he comes to this court through counsel and says "I accept that the procedure mandated by clause 8 must be followed in relation to South Perth and Victoria Park and this if clause 10.2 is satisfied in the sense that 50 per cent of the electors in those districts

vote and a majority of - one or more of them says no, then I can't accept the recommendation."

SHANAHAN, MR: I appreciate that, your Honour, but - - -

MARTIN CJ: So he accepts all the propositions - he's telling the court through counsel that he accepts all the propositions you put, so there's no remaining live issue in relation to South Perth, is there?

SHANAHAN, MR: The - well, a remaining live issue, your Honour, is the conduct of any poll that might be requested and the significance of the Minister's statement in the context of that poll, and the relief that the applicants seek in relation to that is simply that the Minister publish statements in the same manner in which he published his acceptance or rejection, making the point that your Honour has just made to me. And that that is necessary so that the conduct of the poll under schedule 2.1, clause 8(1), if it's requested and if it's held, is conducted appropriately.

MARTIN CJ: Some kind of argument in aid of electoral regularity, is it? It's difficult to see, but - - -

SHANAHAN, MR: Well, your Honour, fairness.

MARTIN CJ: The pleadings as formulated seek a declaration that a poll has to be held in relation to South Perth. Well, the Minister concedes that.

SHANAHAN, MR: Well, your Honour, the point is that the Minister needs to withdraw his acceptance prior to a poll being conducted, otherwise the nature of the poll is not being conducted in the context which is envisaged by schedule 2.1.

MARTIN CJ: I don't sit to tell the Minister how he should perform his duties, Mr Shanahan. I sit to determine the validity or otherwise of his actions.

SHANAHAN, MR: I appreciate that.

MARTIN CJ: And that's all that was raised by the proceedings.

SHANAHAN, MR: I appreciate that, your Honour. I'm certainly not putting any other proposition. I'm simply putting the proposition that the Minister has acted prematurely, he has come out and made public statements about these recommendations which he should have, and he

needs to remedy that, not only by advice to you through counsel in these proceedings, but by advice to the people that have read the public statements that he has made in the context of a poll that might be required under clause 8(1). That's the point.

MARTIN CJ: Yes.

SHANAHAN, MR: In relation to the other applicants, your Honour, the position of the Shire of Serpentine Jarrahdale and the position of the City of Subiaco rests on the position in relation to 1923 as to whether or not they are entitled under clause 8(1) to a poll.

MARTIN CJ: Yes.

SHANAHAN, MR: And I put that to one side for a moment.

MARTIN CJ: Well, that goes to the - your - that's something you haven't - in oral argument you've advanced argument in support of ground 3 - - -

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: - - - in 1923, which is to the effect that the proposals that were ultimately accepted by the board were invalid because they were initiated by local governments at a time prior to - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - the Minister's proposal.

SHANAHAN, MR: And now - - -

MARTIN CJ: And now you haven't developed argument in relation to the construction which you would place on clause 8(1), but you - are you content to rely on your written - - -

SHANAHAN, MR: That's what - that's what - that's what I intend to do now, your Honour.

MARTIN CJ: All right.

SHANAHAN, MR: If your Honour - - -

MARTIN CJ: All right. Good.

SHANAHAN, MR: - - - is happy with that.

MARTIN CJ: Yes.

SHANAHAN, MR: If I can take you to page 10 of the applicant's statement. I don't know if your Honour still has a copy of the statement of facts, legal propositions, submissions in support of the substituted application which the applicants - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - filed, but that's where - I didn't include it in the applicant's submissions, because I didn't want to repeat it. Page 10, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: Paragraph 1.26.

MARTIN CJ: Yes. This is essentially the proposition that where one local authority is abolished and amalgamated into another, the second is effectively abolished.

SHANAHAN, MR: Yes. So - - -

MARTIN CJ: And so there are two or more.

SHANAHAN, MR: Yes. If I could put it this way, your Honour, A and B are adjacent districts. What happens is that there is a proposal accepted by the board which moves the boundary from - of A, it does away with that boundary and moves it to the outer marker of, say, the south of B, so effectively encompassing all of B. B is abolished and there's a boundary change, and that's what the proposal says. What the applicants say about that is that what has happened is that both A and B have been abolished because you're left with A plus B. Even where A plus B is renamed in the same name that was used by either A or B prior to the abolition.

MARTIN CJ: Well, the problem with that is the language of the clause, isn't it, because clause 8 requires that there be two or more districts abolished.

SHANAHAN, MR: Yes.

MARTIN CJ: Now, of course, the Parliament could have said abolish one or more district and amalgamate it into one or more districts - - -

SHANAHAN, MR: It could.

MARTIN CJ: - - - and every time a district is abolished, unless that district is going to be - cease to be part of local government, because the population has left or something of that sort, it will necessarily be amalgamated into one or more other districts, won't it, when it's abolished?

SHANAHAN, MR: Yes.

MARTIN CJ: So Parliament could have said the making of an order to abolish one district and amalgamate it into one or more districts will entitle the electors to a poll, and if it had, then that would correspond exactly to what you say, wouldn't it?

SHANAHAN, MR: Well, if they chose to - - -

MARTIN CJ: But it - - -

SHANAHAN, MR: - - - put it in those terms, yes, your Honour. But that doesn't - - -

MARTIN CJ: It didn't. Parliament said there has to be two or more districts abolished and both of those districts have to be amalgamated - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - into one or more.

SHANAHAN, MR: Which is effectively what I just described by - and if I could put it again so that your Honour can see what is being put. A adjacent to B.

MARTIN CJ: Yes.

SHANAHAN, MR: B is abolished. The boundary - the boundary is then moved to encompass all of A plus B.

MARTIN CJ: Yes.

SHANAHAN, MR: B no longer exists. What we're talking about is a constructive abolition for the purpose of avoiding the binding poll provisions under clause A.

MARTIN CJ: That would - that scenario would be the case every time a district is abolished, necessarily, there will be a change in the boundaries of the districts into which that district is amalgamated.

SHANAHAN, MR: Not unless there's - - -

MARTIN CJ: So - - -

SHANAHAN, MR: Not - I'm sorry, your Honour.

MARTIN CJ: So on your view of the - the word - the number 2 has no work to do at all.

SHANAHAN, MR: Well, unfortunately, your Honour, I think that that factual scenario you just put to me must be wrong, because on occasion there will be a - there will be a district which is divided between three other districts.

MARTIN CJ: Yes.

SHANAHAN, MR: It won't - - -

MARTIN CJ: It's amalgamated into one or more other districts.

SHANAHAN, MR: Yes.

MARTIN CJ: So part of whatever it is goes to - to use your analogy - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - part goes to - - -

SHANAHAN, MR: B, C or D.

MARTIN CJ: - - - B, part goes to C, part goes to D. So the second limb is satisfied. It is amalgamated into one or more other districts.

SHANAHAN, MR: There's no doubt in the proposition that I just put to your Honour that A and B are amalgamated. Can we agree on that. A and B are definitely amalgamated. B is definitely - - -

MARTIN CJ: Well, B has been amalgamated into A.

SHANAHAN, MR: Well, let's just start with the basic proposition and that is that A and B are amalgamated. And we can say that B is abolished because that is the language of the proposal. So we can't argue about that. We've got one abolition and an amalgamation. The question that the applicant is asking the court to consider is whether the combination of A plus B is effectively to abolish A, and we say that that must be so because A plus B can be renamed anything.

The simple fact that the author of the proposal chooses to call A plus B what A was called prior to the boundary change is really, in the applicant's submission, irrelevant. Because what is different is that the district is different. A no longer exists. And it the effect of that, your Honour, is that any proposal for an amalgamation would give rise to a poll, then the applicant says that's entirely consistent with the objects and the intent of the Act, because that's what section 1.3(2)(b) says. I haven't taken your Honour to that, and I don't know if your Honour wishes me to take you to that, but this is the - - -

MARTIN CJ: Well, that was - - -

SHANAHAN, MR: This is - - -

MARTIN CJ: Yes. I understand that. But I think in - well - - -

SHANAHAN, MR: Well, can I take you to it, please?

MARTIN CJ: Yes. By all means.

SHANAHAN, MR: 1.3(2)(b):

This act is intended to result in ... greater community participation in the decisions and affairs of local governments

And what the applicants take from that - - -

MARTIN CJ: All right. Well, read - you need to read all of those provisions as a whole - - -

SHANAHAN, MR: I'm happy to do that, your Honour.

MARTIN CJ: - - - and you need to read them in the context of subsection (1). Subsection (1) provides for a system of local governments.

SHANAHAN, MR: Which includes polls.

MARTIN CJ: And subsection (2) has four limbs. They are:

better decision-making by local governments

That is, the entities created by the Act.

SHANAHAN, MR: Yes.

MARTIN CJ: (c) is - we will skip over (c) and come back.

Greater accountability of local governments to their communities.

SHANAHAN, MR: Yes.

MARTIN CJ: So that's relationship between the - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - government and the governed. And (d) is:

More efficient and effective Local Government.

SHANAHAN, MR: Yes.

MARTIN CJ: So all of those objectives are related to the performance of Local Government vis-à-vis the governed, and (b) surely is the same. It's:

Greater community participation in the decisions and affairs of Local Government.

So that is governing the relationship between a Local Government and the citizens affected - - -

SHANAHAN, MR: No, your Honour.

MARTIN CJ: - - - by the activities of that Local Government. It's a very different thing to the constitution of the boundaries and districts of the Act
- - -

SHANAHAN, MR: I - - -

MARTIN CJ: - - - which is governed by clause - schedule 2.1.

SHANAHAN, MR: I understand your Honour's point. But what the applicants say is is that the reference to the affairs of local governments clearly involves polls and elections of the type included at schedule 2.1 and - - -

MARTIN CJ: No, it doesn't. Why would you say that?

SHANAHAN, MR: Well, if - your Honour, if I could just develop the submission.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour has the ultimate power in this matter, and I'm sure if - - -

MARTIN CJ: Well, clause 8 - - -

SHANAHAN, MR: - - - I can't convince you, we will find out about it.

MARTIN CJ: Clause 8, the participation of the community within the process mandated by schedule 2.1 is identified in two material respects. It's first through the opportunity to participate in any inquiry conducted by the board, the obligation of the board to give notice to effective electors and to invite submissions, and then the second opportunity for public engagement is through the operation of clause 8. But clause 8 only applies in defined circumstances, and so how does clause 1.3(2)(b) shed any light on the proper construction of clause 8, because it's clear that the purpose of the parliament in enacting clause 8 was to restrict the circumstances in which electors were entitled to demand a poll.

SHANAHAN, MR: It does so by conditioning the exercise by the Minister of statutory power under the Act, and if I could just take your Honour to a passage out of Gerlach, Kirby J. Bear with me for a moment. At paragraph 93, your Honour, on page 22 of the applicant's outline.

MARTIN CJ: Yes. Well, I've got the case, so which - - -

SHANAHAN, MR: At 725G.

MARTIN CJ: Gerlach?

SHANAHAN, MR: Yes. I'm sorry. I'm sorry.

MARTIN CJ: (indistinct) that Commonwealth - - -

SHANAHAN, MR: I'm in Woollahra Municipal Council.

MARTIN CJ: Woollahra. All right.

SHANAHAN, MR: Yes. 725G.

MARTIN CJ: I had it a minute ago. Anyway, read me the passage then, Mr Shanahan.

SHANAHAN, MR: Continuing:

It is true that, by section 31 of the Act, the director is given, in wide terms, the care, control and

management of, relevantly, national parks. But this power is not uncontrolled. As with any power or discretion conferred by Parliament, it is not granted to the director to be exercised at his whim or for purposes, however worthy, which are not properly characterised as being for the attainment of the objects for which the power has been conferred.

MARTIN CJ: Now, what has this got to do with ground - the ground - - -

SHANAHAN, MR: Just - - -

MARTIN CJ: - - - relating to the proper construction of clause 8? That's a passage directed at the constraints upon the Minister's purpose.

SHANAHAN, MR: Yes.

MARTIN CJ: So - - -

SHANAHAN, MR: And I'm just - - -

MARTIN CJ: I thought the argument we were dealing with now involved the question of whether clause 8 applies to the abolition of one district by its joinder to another.

SHANAHAN, MR: Well, your Honour, perhaps then if I can just backtrack a little and say this: that the basis for the applicant's argument that the amalgamation of (a) and (b) in the manner that I've described to you is a constructive abolition of one Local Government district and the express abolition of another whilst effecting an amalgamation is based on the proposition that the Act is intended to further the intentions that are set out explicitly, which is the next passage from - Kirby J talks about where these intentions are expressly set out, which is what I wanted to take your Honour to, but - - -

MARTIN CJ: Well, the bit you just read to me was all about the purpose of a decision maker.

SHANAHAN, MR: Well, I wanted to put it in context, your Honour.

MARTIN CJ: But we're in the area of statutory construction, aren't we?

SHANAHAN, MR: Yes.

MARTIN CJ: So is the proposition that the objects of the Act inform the construction to be given to its provisions?

SHANAHAN, MR: Well, the basic proposition is easily put, your Honour. It's like this. If the Minister, in order to avoid the binding poll provisions, manipulates - well, I will use - - -

MARTIN CJ: That's ground 1.

SHANAHAN, MR: - - - a different word.

MARTIN CJ: That's ground 1. We're talking now about the proper construction of clause 8, aren't we?

SHANAHAN, MR: Yes.

MARTIN CJ: Well, you've abandoned ground 1, so - - -

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: So why are we talking about the Minister's purpose?

SHANAHAN, MR: Because I'm trying to give your Honour an example of why the construction that's contended for must be accepted.

MARTIN CJ: All right.

SHANAHAN, MR: If it was possible for the Minister to avoid the poll provisions simply by describing an abolition as a boundary change, then if executive government wanted to avoid the binding poll provisions under clause 8, that's all it need do.

MARTIN CJ: But the proper construction of clause 8 will turn upon the question of whether a district is being abolished, not the nomenclature used by the parties.

SHANAHAN, MR: That's the point.

MARTIN CJ: So - - -

SHANAHAN, MR: Exactly the point, your Honour.

MARTIN CJ: Well, I agree with that, with respect.

SHANAHAN, MR: Yes.

MARTIN CJ: The question remains does there have to be one district abolished or two?

SHANAHAN, MR: There has to be two, your Honour. That much is self evident - - -

MARTIN CJ: But then - - -

SHANAHAN, MR: - - - by the terms of clause 8(1).

MARTIN CJ: But then, if one district is abolished and amalgamated into another, as contemplated by the clause, that's not the abolition of two.

SHANAHAN, MR: The problem with your Honour's scenario, the very last part, and that's what I've been trying to engage, is not that it's the same district. Your Honour keeps talking - - -

MARTIN CJ: Well, I understand that. But the problem that I think you're not confronting is that, every time a district is abolished, by definition it will be amalgamated into other districts. Therefore, if the scenario you posit triggers a poll then number (2) in clause 8 has no work to do.

SHANAHAN, MR: And that's why I was taking your Honour to the objects of the Act, to demonstrate that, in the applicant's contention, that the Act is designed to give that type of access to affected electors, and that such a construction of the Act is entirely consistent with the objects and gives the maximum amount of community participation in Local Government affairs, which includes such polls. That's the point.

MARTIN CJ: All right. Well, I understand the point.

SHANAHAN, MR: Thank you, your Honour. Sorry, your Honour. We will go to ground 4, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: The applicant's submissions begin at page 32 of the outline.

MARTIN CJ: Yes.

SHANAHAN, MR: I don't seek to try your Honour by running through accepted principle, which is the - - -

MARTIN CJ: Well, let's just deal with the ground first. You move to amend - you filed a minute of proposed amendments. You haven't spoken of the amendments, and I assume we don't need to trouble with the amendments to ground 1 because that has been abandoned.

SHANAHAN, MR: That's so, your Honour.

MARTIN CJ: And the same with - but there is an amendment to ground 4.

SHANAHAN, MR: Just bear with me, your Honour. Your Honour will recall that, when these proceedings began, the applicants were agitating a matter in relation to ground 1, which related to an inferred intention.

MARTIN CJ: Yes.

SHANAHAN, MR: And, since then, the Minister has agreed the facts at the statement of agreed facts 24.

MARTIN CJ: Yes.

SHANAHAN, MR: And that statement acknowledged to a particular meeting of the Swan division of the Liberal Party the reasons - well, reasons that he stated as to why he had adopted the process that's before the court today.

MARTIN CJ: Yes.

SHANAHAN, MR: And what the applicant seeks to do in relation to those matters is to pick that up. I'm sorry.

MARTIN CJ: Well, what's the Minister's purpose got to do with anything now that you've abandoned ground 1? Ground 4 is concerned with the validity of the actions by the board members.

SHANAHAN, MR: That's so, your Honour.

MARTIN CJ: So then the Minister's purpose is irrelevant, isn't it?

SHANAHAN, MR: Yes.

MARTIN CJ: So you don't press the amendment to ground 4?

SHANAHAN, MR: Your Honour, the amendment at 4.3 goes to whether or not the board acted independently, not the Minister's purpose.

MARTIN CJ: Well, why did you talk - why did you raise the Minister's purpose with me?

SHANAHAN, MR: I'm sorry, your Honour. I'm sorry, your Honour. I was at a tangent. I apologise.

MARTIN CJ: All right. Well, what is the proposition that you seek to advance under the amendment?

SHANAHAN, MR: That, by reason of the matters set out at paragraphs 4.1 or, alternatively, on the basis that the board did not act independently of the Minister in discharging its obligations under schedule - - -

MARTIN CJ: Well - - -

SHANAHAN, MR: - - - 2.1 of the Act, the rest follows.

MARTIN CJ: Well, the problem with that is that it doesn't say why the board didn't act independently, because it's not by reason of the matter set out in paragraph 4.1 - 4.2 the amendment would allow you to introduce, at the last minute, an extremely broad allegation of acting under - effectively acting under direction, which is not substantiated by any particulars.

SHANAHAN, MR: Did your Honour - - -

MARTIN CJ: Why would I allow that at this stage?

SHANAHAN, MR: Did your Honour see the particulars that were provided in the submissions in reply?

MARTIN CJ: Well, it's a very late stage of the proceedings. They were provided yesterday?

SHANAHAN, MR: Yes.

MARTIN CJ: The submissions in reply?

SHANAHAN, MR: Yes, your Honour. Well, we got - - -

MARTIN CJ: Well, why I would allow you to introduce - what is the assertion that you wish to make? You want to say that - - -

SHANAHAN, MR: Well, the particulars - - -

MARTIN CJ: - - - the board acted under dictation, do you?

SHANAHAN, MR: The particulars are set out, your Honour.
Paragraph 53 of - - -

MARTIN CJ: All right. Well, perhaps you had better take them to me.

SHANAHAN, MR: Of the submissions in reply.

MARTIN CJ: Yes.

SHANAHAN, MR: It's certainly not an - - -

MARTIN CJ: Paragraph?

SHANAHAN, MR: 53. Page 12, your Honour.

MARTIN CJ: So the amendment - will these particulars be introduced as part of the amendment?

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: All right. Well, that's not the amendment though. That's a claim of reasonable apprehension of bias.

SHANAHAN, MR: That's the basis on which it's advanced, your Honour.

MARTIN CJ: Well, that's not what 4.3 says. 4.3 says lack of independence. That's an assertion that the board was acting under dictation, whereas the particulars involve an allegation that the communications gave rise to a perception of bias. They're quite different things.

SHANAHAN, MR: Well, perhaps that could be cured be the addition of the words in the amendment at paragraph 4.3, "herein, alternatively, on the basis that the board could be apprehended by" - "could be apprehended - - -"

MARTIN CJ: So it's not an "acting under direction" argument.

SHANAHAN, MR: No.

MARTIN CJ: It's a "perception of bias" - - -

SHANAHAN, MR: Bias.

MARTIN CJ: - - - argument.

SHANAHAN, MR: It's a reasonable apprehension of bias point, your Honour.

MARTIN CJ: All right.

SHANAHAN, MR: That's in - - -

MARTIN CJ: Well, that's not - - -

SHANAHAN, MR: It's in the particulars.

MARTIN CJ: But that's - all right. Well, do you want to formulate the amendment?

SHANAHAN, MR: Yes, your Honour:

Alternatively, on the basis that the board could be apprehended as not acting impartially in the discharge of its obligations under schedule 2.1 of the Act.

MARTIN CJ: So just read me that again, "Alternatively, on the basis that the board - - -"

SHANAHAN, MR:

...that the board could be apprehended as not acting impartially in discharging its obligations under schedule 2.1 of the Act.

The LG Act.

MARTIN CJ: Right. And the particulars then would be - instead of being particulars of lack of independence, they would be particulars of apprehended bias.

SHANAHAN, MR: Apprehension. Indeed, your Honour.

MARTIN CJ: Particulars of apprehended bias.

SHANAHAN, MR: Apprehended bias. Yes. And, your Honour, perhaps I should formally move that as an amendment at this stage.

MARTIN CJ: Yes. All right. Well, I think it would be useful if you provide a minute in due course, but I will hear what Mr Bydder has to say about it.

SHANAHAN, MR: Thank you, your Honour.

MARTIN CJ: Mr Bydder.

BYDDER, MR: Your Honour, the difficulty with that formulation is that it still appears to be suggesting, in fact, actual bias (indistinct) bias not apprehended bias.

It speaks (indistinct) may be apprehended as not acting impartially. It is also a very late amendment in the day. But, your Honour, we're prepared - - -

MARTIN CJ: Well - - -

BYDDER, MR: I'm sorry. I don't mean to cut off your Honour off.

MARTIN CJ: Yes. No. Sorry.

BYDDER, MR: We're prepared to deal with a reasonable apprehension of bias proposition despite the lateness.

MARTIN CJ: Well, as I understand it, it is limited to the fact that there were discussions between the Minister and - - -

BYDDER, MR: And certain persons.

MARTIN CJ: Certain persons.

BYDDER, MR: Well, whatever may be made of that. What I say about it, your Honour, is that that's something that we can deal with today if your Honour is minded to grant leave.

MARTIN CJ: But it is - but provided it's confined to apprehended bias - - -

BYDDER, MR: Indeed, your Honour.

MARTIN CJ: - - - rather than actual bias.

BYDDER, MR: And, of course, in relation to the three proposals in which - in respect of which the applicants are standing. The other observation - and this is simply by way of suggestion - is that if it's proposed to deal with it by leave to amend, I wonder if perhaps, in an endeavour to be helpful - and I hope not presumptuous - is to suggest that instead of those words that appear in paragraph 53 under the heading Particulars of Lack of Independence being particulars, they simply find their place as - or ground 4.2(a), and then 4.3 could be by reason of the matter set out in paragraphs 4.1, 4.2 and 4.2(a). Herein - omit the insertion and the rest follows. And I say that simply because I am concerned, your Honour, there is some - - -

MARTIN CJ: Yes.

BYDDER, MR: - - - flavour of actual bias in what has been offered by the applicants. If it please.

MARTIN CJ: Yes. Well, Mr Shanahan, that would be neat, wouldn't it?

SHANAHAN, MR: Happy with that, your Honour.

MARTIN CJ: So we would amend four point - we would amend clause 4 to put in 4.2(a), which would be - there would be no heading to it. It would just be the facts asserted in your - - -

SHANAHAN, MR: Particulars.

MARTIN CJ: Your paragraph 53.

SHANAHAN, MR: Yes.

MARTIN CJ: And then - - -

SHANAHAN, MR: In the particulars in paragraph 53.

MARTIN CJ: And then 4.3 would simply read - you would add in 4.2(a).

SHANAHAN, MR: Yes.

MARTIN CJ: And it's clear that that's an apprehended bias point.

SHANAHAN, MR: Yes.

MARTIN CJ: All right. Well, leave will be granted in those terms.

SHANAHAN, MR: Thank you, your Honour. And, your Honour, we will prepare a minute.

MARTIN CJ: And if you could produce a minute - - -

SHANAHAN, MR: We will produce a minute.

MARTIN CJ: - - - in due course, that would be helpful.

SHANAHAN, MR: Thank you.

MARTIN CJ: Thank you.

SHANAHAN, MR: Your Honour, before I start on ground 4, can I say this, that the applicants don't seek to cast any

aspersions on any member of the board or deputies of the board in making this application. It's made on the basis of a reasonable apprehension of bias. So coming back to where I was, your Honour, I don't want to recite the principles that your Honour is familiar with and that are readily accepted, but in order to build the applicants' ground, perhaps it's worth doing some of that. At page 32 of the applicants' outline, paragraph 148 - - -

MARTIN CJ: Yes.

SHANAHAN, MR: The applicants make the proposition that compliance with the principles of procedural fairness is a condition on the valid exercise of statutory power. At 149:

The failure by a decision-maker to comply with the principles of procedural fairness means that the decision-maker is taken outside jurisdiction.

150:

One aspect of the duty to accord procedural fairness requires a decision-maker to be free of actual or the appearance of disqualifying bias.

And here the ground is put on the basis of - on the appearance of disqualifying bias. At 151:

A test for apprehended bias set out in *Ebner* is whether a fair-minded observer might reasonably apprehend that the decision-maker might not bring an impartial mind to the decision-making process.

One - - -

MARTIN CJ: Well, that's not quite what the Court of Appeal said in *Re MacTiernan*, is it? In relation - *Ebner* was about judicial bias.

SHANAHAN, MR: Indeed.

MARTIN CJ: And the principles with respect to administrative bias are a little different, aren't they?

SHANAHAN, MR: Thank you, your Honour.

MARTIN CJ: And they've been enunciated in this state in *Re MacTiernan*; *ex parte Coogee Coastal Action Coalition*, haven't they? You don't disagree with anything said in - - -

SHANAHAN, MR: No, your Honour.

MARTIN CJ: All right.

SHANAHAN, MR:

The strictness with the test applied will depend on the functions imposed by statute on the decision-maker. The test does not require a conclusion about what factors actually influence the outcome.

So there's no reference here to what actually happened. It's a question of whether or not there's a reasonable apprehension of bias.

MARTIN CJ: Yes.

SHANAHAN, MR: And I note that in my friend's submissions, there seem to be some concern with the actual outcome of the process and the applicants say that's entirely irrelevant:

The application of a test requires a consideration of all the circumstances -

so that includes the statutory context and decision-making structure which I think we've now been over in some detail -

the task committed to the decision-maker -

in this case, the board under the Act, which, again, I think we've been over in some detail:

the objective facts which are material to the allegation of apprehended bias -

which is the bit that I haven't taken your Honour to, and I take you to those passages and documents as we move through. And your Honour will see that that emerges from *Re MacTiernan*; *ex parte* - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - Coogee Coastal Action Coalition:

Where the apprehension of bias is applicable to only some members of a multi-member body -

your Honour pointed out that nice questions can arise in relation to whether a disqualification of a person so

taints a group where the group makes up the decision-maker. What the applicants advance in this matter is the contention at 156, that:

Once bias of one or members of a multi-member body is established, such bias taints the others.

And your Honour will see that there's a collection of authority for that proposition there.

The applicants contend that the decision of the Advisory Board are tainted by conflicts of interest on three bases. One, that the Advisory Board misapprehended its independent role, and the applicants say that emerges from its contact with the Minister and the department during the process of its inquiry under schedule 2.1. And I will take your Honour to the evidence in a moment.

MARTIN CJ: Well, that paragraph of your submission is not about apprehended bias, is it. That's about actual bias. You say the Advisory Board misapprehended its role.

SHANAHAN, MR: Well, can I rephrase that submission, then. What is being put is this: is that a reasonable - reasonably minded observer being made aware of the contact between the Minister and the board during the course of the board's inquiry could reasonably apprehend bias against the relevant test. That's the point, and I'm sorry if I've put that inelegantly.

MARTIN CJ: So any contact at all?

SHANAHAN, MR: I don't think it's any contact at all, your Honour. That seems to be a proposal that we can reject immediately. But the - - -

MARTIN CJ: All right. Well, you will take me in due course to the evidence about the nature of the communications, will you?

SHANAHAN, MR: Yes. Yes. I will, your Honour. It has to be something material that gives rise to an apprehension of bias.

MARTIN CJ: It has got to be something that a fair-minded - - -

SHANAHAN, MR: Indeed.

MARTIN CJ: - - - observer would conclude would result in the members of the board - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - not bringing an impartial mind to bear on the issues which they have to determine.

SHANAHAN, MR: One would imagine that the Minister might socialise with members of the board from time to time. That type of contact would have been entirely unremarkable. At 2, the participation in the Advisory Board's deliberations by departmental officers. And can I say this, that the point that the applicant makes about this is this: under the Act the structure - maybe I should take your Honour to those provisions.

MARTIN CJ: I'm aware of it.

SHANAHAN, MR: You're familiar with them.

MARTIN CJ: The departmental officer is a member of the board?

SHANAHAN, MR: An ex officio, effectively.

MARTIN CJ: An ex officio member of the board. And must be - if the person appointed by the Minister is not present, the departmental officer has to be present to comprise a quorum - - -

SHANAHAN, MR: And can preside.

MARTIN CJ: - - - and in the absence of the chairman appointed by the Minister, the departmental officer chairs the board.

SHANAHAN, MR: Yes. Yes.

MARTIN CJ: So the departmental officer has a significant role to play - - -

SHANAHAN, MR: Indeed.

MARTIN CJ: - - - in the work of the board. So the mere fact that he's a member of the - he or she is a member of the Department cannot - - -

SHANAHAN, MR: No.

MARTIN CJ: - - - give rise to a perception of bias.

SHANAHAN, MR: No. No. No.

MARTIN CJ: So there has to be more to it than that.

SHANAHAN, MR: Indeed. There has to - there has to be something material, if I can just use that word again, which links the nature of the departmental officer's role in - within the department to the conduct of that person whilst on the board that gives to the apprehension that I've spoken of.

MARTIN CJ: Yes.

SHANAHAN, MR: And the ministerial order seeking to cure a perceived conflict of interest under clause 7.8 of schedule 2.5 was made after the inquiry had commenced and after a lengthy period of deliberations had already expired. And I will take your Honour to that in a moment. So I won't take your Honour to the provisions regarding the structure of the board if your Honour is satisfied - - -

MARTIN CJ: I'm familiar with them.

SHANAHAN, MR: If - perhaps if I could start generally and then work to the particular. If the board - if the advisory board was unable to discharge its statutory - the advisory board is unable to discharge its statutory functions according to law, in the applicant's submission, unless it is independent, and that means that a reasonable apprehension of bias becomes quite a significant matter in relation to a body such as the board with the powers that it has, particularly in relation to the process that we're dealing with today.

I've talked - I've already made submissions around Professor Saunders' paper in relation to independence. Shortly after the announcement of the government plan, Counsellor Congerton, who is the chair of the Advisory Board, expressed - well, in the - if I can take your Honour to trial bundle document page - document 5. Sorry.

MARTIN CJ: Page?

SHANAHAN, MR: Bear with me, your Honour. Page 16.

MARTIN CJ: Thank you.

SHANAHAN, MR: If your Honour could just bear with me for a moment, please.

MARTIN CJ: Yes. Yes. There's two documents, your Honour. The first one is page 5 and the second is at tab 5. So if we could start with page 5.

SHANAHAN, MR: Page 5.

SHANAHAN, MR: Volume 1.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour will see, as per the applicant's submissions, that Counsellor Congerton expressed his support for the government plan to the Minister. That's in the latter - in the email at the bottom of the page.

MARTIN CJ: Sorry.

SHANAHAN, MR:

Let the Minister know from me that he is doing a great job in the trenches. In the words of Churchill, we will prevail.

MARTIN CJ: Well, what do you ask me to infer from that?

SHANAHAN, MR: We ask your Honour to infer from that that a reasonable person looking at that might apprehend that the chair of the Advisory Board supports the government plan for the reduction of local government councils - districts in the metropolitan area.

MARTIN CJ: Well, this was in July 2013.

SHANAHAN, MR: Yes. At the - - -

MARTIN CJ: The Minister's proposals hadn't been lodged then.

SHANAHAN, MR: No. That's so. But this is - but this government - - -

MARTIN CJ: So when you say - you can't therefore be referring to the government plan as that term is defined in the proceedings, because that didn't emerge until the Minister - you say that was reflected in the Minister's 12 proposals.

SHANAHAN, MR: Well, your Honour, the applicants would say that the beginning of the government plan was when the Minister distributed plans, maps, to local governments

setting out what the - what the government's plan was for the metropolitan area and encouraged those local governments to make their own proposals, and that that process began a long time before the Minister made proposals and that the Minister has made statements to local government saying if you don't make a proposal consistent with the government's maps, government plan, that the Minister would make his own proposals. And that material is in the papers. I don't have those references
- - -

MARTIN CJ: Yes. No. I've seen it. I've seen it.

SHANAHAN, MR: - - - but I would be happy to take you to it.

MARTIN CJ: No. I've seen it.

SHANAHAN, MR: But that's the basis on which I make that submission.

MARTIN CJ: All right.

SHANAHAN, MR: And, your Honour, if I could take you then to tab 5 at page 16. Does your Honour have that? There's a heading Commissioners; does your Honour see that?

MARTIN CJ: Yes. Yes.

SHANAHAN, MR: And there's a proposition put by the chairman of the board to Joanne Webber, who I think it's common ground is the Minister's chief of staff, that:

It was very remiss of me not to throw in my CV (previously provided) into the pot for a position as a commissioner should - - -

MARTIN CJ: Well, yes. Where does - where does this fit into your grounds? Can you explain that - - -

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: - - - to me. Because the ground itself relates to - there are two things within the ground. It relates to a local government of which a member or deputy was members, employees or electors, and the second aspect of it is the - all the departmental officials.

SHANAHAN, MR: Can I take you to the new paragraph 4.2A
- - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - which now sits at paragraph 53, page 12 of the submissions in reply.

MARTIN CJ: Yes.

SHANAHAN, MR:

The board, through the board's chairman, held discussions with the Minister and/or his Department -

and "Minister" should be read as the Minister or his - including his office.

MARTIN CJ: Yes.

SHANAHAN, MR:

...regarding the Minister's views concerning metropolitan local government amalgamation in circumstances which gave rise to a reasonable apprehension of bias.

MARTIN CJ: Well, that's my question. What has this got - how has that got anything to do with that?

SHANAHAN, MR: Well - - -

MARTIN CJ: That has not got anything to do with the Minister's views concerning metropolitan local government amalgamation, has it?

SHANAHAN, MR: Well, we say it does, your Honour. 5 - page 5 effectively says that the - the chairman of the advisory board is in total - in agreement with the Minister - - -

MARTIN CJ: No. No. No. I'm talking about the - the page we're on now is page 16.

SHANAHAN, MR: I'm so sorry. I'm so sorry.

MARTIN CJ: At page 16 - - -

SHANAHAN, MR: Well, these - this is part of - - -

MARTIN CJ: - - - he says he is putting in his CV for - - -

SHANAHAN, MR: This is - - -

MARTIN CJ: - - - should a commissioner be (indistinct).
What has that got to do with any pleaded ground?

SHANAHAN, MR: It's part of the circumstances, your
Honour, that might give reason to a reasonable apprehension
of bias if - - -

MARTIN CJ: Well, it's not pleaded. It's not - what is
it, that there's some improper relationship between the
- - -

SHANAHAN, MR: That there's a reasonable - there may -
there may be a reasonable apprehension that the - that the
chairman of the board may have had expectations in relation
to - - -

MARTIN CJ: Where is that pleaded?

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: It's not, is it?

SHANAHAN, MR: I don't press it.

MARTIN CJ: All right. So we can forget about page 16,
then?

SHANAHAN, MR: We can.

MARTIN CJ: Yes.

SHANAHAN, MR: If I can take you to trial bundle volume 1
at tab 10.

MARTIN CJ: Yes.

SHANAHAN, MR: Page 25.

MARTIN CJ: Yes.

SHANAHAN, MR: Below point 5.

MARTIN CJ: Yes.

SHANAHAN, MR: Does your Honour have that?

MARTIN CJ: Yes.

SHANAHAN, MR:

Mr Congerton advised members that the Minister wished to meet the board on Thursday, 31 October to discuss policy issues associated with the reform. The time and venue for the meeting is yet to be confirmed.

MARTIN CJ: Yes.

SHANAHAN, MR: So that's the only meeting of the Advisory Board in the relevant period where no minutes were taken.

MARTIN CJ: Yes.

SHANAHAN, MR: The Minister - - -

MARTIN CJ: So we don't know what was said.

SHANAHAN, MR: No. No. We don't.

MARTIN CJ: All right.

SHANAHAN, MR: And what we say - what we say by that, your Honour, is that's one of the circumstances that may give rise to a reasonable apprehension of bias, because in the event that there's a contact between the Minister who is the author of 12 proposals, as we've agreed, in relation to a government plan which is trying to effect major changes to the metropolitan area of Perth, that where you have un-minuted meetings with members of the Advisory Board who are going to make recommendations to him under schedule 2.1, that may give rise to a reasonable apprehension of bias in a fair-minded observer.

And your Honour will find at the statement of agreed facts - if I could take you to that, at paragraphs 19.2 and 20.

MARTIN CJ: So we're finished with - all right (indistinct).

SHANAHAN, MR: I think we're going to be going back to the bundles. I'm sorry. Some of the material that's in the agreed facts has been drawn directly from the minutes.

MARTIN CJ: Yes.

SHANAHAN, MR: If I could just ask your Honour to read paragraph 19.2 of the statement of agreed facts.

MARTIN CJ: I've just got to find it. 19.2.

SHANAHAN, MR: Page 6, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: So what's put there is that this is direct contact between the department and the board. And it anticipates direct contact between the Minister and the board in relation to the Minister's proposals.

MARTIN CJ: The Minister could have put a submission before the board, couldn't he?

SHANAHAN, MR: There's no reason why the Minister couldn't put a submission before the board if he wished to, your Honour, but that would be public. That's the point.

MARTIN CJ: So the complaint is that the Minister has done something in private that he could have done in public. That's said to give rise to the fair-minded lay observer's perception of bias.

SHANAHAN, MR: No, your Honour. That's not the proposition. The proposition is we don't know what the Minister did in private. He could - your Honour asked me a question, "Could he have made a submission?" Obviously, yes, the Minister could have made a submission. The question is, what did he do - sorry. Start again. The submission is, there's a reasonable apprehension of bias because we don't know what he did do. And it would have been easy to remedy that either by the course your Honour has just suggested or by minuting meetings.

MARTIN CJ: So the proposition then is the apprehension of bias arises from the failure to keep a record of his communications with the board. Is that - - -

SHANAHAN, MR: That's - - -

MARTIN CJ: Is that the proposition?

SHANAHAN, MR: That's part of it. And the other part of the proposition, I think, must be that to the extent - we - it's unknown. Yes. I think that's the extent of it. Yes.

MARTIN CJ: Yes. All right. So if he had met with the board and kept a record of what was said, you wouldn't haven't any complaint.

SHANAHAN, MR: As long as what he said to the board was appropriate, your Honour, yes, and lawful. But we don't know. That's the point.

MARTIN CJ: Well, you can't ask me to infer that anything inappropriate was said from a vacuum, can you?

SHANAHAN, MR: What we can ask your Honour to consider is whether a fair-minded observer, looking at that, might be concerned that there is direct unminuted contact between the Minister and the very board that is to determine the outcome and recommendations in relation to the whole plan for alteration of boundaries and local government districts and metropolitan Perth.

MARTIN CJ: Yes. All right.

SHANAHAN, MR: And, at 20 - I've taken your Honour to that proposition. This is the board meeting on 31 October, which wasn't minuted.

MARTIN CJ: Yes.

SHANAHAN, MR: Then at 163 of the submissions, your Honour will see that subsequent to that meeting on 31 October 2013, Councillor Congerton met regularly with the Minister to update him on the Advisory Board's deliberations and how the Advisory Board intended to proceed on some matters. And your Honour will find that statement of agreed facts at 26. It's at the bottom of that page.

MARTIN CJ: Yes.

SHANAHAN, MR: And that references documents in the trial bundle that your Honour will be able to cross-reference. I don't want to take you to all the material, but if you - if your Honour flips over the page, onto page 8 - - -

MARTIN CJ: Yes.

SHANAHAN, MR: Does your Honour see subparagraphs 26.1 through to 26.8?

MARTIN CJ: Yes.

SHANAHAN, MR: What the applicants sought to do there is to find for - find all of the circumstances in which it's said that there has been this contact - direct contact between the Minister and the board, or - - -

MARTIN CJ: Well, one member of the board, isn't it?

SHANAHAN, MR: Or one member of the board. The chairman
- - -

MARTIN CJ: There's only contact with the entire board on one occasion; is that right?

SHANAHAN, MR: 31 October. Yes, your Honour.

MARTIN CJ: Yes. And all the other meetings were with Mr Congerton.

SHANAHAN, MR: No, your Honour. Can I take you to an example of what I'm saying. Can I take you to trial bundle document 12.

MARTIN CJ: Yes.

SHANAHAN, MR: Volume 1. More specifically, at page 34. Under the heading 5, halfway the page, does your Honour see Chair's Report?

MARTIN CJ: Yes.

SHANAHAN, MR: And the second paragraph:

Mr Congerton advised that he and R. Earnshaw, on behalf of the board - - -

MARTIN CJ: Yes.

SHANAHAN, MR:

- - - met with T. Fowler.

Now, Mr Fowler is a deputy member of the Advisory Board, but Mr Congerton - - -

MARTIN CJ: But he wasn't meeting in that capacity, was he?

SHANAHAN, MR: Well, this is the point, your Honour.

MARTIN CJ: He's probably meeting as a departmental officer. Who's Mr Earnshaw?

SHANAHAN, MR: The executive officer of the Advisory board, your Honour.

MARTIN CJ: Right. Thank you.

SHANAHAN, MR: The point that has been made here is that Mr Fowler was first appointed as the deputy of the board in 2011, and subsequently reappointed on 7 October 2013. And here we have a deputy member of the board, meeting with the

board, under the guide of being a - in his - in the context of him being a departmental officer. And the proposition that's put is that that represents an obvious conflict of interest where he has an interest on both sides of the advantage line within the meeting.

MARTIN CJ: But his interest as a departmental officer is him providing impartial and reasonable advice to his Minister, isn't it?

SHANAHAN, MR: As it is as an Advisory Board member, your Honour.

MARTIN CJ: Well, exactly. So where's the conflict?

SHANAHAN, MR: The conflict is that if the departmental officers that were appointed to the Advisory Board had no role to play in metropolitan and local government amalgamations, then they could have no conflict of interest in relation to sitting on matters - - -

MARTIN CJ: Well - - -

SHANAHAN, MR: - - - dealing - - -

MARTIN CJ: That doesn't address my point, Mr Shanahan.

SHANAHAN, MR: I was building up to it, your Honour.

MARTIN CJ: My point is that his obligation to the Minister is to provide him with reasonable and appropriate professional advice. He has the same obligation to - in his role in his participation as a member of the board. So where's the conflict?

SHANAHAN, MR: Because in his role in the board, he can't be bound by his departmental obligations, and - - -

MARTIN CJ: But nobody has - has anybody suggest he was?

SHANAHAN, MR: What has been - - -

MARTIN CJ: Where's - - -

SHANAHAN, MR: - - - said, your Honour, is that a fair-minded observer, seeing that a member of the board was acting on behalf of the department, in the context of the very issues that the board was seeking to decide, could form the view - could have a reasonable apprehension of bias - - -

MARTIN CJ: Right.

SHANAHAN, MR: - - - because there's an obvious conflict of interest, the applicants contend, where Mr Fowler, as your Honour has just pointed out, fairly, has obligations to the Minister. But the obligations that Mr Fowler has as a member of the Advisory Board are conditioned by the statutory obligations of a member of the advisory board, not his obligations to the department, and it's clear that, where the ministerial proposals might be being put up to be considered, if they are authored through the department, then that is an issue. And can I just take your Honour to Mr Fowler's job description, which appears in volume 3 of the bundle, so your Honour will have to swap files. Document 73. It's the - right at the back. In fact, it's the last document in that bundle.

MARTIN CJ: Yes.

SHANAHAN, MR: Can your Honour - sorry - page 1229.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour can see the job description form and the key work description. I will let your Honour read that.

MARTIN CJ: Yes. No. I've read it before, Mr Shanahan.

SHANAHAN, MR: And then a work description on the following page.

MARTIN CJ: Yes. And what's significant - this is 1231. Which parts would you intend me to focus on on 1231?

SHANAHAN, MR: Well, "shape and manage strategy", your Honour. There's a lot of strategy involved in the process by which the proposals were developed for Local Government amalgamation in the metropolitan area.

MARTIN CJ: Well, if you go to 1230, the whole focus of his job was to provide advice to the Director-General and through the Director-General to the Minister - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - with respect to Local Government reform.

SHANAHAN, MR: Indeed.

MARTIN CJ: And that was his same obligation to the board.

SHANAHAN, MR: Well, with great respect, your Honour, it must be different because the department, in advising the Minister on Local Government reform, advises the proposer of the changes.

MARTIN CJ: Yes.

SHANAHAN, MR: (indistinct) the context of acting on the board, Mr Fowler then acts as the inquirer and recommender, for want of a better word, in relation to those proposals. Your Honour might recall that, when I started my submissions today, I said that, you know, if the board is not independent then, ultimately, you end up with the Minister advising the Minister and - - -

MARTIN CJ: Did Mr Fowler participate in the assessment of the Minister's proposals?

SHANAHAN, MR: Yes.

MARTIN CJ: Well, you will take me to where he did in due course.

SHANAHAN, MR: Yes, your Honour. My learned junior points out that he participated in all of the board's deliberations, except to the extent that he was an elector in relation to particular districts that might be before the board. But perhaps, your Honour, the best way to deal with that is to give your Honour a list of where your Honour can find those occasions in - - -

MARTIN CJ: Well, he was only a deputy member of the board, so he was only - - -

SHANAHAN, MR: He was.

MARTIN CJ: - - - he could only act when Ms Adam wasn't available.

SHANAHAN, MR: Or when Ms Adam was chairing the board in the absence of Councillor Congerton, or there are several - this is why I wanted to take your Honour to the provisions at schedule 2.5, because there are a number of circumstances in which a deputy can act. Perhaps if I can just briefly take you there.

MARTIN CJ: Yes.

SHANAHAN, MR: That's at - it's at subclause 3(4) of schedule 2.5. Does your Honour have that?

MARTIN CJ: Yes. So it's in the absence of a member - yes.

SHANAHAN, MR: Where the member (indistinct) - - -

MARTIN CJ: So if Ms Adam was chairing, he could attend.

SHANAHAN, MR: Yes.

MARTIN CJ: Yes.

SHANAHAN, MR: Ms Adam disqualifies herself. Or if Ms Adam had retired from the office before the period - her period of appointment was complete.

MARTIN CJ: I see. Thank you.

SHANAHAN, MR: So we say the fact that Mr Fowler is meeting with the board in his separate role is very significant and provides a basis for the apprehension that we argue for and contend for. Taking your Honour to page 35 of the outline, so we're moving through it, paragraph 166.

MARTIN CJ: Yes.

SHANAHAN, MR: Page 35, 166.

MARTIN CJ: Yes.

SHANAHAN, MR: The applicants contend that, whilst clause 2 of schedule 2.5 requires the Minister to nominate a departmental officer, that doesn't abrogate the rule of - rule against bias or apprehended bias. On its proper construction, the Act is not quarantined from the application of bias - the bias for all members of the advisory board, including those members whose departmental roles include advising the Minister on any proposals he makes under schedule 2.1 of the government plan and who then participate in the exercise of the board's powers in relation to those proposals. And I would like to just say a little about Ms Adam now, if I might. Your Honour will see at 168 that Ms Adam's job description appears in volume 3. I'm sorry to have your Honour pulling the volumes out, but - - -

MARTIN CJ: I've read it before.

SHANAHAN, MR: Okay. Volume 3, 1225.

MARTIN CJ: Do we need to go to it, do we? All right.

SHANAHAN, MR: The significance of that, which appears at 72 in volume 3 - so it's the second document from the back.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour will see that the description of her job is:

Director of legal and legislative services in the Department of Local Government in the division of governance and legislation and in the branch of legislation.

Down the bottom there is a description of her key responsibilities, which are:

To provide leadership and management for the legislation branch, including the review of legislation and being the point of liaison with the State Solicitors Office, provide high level legal and policy legal advice to the Minister, Director-General and senior executive. As a member of the divisional management team, to contribute to departmental and divisional strategic and business planning, policy and development processes.

And the applicants say that that clearly would include, on the departmental side of Ms Adam's obligations, involvement with the program for - I haven't finished with that document, your Honour - with Local Government amalgamation. And your Honour will see that that's teased out on the following page at 1226:

Providing high level legal and policy advice to the Minister, Director-General and senior executive -

that's at point 5 in the list of details.

MARTIN CJ: Yes.

SHANAHAN, MR: And then, at point 8:

Liaising with the State Solicitor's Office to obtain advice on specific legal matters -

and then, at 10:

Liaising and negotiating with relevant stakeholders -

which, in the Local Government space, in the context of Local Government amalgamation, must include affected local governments in respect of the proposals then before the board, or at least a reasonable apprehension that it might be possibly the better way of putting it. So, in the ordinary course of her duties, the applicant contends that Ms Adam advised or was the conduit of advice for the Minister on the formulation of the government plan and the purported proposals during the course of the advisory board's inquiry on at least 11 June. And we have several documents that are noted there which are emails that show that advice is passing between various people. If I can take your Honour to the trial bundle volume 1 behind tab 53.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour will see this is a document that's almost entirely redacted.

MARTIN CJ: Yes.

SHANAHAN, MR: And essentially what's being said is that it's an email in the first instance from Mary Adam - at the bottom, your Honour will see that - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - to various people, including the Minister's chief of staff, Ms Webber, and that the details appear to relate to structural reform, which the applicant contends - and I'm now reading from the attachments at the top of the page in respect of the second email in the chain. Does your Honour see that?

MARTIN CJ: Well, I see an email chain. It starts with Ms Adam sending emails to various people on 11 June at 9.17.

SHANAHAN, MR: Yes. Including the Minister's chief of staff.

MARTIN CJ: And then there's another one from Ms Adam to Mr Earnshaw an hour later. I assume she has just forwarded the email to him.

SHANAHAN, MR: Indeed. And the attachments include structural reform, which the applicant says there's a reasonable apprehension relate to the process of Local Government change - Local Government amalgamation.

MARTIN CJ: Well, Ms Adam was a member of the board.

SHANAHAN, MR: Yes. But she's also a departmental officer, your Honour, with the same problems that Mr Fowler has. That's the point.

MARTIN CJ: Well, as a member of the board, she had to discuss structural reform in that capacity.

SHANAHAN, MR: Well - - -

MARTIN CJ: So what does this add?

SHANAHAN, MR: Well, that's so, your Honour. But - just bear with me for a second. Yes, your Honour will see that the chain starts with her signing as Director Legal and Legislative Services, Department of Local Government on page 351.

MARTIN CJ: Well, that's the standard finish to her email.

SHANAHAN, MR: Well, with great respect, the applicants contend that that suggests that this email is an email that has been provided by her to Mr Congerton, as your Honour will see at the top of 350 in the context of her role as a departmental officer, not as a member of the board.

MARTIN CJ: But wouldn't I infer that every email she sent on her computer that she used at her place of work would automatically finish that way? It's in a different font. It would be the standard finisher on her email. It tells you nothing about its contents, just that she's used a departmental email.

SHANAHAN, MR: Well, your Honour, what the applicants would say is that it would be inappropriate for somebody in Ms Adams' position in acting on behalf of the board in the context of her role as a member to employ departmental details in relation to who she is, because ultimately that would create the sort of apprehension that's the subject of this application.

MARTIN CJ: She had to be a departmental officer to be qualified for appointment.

SHANAHAN, MR: No, I accept that. I accept that, your Honour. But there's an issue here as to what context she is acting in at the time. We all have different obligations, and when it comes to how we exercise those obligations, we may have to think about how we present

ourselves. And I think what I'm being offered is a note that was forwarded to the board after originally being advice within the department. So perhaps your Honour might like to consider that.

MARTIN CJ: How do we know that? How do we know that?

SHANAHAN, MR: I think that that's advanced on the basis of the addressees to the first email. Well, we know, your Honour, that Ms Matthews is a departmental officer. We know that - I think Mr Hollingworth is a departmental officer.

MARTIN CJ: Well, the secretary of the board is a departmental officer.

SHANAHAN, MR: Indeed.

MARTIN CJ: So communications between the department and the board are not novel.

SHANAHAN, MR: As my learned junior points out, your Honour, the executive director is not a addressee of this particular email.

MARTIN CJ: But my point is, communications between the department and the board - - -

SHANAHAN, MR: I have it.

MARTIN CJ: - - - are contemplated by the structure of the board and the Act, which requires the secretary of the board to be a departmental officer.

SHANAHAN, MR: The applicants don't resist that proposition. But - - -

MARTIN CJ: Well, what is it about this communication that - - -

SHANAHAN, MR: I'm coming to it, your Honour. But what is put is that if Ms Adam, as a departmental member, departmental officer, with responsibility associated with metropolitan local government is providing advice regarding structural reform to Congerton, to the chairman, counsellor Congerton, then that represents a conflict of interest, because effectively what's happening is that Ms Adam is fulfilling obligations on both sides of the same process. It's not the fact that she is a departmental officer that is the vice. The problem is is that she has an active

interest on the departmental side in amalgamation of local government on behalf of the minister.

You can't reconcile, the applicant says, the interest as a departmental officer supporting the minister, as your Honour has pointed out, the obligation to provide advice to the minister of an appropriate - in an appropriate way with the role of the same person on the other side as a member of the Advisory Board. The two just don't go together, because once they go together, what you have is someone who is a primary adviser of the proposer becoming part of the inquirer and decision-maker.

And that's the vice that the applicant points to. And that's the vice that the applicant says gives rise to a reasonable apprehension that Ms Adam could not independently and impartially discharge her duty as a member of the Advisory Board in circumstances which were referable to the government plan. So Ms Adam may well be an appropriate board member in relation to a proposal regarding matters that she has had nothing to do with. Although I must say it's hard to imagine someone that senior in the local government department not having anything to do with ministerial proposals for change in local government. We're in the final straight, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: 171, on page 36. The contention is put that Mr Fowler's role within the department was special adviser legislation and reform. His role included providing strategic and expert advice to the director general of the department on matters of local government structural reform and assistance to the minister with the passage of reform legislation through the parliament. And your Honour will find that at volume 3 - I won't take your Honour back to the documents that we've already traversed, but that's the document that I took you to earlier. Further, he is one of five officers within the department for local government who is responsible for the metropolitan local government reform. How do we know that? I take your Honour to the statement of agreed facts at paragraph 11. Does your Honour see that?

MARTIN CJ: Yes, I do.

SHANAHAN, MR: If you don't mind, I will just read it quickly:

In August 2013, the Department of Local Government and Communities published an information kit for metropolitan local government reform which identified Mr Fowler as one of the departmental contacts who could provide information or assistance to local governments in implementing the government's reform model.

That really crystallises the vice that I have tried to describe earlier by pointing out that if Mr Fowler has this primary role in relation to the implementation of the government plan as a departmental officer, then that puts him in an impossible position as a deputy member of the board. At the Advisory Board meeting on 6 August 2013, Mr Fowler correctly identified that his role at the department would create a conflict of interest with his participation in the Advisory Board's deliberations on proposals for the Perth metropolitan area.

And your Honour will find that again in the statement of agreed facts at 13. Your Honour will see that during the course of that meeting, it was minuted that Counsellor Congerton suggested that 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, which the applicants understand as a reference to the departmental metropolitan review team. T. Fowler agreed and said that the new departmental member to be appointed in September 2013 would alleviate this problem. But that didn't happen.

MARTIN CJ: That was a reference to Ms Adam.

SHANAHAN, MR: I'm sorry, your Honour?

MARTIN CJ: That was a reference to Ms Adam. Ms Adam was appointed in October 2013. Isn't it - - -

SHANAHAN, MR: Well, as I pointed out to your Honour, all we know is that Mr Fowler was reappointed in late 2013, so to the extent that he had a conflict of interest, that continued to apply to the determinations of the board in which he participated.

MARTIN CJ: Yes, but I think - well, perhaps Mr Bydder will tell me if I'm wrong. But that was a reference, I think, to Ms Adams, pending appointment.

SHANAHAN, MR: Well, your Honour - - -

MARTIN CJ: Is that right, Mr Bydder?

BYDDER, MR: You do, your Honour. And, indeed, paragraph 7.2 of the statement of agreed facts, the date of appointment of Ms Adam is stated as 7 October - I should say, the commencement of her term was 7 October 2013.

MARTIN CJ: Yes, 7 October. Yes, thank you.

SHANAHAN, MR: It really doesn't make any difference to the applicant's contention though, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: I have already taken your Honour to the meeting between Mr Fowler and - as a departmental officer, and Counsellor Congerton as chair of the board. I'm not going to do that again. But the applicants contend that those matters taken together give rise to the reasonable apprehension that's contended for. And perhaps I should draw your Honour's attention to paragraph 176 of the outline at page 37.

MARTIN CJ: Yes.

SHANAHAN, MR: Does your Honour see that his Honour Gibbs J in *S'roffery v Greyhound Racing Control Board* (1972) 128 CLR 509 at 527 observed that:

The very presence of a person who has brought forward a complaint may even unconsciously inhibit the discussion and affect the deliberations of other members of the tribunal.

The reason for including that in that context is the suggestion that if you have departmental officers who are primarily responsible, as Mr Fowler apparently was, for local government reform sitting in the bowels of the Advisory Board during the course of its inquiry, that can have implications and occasion outcomes that are simply not manageable because of other people's perceptions about whether or not Mr Fowler is speaking with the voice of the minister or not. That's the point. At section 5.3 - this is the last section on ground 4 - this relates to the order made by the minister under clause 7(8) of schedule 2.5. Your Honour will be familiar with that?

MARTIN CJ: Yes.

SHANAHAN, MR: Yes. The point of the first paragraph is simply to point out that this order was made after the inquiry had had a significant travel.

MARTIN CJ: Well, the effect of the order is to exclude the application of clause 7(7).

SHANAHAN, MR: Yes.

MARTIN CJ: Were there any breaches of clause 7(7) prior to the order being made on the evidence?

SHANAHAN, MR: We say there were, your Honour. If I could take you to the - it's in the submissions in reply, your Honour, to - - -

MARTIN CJ: Well, this is the occasions upon which you say that members of the board excused themselves for discussion about districts of which they were a member, elector or employee - - -

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: - - - but returned to discuss adjacent districts?

SHANAHAN, MR: I'm sorry. Could you repeat that?

MARTIN CJ: Returned to discuss districts adjacent to the district of which they were a member, elector or employee.

SHANAHAN, MR: We say they shouldn't have participated. Yes, your Honour.

MARTIN CJ: But that's not a breach of 7(7), is it?

SHANAHAN, MR: Just bear with me, your Honour. Your Honour, the applicants contend that where there's a discussion in relation to districts adjacent to - as your Honour has pointed out to the applicants several times today through the course of submissions, adjacent districts are, essentially, engaged by changes to - - -

MARTIN CJ: Well, only if there was a proposal to change the boundary between the two districts.

SHANAHAN, MR: Well, if there are proposals that affect the adjacent district, so the boundary, the names. There might be a number of different ways in which that could occur.

MARTIN CJ: Well, there would have to be some way in which the proposal to the adjacent district bore upon the district of which the board member was a member - - -

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: - - - under clause 7(7). And you can't infer that merely from the fact that the district was adjacent.

SHANAHAN, MR: Just bear with me, your Honour. I think the point is made, your Honour, in relation to the minutes of the meeting that appear at - behind tab 39 in volume 1.

MARTIN CJ: Volume 1. Yes.

SHANAHAN, MR: At page 223.

MARTIN CJ: So whereabouts on that page do we go to?

SHANAHAN, MR: Page 223.

MARTIN CJ: Yes.

SHANAHAN, MR: At point 6, at the bottom of the page, your Honour.

MARTIN CJ: Yes. City of Bayswater.

SHANAHAN, MR: That's the proposal.

MARTIN CJ: All right. Now, who do you say had an interest in this, who shouldn't have been there?

SHANAHAN, MR: Councillor Congerton, because he declared an interest as a member and elector of the City of Swan.

MARTIN CJ: But he wasn't at the meeting, was he?

SHANAHAN, MR: Yes, your Honour.

MARTIN CJ: Go back to page 220.

SHANAHAN, MR: I'm sorry. Bear with me. I'm sorry, your Honour. Could I just have a minute.

MARTIN CJ: Yes.

SHANAHAN, MR: We don't press paragraph 106.1, your Honour.

MARTIN CJ: Thank you. Well, can you point me to any instance in which there was a breach of clause 7(7) - - -

SHANAHAN, MR: I'm - - -

MARTIN CJ: - - - prior to the ministerial declaration?

SHANAHAN, MR: I'm coming to that, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: Can I say, we don't press 106.3 or 4 either.

MARTIN CJ: All right. Let me just - - -

SHANAHAN, MR: So that only leaves us 106.2.

MARTIN CJ: All right. Let me just - hang on. 106, you're referring to - - -

SHANAHAN, MR: 106.2 on page 21. No. I'm talking about the applicants' submissions, your Honour. Can I take you back to that?

MARTIN CJ: Page 21 of the applicants' submissions.

SHANAHAN, MR: Applicants' submissions.

MARTIN CJ: Yes.

SHANAHAN, MR: Does your Honour see paragraph 106?

MARTIN CJ: The applicants' submissions on page 21.

SHANAHAN, MR: Yes.

MARTIN CJ: I've got 90 and 91.

SHANAHAN, MR: I'm sorry. The submissions in reply.

MARTIN CJ: Submissions in reply.

SHANAHAN, MR: I'm sorry about - - -

MARTIN CJ: Right. So we can forget about 106.1?

SHANAHAN, MR: Yes. 106.3.

MARTIN CJ: 106.3. Yes.

SHANAHAN, MR: And 106.4.

MARTIN CJ: And 106.4.

SHANAHAN, MR: Which takes us back to 106.2.

MARTIN CJ: Right.

SHANAHAN, MR: And if your Honour will just give me a moment.

MARTIN CJ: Yes. Well, this concerns discussion about the proposal relating to the City of Vincent.

SHANAHAN, MR: Yes.

MARTIN CJ: It has got nothing to do with your clients, has it?

SHANAHAN, MR: No longer. So I think we're obliged to
- - -

MARTIN CJ: So we can forget about - - -

SHANAHAN, MR: 106.2 as well, your Honour.

MARTIN CJ: And that means that there is no basis - - -

SHANAHAN, MR: We - - -

MARTIN CJ: - - - for a submission that 707 - - -

SHANAHAN, MR: We move away from - - -

MARTIN CJ: Clause 7(7) was breached prior to the ministerial declaration.

SHANAHAN, MR: We move away from that. Yes. We don't press that.

MARTIN CJ: Yes. All right. Thank you.

SHANAHAN, MR: I'm told, your Honour, that that particular - perhaps if we could go back to 106.2. I'm being told that that particular meeting discussed proposal 17 which engages the City of Subiaco.

MARTIN CJ: All right.

SHANAHAN, MR: It's just that it's not teased out in that paragraph of the submissions. If your Honour will just give me a couple of minutes, I will just try and sort that out and then I will give you a response.

MARTIN CJ: Yes.

SHANAHAN, MR: I'm sorry, your Honour. Can I say this is the last point before the lunch, so - - -

MARTIN CJ: All right. So there is no submission that there was a breach of 7(7).

SHANAHAN, MR: I'm still trying to work that out, your Honour.

MARTIN CJ: All right.

SHANAHAN, MR: If you just give me a moment.

MARTIN CJ: Yes. All right.

SHANAHAN, MR: Your Honour, we maintain the contention at paragraph 106.2 in relation to 7(7) - - -

MARTIN CJ: All right.

SHANAHAN, MR: - - - on the basis that - and we're now in the submissions in reply at page 21.

MARTIN CJ: Yes.

SHANAHAN, MR: We're maintaining 1062 on the basis that at that meeting on 19 May the board discussed proposal 17, which affected the City of Subiaco, so whilst that's not teased out in that particular - - -

MARTIN CJ: All right. Well - - -

SHANAHAN, MR: - - - paragraph - - -

MARTIN CJ: - - - can you take me - can you take me to the minutes and explain the submission.

SHANAHAN, MR: Yes. Could I take your Honour to tab 43 in volume 1.

MARTIN CJ: Yes.

SHANAHAN, MR: I will take you to page 265.

MARTIN CJ: I'm sorry. Could I have that page number again, Mr - - -

SHANAHAN, MR: 265, your Honour.

MARTIN CJ: Thank you.

SHANAHAN, MR: It's behind tab 43.

MARTIN CJ: Yes.

SHANAHAN, MR: Although it is some way in. And perhaps it's better if I start right behind tab 43, just so your Honour is clear about what we're talking about.

MARTIN CJ: Yes.

SHANAHAN, MR: You will see that these are the minutes of the meeting of the board, the Advisory Board - - -

MARTIN CJ: 19 May. Yes.

SHANAHAN, MR: - - - held on Monday, 19 May 2014. And there were no apologies. The leaves of absence related to Ms Mary Adams, and there were no declarations of interest. That's on page 1.

MARTIN CJ: Yes.

SHANAHAN, MR: But - and those who attended included those who are set out under the heading Present or Attendee.

MARTIN CJ: Yes.

SHANAHAN, MR: And if I can take your Honour to - now to page 265, you will see that the board considered a proposal 17, which is titled the Town of Cambridge.

MARTIN CJ: Yes.

SHANAHAN, MR: That proposal affects the City of Subiaco.

MARTIN CJ: All right. And why do you say - who do you say was precluded from participation by 17(7) and why?

SHANAHAN, MR: We say Counsellor Dullard, because - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - she participated in the deliberations in circumstances in which she was an elector of the City of Vincent - - -

MARTIN CJ: All right.

SHANAHAN, MR: - - - and - - -

MARTIN CJ: So does proposal 17 relate to the City of Vincent?

SHANAHAN, MR: Yes.

MARTIN CJ: All right. Well, can you show me where - - -

SHANAHAN, MR: Can I take you to the map.

MARTIN CJ: Where that's demonstrated.

SHANAHAN, MR: The map is probably the easiest way to show your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: And that's at volume 3.

MARTIN CJ: Yes.

SHANAHAN, MR: I'm sorry to do that to you. Volume 3. Behind tab - well, behind tab 7, which is most of the volume, at page 1126.

MARTIN CJ: Sorry. Page?

SHANAHAN, MR: Page 1126.

MARTIN CJ: 1126. All right.

SHANAHAN, MR: Does your Honour see it's 2.17 at the top?

MARTIN CJ: Yes.

SHANAHAN, MR: Proposal 17, Town of Cambridge.

MARTIN CJ: Yes.

SHANAHAN, MR: And can your Honour see that the boundary of the proposal has a boundary shared with the City of Vincent - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - and the proposal includes the City of Subiaco.

MARTIN CJ: But Counsellor Dullard is an elector - I'm sorry. Ms Dullard is an elector in Vincent.

SHANAHAN, MR: In Vincent.

MARTIN CJ: The proposal doesn't include the City of Vincent. It's adjacent to it.

SHANAHAN, MR: It impacts on the boundary with the City of Vincent.

MARTIN CJ: But as I read that map, that is the boundary of the City of Vincent. There is no suggestion that it be varied.

SHANAHAN, MR: We don't press it, your Honour. We don't press it.

MARTIN CJ: All right. So we get back to the point where there is no submission that there was a breach of - - -

SHANAHAN, MR: We do. That's so.

MARTIN CJ: - - - 7(7). All right.

SHANAHAN, MR: And that's - - -

MARTIN CJ: All right.

SHANAHAN, MR: And that concludes the applicant's submissions in relation to ground 4.

MARTIN CJ: Yes.

SHANAHAN, MR: And in relation to both actions, with the exception of some procedural matters - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - that I wanted to raise with your Honour, but perhaps that's best done at the end of the proceedings today.

MARTIN CJ: Well, what are the procedural matters?

SHANAHAN, MR: Well, your Honour would then have had an opportunity at the end of the proceedings today to have heard argument from both sides as to the merits of the - of the applicant's contentions, and we've foreshadowed that we would seek interlocutory injunction in - - -

MARTIN CJ: Well, I haven't heard all the argument yet, Mr Shanahan, but it's my - - -

SHANAHAN, MR: That's so.

MARTIN CJ: - - - present intention to give my decision today.

SHANAHAN, MR: Thank you, your Honour.

MARTIN CJ: Yes. Mr Bydder, do you want to use the five minutes before lunch?

BYDDER, MR: Your Honour, I wonder if it would be better if we simply start at 2.

MARTIN CJ: Yes.

BYDDER, MR: Although I can say - - -

MARTIN CJ: How long do you think you will be, Mr Bydder?

BYDDER, MR: I was about to say to your Honour I would hope to be no more than an hour, on the basis that we've provided detailed written submissions and, with respect, your Honour has plainly read them.

MARTIN CJ: Yes.

BYDDER, MR: I simply propose to supplement them as much as necessary and then - - -

MARTIN CJ: Yes. Well, as I say, I would like to give my decision today, and that may take a little time. Counsel, would it be stretching your digestion to return at 1.45?

SHANAHAN, MR: No, your Honour.

MARTIN CJ: Mr Bydder?

BYDDER, MR: No, your Honour.

MARTIN CJ: All right. We will resume at 1.45, then. The court will now adjourn.

(LUNCHEON ADJOURNMENT)

MARTIN CJ: Yes, Mr Shanahan.

SHANAHAN, MR: Your Honour, I have the minute that I promised.

MARTIN CJ: Yes. Thank you very much. That's very helpful.

SHANAHAN, MR: There's four copies there.

MARTIN CJ: Thank you. And while you're on your feet, Mr Shanahan, there's one question that I would like to ask you. Shortly before the adjournment you effectively abandoned that aspect of ground 4 which relates to contravention of clause 7(7), leaving only, as I understand it, two aspects of ground 4, that is, the involvement of the departmental officers, Ms Adam and Mr Fowler, and the communications between the Minister and the board through - sometimes directly through the board and sometimes through Mr Congerton. And the proposition, as I apprehend, underpinning both of those discrete areas of the ground is that a fair minded lay observer would perceive that the board was not bringing an impartial mind to bear upon the assessment of the proposals because it was being unduly influenced by the Minister. Is that right?

SHANAHAN, MR: Yes.

MARTIN CJ: Now, the fair minded lay observer might apprehend that that would impede the board's impartial assessment of the Minister's proposals, but why would the fair minded lay observer consider that that would have any impact upon the board's assessment of the other proposals considered by the board. And, of course, I raise that question in the context that you've conceded that the board's recommendations with respect to the Minister's proposals had had no impact upon your clients.

SHANAHAN, MR: Because, your Honour, as I tried to explain during my submissions in-chief, the fact of this litigation has been ongoing throughout the course of the board's inquiry, and it would be - we say that - well, the applicant contends that the manner in which the board has produced its recommendations with an absence of reliance on ministerial proposals is a direct product of that, and that the influence of the Minister in relation to how the board has gone about the - about its recommendations is not limited to endorsing the elements of the ministerial proposals.

MARTIN CJ: Well - - -

SHANAHAN, MR: But I just need to give you - I just need to give you one example of that, and that is in relation to Serpentine-Jarrahdale, where the board ultimately made recommendations on the basis of a proposal advanced by the City of Armadale, that that proposal, the form of it was almost identical - identical to the ministerial proposal. And - - -

MARTIN CJ: Well, is there any other evidence to sustain the proposition that the board shaped its recommendations because of these proceedings?

SHANAHAN, MR: We say - well, now your Honour is putting it in a slightly different context. What I'm advancing on behalf of the applicants is this proposition. The evidence shows that, to a fair minded lay observer, there was contact between the Minister and the board throughout the process of its inquiry which led to its recommendations. On an account of the evidence - and I tried to take your Honour to it in-chief - there is a congruence between the ministerial proposals and the outcomes in relation to our clients, particularly in relation to Serpentine-Jarrahdale and South Perth.

Particularly in Serpentine-Jarrahdale it can be demonstrated. So what's being advanced is that the connection between the Minister, through departmental officers or communications or otherwise, meant that the Minister continued to have influence in relation to the recommendations, because the Minister - I think this is the point. A fair minded lay observer would know that the Minister had a crucial interest in the recommendations made by the board, and what's being put is that the - that the conclusions by the board, particularly in relation to Serpentine-Jarrahdale - and I would have to develop it in relation to the other applicants - was such that it was congruent with the ministerial proposal and, therefore, your Honour's suggestion to the applicants that that precludes the conflict of interest ground, we would reject that and say that it doesn't.

MARTIN CJ: All right. Thank you, Mr Shanahan. Mr Bydder.

SHANAHAN, MR: Your Honour - sorry. I'm sorry.

MARTIN CJ: Yes.

SHANAHAN, MR: If I could just give you the references in the papers - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - to the relevant proposals that I'm taking your Honour to in relation to Serpentine-Jarrahdale
- - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - with a view to providing you with more detail around the congruence that I'm talking about, as it may relate to our other clients.

MARTIN CJ: Well, I've seen them and the board expressly acknowledged the similarity between the - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - Armadale proposal and the Minister's proposal.

SHANAHAN, MR: Indeed, your Honour, and you might recall - I would take you to them - the minutes of the board - if I could. There is a passage in one of the board meetings where what the board says is that they don't need to assess the Armadale proposal because it's exactly the same as 11/2013, which was the ministerial proposal. That's the point.

MARTIN CJ: All right.

SHANAHAN, MR: Thank you.

MARTIN CJ: Thank you, Mr Shanahan. Mr Bydder.

BYDDER, MR: May it please the court. Your Honour, I propose to address five matters orally.

MARTIN CJ: Yes.

BYDDER, MR: Before I do that, I adopt our written submissions - - -

MARTIN CJ: Yes. Thank you.

BYDDER, MR: - - - in both matters. The matters I propose to address orally, your Honour, are, firstly, grounds 3.2 and 3.3, which go to the question of who can make a proposal.

MARTIN CJ: Yes.

BYDDER, MR: The second and third matters that I propose to address, your Honour, go to clause 8 - sorry - the second, third and fourth - and that is the entitlement to request a poll under clause 8.

MARTIN CJ: Yes.

BYDDER, MR: Whether the Minister can reject a recommendation to which clause 8 would otherwise apply without waiting for that process to unfold.

MARTIN CJ: That's what I might call the Peppermint Grove point. Yes.

BYDDER, MR: Very apt, your Honour, with respect. And, finally, in respect of clause 8, whether proposals 5 and 17 fall within clause 8 - - -

MARTIN CJ: Yes.

BYDDER, MR: - - - the boundary adjustment versus abolition point.

MARTIN CJ: Yes. Thank you.

BYDDER, MR: I finally then propose to deal with the question of conflict of interest, your Honour. What I don't propose to do, unless it would assist your Honour, is to address the question of relief - - -

MARTIN CJ: No.

BYDDER, MR: - - - given that your Honour has - - -

MARTIN CJ: No. There's no need to address me on that. I will give my reasons this afternoon, hopefully, and we can - - -

BYDDER, MR: And then it will follow.

MARTIN CJ: - - - worry about relief after that.

BYDDER, MR: As your Honour pleases. So if I can then go to grounds 3.2 and 3.3 and who can make a proposal, your Honour. The starting point is necessarily clause 2, subclause (1) of schedule 2.1, because clause 2 is the clause which expressly confers power on three categories of person - - -

MARTIN CJ: Yes.

BYDDER, MR: - - - to make a proposal. Those are the Minister, an affected Local Government or two affected local governments jointly, or the requisite number of affected electors. And it's necessary, your Honour, to have regard to the relevant definitions hear, bearing in mind the well settled principle of statutory interpretation

that you don't construe the definition in the (indistinct); you construe them in the context of the provision - - -

MARTIN CJ: Yes.

BYDDER, MR: - - - as they are an aid to construe operative provisions. The definition, your Honour, of "proposal" is in clause 1:

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
-

and, relevantly, for these proceedings, those are either a boundary adjustment or the abolition of a district. The definitions of "affected Local Government" and "affected electors" also appear in clause 1, your Honour, and those are respectively:

A Local Government directly affected by a proposal -
and, in the case of "affected electors":

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

But what's common to both of those definitions, your Honour, is a requirement that they be affected either by (a), in the case of a Local Government, or (indistinct) in the case of elector's proposal. And where the parties differ, as your Honour is aware, on whether they need to be affected by their own proposal or by someone else's. And our submission, your Honour, is that they need to be affected by their own proposal. The reason we make that submission - the reasons we make that submission are these, your Honour. Firstly, when one looks at - when one reads into the operative provisions in clause 2(1), the definitions of "affected elector" and "affected Local Government", it sits very comfortably in the provision dealing with "affected electors", because it reads:

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 electors in the area directly affected by the proposal.

The use of the definite article would refer to the earlier reference to the proposal that they had made.

MARTIN CJ: And the indefinite article might be explained by the possible application of the definition in clauses 6 and 8 - - -

BYDDER, MR: Indeed, your Honour.

MARTIN CJ: - - - prior to some proposal by somebody else.

BYDDER, MR: That's right, your Honour.

MARTIN CJ: Yes.

BYDDER, MR: And what we've also observed in our written submissions, your Honour, is that, while we accept that the indefinite article in respect of affected local governments sits less comfortably with our construction. It's not a strong textual indicator for the reason that your Honour has outlined, and also because it is unlikely in the extreme that parliament would have intended that the requirements for making a proposal in respect of electors is that they be affected by their own proposal but, in respect of local governments, it would be something else.

And also that where - the definition of "affected Local Government" is used elsewhere in schedule 2.1, in fact, the definite article would be more apt in any event. So it's similarly not a strong textual indication against our construction. The strongest point in our favour, your Honour, though, in my respectful submission, is simply that the construction for which we contend imposes a limitation upon the ability of local governments and electors to make proposals that is logical and not unduly restrictive.

On our construction, your Honour, local governments and electors would directly - they could only propose the making of orders under section 2.1 if those orders would directly affect their districts, in the case of a Local Government, and their area in the case of affected electors, whereas the Minister can propose the making of orders under section 2.1 that could affect any district or area. And, as your Honour observed, with respect, that's entirely in keeping with his role as the person to whom the administration of the Act has been entrusted by the governor.

The applicants, as your Honour is aware, contend that local governments or electors must be directly affected by someone else's proposal and, more specifically, I think they say the Minister's proposal. And we say that that construction shouldn't be accepted for these reasons, your Honour. Firstly, we have the obverse of the submission I

made in respect of our construction. It doesn't sit comfortably at all with affected electors. And while it sits somewhat more comfortably with affected local government, it's not a strong textual indicator either way.

The second point is that the definition of proposal when it is read into the operative provisions cannot be taken to be referring to some other proposal than the proposal that is actually being made by the affected electors or affected local governments, because when the definition is read in to the provision, then the opening words of clause 2(1) are:

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 may be made to the Advisory Board by -

And then it continues. So the reference there to a proposal made has to be a reference to the proposal actually being made by the persons in clause 2.1 entitled to make it. And adopting a narrower approach in the subclauses of clause 2.1 similarly doesn't - would be inconsistent with what those opening words mean in their natural sense. And there's no warrant in the text, we would say, for taking a narrower approach. There are certain other issues that count against the applicant's construction in my respectful submission, your Honour. The first is that their construction creates the result that there is really - once a minister's proposal, someone else's proposal has been made, there is no other constraint.

MARTIN CJ: Well, Mr Shanahan - he doesn't accept that. He says that the word "affected" has two operative effects. First of all, there must have been a prior proposal by the minister. And also, the proposal from the local government or electors must be a proposal by which they are affected.

BYDDER, MR: Yes.

MARTIN CJ: So he says it has got two jobs to do, I think.

BYDDER, MR: Yes. Yes, your Honour. I accept that. But the construction that was proposed then means that there is a - the natural meaning of the words, in our respectful submission, which is the ones which we contend, and then there is an additional amount of work that it said those words to for which there is, with respect, no warrant in the text and which imposes a constraint which doesn't appear to fit within the policy of the Act at all. That

is, there is no clear reason why a local government or a group of electors should not be able to make a proposal.

That's all it is, a proposal for the board's consideration without first having the minister's sanction in the form of a proposal that is made by them - that is made in respect of their district or area. And the point we would make, your Honour, is that the requirement that a local government or electors be affected isn't a requirement that is intended to qualify them to make a proposal. What it does is impose a constraint on the kind of proposals that any local government or any requisite number of electors can make, and that's all that it does.

And that's the only, with respect, the only logical constraint we would submit that the provisions impose on the power - or, I should say, the entitlement of local governments and electors to make proposals. Can I deal briefly, your Honour, with the other aspects that are put for the applicants in favour of their construction. The first is the provisions of schedule 2.2, and we say that those don't assist the applicants, first because it's a separate schedule dealing with different subject matters and with a different arrangement beginning with the making of a submission by electors. That's clause 3.

And contrary to the applicant's written submissions, clause 3 is an opportunity for electors to make submissions that an order ought to be made, not simply responding by way of submissions to something the local government is proposing to do. And clause 5 is a separate power which might be triggered by submissions under clause 3, but can also be acted upon independently. The other point that is raised is that in clause 5, a specific and clear power is given to local governments to make proposals, and it's said that in clause - schedule 2.1, the power is not similarly clear.

In our respectful submission, that isn't so. But the power is clear properly construed. But, in any event, the reason why schedule 2.5 didn't need to employ words like "affected" is that when one looks at schedule 2.2, schedule 2.2 is concerned with a specific local government, not local governments generally. There's simply no requirement to adopt the same drafting approach as was required in respect of schedule 2.1.

It is also put against us, your Honour, in written submissions by the applicant that on the minister's construction, the requirement the affected electors be at least 250 in number or 10 per cent of the total number has

no work to do. Now, with respect, it plainly has work to do. It identifies the number of electors required to be able to make a proposal, and nothing in the minister's submission detracts from that. The applicants also rely upon the second reading speech - his is at paragraph 65 of their original submissions - for the proposition that - - -

MARTIN CJ: That's the second reading speech of another bill?

BYDDER, MR: I think it was the second reading speech, if I'm not mistaken, your Honour, of the local government bill itself, if I remember, or it might have been an amending one.

MARTIN CJ: I thought it was the bill that went to the parliament last year.

BYDDER, MR: I didn't understand that to be so, your Honour, but I may be wrong.

MARTIN CJ: Well, I might be - well, sorry, perhaps - - -

BYDDER, MR: I'm sorry. If your Honour goes to paragraph 65 of my friend's submissions.

MARTIN CJ: All right.

BYDDER, MR: Your Honour will see it's a 1985 - - -

MARTIN CJ: Yes. No, no. You're quite right. Yes, I have misread that. Thank you.

BYDDER, MR: But it's convenient that your Honour has that open, because if your Honour quickly reads the extract from the second reading speech on which the applicants rely.

MARTIN CJ: Yes.

BYDDER, MR: And then above that, what they say is it specifically confirms that the new provisions were to allow the minister to initiate change by making proposals, and that affected electors would be able to initiate a review thereof. Now, if your Honour looks at what the second reading speech says, it doesn't say that.

MARTIN CJ: Yes.

BYDDER, MR: What it says is simply that the minister will be able to initiate change under the bill which is not currently the case. That is, under the old provisions, the

minister couldn't make a proposal. Now the minister will be able to make a proposal. And then it goes on.

MARTIN CJ: Yes.

BYDDER, MR: And that the number of electors required to initiate a review will be standardised for all circumstances. And that's not referring to a review of the proposal, with respect, it's plainly simply a somewhat inaccurate reference to initiating a proposal.

MARTIN CJ: Yes.

BYDDER, MR: But the object is to standardise the numbers so that you don't have different numbers depending upon what you're doing.

MARTIN CJ: Yes.

BYDDER, MR: So the second reading speech, in our submission, simply doesn't say what the applicants say it does. Now, the applicants also expressed some concerns about the operation of the system, if there are not (indistinct) for which they contend. One of them is - one of the concerns that has been expressed is a resourcing concern. That is, that there might be a plethora of proposals if any local government or any group of electors could make proposals. Now, there are a couple of answers to that.

The first is really that doesn't bear on the construction of the provision. But it also ignores the provisions of clause 3 which is the provision that deals with the initial consideration by the board of a proposal that is made to it. And what clause 3 does is it provides a mechanism for the board to separate the wheat from the chuff, if I can put it that way, because what schedule 2.1, clause 3 observes is that at subclause 2, paragraph (b), is that:

The board may in a written report to the minister recommend that the minister reject a proposal, if in the board's opinion, the proposal is frivolous or otherwise not in the interests of good government.

And with respect, if a proposal is neither frivolous nor otherwise not in the interests of good government, there is no reason why the proposal ought not to be made and considered in the usual way.

MARTIN CJ: Yes.

BYDDER, MR: Another concern that's expressed in the same vein, your Honour, is a concern that the Minister would have no input into the design, nature or effect of proposals by local governments or electors, but, with respect, that concern is misplaced, because the Minister is entitled to make his own proposals and no order proposed by a local government or the requisite group of electors will be made unless the Minister accepts the recommendation that the order be made.

So the matter - the proposal that is put up by a local government or a group of electors, it will not result in change unless the Minister agrees with it, assuming, of course, the prior requirements are met. Now, the - the submission that's made about the primacy of Ministers' proposals is also, in our respectful submission, misplaced, because it assumes that the requirement - that they be affected is a requirement - that they be affected by a Minister's proposal, not someone else's proposal, but there's nothing in the statutory language that requires that outcome.

It speaks simply of directly affected by a proposal. There's nothing to suggest by whom that proposal would be made. It's for those reasons we would submit, your Honour, that on a proper construction of clause 2.1, the persons who can make a proposal are the Minister, and that is unconstrained, or by a local government or two local governments jointly if the proposal affects their district, or by the requisite number of electors if the proposal affects their area, and that will then have flow on effects potentially in terms of notice about who was directly affected or otherwise affected for the purposes of giving notice to electors of other districts and so on. But that's the submission, your Honour, we make on that point.

Turning to the question of the entitlement to make a poll - to request a poll, I should say, under clause 8. If one looks at clause 8, your Honour, it's only engaged on its terms if the board recommends to the Minister the making of an order to first - and I will wait for your Honour to - - -

MARTIN CJ: Yes. I have it. Thanks.

BYDDER, MR: That provision under clause 8(1) is only engaged if what is proposed, or, I should say, what is recommended is the making of an order to abolish two or more districts and amalgamate them into one or more districts. And your Honour had some exchanges with my

learned friend about the fact that the Parliament has identified two or more districts and, with respect, we would adopt what your Honour has said. That every amalgamation, if you like, is going to involve a boundary change of some description, whether it's one or more, and therefore the designation of two or more must be significant and it's a requirement that there be two or more.

And the - and those who will be entitled to request a poll in respect of it, your Honour, are to be identified beginning with clause 8, subclause (3). Because clause 8(3) identifies a class of electors whose requests for a poll will impose a duty on the Minister to require the board's recommendation to be put to a poll. That's quite a confined class. It's the electors of one of the districts, and your Honour will find that the districts - that expression of the districts is used only four times in the Local Government Act.

The first occasion on which it is used is in section 3.53, and that's an entirely unrelated provision dealing with the control and management of certain unvested facilities, and so that doesn't bear on the construction of the term in clause 8. The second use, however, is in clause 8(1), which opens with the words:

Where the advisory board recommends to the Minister the making of an order to abolish two or more districts (the districts)

And then the provision goes on. Now, it may be observed once your Honour that there was no need to include in parenthesis the words "the districts" unless that expression was intended to bear the same meaning somewhere else in the Act. And what we find is that its next use in the Act is in fact in the same clause, in subclause 8(3), to which I have already taken your Honour. And its final use, your Honour, is in clause 10(2)(a), which relevantly provides:

If at a poll held as required by clause 8:

(a) at least 50 per cent of the electors of one of the districts vote -

and then it goes on. So all of the uses - with the exception of that anomalous one earlier one, all of the uses of the term "the districts" in schedule 2.1 necessarily, we would say, have to be the districts as defined in clause 8(1), and that is the two or more

districts that are recommended for abolition. It cannot be anything else. And so it would have to follow, in my submission, that the only electors entitled to request a poll are the electors of those districts and not some other districts - electors of some other districts which might be affected.

And the possibility that there may be electors of districts who are affected by a recommendation but will not be abolished is expressly contemplated in clause 8(1) where your Honour will see the reference to affected - the requirement to give notice to affected local governments, affected electors and the other electors of districts directly affected by the recommendation about the recommendation. Those other districts may well be other districts which are affected by boundary adjustment proposals.

MARTIN CJ: So the district or districts into which the abolished districts are being amalgamated.

BYDDER, MR: Yes. Indeed. Quite possibly, your Honour. Yes.

MARTIN CJ: Because they would be the only districts directly affected.

BYDDER, MR: That would be what one would expect. Yes, your Honour. And really that's a very short point. That's why we say that the entitlement to request a poll is so confined. Now, the third point is that of whether the Minister can reject a recommendation to which clause 8 applies, and that falls squarely within 2527 of 2014.

MARTIN CJ: Yes.

BYDDER, MR: And in our respectful submissions, he can, although we accept that the construction task here for the court is a little bit more difficult than we would say has been presented earlier. The starting point again has to be the source of the power to accept or reject a recommendation, and that's clause 10. And your Honour will see that clause 10(1) empowers the Minister, subject to subclause (2), to accept or reject a recommendation of the Advisory Board made under clause 3, and that's the frivolous sort of category and some others, or clause 6, which is what we're dealing with here.

And subclause (2), your Honour - if your Honour reads it for a moment, what your Honour will find, in my respectful submission, is that it doesn't impose any

limitation on the Minister's power to reject a recommendation. All it expressly does is require the Minister to reject a recommendation in certain circumstances, from which it may follow that therefore the Minister cannot accept a recommendation in the circumstances of that kind. But there's nothing in there that expressly prohibits the Minister from rejecting a recommendation, notwithstanding that clause 8 applies to it.

We also accept, your Honour, that clause 8 taken literally would require a poll or, I should say, notice to be given of the opportunity for a poll and, indeed, if requested, a poll to be conducted, even if the Minister has rejected that recommendation. And I think it may be common ground that that can't have been the legislative intention, so it's necessary to resolve the inconsistency between the two clauses and to determine whether the Minister is free to reject a recommendation without the need for the clause 8 process, which is the position for which we contend, or the Minister can neither accept nor reject the recommendation to which that process applies until the process is complete, as the applicants contend.

MARTIN CJ: Yes.

BYDDER, MR: Now, your Honour, in our submission, the proper construction is that the Minister is free to reject a recommendation without the need for the clause 8 process, because firstly that construction sits comfortably with the language of clause 10, and clause 10 is the power which - is the clause, I should say, which confers power on the Minister to accept or reject a recommendation. That is the source of the power. That's the primary provision, we would say. If the Minister, your Honour, considers that he would be assisted in making his decision by a poll of electors - and that's dealt with not by clause 8, but by clause 7. Clause 7 provides:

In order to assist in deciding whether or not to accept a recommendation of the Advisory Board made under clause 6, the Minister may require that the board's recommendation be put to a poll of the electors of districts directly affected by the recommendation.

If your Honour looks at clause 8, subclause (4), your Honour will see that clause 8 does not limit the Minister's power under clause 7 to require a recommendation to be put to a poll in any case.

MARTIN CJ: Yes.

BYDDER, MR: And the proper inference to be drawn from that for the purposes of construing the provisions is that the purpose of clause 8 poll is not to inform the Minister's decision-making process. That's what a clause 7 poll is for. The purpose of a clause 8 poll is give affected electors, within the meaning of that clause, the opportunity to require a poll that will prevent the Minister from accepting a recommendation, irrespective of what the Minister is minded to do.

We would say that no further purpose is discernable for clause 8 from the statutory scheme. It would follow from that, your Honour, that if the Minister rejects the recommendation, then the purpose of clause 8, at least in relation to the right of a poll has been fulfilled. And a poll that was conducted under clause 8(3) would serve no relevant statutory purpose or no purpose that's referable to the text or the structure of the Act. And your Honour would - may note that clause 8(1) is concerned with a recommendation to the Minister that - made an order abolishing two or more districts. The reality is, if the recommendation is rejected, that's not going to happen.

And so clause 8, even though it's not the literal construction, the concern of clause 8 falls away if the Minister simply rejects the proposal - the recommendation, I should say. For those reasons, we say clause 8 should be construed in such a way as - or shouldn't be construed in a way that affords an opportunity for a poll in circumstances where the Minister has rejected the recommendation. Now, the applicants suggest that clause 10(2) doesn't qualify the Minister's power to approve or reject - or accept or reject the recommendation, but that it instead establishes a jurisdictional fact which enlivens the Minister's powers under clause 10(1).

Now, in our respectful submission, that's simply not what it does. It does nothing more than impose a limitation on the capacity to accept a recommendation. It's also submitted that - by the applicants in their written submissions at paragraph 16, that it's tolerably clear that the process envisioned under schedule 2.1 is for electors to have their say on an Advisory Board recommendation, uninfluenced by the Minister as to whether he or she will accept or reject such a recommendation. Now, that submission, your Honour, ought not to be accepted: first, because there's nothing in the statutory language which supports a restriction on the Minister expressing a view.

And clear words would be required to impose a restriction on the Minister to express a view on a subject of that kind. And, finally, a Minister's indication that he intends to accept a recommendation is, one would have thought, exactly the sort of indication that might galvanise electors to request a poll. Given the purpose of clause 8 is to give electors who are qualified an opportunity to request a poll for the purpose of, ultimately, preventing the Minister from accepting it - if the Minister signals that that's what he's minded to do, the purpose of clause 8 is subverted by the Minister expressing a view on that ahead of time.

So in those circumstances, your Honour, we submit that clauses 8 and 10(2) do not require the giving of notice to affected electors - in this case, Peppermint Grove - pursuant to clause 8(1) or require the Minister to put the board's recommendation in relation to proposal 24 to a poll or preclude the Minister from exercising his power to reject the board's recommendation as he did with respect to proposal 24. The final point dealing with clause 8, your Honour, is the question of whether the recommendations relating to proposals 5 and 17 fall within the terms of clause 8.

And we come back to the observation, the clause doesn't apply unless the board recommends the making of an order to abolish two or more districts and amalgamate them into one or more districts. And that requires attention to be paid to what the meaning of the word "abolish" is in clause 8, subclause (1). In our submission, the meaning of the word is to be derived from the context provided by the statute as a whole. And the subclause is predicated upon a recommendation having been made by the board to the Minister, that an order be made under section 2.1. And if your Honour turns up section 2.1 - - -

MARTIN CJ: Yes. Yes

BYDDER, MR: Your Honour will see that the orders that can be made under section 2.1 are orders 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. And, importantly, abolition is not the same thing as changing the boundaries of a district. Now, given that's the wording in section 2.1, and clause 8 is concerned with a recommendation, to make an order under section 2.1, the word "abolish" must have the same meaning in both provisions.

And as a consequence, we would say, therefore, that unless there is a recommended - an order to abolish two or more districts instead of simply extending a boundary, being clause 8, simply isn't engaged on the ordinary meaning of the language. And in that regard, we also - I don't need to take your Honour to it in detail, but at paragraphs 24 through to 26 of our submissions, we also refer to clause 11, subclause (1)(f) of schedule 2.1, which - it's part of the same schedule, and is concerned with the effect of the orders made rather than (indistinct) if clause 8 was intended to have the same effect.

And one would have thought the draft order adopted the same approach, so a provision in the same schedule. So for those reasons, your Honour, we would say the recommendations relating to proposals 5 and 17 do not fall within the terms of clause 8. That then leaves the question of conflict of interest, your Honour. In relation to conflict of interest, we've set out the relevant principles at paragraph 72. I don't think I need to take your Honour to them save to emphasise the importance of construing the statute to - as a precursor to applying the test.

MARTIN CJ: Yes.

BYDDER, MR: And, also, dealing with the question of the relevant of the decision of the board to issues of reasonable apprehension of bias - because it's put against us that, on the authority of the High Court's decision in Michael Wilson & Partners Limited v Nicholls (2011) HCA 48 reported in volume 244 of the Commonwealth Law Reports at 427, the decision that was made by the board in respect of these proposals is simply irrelevant to assessing the question of reasonable apprehension of bias, and we take issue with that. Can I hand up to your Honour an extract from the fifth edition of Aronson and Groves on Judicial Review of Administrative Action.

MARTIN CJ: Thank you.

BYDDER, MR: And this extract, your Honour, in my respectful submission, provides a very helpful analysis of the use that may be made of reasons in assessing apprehension of bias, including - it was after Michael Wilson & Partners. If your Honour goes to the bottom of page 624, that's the first page of the extract. Your Honour will see there that the learned authors observed that:

There are reasons why the statement of a decision maker could be useful to the hypothetical observer, just as the conduct of decision makers may create a bias claim, it can also dispel it. Decision makers sometimes ameliorate initial statements and conduct so as to lessen an apprehension of bias. If the conduct in the statements of decision makers can dispel a bias claim, it would be odd not to consider reasons delivered in response to a bias claim. And I invite your Honour to read the balance of that paragraph.

MARTIN CJ: Yes.

BYDDER, MR: And your Honour will see there that the learned authors observed that the point was muddled by Michael Wilson & partners Limited v Nicholls, and they give a convenient account of the case. But if I can invite your Honour then to turn to the last page, page 626 of the extract, your Honour will see there that the authors observe that:

Whether an apprehension arises depends on the circumstances of each case, particularly whether issues decided by the judge in the earlier case are relevant to the later one and the tenor of any such earlier findings. It follows that the mere making by a judge or adverse or erroneous orders cannot be of great value in determining whether a reasonable apprehension of bias might arise in the circumstances, but it is surely possible that the circumstances or tenor in which such orders are made can be of value.

In my submission, the decisions that were made by the board, both generally and in respect of the three specific proposals, which are the only proposals, in our submission, that the applicants have standing to challenge, will necessarily inform the question of whether or not there would have been a reasonable apprehension of bias. And can I mention two of them specifically, your Honour. The first is the general, and the second relating to the proposals that were dealt with by the - that concerned the applicants. The general one is the matter that's the subject of the press release that is appended to Mr Tindale's affidavit in the later proceedings where the minister expresses his view and the government's view about why they rejected proposals for Riversea and for Perth.

And one of the things that concerned the government was that the board had not accepted their proposal to include the University of Western Australia and the Queen

Elizabeth II Medical Centre within the boundaries of the City of Perth. Now, those are matters where, contrary to what my friend says - and we accept what he says about Armadale, Serpentine Jarrahdale, but that's not the whole story. The board has also looked at proposals including that one and has come to a view sufficiently different from what the minister had proposed and what government wanted that the minister has rejected both the Perth proposal that was recommended by the board and the Riversea proposal.

And then if one can turn to a proposal that concerns the applicant's directly, in this case, the applicant is South Perth, the proposal in relation to South Perth and Victoria Park proposed by the minister suggested the excision of the Burswood Peninsula from Victoria Park and its inclusion within the boundaries of the City of Perth. That isn't something that found favour with the board and was not recommended by the board. Now, the minister has accepted that. My friends invite your Honour to draw an inference, and that's because that's what he wanted all along.

With respect, that inference simply isn't available. But that's another example of the board doing something which, if they were there doing the bidding of the minister, or unduly influenced by the ministers, they simply wouldn't have done. And that must be relevant to your Honour's assessment of apprehension of bias. Now, I have set out in our written submissions the relevant statutory provisions in order to hopefully assist your Honour in the construction of the statute. Can I draw out a couple of aspects of that before turning to the specific allegations that are made against - - -

MARTIN CJ: Yes.

BYDDER, MR: Allegations of apprehended bias that are made. The first is that it's clear that parliament envisage that ministerial appointees - I don't propose to take your Honour to the provisions, I think your Honour knows them.

MARTIN CJ: All right, yes.

BYDDER, MR: But I will if it would assist.

MARTIN CJ: No.

BYDDER, MR: But parliament plainly envisaged that ministerial appointees, including departmental officers would necessarily be involved in deliberating on

ministerial proposals. That follows from the how the minister make a proposal and the requirements for the involvement of the departmental member, if I can put it that way, either to preside or to be present for the purposes of meetings. A fair minded and informed lay observer - and it's important to use the word "informed" as well - a fair minded and informed lay observer would be aware of that, and would also - and would interpret what that person saw or heard in light of that fact and some others.

The observer would be aware that departmental officers are public servants, and as a consequence, they provide apolitical, impartial and responsible advice to their ministers, and relevantly as with respect your Honour observed to my friend, in the context of the board there's no conflict there between them. Not only that, but they perform the tasks that are entrusted to them by government as far as they are able to in accordance with the law.

And the responsibilities of a board member such as a member of the local government advisory board have been set out in the seminal case of Bennetts to which we refer in our written submissions, where it's very clear that those board members, when they are acting in that capacity, must not - if I can put it this way - subordinate their responsibilities to the board, their responsibilities to the minister. They have to achieve the requisite balance, and that's something that a properly informed lay observer, as well as a fair minded lay observer, would have in mind in assessing the conduct that is complained of in this circumstance. It also, given the membership of the board, could hardly be suggested that members of the board need to be quarantined, if I can put it that way, from the Minister, because of the role of departmental officials, or indeed for other local governments, given that you have one representative who has experience as a chief executive officer and, as is the case, is one, and you have two persons who have experience as members of the council and, in this case, are councillors.

So there can be no suggestion of quarantining. All of that needs to be brought into mind in assessing what's complained of in the applicant's case. If I can then turn, your Honour, to the specific allegations that are made, beginning at paragraph 158 of their primary written submissions. And, in fact, if I can begin with paragraph 558, your Honour - it's at page 34.

MARTIN CJ: Yes. Thank you.

BYDDER, MR: Before I come to the specific allegations, the difficulty we have with the applicant's reference to the board being independent is the danger in construing a statute, and that's the exercise which your Honour has to undertake by reference to a non-statutory label and then reasoning from it. It's not orthodox to say, "Well, the board is independent and, therefore, these conclusions follow." You have to go to the statutory provisions and then identify what the obligation of impartiality is in light of those provisions, and that's where we cavil with the applicant's use of the word "independent" and only in that sense.

MARTIN CJ: Well, it begs the question of what degrees of separation are mandated by the particular statutory provision and the circumstances of the case. That's the problem with it, isn't it?

BYDDER, MR: It does, your Honour. Yes. That's exactly right, with respect. Now, your Honour, the allegations that are made are that - beginning at paragraph 160 - shortly after the announcement of the government plan, Councillor Congerton expressed his support of the government - for the government plan to the Minister's chief of staff. The second part we don't need to be troubled about, because that has been abandoned.

MARTIN CJ: Yes.

BYDDER, MR: Now, I won't take your Honour back to page 5 of the trial bundle, but, with respect, there's not a lot there. It's - - -

MARTIN CJ: Well, you could infer that Mr Congerton was generally supportive of the Minister's effort to generate Local Government reform. That's about as far as you could take it, isn't it?

BYDDER, MR: Yes, your Honour. That would be as far - - -

MARTIN CJ: Yes.

BYDDER, MR: - - - as it could be taken.

MARTIN CJ: Yes.

BYDDER, MR: And that, as your Honour pointed out in July, some months before ministerial proposals had been made or anything else of that kind.

MARTIN CJ: Yes.

BYDDER, MR: It's also said that, prior to (indistinct) proposals being made to the advisory board, Councillor Congerton knew their substance. Our respectful submission, really nothing flows from that. The member of a - or the chair of a board that advises the Minister may well be aware, generally, of what the Minister is going to propose, but that doesn't, in any way, in my respectful submission, give rise in a fair minded and informed lay observer of any apprehension of bias. The next point that's made is at a meeting on 31 October. The Minister met with the advisory board and briefed the advisory board on the Minister's proposals. And, in that respect, I do need to take your Honour to volume 1 of the trial bundle, because my friend observed and it's in the agreed facts that there's no record of what was said - - -

MARTIN CJ: Yes.

BYDDER, MR: - - - at that meeting. But if your Honour turns up page 26.

MARTIN CJ: Yes.

BYDDER, MR: And this is a meeting of the board that was held on 24 October, the week before - one week before.

MARTIN CJ: Yes.

BYDDER, MR: Your Honour will see, on the second paragraph of page 26, about four lines down, that:

Director-General Matthews advised that the Minister planned to meet with the board as soon as possible in order to brief members on the development of his proposals, timeframes and to discuss the government's policy position.

That's what was to be discussed, and that, I would invite your Honour to infer, was what was discussed. There's nothing untoward in that, in my respectful submission. The Minister could have made submissions to that effect.

MARTIN CJ: And, of course, before ground 2 was abandoned, the complaint was that the Minister hadn't complied with the obligation under the Act to explain his proposals fully.

BYDDER, MR: Indeed, your Honour.

MARTIN CJ: So, under the Act, he has got to explain his proposals fully.

BYDDER, MR: Yes.

MARTIN CJ: Where's the harm in him communicating that to the board?

BYDDER, MR: With respect, that's so, your Honour, and it certainly couldn't cause a fair minded observer, particularly an informed fair minded observer, to form any reasonable apprehension of bias. It's also observed against us that, separately from the meetings with the Minister, Councillor Congerton met with Mr Fowler, apparently in his role as a departmental officer, to consider the policy advice received from the Minister on 31 October 2013.

This goes to the role of Mr Fowler and the position, as we would submit, as, with respect, your Honour has observed, that there is no distinction between the task of Mr Fowler, in terms of what he says - what advice he gives as a departmental officer to a Minister and as a deputy to the board. It's to give reasonable and - (indistinct) use the word unbiased - impartial advice, and there could be no - again, no apprehension of bias arising from that change. So, in my submission, the matters that are raised by the applicants under the banner of independence don't, in any way, give rise to a reasonable apprehension of bias.

The other matters that are raised by the applicants relate to the participation in the advisory board's deliberations of the departmental officers, and they refer firstly to the job description form of Ms Adam. Now, your Honour has seen that. In my respectful submission, it just doesn't take you anywhere. She gives advice. Well, there's nothing that would cause a reasonable apprehension of bias in that regard. The proposition is then put at paragraph 169 that:

In the ordinary course of her duties, Ms Adam advised or was the conduit of advice for the Minister on the formulation of the government plan and his proposals during the course of the advisory board's inquiry and was a conduit of information to the board from the Minister, including legal advice.

Well, again, the board has to receive its legal advice in some way. The fact that Ms Adam may have been the conduit of it - may have passed it on could not, on any view, give rise to a reasonable apprehension of bias, much less - and it certainly couldn't, as the applicants contend, cause any fair minded and informed observer, knowing what public servants do, to apprehend that Ms Adam couldn't

independently and impartially discharge her duty as a member of the board.

Now, Mr Fowler's role is dealt with beginning at paragraph 171 of the applicant's written submissions, and, again, we have a job description form that is raised and, similarly to Ms Adam, in my respectful submission, that job description form cannot in any way give rise to a reasonable apprehension of bias. The next point that's made by the applicants is that Mr Fowler was one of five officers within the Department for the Local Government who was responsible for metropolitan Local Government reform. Now, if one has a look at, firstly, paragraph 11 of the statement of agreed facts, that's not what the agreed facts says. Paragraph 11 of the statement of agreed facts reads:

In August 2013, the Department of Local Government and Communities published an information kit for metropolitan Local Government reform which identified Mr Fowler as one of the departmental contacts who could provide information or assistance to local governments in implementing the government's reform model.

And that is indeed, if you were to go to tab 3 in volume 1 - and I don't invite your Honour to do so - that is indeed what that page, which appears there, says. That is not the same thing as one of the five officers - the elite group of five within the department who is responsible for metropolitan Local Government reform. So that agreed fact doesn't, with respect, go anywhere in terms of reasonable apprehension of bias. The meeting on 6 August 2013, where Mr Fowler identified his role in the department as creating a conflict of interest, doesn't, in fact, go to the question whether, on the facts, a fair minded lay observer, properly informed, would hold that view.

MARTIN CJ: Well, if he thought he did, isn't that an indicator that other people might have as well?

BYDDER, MR: Well, in my respectful submission, it isn't, your Honour. One has to have a look at the entirety of the facts. And when one has a look at the entirety of the facts, that observation isn't enough to, in effect, substitute his observation on that day for the observation that the fair minded lay observer, properly informed, would make.

MARTIN CJ: Having made that observation, he did, in fact, participate, didn't he?

BYDDER, MR: In August 2013? Yes. That's so.

MARTIN CJ: Well, later.

BYDDER, MR: That's right, which would suggest that that wasn't his view later on, in my submission.

MARTIN CJ: But you don't dispute the fact that he did participate in the board's deliberations.

BYDDER, MR: Where the minutes record that he was there, yes. And, of course, attention needs to be focused, your Honour, on which proposals we're dealing with here, and there are only three that are involved here. But, in any event, that feature, in my submission, isn't enough to form a reasonable apprehension of bias. When one has a look at the entire range of circumstances, all of the other matters not identifying a reasonable apprehension of bias, and the decisions of - that the board took which, for the reasons identified in and Dyer, are relevant, the assessment of reasonable apprehension of bias again would suggest that there was no apprehension of bias to be formed in the sense of a concern that Mr Fowler would be diverted from the impartial exercise of power.

MARTIN CJ: Yes.

BYDDER, MR: The next allegation is again the meeting on 7 November, or, I should say, the minutes of that meeting recording that Counsellor Congerton and Mr Earnshaw met with Mr Fowler and Mr Hollingsworth to consider the policy advice receive from the Minister. That comes again to the point that whether one is acting in the capacity of a public servant or as a member of the board, the role in providing advice and providing views is essentially the same, or there will be no difference in outcome in that regard. So for those reasons, your Honour, we would say that there is no basis upon which it could be said on the grounds that are advanced by the applicants for a reasonable apprehension of bias.

One other observation I should make in respect of that, your Honour, is that if your Honour was to find that there was a base on which a fair-minded and informed observer could have formed the relevant apprehension, that is, one - two members involved - and the law is not that it necessarily follows that therefore the decision of the board is invalid. And your Honour in the Wilderness Society decision, of course, made the observation that the law in respect of that is somewhat unsettled.

MARTIN CJ: Well, we didn't have to address it in that case, because there was a clear majority who were conflicted.

BYDDER, MR: There was indeed, your Honour, but that's not so here. And the law not being settled in that regard, your Honour, I would simply refer your Honour to the summary of Pritchard J in *Aloi v Bertola (No 2) (2013) WASC 214*, which your Honour may well be aware of - - -

MARTIN CJ: Yes.

BYDDER, MR: - - - which summarises the law in relation to that. And we would say that on the state of the law, even if there was a reasonable apprehension of bias in respect of one or two of the members, it does not invalidate the decisions that were - or the recommendations, I should say, that were ultimately made by the board that are in issue in this case. Bearing in mind that they are all - find their origin in proposals by local governments and not by the Minister. And the reasonable apprehension of bias grounds are very much directed at the relationship between the members of the board and the Minister. If it please, your Honour, those are the submissions for the first respondent.

MARTIN CJ: Thank you, Mr Bydder. Mr Shanahan, submissions in reply?

SHANAHAN, MR: Yes, your Honour. Your Honour, before I commence my submission in reply, your Honour asked me some questions before - when I first rose to my feet. Can I just respond to those briefly before I start in reply?

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour asked me where in the papers there was discussion by the board in relation to these proceedings, and it occurred in three different meetings and I can just show your Honour where they are.

MARTIN CJ: Yes.

SHANAHAN, MR: The first is at volume 1 of the trial bundle.

MARTIN CJ: Yes.

SHANAHAN, MR: Behind tab 65.

MARTIN CJ: Tab 65?

SHANAHAN, MR: That's so. From page 401. Your Honour will see that this is a meeting of the board on 25 July
- - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - 2014. Can I take you now to page 403 at point 6.1. Does your Honour see "MLGDI legal proceedings"?

MARTIN CJ: Yes.

SHANAHAN, MR: And the redaction. The reason why we can't tell your Honour what the board said about the proceedings is we don't know. That they did discuss them is obvious, but all of that material has been redacted. Can I take your Honour to the next meeting.

MARTIN CJ: Well, I mean, I would expect the board would have considered the fact that they had been sued. Where does that take us?

SHANAHAN, MR: Well, your Honour asked me and - and - - -

MARTIN CJ: No. What I asked you - - -

SHANAHAN, MR: - - - I'm just trying to respond to that.

MARTIN CJ: - - - was for evidence that the board had shaped its recommendations in order to avoid the prospect of an adverse finding in these proceedings.

SHANAHAN, MR: And the best we can do is to point your Honour to what we have, and that's what I'm taking you to now, which is where the board definitely discussed this in detail over a period of three meetings and we're not privy to those details.

MARTIN CJ: Yes.

SHANAHAN, MR: The next - although there are some details in relation to some of these meetings, and I will take your Honour to those in due course. At volume 2 of the trial bundle, behind tab 67.

MARTIN CJ: Yes.

SHANAHAN, MR: The meeting of 5 August 2014. From page 409, your Honour.

MARTIN CJ: Yes.

SHANAHAN, MR: Does your Honour see that? If you turn the - flip the page to, again it's the same number, 6.1 - - -

MARTIN CJ: Yes.

SHANAHAN, MR: - - - your Honour will see that there was an update to the board on the status of the legal proceedings. Ms Adams advised that the next directions hearing was scheduled for Friday, 5 September. She said that the Chief Justice advised the applicants that they have until 19 August 2014 to resubmit their case. So you can see that Ms Adams is providing advice to the board in relation to these proceedings. Member Silcox asked Ms Adam to identify the main concerns of the applicants, and then she then went on to do that and set those out, and then there's a portion that's redacted.

Ms Adams then informed the board that the redacted minutes from all the board's meetings were - MLGDI proposals had been considered. Only revealed headings and conflict of interest declared. Then if I could take your Honour to the last of the meetings.

MARTIN CJ: Yes.

SHANAHAN, MR: This is behind tab 69 in the same volume that your Honour has open.

MARTIN CJ: Yes.

SHANAHAN, MR: Tab 69, page four - from page 432.

MARTIN CJ: Yes.

SHANAHAN, MR: It's a meeting of the board on 9 September 2014. And again if I can take your Honour to 6.1 on page 433. Again, it's another update on the status of the proceedings, and then again we have the redactions.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour - I'm now making submissions in reply.

MARTIN CJ: Yes.

SHANAHAN, MR: Your Honour, sometimes we feel like we live in parallel universes when we hear discussions around the concept of a conflict of interest, and I've been privileged to have one of those moments myself this afternoon when your Honour put to my friend, well, isn't the fact that Mr

Fowler admitted that he had a conflict of interest of relevance to an apprehension by a fair-minded lay person. Now, there can't be - there can't be anything more concerning for a fair-minded lay person than where somebody in Mr Fowler's position accepts that he has a conflict of interest, and the applicants say that there can be.

You know. In circumstances such as this where it's so hard to get evidence in relation to what actually occurs in government, and being a part-time public servant myself at the moment, it's quite clear that getting this sort of information is almost impossible.

MARTIN CJ: Well, in your part-time role you've got quite significant powers to gather information, Mr Shanahan.

SHANAHAN, MR: Indeed, your Honour. And perhaps in another place, in another time, where conflict of interest meant something other than it does now, I might have used them. That's my point. My friend took your Honour to the applicant's case regarding Adam and Fowler and said that the job descriptions don't take us any further. With great respect to him, it must be the case that officers, public sector officers, with the responsibilities that are clearly outlined in those descriptions, have a role in the Department in relation to local government metropolitan reform.

The question that your Honour put to my friend is the question the applicant says is the question to answer. What level of separation does there have to be between the Department on one hand, in terms of the - these officers' role, the departmental role, and the board's role. The answer to that is clear, in the applicant's submission. It's so that the board can do its job. It's as simple as that. To do its job. And if one goes to schedule 2.1, one can see what its job is. It's to give impartial advice to the Minister in respect of proposals that are put to it.

And the applicant says there's a reasonable apprehension of bias in relation to the roles of Fowler and Adam because the appointments made of departmental officers under schedule 2.5 could easily have appointed officers who had nothing at all to do with metropolitan local government reform. That's the point.

And what your Honour is faced with is this, were your Honour to resist the applicant's case in this regard then fair-minded lay observers tomorrow reading the newspaper will see that on one hand you have senior

departmental officers participating in the board's decision making with obligations on the departmental side both in terms of their obligation, as your Honour pointed out to me in-chief, of giving impartial advice to the Minister, but also the obligation to apply government policy. That's the reality of a senior public servant.

So you have a senior public servant on one side of the advantage line with those obligations, assisting the Minister to prepare proposals, and then on the other side of the advantage line being part of the body that assesses them. The applicants say that's not the appropriate level of separation.

The fact that the chairman had advance notice of the Minister's proposals is significant because to a reasonable person, to a fair-minded lay observer, it indicates that Councillor Congerton had contact with the Minister in relation to this issue, in a non-public setting, in a non-public way, before the process gathered significant momentum. And your Honour made the observation to my friend in relation to that, well, look at what the applicants were putting when they put ground 2. They were actually saying that the Minister had to give more details.

But the difference is this, if the Minister had given what the applicant says are the appropriate details pursuant to clause 2(2) of schedule 2.1, they would have been public.

MARTIN CJ: But there's no evidence to the effect that the Minister said anything in his communications with anybody that wasn't ultimately public.

SHANAHAN, MR: There's no evidence of actual bias. The applicant doesn't make a case for actual bias. What the applicant - - -

MARTIN CJ: There's no evidence that the communications were inappropriate in any way in the sense that would give rise to a perception on the part of the fair-minded lay observer.

SHANAHAN, MR: To the extent that they show a course of conduct over a period of unminuted non-public contact between the Minister and the chairman of the board, they provide evidence that will support a proposition of apprehended bias if there is other evidence to suggest it. And we say in this case there is. That's the point.

Your Honour, my friend made some points about the City of South Perth and was suggesting that the board has actually brought in a proposal - sorry, brought in recommendations that are contrary to the government's proposal and therefore it's not the same situation as I think we identified for your Honour in-chief in relation to the City - sorry, the Shire of Serpentine Jarrahdale. Could I just take your Honour to the second Tindale affidavit in 2527. This is the affidavit sworn 20 November.

Your Honour will see that the primary function of the affidavit was to adduce evidence of a statement - I'm sorry. A statement made by the Premier to mayors and chief executive officers at Dumas House on 22 October.

MARTIN CJ: Yes.

SHANAHAN, MR: The relevant part that I take your Honour to is at page 5, which is the last page of the affidavit.

MARTIN CJ: Yes.

SHANAHAN, MR: And there you will see that the Premier points out that what the Local Government Advisory Board's position is in relation to the boundary is one that the government accepts.

MARTIN CJ: But it wasn't their idea.

SHANAHAN, MR: I'm not suggesting that, your Honour. I'm simply saying that by the time the board came to make its recommendation - this is - what I'm trying to put to your Honour is that the process of the inquiry has got a temporal dimension. That it's not an inquiry on a particular day, it's a process that goes on over a lengthy period and, as that period moves forward, then people tailor their cloth to fit the circumstances and what they can achieve.

My friend relies heavily on the commentary made by Aronson and Groves, and all the applicants would say is we continue to rely on Michael Wilson. There is another decision that I was going to provide to your Honour. That was the case of Phillips, which is a decision by a single judge in the Federal Court, Wilcox J.

MARTIN CJ: Thank you.

SHANAHAN, MR: And I was going to take your Honour to page 78. I'm sorry; not 78 - to 76 at line (d). And your Honour will see that one of the propositions put to Wilcox J suggested that the outcome of the process which had been allegedly tainted with actual bias was said to be relevant to the question of apprehended bias, and Wilcox J points out that the outcome that - to do that is to confuse the test for apprehended bias with actual bias, and this is a case, as I've hopefully pointed out, that relates to apprehended bias, not actual bias. The other thing that I might take your Honour to, whilst we have Phillips open, is on page 78.

MARTIN CJ: Yes.

SHANAHAN, MR: At line (b), where Wilcox J observed:

The realisation that a leader's unspoken wish can influence a subordinate's action is at least as old as the murderous and Thomas Becket in 1170. Readers will recall the legend that, on news being brought to him in France of Becket's last provocative act, King Henry II muttered and irritated the rhetorical, "Who will rid me of this turbulent priest?"

Now, the relevance of that to this case, your Honour, is if there are un-minuted non-public meetings between the Minister and the chairman of the board, we don't know what request the Minister may or may not have made in respect of whether or not the board would rid him of turbulent affected electors or turbulent affected local governments.

MARTIN CJ: I wonder if the Minister would be flattered by your comparison to Henry II.

SHANAHAN, MR: I wouldn't like to speculate, your Honour. Now, this is a very important point, so I need to just take your Honour back to my example of two adjacent districts, A and B. It would be easier if I had a diagram, but I think we can all imagine a square, divided in the middle, where the district at the top is A and the district at the bottom is B. Where B is abolished and the boundary is said to move to the limits of B, there is, in effect, no change in the boundaries of the government districts. The boundaries of the government districts don't actually change; all that happens is that they're united.

So it's not an order of the type that my friend put to the court in relation to section 2.1(1) - bear with me - 2.1(1)(b). It's, in effect, an order that achieves an abolition of a district under section 2.1(1)(c), and I've

got support for that submission in the text of schedule 2.1, if I could take your Honour to clause 11. It's called the Transitional Arrangements for Orders About Districts. Does your Honour see, at 11(1)(f) - - -

MARTIN CJ: Yes. Yes.

SHANAHAN, MR: Continuing:

If the effect of an order under section 2.1 is to unite two or more districts -

well, here we now have another term, "unite". What the applicant says is that the approach adopted by the Minister in using one abolition with a notional boundary change was to misunderstand, effectively, what he was attempting.

MARTIN CJ: Well, because Mr Bydder relies upon this provision as supporting the view that there is a difference between the effect of an order, to which reference is made in that provision, and the abolition of two districts, to which reference is made in clause 8.

SHANAHAN, MR: I understand. And I - the applicants would say this: that the effect of an amalgamation must be unification. You can't have an amalgamation without a unification. And what's happening in a proposal where we have A and B, B is abolished and the intermediary boundary is removed so that the two bodies come together, is that we have a unification and no change of the boundary. The boundary that ran around A and B remains the same. That's the point, your Honour. That's the point I was trying to make to you in-chief.

My friend made a series of submissions about clause 10. The applicants say that the plain meaning of clause 10 and clause 11 must be this: that the power that the Minister has at clause 10(1) to accept or reject a recommendation by the advisory board made under schedule 2.1 must be subject to the process under clause 8 where it applies. That's the effect of the words "subject to subclause (2)", because, were it not the case, the Minister would be exercising the power at 10(1) without knowing whether or not there was going to be a poll. That's the point. And until that one month period under 8(1) expires, the Minister can't know whether there's going to be a poll or not.

MARTIN CJ: But if he has decided to reject the recommendation, whatever the poll says, why would he have to wait?

SHANAHAN, MR: Because that's what the Act says. The Act says he must wait - - -

MARTIN CJ: Well, it doesn't say it in so many words, does it?

SHANAHAN, MR: Well, with great respect, your Honour, that's the story of this case. We're dealing with a series of provisions that are not drafted with particularity. But can I say this to your Honour: that, if that were the case, then no one would ever have a poll if the Minister decided that he didn't want them. He would simply reject them on a - could reject them on an arbitrary basis.

MARTIN CJ: Well then, the purpose of the poll is achieved; there can be no proposal that falls within clause 8 unless a poll is provided so the rate payers of the districts affected are not prejudiced.

SHANAHAN, MR: The obligation of the advisory board to give the notice under 8(1), which initiates the process of a poll, is not within the control of the Minister. That obligation arises in the board irrespective of the Minister's attitude to the recommendations. That's the difference. And, as my learned junior hands me a note, what happens if the poll accepts the recommendation? That would then put the Minister in the position of having to decide what clause 10 means in that regard, and I don't think that's straightforward, your Honour.

MARTIN CJ: Well, it's pretty straightforward, isn't it? And that is that the only way in which it's - - -

SHANAHAN, MR: I thought you might say that.

MARTIN CJ: - - - bound by the outcome of a poll is if the requirements of 10(2) are met.

SHANAHAN, MR: If they reject it.

MARTIN CJ: Yes.

SHANAHAN, MR: Yes. So if the - I think now we come back to the prospect that perhaps the check or balance on the Minister is political, so that, if there is a poll that's held which is accepted but the Minister doesn't want it and rejects it, the Minister then has to explain to those who have voted in the poll why the Minister is taking the course that he has, so that there's a political check rather than a legal check in that regard. But that

explains the construction of those clauses that the applicant contends for.

In the applicant's respectful submission, the Minister can't accept or reject a recommendation prior to either the time limited under clause 8(1) expiring, which is a month, or the holding of the poll. My friend made a series of submissions around the definitions of "affected electors" and "affected local governments". I don't want to repeat myself about those things, your Honour, but the applicants see that there's a whole series of reasons why the construction that they argue for in ground 3 should be accepted rather than the propositions contended for by my friend.

The first of those is that it makes sense that executive government control the way in which Local Government develops. The problem with my friend's submissions is that it imagines that Local Government development in Western Australia can occur simply because a group of people get together and have a bright idea. Now, yes, there are provisions about frivolous proposals and there are provisions about proposals not in the interests of good government, but that doesn't deal with the example that I gave your Honour in-chief - simply doesn't engage it.

There may be proposals that are put forward by sectoral grounds for all sorts of reasons that the Minister simply doesn't want to go to the advisory board. The Minister is in a position where he can be moved by affected electors of affected local governments to put proposals. I don't want to develop that any more. So what are some of the reasons why we say that the definitions of "affected electors" and "affected local governments" must be as the applicant contends.

One is that the effect of it, as I put to your Honour in-chief, at clause 4 would be the ridiculous situation where authors of proposals are being told by the board, having made the proposal, that they are affected electors or affected local governments. The other nonsensical aspect to it is that, in order to identify the proposal that affects affected electors or affected local governments, one has to have regard to what they have authored. The applicants say that simply can't be right, that self-referable process.

MARTIN CJ: But you say it is right in relation to the second step of the process. You accept that any proposal that comes from an affected Local Government or affected

elector must satisfy the requirement. That's what you told me earlier.

SHANAHAN, MR: What I told you earlier, your Honour, was that - I think - well, I'm not sure if we're at odds about this at all. What I'm saying is this - I think I said to your Honour the proposal is by the Minister.

MARTIN CJ: Yes.

SHANAHAN, MR: Then you work out the affected Local Government and affected electors by reference to that.

MARTIN CJ: Yes.

SHANAHAN, MR: They make their proposal and, if their proposal affects other local governments or other electors, then they are entitled to make their own proposals as well.

MARTIN CJ: But they must be affected. You told me that they must - that the word "affected" applies at that second stage. The proposal which they advance must - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - fall within the degree of affectation that brings it within the definition.

SHANAHAN, MR: I understand that, your Honour, but I'm wondering if we're - I'm just not sure that we're ad idem about what I'm saying and what your Honour is putting to me.

MARTIN CJ: What you're saying - I thought we clarified this before lunch, but you told me that the word "affected" has two jobs to do.

SHANAHAN, MR: Yes. Yes. One is - - -

MARTIN CJ: One is in relation to the relationship between electors and Local Government arising from a Minister's antecedent proposals - - -

SHANAHAN, MR: Yes.

MARTIN CJ: - - - and the other is in relation to the proposal which they, themselves, advance.

SHANAHAN, MR: Yes. No. That - - -

MARTIN CJ: All right. Well - - -

SHANAHAN, MR: That's so.

MARTIN CJ: Yes. All right.

SHANAHAN, MR: That's so. And that, the applicant says, explains how it works.

MARTIN CJ: Yes.

SHANAHAN, MR: Thank you, your Honour. They are the applicant's submissions.

MARTIN CJ: Right. Well, I will give the reasons for the views to which I've come.

(Judgment Delivered)

MARTIN CJ: So for those reasons, I would dismiss both sets of proceedings. Mr Bydder.

BYDDER, MR: If it please the court, I move in each proceeding for orders that the application be dismissed and the applicants pay the first respondent's costs to be taxed if not agreed.

MARTIN CJ: Mr Shanahan?

SHANAHAN, MR: I have nothing to say about that, your Honour.

MARTIN CJ: Very well. There will be orders in those terms. The court will now adjourn.

AT 4.27 PM THE MATTER WAS ADJOURNED ACCORDINGLY

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