THIRTY-NINTH PARLIAMENT

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

REPORT 66

SUPREME COURT AMENDMENT RULES 2013

Presented by Mr Peter Abetz MLA (Chair)

and

Hon Robin Chapple MLC (Deputy Chair)

October 2013

JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

Date first appointed:
28 June 2001
Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

"**6. Joint Standing Committee on Delegated Legislation**

6.1 A *Joint Standing Committee on Delegated Legislation* is established.

6.2 The Committee consists of 8 Members, 4 of whom are appointed from each House. The Chairman must be a Member of the Committee who supports the Government.

6.3 A quorum is 4 Members of whom at least one is a Member of the Council and one a Member of the Assembly.

6.4 (a) A report of the Committee is to be presented to each House by a Member of each House appointed for the purpose by the Committee.

(b) Where a notice of motion to disallow an instrument has been given in either House pursuant to recommendation of the Committee, the Committee shall present a report to both Houses in relation to that instrument prior to the House's consideration of that notice of motion. If the Committee is unable to report a majority position in regards to the instrument, the Committee shall report the contrary arguments.

6.5 Upon its publication, whether under section 41(1)(a) of the *Interpretation Act 1984* or another written law, an instrument stands referred to the Committee for consideration.

6.6 In its consideration of an instrument, the Committee is to inquire whether the instrument –

(a) is within power;

(b) has no unintended effect on any person's existing rights or interests;

(c) provides an effective mechanism for the review of administrative decisions; and

(d) contains only matter that is appropriate for subsidiary legislation.

6.7 It is also a function of the Committee to inquire into and report on –

(a) any proposed or existing template, *pro forma* or model local law;

(b) any systemic issue identified in 2 or more instruments of subsidiary legislation; and

(c) the statutory an administrative procedures for the making of subsidiary legislation generally, but not so as to inquire into any specific proposed instrument of subsidiary legislation that has yet to be published.

6.8 In this order –

"instrument" means –

(a) subsidiary legislation in the form in which, and with the content it has, when it is published;

(b) an instrument, not being subsidiary legislation, that is made subject to disallowance by either House under a written law;

"subsidiary legislation" has the meaning given to it by section 5 of the *Interpretation Act 1984*."

Members as at the time of this inquiry:

Mr Peter Abetz MLA (Chair)	Hon Ljiljanna Ravlich MLC (Deputy Chair) until 16 October 2013
Hon John Castrilli MLA	Hon Robin Chapple MLC (Deputy Chair) from 16 October 2013
Hon Peter Katsambanis MLC	Hon Mark Lewis MLC
Ms Simone McGurk MLA	Mr Peter Watson MLA

Staff as at the time of this inquiry:

Felicity Mackie (Advisory Officer (Legal))	Alex Hickman (Advisory Officer (Legal))
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ISBN 978-1-922047-57-1

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EXECUTIVE SUMMARY AND RECOMMENDATION OF THE

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE SUPREME COURT AMENDMENT RULES 2013

EXECUTIVE SUMMARY

1 The Joint Standing Committee on Delegated Legislation has formed the view that the Supreme Court Amendment Rules 2013 are not 'within power' of the *Supreme Court Act 1935* and contain matter that is inappropriate for subsidiary legislation.

2 The Committee took issue with the requirement in the Amendment Rules for "adequate reasons" to be given for a challenged administrative decision when a person makes an application for judicial review of that decision. This is because there is no general rule of the common law, or principle of natural justice, that requires reasons (adequate or otherwise) to be given for administrative decisions.

3 The Committee formed the view that the Amendment Rules would, if allowed, change the common law by subsidiary means. Any change to the common law begins with a policy decision of Executive Government and is ultimately debated in a bill before the Parliament. It is not within the remit of the Judiciary to change the common law by subsidiary means.

4 The Committee was not persuaded by the argument of the Chief Justice of Western Australia that the Amendment Rules constitute mere matters of practice or procedure. The Committee formed the view that in this instance, the boundaries of permissible rule-making have been exceeded and there has been an intrusion into rule-making with respect to substantive rights of parties. In this case, the existing common law right of an administrative decision maker not to give reasons for a decision.

RECOMMENDATION

5 The Recommendation is as it appears in the text at the page number indicated:

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Recommendation 1: The Committee recommends that the Supreme Court Amendment Rules 2013 be disallowed.

REPORT OF THE JOINT STANDING COMMITTEE ON DELEGATED LEGISLATION

IN RELATION TO THE SUPREME COURT AMENDMENT RULES 2013

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1 REFERENCE AND PROCEDURE

1.1 The Parliament of Western Australia has delegated the role of scrutinising subsidiary legislation to the Joint Standing Committee on Delegated Legislation (**Committee**) against four *Terms of Reference*.[1]

1.2 In addition to its *Terms of Reference*, the Committee may, in exercising its function of scrutinising delegated legislation, have regard to, but is not bound by, the law.[2]

1.3 The Supreme Court Amendment Rules 2013 (**Amendment Rules**) were published in the *Government Gazette* on 23 April 2013 and tabled in the Legislative Council on 15 May 2013. They fall within the definition of '*Instrument*' in the Committee's *Terms of Reference* and are reproduced at **Appendix 1**.

1.4 The Amendment Rules stood referred to the Committee upon their publication in the *Government Gazette.* Once the Amendment Rules were tabled in the Parliament, they became an Instrument which may be subject to disallowance. On 13 August 2013 the Committee gave a *Notice of Motion* to disallow the Amendment Rules in the Legislative Council.

1.5 As part of its scrutiny procedure, the Committee sought views of the Amendment Rules from the Attorney General, the Chief Justice of Western Australia and the Parliamentary Counsel. Their responses are attached at respectively, **Appendices 2, 3** and **4.** The Attorney General included a copy of advice he obtained from the Solicitor General for Western Australia regarding the Amendment Rules. That advice is attached as **Appendix 5**.

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1 These are that in its consideration of an instrument, the Committee is to inquire whether the instrument – (a) is within power; (b) has no unintended effect on any person's existing rights or interests; (c) provides an effective mechanism for the review of administrative decisions; and (d) contains only matter that is appropriate for subsidiary legislation.

2 This was stated in the Joint Standing Committee on Delegated Legislation, Report 50, *Hospital Parking Fees*, tabled 16 August 2012. Hon Peter Foss MLC, Legislative Council, in *Parliamentary Debates (Hansard)*, 27 June 2001, p1447 also stated that the House "*is not bound by the law; it is bound by the views of the House of what is appropriate. A matter may be intra vires, but the Committee may be of the view that it is not contemplated by the empowering enactment; it might be authorised by it due to the wide wording of the empowering legislation. It is possible for Parliament to enact legislation that has an enormous amount of coverage, which could make something intra vires. However, if the House decided that was not what the legislation intended, it would disallow the* [subsidiary legislation]."

2 INTRODUCTION

2.1 The Committee focussed its consideration of the Amendment Rules on whether they:

- are 'within power' of the *Supreme Court Act*;[3] and
- contain only matter that is appropriate for subsidiary legislation.[4]

2.2 However, as the Chief Justice acknowledged, "*there is no doubt that the Parliament has power to disallow rules of court on any ground.*"[5]

2.3 The Amendment Rules are made pursuant to section 167(1)(a) of the *Supreme Court Act 1935.* They amend the *Rules of the Supreme Court 1971*. Section 167 provides for the content of the rules of court that a majority of Judges can make whilst section 167(1)(a), the broad, general rule making power states:

> *Rules of court may be made…, for the following purposes —*
>
> > *for regulating and prescribing the procedure… and the practice to be followed in the Supreme Court in all causes and matters whatsoever ….*
> >
> > *… and any matters incidental to or relating to any such procedure or practice, …*

3 THE EXPLANATORY MEMORANDUM

3.1 The Explanatory Memorandum accompanying the Amendment Rules describes their purpose as providing:

> *a simplified procedure common to all applications for the granting of prerogative writs*[6] *or any other relief at common law or in equity relating to administrative decisions.*

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3 *Term of Reference* 6.6(a).

4 *Term of Reference* 6.6(d).

5 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 28 August 2013, p6.

6 A prerogative writ is an order directing the behaviour of another arm of government, such as an agency, official, or other court. It was originally available only to the Crown under English law, and reflected the discretionary prerogative and extraordinary power of the monarch. Six writs are traditionally classified as prerogative writs: *certiorari* an order by a higher court directing a lower court to send the record in a given case for review; *habeas corpus* demands that a prisoner be taken before the court to determine whether there is lawful authority to detain the person; *mandamus* an order issued by higher court to compel or to direct a lower court or a government officer to perform mandatory duties correctly; prohibition directing a subordinate to stop doing something the law prohibits; *procedendo* sends a case from an appellate court to a lower court with an order to proceed to judgment; *quo warranto* requiring a person to show by what authority they have to exercise a power.

3.2 The Explanatory Memorandum further states that the Amendment Rules are neither unusual nor contentious. On the matter of consultation, a requirement under *Premier's Circular Number 2007/14* for all subsidiary legislation before the Committee, the Explanatory Memorandum states:

> *At various stages, drafts of the Rules were circularised among the judges for discussion. The Rules in draft form were also provided to the Western Australian Bar Association, the Law Society of Western Australia and the Western Australian Chapter of the Australian Institute of Administrative Law. Each of these bodies made written submissions on the Rules which were taken into account during the process.*

3.3 *Premier's Circular Number 2007/14* requires details of not only who was consulted but a précis of their comments and the response to any suggestions put forward. The Committee formed the view that the Explanatory Memorandum is deficient in substance with respect to the views of those consulted and "*did not specifically seek the views of the government.*"[7]

3.4 The Committee is of the view that the Amendment Rules are both an unusual and contentious Instrument.

4 DESCRIPTION OF AMENDMENT ORDER 56 - JUDICIAL REVIEW

4.1 The Committee noted the deletion of Order 56 rules 1 to 9 and the insertion of Amendment Order 56 containing seven new rules. Those amendments prescribe a procedure for a person to complete and file a new Form 67A for judicial review of a decision or conduct.

4.2 New Form 67A requires the applicant to state the nature of the application being made[8] and the grounds for the application. If there are inadequate reasons given for a decision challenged, the applicant can apply for the Court to order the decision maker to give adequate reasons.[9]

4.3 The Committee scrutinised elements of the application procedure in amendment Order 56, sub-rules 2(5) and 5(2)(c). Amendment Order 56, sub-rule 2(5) states that:

> *If adequate reasons for a challenged decision have not been given when an application is made for judicial review of it, the application*

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7 Letter from the Hon Michael Mischin MLC, Attorney General, 2 August 2013 enclosing advice from the Solicitor General to the Attorney General, 1 August 2013, p5 and attached at **Appendix 5**.

8 Writ, declaration, injunction or remedy having the same effect that could be provided by writ.

9 This description was provided by the Chief Justice of Western Australia, Hon Wayne Martin AC in a letter to the Committee, 4 July 2013, pp1-2.

> *may include an application for an order that the person who made it must give adequate reasons.*

4.4 Amendment Order 56, rule 1, states "*adequate reasons*" for a decision means a document that:

> *(a) states any findings on material questions of fact that led to the decision and refers to the evidence or other material on which those findings were made; and*
>
> *(b) states the reasons for the decision.*

4.5 Amendment Order 56, sub-rule 5(2)(c) provides that:

> *On an application, the Court may do one or more of the following –*
>
> *(c) if adequate reasons for the challenged decision have not been given, order the person who made it to give adequate reasons for it to any or all of the following —*
>
> *(i) the Court;*
>
> *(ii) the applicant;*
>
> *(iii) a person served with the application;*

5 THE COMMITTEE'S VIEW OF AMENDMENT ORDER 56

5.1 The Committee took issue with the requirement in Amendment Order 56 for "*adequate reasons*" to be given for a challenged administrative decision when a person makes an application for judicial review of that decision. This is because the common law does not require reasons (adequate or otherwise) to be given for administrative decisions.[10]

5.2 In the High Court of Australia case of *Public Service Board of New South Wales v Osmond*, reasons were precisely what Mr Osmond sought in order to comprehend why a Board denied him promotion.

5.3 Mr Osmond unsuccessfully appealed the Board's decision at first instance. The New South Wales Court of Appeal then allowed his appeal with Kirby, P stating that the Board was obliged to give reasons for its decisions on the broad principle that the common law requires those entrusted by statute with discretionary power to make decisions to act fairly and "*normally this will require … an obligation to state the*

[10] Per Gibbs CJ in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656 at 662.

reasons for their decisions".[11] The Board then appealed to the High Court where Gibbs CJ said the Court of Appeal's conclusion was "*opposed to overwhelming authority.*"[12] He said:

> *There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests or defeat the legitimate or reasonable expectations of other persons.*[13]

5.4 This is so:

- no matter how desirable it might be thought to provide reasons;[14]
- even though the inability to compel reasons may frustrate the work of the judiciary;[15] and
- even though arguably, the common law may be advanced.[16]

5.5 The very point of the authoritative *Osmond case* is that the courts, at common law or in the exercise of judicial power at common law do not have power to order administrative decision makers to give reasons, yet this is a significant element of Amendment Order 56. In the Committee's view, Amendment Order 56 extends the common law by adding another layer of subjectivity to the decision making process because "*adequate*" reasons may be ordered.

5.6 What may be a reason for a decision may not necessarily be considered judicially adequate. Reasons are not contemplated by the common law at all let alone

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11 Per Gibbs CJ in *Public Service Board of New South Wales v Osmond* 1986) 159 CLR 656 at paragraph 5 quoting Kirby P from *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447.

12 Per Gibbs CJ in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, at paragraph 4.

13 Ibid, paragraph 6.

14 Per Gibbs CJ in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, paragraph 15, p9 and Council of Australasian Tribunals, the Whitmore Lecture 2012, *The Reason for Administrative Reasons – Osmond Revisited*, by the Hon Michael Kirby, AC CMG, pp11 and 14.

15 As was evidenced in *Watson v South Australia* [2010] SASCFC 69, a case in which the Governor was not obliged to give reasons for his decision not to release a prisoner on parole. Doyle CJ in applying *Osmond* said at paragraph 124 on p29; "*The Court cannot require reasons, absent any other obligation to provide them, to assist an applicant for judicial review*". At paragraph 3 on p1 Doyle CJ further said that "*Mr Watson is left in an unfortunate position. He has served about 25 years' imprisonment. He does not know why the Board's recommendations have not been accepted by the Governor. He does not know how he might change the situation*." In Council of Australasian Tribunals, the Whitmore Lecture 2012, *The Reason for Administrative Reasons – Osmond Revisited*, the Hon Michael Kirby, AC CMG referred at p37 to the "*hand ringing that has accompanied this area of the law since the High Court delivered its decision in Osmond*."

16 Council of Australasian Tribunals, the Whitmore Lecture 2012, *The Reason for Administrative Reasons – Osmond Revisited*, by the Hon Michael Kirby, AC CMG, pp10 and 13.

'adequate' reasons. For example, in *South Australia v Totani,*[17] the High Court clarified that the Attorney General in that case was not bound to give any reasons for declaring a particular motor cycle gang to be a declared organisation, let alone the "*comprehensive*" reasons that were in fact given.[18]

5.7 The Committee formed the view that under the 'separation of powers doctrine'[19] it is not within the remit of the Judiciary to change by subsidiary means, the common law. Any such change is preceded by an extensive review of the policy considerations. The Executive contemplates a departure from a settled legal rule, principle, freedom, immunity or privilege on grounds of public policy or on occasion, responding to a significant court case (such as occurred with the reform of the 800 year old common law rule against double jeopardy).[20]

5.8 The Chief Justice has previously raised concerns about the absence of law reform with respect to the provision of reasons for administrative decisions. In 2012 he referred to the Executive's "*absence of any evident ambition to reform the substantive law with respect to judicial review.*"[21] It was this slow pace of legislative reform that in fact motivated the making of the Amendment Rules. The Chief Justice said:

> *As substantive reform of the law relating to administrative review seems unlikely in the short to medium terms, the Judges of the Supreme Court have resolved to consider the implementation of procedural reform by way of changes to the Rules of Court.*[22]

5.9 However, as the High Court said, even if change is beneficial, it "*should be decided by the legislature and not by the courts.*"[23] The power of the courts to renovate the law is not untrammelled[24] and the absence of a duty to give reasons scarcely deprives a court

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17 [2010] HCA 39.

18 Per Hayne J in *South Australia v Totani* [2010] HCA 39, para 166 at p65.

19 A fundamental principle of law that the Executive, the Parliament and the Judiciary remain separate from each other and do not encroach upon each other.

20 For example, *R v Carroll* (2002) 213 CLR 635. Public outrage over that case in Australia and similar cases in the United Kingdom regarding perceived guilty persons being freed by the courts drove reform of this ancient rule.

21 Law Summer School 2012, *Review of Administrative Decisions in Western Australia - Procedural Reform*, Address by the Honourable Wayne Martin, Chief Justice of Western Australia, 24 February 2012, p16.

22 Ibid, p3.

23 Per Gibbs CJ in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656, paragraph 13.

24 Per the dissenting judgment of Glass J in *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447 at 471 which was Mr Osmond's second attempt to obtain reasons for why he was refused promotion.

of its institutional integrity.[25] It also does not follow from the fact that a decision-maker has not provided reasons that the decision-maker's decision is unreasoned.[26]

5.10 In a post-*Osmond* world, former High Court Justice Michael Kirby said:

> *The near unanimous opinion of the High Court of Australia … ensured that there would be no easy path to expand the duty to provide reasons to administrators unless legislatures, in clear terms, accepted that principle and imposed that duty by or under statute*.[27]

5.11 The Committee considers that the place for reforming the common law is not within the *Rules of the Supreme Court 1971* but within the *Supreme Court Act 1935* itself or other Act of the Parliament, not in rules of court.

5.12 After the decision in the *Osmond case*, there was a flurry of statutory activity by various jurisdictions to change their common law positions.[28] Except for New South Wales, this activity was by primary, not subsidiary legislation. The Solicitor General advised the Attorney General that:

> *This is the case with the Commonwealth, Queensland, Tasmania, Victoria, and the Australian Capital Territory. South Australia and the Northern Territory have not altered the position as stated in Osmond.*[29]

6 VIEWS OF THE CHIEF JUSTICE OF WESTERN AUSTRALIA

6.1 The Chief Justice has consistently asserted in correspondence[30] that the Amendment Rules are 'within power' of the *Supreme Court Act 1935* because:

- the content of them deals "*only*"[31] with 'practice and procedure'; and
- they do not confer substantive rights on persons.

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25 Per Heydon J in *South Australia v Totani* [2010] HCA 39, paragraph 269 on p106.

26 *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28 per Heydon J at para 94, p40.

27 Council of Australasian Tribunals, the Whitmore Lecture 2012, *The Reason for Administrative Reasons – Osmond Revisited*, the Hon Michael Kirby, AC CMG, p15.

28 In Council of Australasian Tribunals, the Whitmore Lecture 2012, *The Reason for Administrative Reasons – Osmond Revisited*, the Hon Michael Kirby, AC CMG lists at footnotes 106 and 107 on p33, the statutory responses.

29 Letter from Hon Michael Mischin MLC, Attorney General, 2 August 2013 enclosing advice from the Solicitor General, Mr Grant Donaldson SC to the Attorney General, 1 August 2013, p12.

30 See **Appendix 3**.

31 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 28 August 2013, pp5 and 6.

6.2 The Chief Justice asserts that the Court may order reasons to be provided in cases which have been initiated in the Court but "*plainly that power would not be exercised unless the provision of reasons is relevant to one or more of the grounds of review specified in the application*"[32] for judicial review.

6.3 The Chief Justice relies for his view on a New South Wales *Practice Note*[33] (the substance of which is equivalent to the Amendment Rules) and summaries of nine New South Wales cases based on that *Practice Note* to justify the Amendment Rules. The Chief Justice is of the view that the principles emanating from those nine cases based on the *Practice Note* are a "*contemporary approach*"[34] that would be applied in Western Australia.

6.4 According to the Chief Justice, those nine cases establish that reasons are not ordered as a matter of course, but only when justified having regard to the issues which must be resolved by the court, and to the other interlocutory procedures[35] available to the parties.[36]

6.5 The fact that the *Practice Note* passaged unimpeded through a sovereign, New South Wales Parliament is not a relevant consideration as to whether the equivalent Amendment Rules should passage through a sovereign, Western Australian Parliament. The Committee has been informed that the relevant New South Wales scrutiny committee does not ordinarily scrutinise Practice Notes even though they are statutory rules and subject to disallowance.[37]

6.6 The Chief Justice said only New South Wales has rules of this kind because most of the other jurisdictions have legislation "*providing for a general right to reasons for administrative decisions*."[38] In the Committee's view this is the important point - the other jurisdictions have provided for a right to reasons in primary, not subsidiary legislation.

6.7 It is the Committee's view that the Chief Justice's proposition, if accepted, would reduce an order for 'adequate reasons' to a mere procedural event within the overall process of applying for judicial review. In contrast, the Committee is of the view that the Amendment Rules, if allowed would in fact, amend the common law by subsidiary

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32 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 4 July 2013, p2.

33 The first New South Wales Practice Note was *Supreme Court Practice Note 119*. It came into effect on 2 May 2001. The current Practice Note is *Supreme Court Practice Note SC CL 3*.

34 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 28 August 2013, p7.

35 Interlocutory proceedings are proceedings in which the substantive rights of parties to a matter are not finally determined.

36 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 28 August 2013, p6.

37 Email correspondence between the New South Wales Parliamentary Library Service and the Western Australian Parliamentary Library Service, 14 October 2013.

38 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 28 August 2013, p4.

means. A line of High Court case law including *Potter v Minahan*,[39] *Bropho v Western Australia*,[40] *Coco v R* [41] and more recently the Federal Court in *Evans v State of New South Wales*[42] reinforce and settle that the common law must be changed by clear words in an Act of the relevant Parliament.

6.8 The Western Australian *Supreme Court Act 1935* does not expressly provide for the abrogation of the common law position that administrative decision makers do not have to give reasons for their decisions.

7 VIEWS OF THE SOLICITOR GENERAL

7.1 The Solicitor General said that both the 'practice/procedure' and incidental powers in section 167(1)(a) of the *Supreme Court Act 1935* are "*broad, but limited terms*" [43] and have been exceeded in the Amendment Rules. The Solicitor General said:

> *Prior to the 2013 Rules an applicant to the Court seeking the quashing of a decision on grounds (say) that the decision maker took into account irrelevant considerations, could not require the decision maker to provide the reasons for a decision. The assertion that the decision maker took into account irrelevant considerations would have to be made out from the terms of the decision itself and the drawing of whatever inferences were available at law.*
>
> *The applicant could not seek, and the Court could not order, a decision maker to explain what considerations were actually taken into account and which were not. The Court could not do this because the Court did not have power to do so. This deficit of power was fundamental and derived from deep seated, underlying principles of the common law, explained in (inter alia) Osmond.*
>
> *The 2013 Rules purport to give a power to the Court which it lacks and provide a right to a person - to obtain adequate reasons for an administrative decision - which the law denies.*[44]

7.2 The Committee concurs with this assessment of the Amendment Rules.

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39 (1908) 7 CLR 277.

40 (1990) 171 CLR 1.

41 (1994) 179 CLR 427.

42 [2008] FCAFC 130.

43 Letter from the Hon Michael Mischin MLC, Attorney General, 2 August 2013 enclosing advice from the Solicitor General, Mr Grant Donaldson SC to the Attorney General, 1 August 2013, p9 and attached at **Appendix 5**.

44 Ibid, pp9-10.

8 COMMENTARY ON WHAT CONSTITUTES 'PRACTICE OR PROCEDURE'

8.1 The issue of what constitutes practice or procedure has been the subject of academic debate and judicial comment. Pearce and Argument in their seminal work, *Delegated Legislation in Australia*, state that the issue that arises most frequently is whether the rules are concerned with matters of practice and procedure or whether they attempt to deal with issues extending beyond that description.[45] The question the Committee therefore asked itself is whether Amendment Order 56 can be properly characterised as a law with respect to 'practice and procedure'?[46] In this exercise, the Committee found the following list of items in *Ousley v R*[47] to be useful examples of practice and procedure. They are:

- forms of action,
- parties to an action,
- venue,
- rules of practice and pleading,
- proof of facts,
- admissibility of evidence,
- rebuttable presumptions, and
- burdens of proof.

8.2 In *Ousley v R*, McHugh J said:

> *It has been suggested that the line between substance and procedure should be drawn on the basis of the general distinction between procedural rules which concern methods of presenting to a court the operative facts upon which legal relations depend, and substantive rules which concern the legal effect of those facts after they have been established.*

8.3 The following differentiation is also helpful:

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45 Pearce, D and Argument, S, *Delegated Legislation in Australia*, 4th edition, 2012, LexisNexis Butterworths, p180.

46 Ibid.

47 HCA 49; (1997) 192 CLR 69; (1997) 148 ALR 510; (1997) 71 ALJR 1548 (20 October 1997), quoting from *Cleland v Boynes* (1978) 19 SASR 464 on the procedural/substantive law distinction.

> *The mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which by means of the proceeding the Court is to administer the machinery as distinguished from its product.*[48]

8.4 In *Harrington v Lowe*[49], Kirby J discussed the nature of a court's rule making power. He said:

> *That compendious phrase has conventionally been given a broad operation especially in the context of a power to make rules, to cover the multitude of subsidiary matters which can arise in the operation of a court with a complex jurisdiction, the phrase should not be narrowly construed.*
>
> *The task of a court is to characterise a rule which is challenged on the ground that it has exceeded the legislative grant of power. Such a rule may exhibit the appearance of having a dual character: pertaining in some ways to procedural matters but in other way having an effect on substantive rights.*
>
> [The] … *purpose, relevantly, is to decide whether the subject matter of the challenged rule is no more than a procedural pre-condition to the enjoyment of rights judicially recognised or an abrogation of substantive rights, beyond the power of the subordinate law-maker.*
>
> *The mere fact that a procedural rule has effect upon substantive rights is not enough to strip it of its procedural character.*
>
> *But if the rule goes beyond the provision of the means by which substantive rights are to be enforced or protected, the decision-maker will be entitled to conclude that what has been done, under the guise of a procedural rule, is, in fact, impermissibly to alter substantive rights.*

8.5 Kirby J referred to an end point being reached where a rule-maker will exceed the boundaries of permissible rule-making on matters in relation to practice and procedure and intrude into rule-making with respect to the substantive rights of the parties. He said there is no clear demarcation or "*bright line*" which divides practice and procedure type rules from those with respect to substantive rights as the two are often

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48 *Poyser v Minors* (1881) 7 QBD 329 at 333 per Lush LJ. See also *Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc* [1981] HCA 39; (1981) 148 CLR 170 at 176-177; *The Commonwealth v Hospital Contribution Fund* [1982] HCA 13; (1982) 150 CLR 49 at 75.

49 *Harrington v Lowe* [1996] HCA 8; (1996) 190 CLR 311.

inter-connected.[50] It is the Committee's role to determine the point at which that "*bright line*" has been crossed.

8.6 The Committee finds that the judges of the Supreme Court have intruded into rule-making with respect to the substantive rights of parties, in this case, the right of an administrative decision maker not to give reasons for a decision. Therefore, Amendment Order 56 cannot be characterised as a rule with respect to practice or procedure.

9 THE PARLIAMENT OR THE COURTS?

9.1 During consideration of the Amendment Rules, it became clear that there is discord between what the Chief Justice considers to be the "*proper*"[51] relationship between the Parliament (and by extension, its committees), and the Courts when scrutinising subsidiary legislation.

9.2 The Chief Justice is of the view that any contest between the Courts and the Parliament over an Instrument should be resolved by the courts. Thus, the Committee should allow the Amendment Rules to passage through unimpeded by concerns over validity so that the power to disallow:

> *…will ordinarily be exercised in a context in which Parliament acknowledges and respects the primary role and responsibility of the Court to determine issues of law*.[52]

9.3 The Chief Justice said:

> *With the greatest of respect, the proper forum for the resolution of contested legal issues is the Court, not the Parliament.*
>
> *If any party to proceedings before the Court wishes to contend that the amendment rules, and in particular the rule relating to the provision of reasons is beyond the rule-making power of the Court, and considers that they can overcome the line of authority in New South Wales to which I have referred, they are free to do so, and the Courts, including perhaps the High Court, can rule upon the issue. I would, of course, recuse myself from any involvement in any such case.*

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50 *Harrington v Lowe* [1996] HCA 8; (1996) 190 CLR 311), para 27.

51 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 8 August 2013, p1.

52 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 28 August 2013, p6.

> *Accordingly, the proper course in this instance, with respect, is to allow the amendment rules to stand, and to enable any issue of the legality of those rules to be determined in the usual way.*[53]

9.4 The Committee finds the Chief Justice's proposition (above) troubling and does not accept it. Pearce and Argument in *Delegated Legislation in Australia*, state that questions relating to the validity of rules made by the superior courts arise infrequently but when they do, the general principles that apply to subsidiary legislation made by the Executive are applied to determine validity.[54] The Parliament has tasked the Committee through *Standing Orders* to 'consider' an Instrument and inquire whether it is 'within power' and 'contains only matter that is appropriate for subsidiary legislation.' This is an active role, not a passive passaging of an Instrument through to the Courts to decide validity.

9.5 The Committee notes the Solicitor General's view of the Parliament's role:

> *In no Australian jurisdiction, other than New South Wales (and now Western Australia), does the judiciary, and not the Parliament or the Executive, determine which decisions - amongst the myriad of administrative decisions made daily by government- attract an obligation to provide "adequate reasons".*[55]

9.6 The Committee is of the view that it is clearly preferable and correct practice that the Amendment Rules are either allowed or disallowed by the Parliament rather than their validity determined within the forum of the Courts. This accords with the principle that no-one should be a judge in their own cause.[56]

10 OTHER CONSIDERATIONS

10.1 If the Amendment Rules were allowed to stand, an aggrieved applicant seeking reasons for an administrative decision would incur the expense of a Court determining whether it will make an order for reasons. There would be no certainty of a successful outcome. Of this, the Chief Justice said:

> *Lest members of the Committee think that proceedings may be commenced in the Court by a significant number of individuals or*

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53 Letter from the Chief Justice of Western Australia, Hon Wayne Martin AC, 28 August 2013, p7.

54 Pearce, D and Argument, S, *Delegated Legislation in Australia*, 4th edition, 2012, LexisNexis Butterworths, p180 and 313-314.

55 Letter from the Hon Michael Mischin MLC, Attorney General, 2 August 2013 enclosing advice from the Solicitor General, Mr Grant Donaldson SC to the Hon Michael Mischin MLC, Attorney General, 1 August 2013, p14 and attached at **Appendix 5**.

56 This is the *nemo iudex in causa sua* principle. It is a principle of natural justice that no person can judge a case in which they have an interest. The rule is very strictly applied to any appearance of a possible bias, even if there is actually none.

> *corporations for the collateral purpose of obtaining reasons for decision, rather than for the purpose of pursuing a challenge to the validity of the decision in question, it should be remembered that the fee for commencement of proceedings in the Court for individuals is currently $831, and for corporations $1619.*
>
> *Legal costs would have to be added to those fees, in order to get the case to the point where an application for an order for the provision of reasons could be successfully mounted.*
>
> *The economic barriers to such a course would appear to make subversion of the process for the dominant purpose of obtaining reasons highly improbable.*

10.2 The Chief Justice's views have ramifications for the practical operation of the Amendment Rules. If allowed, only those with 'deep pockets' would be in a position to seek to obtain the benefit. The Amendment Rules would create a special class of applicants accessing the 'justice' the Amendment Rules would provide.

10.3 The Committee finds this operative effect of the Amendment Rules also troubling.

11 CONCLUSIONS

11.1 In the words of former High Court Justice Michael Kirby, the common law has not advanced to impose upon administrative officials a general duty to express reasons for significant decisions adverse to the interest of a claimant.[57]

11.2 The Committee is not persuaded by the Chief Justice's argument that the Amendment Rules are only 'practice or procedure'. The Committee characterises them as impinging on substantive rights.

11.3 The Committee is of the view that the Amendment Rules offend:

- Term of Reference 6.6.(a) – not within power of the *Supreme Court Act 1935*; and
- Term of Reference 6.6.(d) - contain matter that is not appropriate for subsidiary legislation.

12 RECOMMENDATION

12.1 The Committee recommends the Amendment Rules be disallowed for the reasons outlined in this Report.

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[57] Council of Australasian Tribunals, the Whitmore Lecture 2012, *The Reason for Administrative Reasons – Osmond Revisited*, by the Hon Michael Kirby, AC CMG, p6.

Recommendation 1: The Committee recommends that the Supreme Court Amendment Rules 2013 be disallowed.

Mr Peter Abetz MLA
Chair
24 October 2013

APPENDIX 1

SUPREME COURT AMENDMENT RULES 2013

APPENDIX 1

SUPREME COURT AMENDMENT RULES 2013

Supreme Court Act 1935

Supreme Court Amendment Rules 2013

Made by the judges of the Supreme Court.

1. Citation

These rules are the *Supreme Court Amendment Rules 2013*.

2. Commencement

These rules come into operation as follows —

(a) rules 1 and 2 — on the day on which these rules are published in the *Gazette*;

(b) the rest of the rules — on the 14th day after that day.

3. Rules amended

These rules amend the *Rules of the Supreme Court 1971*.

4. Order 4A amended

After Order 4A rule 11(a) insert:

(ba) any case in which there is an application for —

(i) judicial review to which Order 56 applies; or

(ii) a review order under the *Magistrates Court Act 2004* section 36;

(iii) a writ of habeas corpus or an information of *quo warranto*;

5. Order 56 heading replaced

Delete the heading to Order 56 and insert:

Order 56 — Judicial review

6. Order 56 amended

(1) Delete Order 56 rules 1 to 9 and insert:

1. Terms used

(1) In this Order, unless the contrary intention appears —

adequate reasons, for a decision, means a document that —

(a) states any findings on material questions of fact that led to the decision and refers to the evidence or other material on which those findings were made; and

(b) states the reasons for the decision;

application means an application for judicial review of a reviewable decision or of reviewable conduct;

challenged conduct means reviewable conduct in respect of which an application is made;

challenged decision means a reviewable decision in respect of which an application is made;

conduct includes any act and any omission;

limitation period —

(a) for an application for judicial review of a reviewable decision, means 6 months after the later of —

(i) the date on which the decision is made; or

(ii) the date on which the applicant became aware of it;

(b) for an application for judicial review of reviewable conduct, other than a failure to make a decision, means 6 months after the later of —

(i) the date on which the conduct occurred; or

(ii) the date on which an applicant became aware of it,

unless a written law sets a different period, in which case it means that period;

remedy includes relief;

reviewable conduct means any conduct, including conduct for the purpose of making a decision and a failure to make a decision, that the Court, under the common law or in equity, has jurisdiction to review and to grant relief in respect of by way of a writ, a declaration or an injunction;

reviewable decision means any decision that the Court, under the common law or in equity, has jurisdiction to review and to grant relief in respect of by way of a writ, a declaration or an injunction;

writ means a writ of certiorari, mandamus, prohibition or *procedendo* or an information of *quo warranto*.

(2) For the purposes of paragraph (a) of the definition of ***limitation period*** in subrule (1), it does not matter if on the relevant date —

(a) the reviewable decision is not or had not been extracted or given in writing; or

(b) adequate reasons for the reviewable decision are not or had not been given.

2. Application, making

(1) To make an application, a person must file an application in the form of Form No. 67A.

(2) In one application a person may apply for any or a combination of these remedies —

(a) one or more writs;

(b) either a declaration or an injunction or both;

(c) a remedy having the same effect as a remedy that could be provided by means of a writ.

(3) An application must state the grounds on which it is made.

(4) If an application is made outside the limitation period for the application —

(a) the application must include an application for leave to proceed with the application; and

(b) the applicant must file an affidavit explaining why the application was not made within the limitation period.

(5) If adequate reasons for a challenged decision have not been given when an application is made for judicial review of it, the application may include an application for an order that the person who made it must give adequate reasons.

3. Application, service of

After making an application, the applicant must serve it, by personal service, on —

(a) the person who made the challenged decision or engaged in the challenged conduct; and

(b) any person who was a party to the proceedings in which the challenged decision was made or the challenged conduct occurred.

4. Person served with application, options of

A person served with an application may —

(a) enter an appearance under Order 12, which applies with any necessary changes; or

(b) file, and serve on the applicant, a notice stating the person does not intend to take part in the proceedings and will accept any order made by the Court on the application other than as to costs.

5. Procedure on application

(1) The applicant and any person served with an application are entitled to be heard on it.

(2) On an application, the Court may do one or more of the following —

(a) if the application is made outside the limitation period for the application, give or refuse the applicant leave to proceed with the application;

(b) order the applicant to serve the application on a person whom the Court considers might have an interest in the challenged decision, the challenged conduct or the outcome of the application;

(c) if adequate reasons for the challenged decision have not been given, order the person who made it to give adequate reasons for it to any or all of the following —

(i) the Court;

(ii) the applicant;

(iii) a person served with the application;

(d) prohibit or restrict the disclosure of the reasons for the challenged decision or any part of them;

(e) order the applicant or any other person to file an affidavit as to any facts material to the application, the challenged decision or the challenged conduct;

(f) give the applicant leave to file and rely on an affidavit (whether or not made by the applicant);

(g) allow a person not served with the application to be heard on it;

(h) give the applicant leave to require a person served with the application to give discovery under Order 26;

(i) give the applicant leave to require a person served with the application to answer interrogatories under Order 27;

(j) allow the applicant to amend the application;

(k) adjourn the hearing of the application;

(l) refuse the whole or a part of the application if it has no reasonable prospect of succeeding;

(m) grant or refuse the application;

(n) if it considers the remedy applied for would be inadequate, grant any other remedy.

(3) Subrule (2) does not limit the operation of Order 4A or the powers of the Court when dealing with an application.

(4) A single judge dealing with an application may, without deciding it, order it be heard by the Court of Appeal.

6. Discovery and interrogatories

Orders 26 and 27 do not apply in proceedings on an application unless and to the extent the Court, under rule 5(2) or Order 4A, gives leave and orders otherwise.

7. Costs

(1) The Court may make an order for the payment of the costs of the proceedings on an application against one or more of these persons —

(a) the applicant;

(b) the person who made the challenged decision or engaged in the challenged conduct;

(c) a person served with the application;

(d) a person not served with the application whom the Court allowed to be heard on it.

(2) Subject to rule 24, the Court may make such an order before, when or after deciding the application.

(2) In Order 56 rule 10(1):

(a) delete "in proceedings to which this Order relates" and insert:

on an application

(b) delete paragraph (a) and insert:

(a) be prepared by the applicant; and

(3) Delete Order 56 rules 11, 12 and 13.

(4) In Order 56 rule 15(1) delete "An order nisi for a writ" and insert:

A writ

(5) In Order 56 rule 25 delete "order nisi or".

(6) In Order 56 rule 26 delete "to whom the notice of motion, order nisi or" and insert:

who made the challenged decision or to whom the

(7) Delete Order 56 rule 27.

(8) Delete the heading to Order 56 Division 4 and insert:

Division 4 — Prohibition and *procedendo*

(9) At the beginning of Order 56 Division 5 insert:

34A. Application for information of *quo warranto*

To apply for an information of *quo warranto* without applying for judicial review, a person must apply *ex parte* by originating motion.

(10) Delete Order 56 rule 35(2) and insert:

(2) A copy of the information must be served on the respondent or, if he or she appeared by a lawyer, on the lawyer.

7. Schedule 2 amended

In Schedule 2 after Form 66 insert:

67A. Application for judicial review (O. 56 r. 2)

In the Supreme Court of Western Australia	No: **Application for judicial review**
Applicant	
Respondent [1]	Name: Office:
Other parties	
Decision or conduct to be reviewed	Date: Where made or occurring: Written law governing: Description:
Application [Tick one or more]	The applicant applies for judicial review of the above decision or conduct and — ☐ a writ of certiorari; ☐ a writ of mandamus; ☐ a writ of prohibition; ☐ a writ of *procedendo*; ☐ an information of *quo warranto*; ☐ a declaration; ☐ an injunction; ☐ this remedy (being a remedy which would have the same effect as a remedy that could be provided by means of one or more of the above writs) —

Grounds of application	The grounds for the above application are these — 1.	
Late application [2]	☐ The applicant also applies for leave to proceed with this application which is made outside the limitation period.	
Reasons for decision [2]	☐ The applicant also applies for an order that the maker of the challenged decision give adequate reasons for it.	
Signature of applicant or lawyer	Applicant/Applicant's lawyer	Date:

Notes to Form No. 67A —
1. The respondent is the person whose decision or conduct is to be reviewed.
2. Tick only if necessary.

Dated: 15 April 2013.

Judges' signatures:

Chief Justice MARTIN

Justice McKECHNIE

Justice BEECH

Justice McLURE

Justice NEWNES

Justice PULLIN

Justice MARTIN

Justice HEENAN

Justice MURPHY

Justice Le MIERE

Justice HALL

Justice JENKINS

Justice MAZZA

Justice SIMMONDS

Justice PRITCHARD

Justice BUSS

Justice EDELMAN

APPENDIX 2

LETTER FROM HON MICHAEL MISCHIN MLC, ATTORNEY GENERAL - DATED 2 AUGUST 2013

APPENDIX 2

LETTER FROM HON MICHAEL MISCHIN MLC, ATTORNEY GENERAL- DATED 2 AUGUST 2013

ATTORNEY GENERAL; MINISTER FOR COMMERCE

Our Ref: 44-05423
Your Ref: 3901/7 & A398740

12 AUG 2013

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

Dear Mr Abetz

SUPREME COURT AMENDMENT RULES 2013

Thank you for your letter of 2 July 2013 seeking my comments concerning the preliminary view you have expressed with respect to the Supreme Court Amendment Rules 2013 (2013 Rules). I note your letter, of the same date, to the Chief Justice of Western Australia on this issue as well as the Chief Justice's response to that letter dated 4 July 2013.

I have sought the Solicitor General's advice in relation to the validity of the 2013 Rules which seek to amend Order 56 of the *Rules of the Supreme Court*. In addition, the Solicitor General has provided advice as to whether, in terms of clause 6.6(a) of the Joint Standing Committee on Delegated Legislation's terms of reference, the 2013 Rules are within power. With reference to clause 6.6(d) of the Committee's terms of reference, advice was also sought in regard to the appropriateness of the amendments, made by the 2013 Rules, being contained in subsidiary legislation.

A copy of the Solicitor General's advice is enclosed for your consideration.

I have also asked the Solicitor General to make himself available to appear before the Committee should it require any further information on this issue.

Yours sincerely

Hon. Michael Mischin MLC
ATTORNEY GENERAL; MINISTER FOR COMMERCE

Attch. - 2 AUG 2013

cc: The Hon Wayne Martin AC,
Chief Justice of Western Australia

Level 10, Dumas House, 2 Havelock Street, West Perth Western Australia 6005
Telephone: +61 8 6552 5600 Facsimile: +61 8 6552 5601 Email: Minister.Mischin@dpc.wa.gov.au

APPENDIX 3

VARIOUS CORRESPONDENCE FROM HON WAYNE MARTIN AC, CHIEF JUSTICE OF WESTERN AUSTRALIA

APPENDIX 3

VARIOUS CORRESPONDENCE FROM HON WAYNE MARTIN AC, CHIEF JUSTICE OF WESTERN AUSTRALIA

CHIEF JUSTICE OF WESTERN AUSTRALIA
Chief Justice's Chambers, Supreme Court of Western Australia,
Stirling Gardens, Barrack Street,
Perth, Western Australia 6000

Telephone: +(08) 9421 5337 Fax: +(08) 9221 3833
Email: chief.justice.chambers@justice.wa.gov.au

Your ref: 3901/7 & A398740
Our ref: JUDI2001

4 July 2013

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
Legislative Council Committee office
Ground Floor, 18-32 Parliament Place
WEST PERTH WA 6005

Dear Mr Abetz

Supreme Court Amendment Rules 2013

Thank you for your letter of 2 July 2013. I note your preliminary view, advised on behalf of the Committee, that Amendment Order 56, sub-rules 2(5) and 5(2)(c) are not '*within power*' of the *Supreme Court Act 1935*.

I am grateful for the opportunity to respond.

In your letter, the amendment to Order 56 is described as:

> *providing a process for a person to make an application for judicial review of 'reviewable conduct' and 'reviewable decisions'. The application has to include "adequate reasons" for the challenge, defined as a document stating "findings on material questions of fact".*

With respect, it appears to me that this summary is a misstatement of the processes envisaged under the amended rules.

To make an application under the amended rules a person must complete Form 67A. That form must set out the decision or conduct to be reviewed, the nature of the application being made (writ, declaration, injunction or remedy having the same effect that could be

provided by writ) and the grounds for the application. If there are inadequate reasons given for a decision challenged, the applicant can apply for the Court to order the decision-maker to give adequate reasons (Order 56(5)).

The application does not have to include '*"adequate reasons" for the challenge defined as a document stating "findings on material questions of fact"*' as stated in your letter. The application has to include the grounds for application. It can also include a request that the Court order the maker of the challenged decision to give adequate reasons for it. The request that the Court order the decision-maker to provide adequate reasons (including the findings on material questions of fact) is neither a necessary part of the application nor will the giving of adequate reasons be the 'remedy' to the application.

The decision in *Public Service Board of NSW v Osmond*, to which you refer, stands for the proposition that at common law, the provision of reasons is not a condition of the valid exercise of the power of an administrative decision-maker, whereas the provision of reasons is generally regarded as a condition of the valid exercise of judicial power. In other words, the cases establish that an administrative decision cannot be quashed merely because no or inadequate reasons were provided in the absence of a statutory provision to that effect.

There is nothing in the amended rules which is inconsistent with that decision. The Rules do not provide that a decision can be quashed for a failure to give reasons. All that the Rules provide is that the Court may order reasons to be provided in cases which have been initiated in the Court. Plainly that power would not be exercised unless the provision of reasons is relevant to one or more of the grounds of review specified in the Application.

A rule allowing for an Applicant to request that the Court order the decision-maker to provide adequate reasons is part of the Court's procedure. It is similar to the Court's procedures for interrogatories and discovery. These are processes by which the Court can require a party to answer questions put, or provide access to records requested,

by the other party should the Court consider the questions asked or the records requested relevant to the matter at hand.

The provisions in the Rules concerning the provision of reasons are analogous to these processes, which facilitate the administration of justice without altering substantive legal rights and obligations. In my opinion Order 56, sub-rules 2(5) and 5(2)(c) therefore fall within the Court's powers to regulate and prescribe the procedure and practice to be followed in all causes and matters for which this Court has jurisdiction, under section 167(1)(a) of the *Supreme Court Act 1935*.

I have attached a copy of a Practice Note from the Supreme Court of NSW for your information. As you can see, the process outlined at paragraph 23 provides that the Court may direct the decision-maker to furnish a statement of reasons, including findings of material questions of fact. This is similar to the intended process under the amended Rules, whereby this Court could order the provision of adequate reasons at a directions hearing if it is considered relevant to the Application. Although NSW has a statutory requirement that reasons for administrative decisions be provided (*Administrative Decisions Tribunal Act 1997* (NSW) this applies only to decisions reviewable by the Tribunal on their merits. The NSW Supreme Court's jurisdiction is broader and extends to all decisions, whether administrative, judicial, or even legislative, which exceed the lawful jurisdiction of the decision-maker. There is no statutory power authorising the NSW Practice. It can reasonably be inferred that the issue raised in your letter has not been seen as an impediment of the practice of ordering reasons, where relevant to the issues in the case, in NSW.

The amended Rules do not provide for an applicant to challenge a decision on the basis that inadequate reasons were provided. Applications can only be made in relation to conduct or decisions that are 'reviewable'; that is conduct or decisions that *'the Court, under common law or in equity, has jurisdiction to review and to grant relief in respect of or way of a writ, a declaration or an injunction'*. As I have pointed out, it can safely be assumed that reasons will only be ordered in cases where their provision would be relevant to the existing ground of review.

Chief Justice's Chambers, Supreme Court of Western Australia

4 July 2013

As pointed out elsewhere in your letter, neither the common law nor natural justice require that reasons be given for administrative decisions. The position at common law has not been abrogated by statute in WA. As a result this Court does not have jurisdiction to review decisions on the basis that there are no, or inadequate, reasons provided for the decision. The amended rules do not purport to, and cannot give, this Court that jurisdiction.

As you may be aware from my previous work for the Law Reform Commission of Western Australia and more recent published speeches, in fact I have long lamented the absence of any requirement that administrative decision-makers provide reasons in WA, independently of proceedings for judicial review. Indeed, I would welcome it if your colleague, Hon Michael Mischin MLC, Attorney General, would consider reform in this area.

Please do not hesitate to contact Dr Jeannine Purdy, Senior Legal Research Officer on 9421 5328 or email jeannine.purdy@wa.gov.au, should you require any further information. Alternatively, I would be pleased to meet with you and your colleagues on the Committee if you thought that further elaboration would be beneficial.

Yours sincerely

Wayne Martin

The Hon Wayne Martin AC
Chief Justice of Western Australia

cc: Hon Michael Mischin MLC, Attorney General
Mr Walter Munyard, the Parliamentary Counsel

Letter to DelLeg Committee_O56(2)(5)

Practice Note No. SC CL 3

Supreme Court Common Law Division - Administrative Law List

Date: 16/07/2007

PRACTICE NOTE SC CL 3

Supreme Court Common Law Division - Administrative Law List

Commencement
1. This Practice Note commences on 16 July 2007.

Application
2. This Practice Note applies to proceedings in, or to be entered in, the Administrative Law List.

Definitions
3. In this Practice Note:
List means the Administrative Law List
SCA means the *Supreme Court Act 1970*
SCR means *Supreme Court Rules 1970*
UCPR means the *Uniform Civil Procedure Rules 2005*

Introduction
4. The purpose of this Practice Note is to explain the operation of the List which is provided for by UCPR r 45.3.

5. The Court exercises both common law and statutory jurisdiction with respect to public bodies and officials. The common law jurisdiction provides for judicial review of the actions and decisions of public bodies, officials and various tribunals. The statutory jurisdiction provides for appeals and applications to the Court from the decisions of various tribunals and quasi-judicial bodies.

Judicial review
6. The common law grounds for judicial review have been refined in recent years. They include:
- "ultra vires" - lack of jurisdiction;
- lack of procedural fairness;
- acting under dictation;
- real or apprehended bias;
- inflexible application of a policy;
- taking into account irrelevant considerations;
- failing to take into account relevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;
- bad faith; and
- "Wednesbury" unreasonableness.

Statutory appeals and applications
7. UCPR Schedule 8 provides that proceedings under sections 65-67 of the *Consumer, Trader and Tenancy Tribunal Act 2001* are assigned to the List.

8. Additionally, UCPR Schedule 8 assigns matters arising under a number of Acts to the List. These include:
- *Administrative Decisions Tribunal Act 1997*, ss 118 and 119;
- *Dividing Fences Act 1991*, s 19(2) or (3);
- *Freedom of Information Act 1989*, s 58A(1);

- *Independent Commission Against Corruption Act 1988*;
- *Motor Dealers Act 1974*, ss 38(2), 38(3B)(a), Part 5A;
- *Ombudsman Act 1974*, ss 21A, 35A, 35B;
- *Police Integrity Commission Act 1996;*
- *Racial Discrimination Act 1975 (Cth)*;
- *Royal Commissions Act 1923*, s 18B; and
- *Supreme Court Act 1970*, s 70 (ouster of office).

9. As a general rule, all proceedings for review or in the nature of appeals from administrative bodies or administrative decision makers are assigned to the List, but not appeals from the Local Court, whether in committal proceedings, summary jurisdiction or civil claims, or from any other court presided over by a Magistrate, such as the Coroner's Court, Licensing Court or Mining Wardens' Court. Such matters are not assigned to the List.

10. Notwithstanding UCPR Schedule 8, proceedings in the nature of appeals from bodies presided over by a Judge (e.g. of the District Court) are not assigned to the List, but to the Court of Appeal (SCA, s 48).

11. Matters which were formerly assigned to the List under the *Taxation Administration Act 1996* (e.g. stamp duty, payroll tax and land tax appeals) are assigned to the Equity Division (see UCPR r 1.19(f)). However, claims for debts under that Act are dealt with in the Common Law Division pursuant to UCPR r 1.18(a), but are not assigned to the List.

12. Judicial Proceedings with respect to environmental and planning laws are within the exclusive jurisdiction of the Land and Environment Court.

13. Grounds of appeal and applications from administrative tribunals depend on the terms of the statute setting up the particular tribunal, but invariably include excess of jurisdiction and denial of natural justice, whilst in some cases (e.g. Administrative Decisions Tribunal Appeal Panel and the Consumer, Trader and Tenancy Tribunal) error of law is also available.

Commencing proceedings in the List

14. Proceedings appropriate for the List should be commenced in accordance with UCPR 6.2. Upon commencement, the proceedings are automatically entered in the List pursuant to UCPR r 45.3. If not so commenced, they may be transferred to that list pursuant to UCPR r 45.2 or SCA s54. Proceedings are generally commenced by summons although on occasions where there is an extensive challenge to the decision of a public official or public body they may be commenced by statement of claim. In either case the words, "Administrative Law List" should be added immediately under the words, "Common Law Division" on the front page of the originating process. These words should also be included in the Appearance and all other documents filed in the proceedings. In either case they will be given a date for a directions hearing before the registrar on a weekday at 9.00 am.

15. As to proceedings for prerogative relief, it should be noted that the prerogative writs have been replaced by judgments and orders to a similar effect (SCA s69). Such applications often seek other administrative relief such as declarations or injunctions.

16. Proceedings by way of statutory appeal from an administrative tribunal pursuant to the provisions of the Act constituting the relevant tribunal are governed by UCPR Part 50. Such appeals must be instituted within 28 days (UCPR r 50.3), and there must be served with the summons, a statement of the grounds relied on (UCPR r 50.4). Provision is also made for cross-appeals (UCPR r 50.10) and notices of contention (UCPR r 50.11). Where the appeal is only on a question of law and there is no allegation of denial of natural justice or procedural fairness or excess of jurisdiction, the only evidence necessary is an affidavit annexing or exhibiting a copy of the relevant judgment, and where appropriate, a transcript of the evidence before the tribunal and a copy of the exhibits (see UCPR 50.14).

17. In relation to both applications for prerogative or other administrative law relief and statutory appeals, the relevant tribunal, public body or official must be made a party to the proceedings and served with a copy of the summons, except in the case of the Administrative Decisions Tribunal Appeal Panel. Where such tribunal or public body or official files a submitting appearance save as to costs not less than 2 clear days before the first directions hearing, such tribunal, public body or official need not be represented at such directions hearing but will be automatically excused from further attendance. If another party wishes to seek an order for costs against a submitting defendant, it must prior to such directions hearing, or within such further time as the Court may allow, give notice in writing to such submitting defendant setting out the grounds upon which such costs order will be sought (UCPR r6.11).

Urgent applications

18. Urgent applications, e.g. for ex-parte injunctions and/or leave to serve short notice of proceedings, which on commencement will be appropriate for entry in the List should be made to the Administrative Law List Judge or, if he or she is not available, the Judge designated to assist the List Judge, or if both are unavailable, to the Common Law Duty Judge for that week. Depending on the urgency of the matter, the Judge who deals with the urgent application will normally make the proceedings returnable in the ordinary directions list before the Registrar and will require a summons

and affidavit to be filed and served.

19. Urgent interlocutory relief, including stays of orders for possession of the Consumer, Trader and Tenancy Tribunal normally require the plaintiff to give the usual undertaking as to damages under UCPR r 25.8.

20. In cases involving stays of execution in appeals from the Consumer, Trader and Tenancy Tribunal where the plaintiff is unrepresented, an order is commonly made for service of the summons, affidavit and notice of the stay on the estate agent who appeared for the landlord in the Tribunal. This generally has the effect of ensuring that the respondent is aware of the proceedings and someone appears on his or her behalf at the directions hearing.

Directions hearings

21. When the proceedings come before the Court for directions, all parties should be represented by someone familiar with the case so that the Court can give directions to enable the case to be prepared for hearing. Such directions will typically include dates for the filing of affidavits, discovery, particulars and/or production of documents (if necessary) and the determination of any interlocutory issues. In the ordinary case the only directions necessary are dates for the filing of affidavits. Any timetable fixed should be adhered to so as to avoid unnecessary appearances in the Directions List and the costs occasioned with such appearances. If a party is in default in adhering to the timetable set and such default necessitates additional appearances in the Directions List, consideration may be given to ordering the party in default to pay the costs of the additional appearances.

22. Only in exceptional cases will directions be given for the filing of Points of Claim and Points of Defence, but in appropriate cases, orders for particulars may be made e.g. where a plaintiff seeks orders in the nature of prohibition or certiorari but does not specify the grounds on which such relief is sought.

23. Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Court may, at a directions hearing direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision (compare *Administrative Decisions Tribunal Act 1997 (NSW)*, s49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the List is normally by affidavit.

24. Interlocutory motions such as for summary judgment, to strike out the claim or any part thereof or for an expedited hearing should be made by notice of motion returnable in the Directions List. Unless such orders are consented to, they will generally not be heard on the return date, but a date will be fixed for hearing, possibly before the Duty Judge, if that Judge is available. If they are going to be lengthy, or the Duty Judge will not be available within a reasonable time, they may be referred to the Common Law List Judge to obtain a special fixture.

25. When the proceedings are ready for a final hearing they are allocated dates by the Common Law Case Management Registrar, although when the hearing has been expedited such matters will be referred to the Common Law List Judge to fix a hearing date. Except in cases of extreme urgency, this will not be done until all affidavits have been prepared and the matter is otherwise ready for hearing.

26. There is express power in the to refer an appeal from, or an application for prerogative or declaratory relief relating to a tribunal to an Associate Judge. The List Judge will consider each matter on a case by case basis. An appeal from a Local Court, or an appeal from, or an application for prerogative relief or declaratory relief relating to, the Consumer, Trader and Tenancy Tribunal will be heard by an Associate Judge (SCR Schedule D, Part 3, paragraph 5). In such cases the Registrar examines the issues in the case at the first directions hearing, gives directions for the preparation of the case and then lists the matter for further directions in the Associate Judge's List before the registrar at 9.00 am on a suitable day. When the matter is ready for a hearing, the registrar allocates a hearing date before the Associate Judge. In such cases there is no right of appeal from an Associate Judge to a Judge in the Division, but only to the Court of Appeal, and usually only by leave of the Court of Appeal (SCR Pt 60 r 17 and UCPR r 49.4).

27. Proceedings in the List will not be stood over generally, even by consent. If parties require time to consider their position or negotiate a possible settlement, proceedings may, with the Court's approval, be adjourned for a comparatively lengthy period, but always to a fixed date with (if appropriate) liberty to restore the matter to the Directions List within that time.

J J Spigelman AC

Chief Justice of New South Wales

16 July 2007

Related Information
Practice Note SC CL 3 was issued and commenced on 9 July 2007.

See also:
Practice Note SC Gen 1 Supreme Court – Application of Practice Notes
Practice Note SC Gen 4 Supreme Court – Affidavits
Supreme Court Rules 1970
Supreme Court Act 1970
Uniform Civil Procedure Rules 2005

Amendment History
This Practice Note replaces SC CL 3 issued on 9 July 2007.
Practice Note SC CL 3 issued on 9 July 2007 replaced SC CL 3 issued on 17 August 2005.
Practice Note SC CL 3 issued on 17 August 2005 replaced Former Practice Note No. 119.

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Your ref: 390/7 & A398740 & A402920
Our ref: JUDI2001

8 August 2013

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
PERTH WA 6000

By email: delleg@parliament.wa.gov.au

Dear Mr Abetz

Supreme Court Amendment Rules 2013

Thank you for your letter of 8 August 2013, which has crossed with my earlier letter of the same date.

As you will see from my letter, I had assumed that I would be given the opportunity to respond to the assertions contained within the advice provided by the Solicitor General, which I did not receive until 6 August 2013. As it appears from your letter that the Committee has also taken account of advice received from Parliamentary Counsel and the Attorney General, I would be grateful to receive copies of that advice in order that I might respond to it. As you will be aware, because both of these officers were copied by the Committee into its correspondence with me, they had access to my views when formulating their advice, but I have not yet been given the same opportunity in relation to their advice.

As foreshadowed in my earlier letter, I will write to you as soon as practicable, and before 22 August 2013, providing a substantive response to the Solicitor General's advice, and to any other advice taken into account by the Committee which is provided to me in response to my request above. I would hope that the Committee would take those views into consideration before making any recommendation on the subject of disallowance.

Yours sincerely

Wayne Martin

The Hon Wayne Martin AC
Chief Justice of Western Australia

8Aug03

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Our ref: JUDI2001

28 August 2013

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
Parliament House
Perth WA 6000

By email: delleg@parliament.wa.gov.au

Dear Mr Abetz

Supreme Court Amendment Rules 2013

Thank you for your letter of 15 August 2013. I am most grateful for the opportunity to provide a written response to the Solicitor General's comments regarding the *Supreme Court Amendment Rules 2013* (the amendment rules) and to review the advice received from the Parliamentary Counsel's Office and the Attorney General, and for the extension of time to enable me to prepare such response.

I take your previous letter of 8 August 2013 to report the Committee's view that:

- the *Supreme Court Amendment Rules* have the effect of altering substantive laws, and in particular the common law referred to in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; and

- the amendment rules are concerned with matters beyond practice and procedure.

I assume that this view is based to a significant extent upon the opinion of the Solicitor General dated 1 August 2013.

With respect to the Solicitor General, it is my opinion that his advice is contrary to principle and well established authority, as this letter will demonstrate. A detailed analysis of that advice is attached for your consideration. A summary is provided below.

Summary of my analysis of the Solicitor General's opinion

Overview

There are two persistent flaws in the Solicitor General's advice on the amending rules. Contrary to his assertions:

- Procedural rights to the provision of information in the course of court proceedings do not alter substantive legal rights.

- There is a clear distinction between the power of the court to order reasons where appropriate to the issues raised in proceedings before the Court, and a general right to reasons for administrative decisions.

A series of decisions in New South Wales establishes these two propositions to the point where they can no longer be regarded as controversial. There is no reason to suppose that those decisions would not be applied in any proceedings in this State with respect to the validity and operation of the amendment rules. There is no decision identified by the Solicitor General, or which I have identified, nor any academic writing which supports the views he has expressed, and which are inconsistent with the advice which the Committee received form Parliamentary Counsel.

Chief Justice's Chambers, Supreme Court of Western Australia

28 August 2013

How the Supreme Court of Western Australia operates

Contrary to the Solicitor General's views on how this Court operates:

- Reasons can only be ordered where their provision is relevant to an issue in the proceedings.
- Judges exercise the discretion conferred by the rules judicially, having regard to the particular issues in the case, and all relevant circumstances.

- In accordance with the overarching rules of the Court establishing the objectives of minimising delay and cost and the maximisation of efficiency, the Court will not order any interlocutory step or process to be undertaken unless the time and cost involved in that process would be proportionate to the effect which the process would have upon the just resolution of the dispute between the parties.

- Prior to the amendment rules, the Court had the power to order reasons to be provided. Those powers can be found in the power to order discovery of any documents in which the reasons for decision are recorded, the power to require the provision of better particulars to a pleading or answers to interrogatories, the power to issue a subpoena to compel the production of any documents recording the reasons either before or at trial, or to give evidence at trial, and more recently, the power to make case management directions.

The New South Wales case law on the Practice Note and similar provisions

- The Solicitor General's advice did not refer to a lengthy series of cases in New South Wales which considered the NSW Supreme Court Practice Note and a similar Rule and Practice Note in its Environment and Land Court jurisdiction.

- These cases establish that reasons are not ordered as a matter of course, but only when justified having regard to the issues

which must be resolved by the court, and to the other interlocutory procedures available to the parties.

- The decision in *Osmond* was not about whether a court could order the provision of reasons to assist it to determine an action before it; it was about whether there was a substantive legal right to reasons which the court could enforce by ordering the provision of reasons as the remedy (resolution) to the action before the court.

- The NSW Supreme Court Practice Note and its various amendments as well as a similar Rule and Practice Note in its Environment and Land Court jurisdiction are disallowable instruments, all of which have been tabled before the NSW Parliament. As far as I am aware, no step has been taken in NSW towards the disallowance of these instruments.

- The provisions in the Commonwealth's *Administrative Decisions Judicial Review Act* and WA's State Administrative Tribunal legislation conferring a right to reasons are very different to the New South Wales Practice Note or Western Australia's amending rules. Under the NSW Practice Note and the amendment rules in this State, reasons will only be ordered if and to the extent that they are necessary and appropriate to enable the Court to determine the lawfulness of a decision in proceedings which have been commenced in the Court. This has a very significant practical effect upon the potential ambit of any obligation to provide reasons. Data available to this Court indicate that there are few applications for administrative review. No applications for reasons have yet been made, in the four months or so in which the amendment rules have been in operation.

- Only NSW and WA have rules of this kind because most of the other jurisdictions have legislation providing for a general right to reasons for administrative decisions. As a result the issue of whether court proceedings would be assisted by a statement of

reasons would rarely arise and a Practice Note or Rule would not be warranted.

Are the rules appropriate for subsidiary legislation?

- Prior to the amendment rules, this Court had power to require the decision-maker to provide reasons for a decision through the provision of discovery of documents or the administration of interrogatories (or some other mechanism such as the provision of particulars or subpoenas to produce documents or give evidence) provided an applicant had established an arguable basis for a ground of challenge to which the provision of reasons would be relevant.

- The changes sought to be made in the amendment rules are appropriately made by subsidiary legislation because the amendment rules are not analogous to provisions such as s 13 of the *Administrative Decisions (Judicial Review) Act* (Cth) which provide a general right to reasons irrespective of the commencement of proceedings. Rather they are concerned only with the practice and procedures of the court, and do not alter substantive law.

The desirability or otherwise of reasoned decision-making

More generally, I note that various agencies of the State have recognised the desirability of reasoned decision-making. The Western Australian Ministerial Code of Conduct 2008 (as revised April 2013) asserts that Ministers "are accountable to both the community and Parliament for the administration of their departments, authorities and statutes" and should "give reasons for their decisions and actions to ensure that they are working in the public interest". The Ombudsman of Western Australia has published a guideline setting out the benefits to be derived from the provision of reasons,[1] the Integrity Coordinating Group has promoted the provision of reasons as an aspect of proper process,[2] and the Public Sector Commission has

[1] Ombudsman Western Australia, *Guidelines: Giving reasons for decisions* (revised July 2009).
[2] See its *Integrity in decision making: Proper process* (information sheet) (June 2011).

endorsed the views of the ICG with respect to the making of reasoned decisions.[3]

The validity of these views is not a matter for the Court, but for Executive Government. Nothing in the amendment rules raises any issue with respect to the desirability or undesirability of the conferral of a general right to reasons for decisions. That is because the amendment rules are concerned only with proceedings in the Court, and only empower the Court to order reasons where relevant to a contentious issue which arises in those proceedings, and where appropriate.

The relationship between the Courts and the Parliament

The proper relationship between the Courts and the Parliament has, of course, been worked out over centuries. It is based on mutual respect, and recognition of the particular responsibilities of each branch of government. In that context, the Courts are assiduous to avoid any action which could constitute an interference with the workings of Parliament. However, it is ultimately the responsibility of the Courts to determine the legal validity of the legislative actions of the Parliament.

Conversely, although it is clear that Rules of Court are disallowable instruments, there is a long-established practice to the effect that the Parliament will give full faith and credit to the decisions of the Courts with respect to the procedures to be followed in the administration of justice, and will not lightly interfere with decisions made by the Courts with respect to the procedures appropriately adopted. Similarly, while there is no doubt that the Parliament has power to disallow Rules of Court on any ground, including the ground that the rules are beyond power, those powers will ordinarily be exercised in a context in which Parliament acknowledges and respects the primary role and responsibility of the Court to determine issues of law.

If it were clear that the amendment rules were beyond the rule-making power of the Court, no reasonable person would contest the

[3] Public Sector Commission, *A review of how agencies promote integrity* (2013) pp 9-10.

proposition that the rules should be disallowed by the Parliament. However, for all the reasons I have given, that is not the case. The advice of the Solicitor General does not identify any decision or academic writing which would sustain the proposition that the rules are beyond power, and the analysis is flawed for the various reasons I have enunciated. There is a well-established line of clear authority in the cases in New South Wales to which I have referred which contradict the assertions made by the Solicitor General, and establish, convincingly, that the amendment rules are within the rule-making power of the Court. I note in this context that Parliamentary Counsel has, in effect, advised the Committee that in his view the amendment rules are within power and do not alter the substantive law.

In these circumstances, it would, with respect, be inappropriate for the Parliament to take upon itself the role of resolving the legal questions ventilated in the advice given by the Solicitor General, the Parliamentary Counsel or by me in this response. With the greatest of respect, the proper forum for the resolution of contested legal issues is the Court, not the Parliament. If any party to proceedings before the Court wishes to contend that the amendment rules, and in particular the rule relating to the provision of reasons is beyond the rule-making power of the Court, and considers that they can overcome the line of authority in New South Wales to which I have referred, they are free to do so, and the Courts, including perhaps the High Court, can rule upon the issue. I would, of course, recuse myself from any involvement in any such case.

Accordingly, the proper course in this instance, with respect, is to allow the amendment rules to stand, and to enable any issue of the legality of those rules to be determined in the usual way. For that reason, I respectfully invite the Committee to reconsider its position.

I apologise for the length of this letter and attachment, but I considered it necessary to respond in detail to the various assertions made in the advice of the Solicitor General. I am pleased to reiterate my earlier offer to attend upon the Committee to expand orally upon any of the issues addressed in this letter, at the convenience of the Committee.

Chief Justice's Chambers, Supreme Court of Western Australia

28 August 2013

As the Solicitor General's advice was provided to me by the Attorney General, it would be appropriate for me to respond to him with a copy of this letter and its attachment, as a matter of courtesy. I would be grateful if you could advise whether the Committee has any objection to that course.

Yours sincerely

Wayne Martin

The Hon Wayne Martin AC
Chief Justice of Western Australia

Chief Justice's Chambers, Supreme Court of Western Australia

28 August 2013

ANALYSIS OF THE SOLICITOR GENERAL'S OPINION

Overview

1. Before detailing the specific aspects of the Solicitor General's advice, it is appropriate to first identify two persistent flaws which pervade the approach taken in the advice.

   Procedural rights to the provision of information in the course of court proceedings do not alter substantive legal rights.

2. In our legal system, there are various long-standing court procedures whereby parties to proceedings are entitled to obtain records or information in the possession of another party. This can be achieved by court orders to the effect that a party provide:

   - particulars to a pleading;
   - answers to interrogatories (questions);
   - inspection of documents in the possession of that party; or

   by the issue of a subpoena to produce documents or to give evidence.

3. Any information obtained by the exercise of these powers is subject to an implied undertaking that it be used only for the purposes of the proceedings in which the information is obtained.

4. The legitimacy of these procedures has never been questioned on the basis that because there is no common law right to information or records in the possession of another, they amend or abrogate common law principles.

5. The proposed procedure for the provision of reasons for a decision challenged in proceedings before the Court is a specific application of these general principles and involves no subversion of common law principle. This is the point succinctly made by the Parliamentary Counsel in his advice to the Committee.

6. The amendment rules do not purport to alter in any way substantive legal rights to resist the provision of information to another, such as the substantive legal rights associated with the privilege against self-incrimination or public interest immunity, which includes the confidentiality of Cabinet documents.

There is a clear distinction between the power of the Court to order reasons where appropriate to the issues raised in proceedings before the Court, and a general right to reasons for administrative decisions.

7. A general right to reasons for an administrative decision of the kind asserted by Mr Osmond, or conferred by s 13 of the *Administrative Decisions (Judicial Review) Act*, is very different to a procedure providing the Court with a discretion to order that a party to proceedings provide reasons for a decision made by that party in cases in which those reasons are relevant to the issues before the Court.

8. The Solicitor General unfortunately failed to identify a series of decisions in New South Wales which establish these two propositions to the point where they can no longer be regarded as controversial. There is no reason to suppose that those decisions would not be applied in any proceedings in this State with respect to the validity and operation of the amendment rules. There is no decision identified by the Solicitor General, or which I have identified, nor any academic writing which supports the views he has expressed.

9. I will now address the specific propositions advanced by the Solicitor General in his advice, in the same order, and by reference to the paragraph numbering he has used.

Paragraphs 9 - 15: the Amendment Rules

10. In these paragraphs it is asserted that:

(a) a party can seek reasons even if the ground upon which review is sought has nothing to do with a failure to provide adequate reasons;
(b) every person who commences an application for review will seek reasons;
(c) it is inevitable that in any application, for any relief, where reasons or adequate reasons have not been given, the court will order their provision.

11. These assumptions about the manner in which the amendment rules will operate underpin much of what follows in the Solicitor General's advice. They are assumptions which are propounded without reference to the experience of the operation of similar provisions in New South Wales or detailed analysis.

12. You may be interested that, in practice, the amendment rules have now been in operation since 17 April 2013 and no application for an order for reasons has yet been made pursuant to rule 5 of Order 56. The assumptions made by the Solicitor General are wrong at law for at least the five reasons which follow.

13. First, the amendment rules are, of course, concerned with proceedings in the Court. The powers conferred by rule 5 of O 56 concern the procedure to be followed when an application is brought within the scope of that Order. It is clearly implicit in the structure of the Order, and the terms of rule 5 that the powers are only to be exercised as an adjunct to, and for the purposes of the resolution of the issues raised by the proceedings. It follows that reasons can only be ordered where their provision is relevant to an issue in the proceedings.

14. Second, the Solicitor General uses the word "can" when describing the Court's power to order reasons (par 14). However, rule 5 uses the term "may" in relation to the power. Section 56 of the *Interpretation Act 1984* (WA) provides that:

> Where in a written law the word "may" is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion.

15. The judges of this Court will exercise the discretion conferred by the rules judicially, having regard to the particular issues in the case, and all relevant circumstances, as one would expect. As I will demonstrate below, this has been the approach taken in New South Wales, and there is no reason to suppose any different approach would be taken in Western Australia.

16. Third, Order 56 and rule 5 must be construed and applied in accordance with the other provisions of the rules. Significantly, Order 1 rules 4A and 4B provide:

> **4A. Delays, elimination of**
> The practice, procedure and interlocutory processes of the Court shall have as their goal the elimination of any lapse of time from the date of initiation of proceedings to their final determination beyond that reasonably required for interlocutory activities essential to the fair and just determination of the issues bona fide in contention between the parties and the preparation of the case for trial.
>
> **4B. Case flow management, use and objects of**
> (1) Actions, causes and matters in the Court will, to the extent that the resources of the Court permit, be managed and supervised in accordance with a system of positive case flow management with the objects of -
>
> (a) promoting the just determination of litigation; and
> (b) disposing efficiently of the business of the Court; and
> (c) maximising the efficient use of available judicial and administrative resources; and
> (d) facilitating the timely disposal of business; and
> (e) ensuring the procedure applicable, and the costs of the procedure to the parties and the State, are proportionate to the value, importance and complexity of the subject matter in dispute; and
> (f) that the procedure applicable, and the costs of the procedure to the parties, are proportionate to the financial position of each party.

> (2) These rules are to be construed and applied and the processes and procedures of the Court conducted so as best to ensure the attainment of the objects referred to in subrule (1).

17. These rules provide overarching principles. All other rules of the Court are to be construed, and the practices and procedures of the Court applied so as to achieve those objectives. Those objectives include the minimisation of delay and cost and the maximisation of efficiency. Pursuant to those rules, it is now well established that the Court will not order any interlocutory step or process to be undertaken unless the time and cost involved in that process would be proportionate to the effect which the process would have upon the just resolution of the dispute between the parties. Consistently with these rules and well established practice, reasons can only be ordered under Order 56 rule 5 if the provision of those reasons is necessary for the proper disposition of the proceedings before the Court, and if the cost and time involved in providing reasons are proportionate to the value, importance and complexity of the subject matter in dispute.

18. Fourth, the Court currently has the power to order reasons to be provided by:

- ordering discovery of any documents in which the reasons for decision are recorded pursuant to Order 26;
- requiring answers to interrogatories pursuant to Order 27;
- issuing a subpoena to compel the production of any documents recording the reasons either before or at trial, or to give evidence at trial; and
- more recently, making case management directions pursuant to Order 4A rule 2, to facilitate the attainment of the objects referred to in Order 1 rule 4B(1) which I have set out above.

19. So, as the cases set out below illustrate, there is currently power to order that reasons be provided when the Court concludes that the provision of reasons would promote the just determination of litigation, or facilitate the timely disposal of the business of the Court, by, for example, narrowing the issues between the parties, or facilitating proof of a fact in issue. I deal below with the errors in the Solicitor General's contention to the contrary (see par 63 of his advice). I am not aware of any evidence to the effect that the Court's powers in this respect have been improperly invoked or improperly exercised.

20. Fifth, as I will illustrate by reference to the cases, the operation of similar rules in New South Wales demonstrates that reasons are not ordered as a matter of course, but only when justified having regard to the issues which must be resolved by the Court, and to the other interlocutory procedures available to the parties. This is apparent from the only decision relating to the operation of the New South Wales practice to which the Solicitor General refers - in *Re Whalley*, in which the application for reasons was refused, and in the other cases to which I refer below.

Paragraphs 16 - 32: *Osmond's* case

21. The significant feature of *Osmond's* case was that Mr Osmond asserted that he had a common law right to be given reasons at the time the decision was made which adversely affected his interests. He sought a declaration that the Board was obliged to give reasons or an order from the Court to compel the enforcement of that right. His claims were refused. At no point did he assert that the decision was invalid or beyond the powers of the decision-maker for any other reason or on any other ground; at no point did he assert that he required the reasons so he could pursue a different issue which was before the Court.

22. There is a significant distinction between a claim of the kind made by Mr Osmond, and proceedings in which a person aggrieved by a decision asserts that the decision should be quashed because of one or more of the principles governing the

legality of administrative decision making. The Court's jurisdiction to review the legality of administrative decisions is long established and recognised grounds of judicial review of administrative decision making include at least the following:

- "ultra vires" - lack of jurisdiction;
- lack of procedural fairness;
- acting under dictation;
- real or apprehended bias;
- inflexible application of a policy;
- taking into account irrelevant considerations;
- failing to take into account relevant considerations;
- extraneous (improper) purpose;
- error of law on the face of the record;
- no evidence;
- bad faith; and
- "Wednesbury" unreasonableness.

23. The established procedures of the Court permit a party who makes an arguable case for judicial review on one or more of those grounds to gather the evidence which he or she might need to advance that case, and which might facilitate the identification of the real issues in the case, or the proof of facts in issue thereby facilitating the objectives specified in Order 1 rules 4A and 4B. As the cases to which I refer below establish, proceedings for the judicial review of administrative decisions are no different in this respect to proceedings in the various other areas of the Court's jurisdiction.

24. The distinction between the assertion of a right to reasons, unrelated to any other form of relief sought from the Court, and the conferral of a power upon the Court to order that reasons be provided if and to the extent that they would facilitate the resolution of an arguable case of illegality is now well established in New South Wales. The line of decisions to which I refer shortly is now so well established that, consistently with the contemporary approach amongst the courts comprising the

Australian judicature, it is most unlikely that the principles established would not be applied in Western Australia. I am not aware of any authority to the contrary, nor is any such authority identified by the Solicitor General.

Paragraphs 33 - 41: statutory changes

25. The Solicitor General draws attention to s 13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, he does not explicitly acknowledge that the obligation imposed by that section applies irrespective of whether or not proceedings challenging the decision are commenced, and applies even if there is no contemplation that proceedings will be commenced. Accordingly, the obligation to provide reasons applies to literally millions of decisions made each year by Commonwealth officials and is unrelated to any court proceedings.

26. Similar observations (but with obviously reduced numbers) can be made in respect of the obligation to provide reasons imposed by s 21 of the *State Administrative Tribunal Act 2004* (WA), which applies to any decision reviewable by the Tribunal, irrespective of whether or not an application for review has been commenced, and even in cases where review is not in contemplation.

27. It is not appropriate to compare provisions of this character to the rules of court in New South Wales and Western Australia. The rules of court are only concerned with proceedings which have been commenced in the Court. This has implications both in terms of principle and in terms of the practical consequences of the rules. The distinction of principle is the one to which I have already referred - namely, that under the New South Wales practice, and the amendment rules in this State, reasons will only be ordered if and to the extent that they are necessary and appropriate to enable a Court to determine the lawfulness of a decision in proceedings which have been commenced in the

Court. This has a very significant practical effect upon the potential ambit of any obligation to provide reasons.

28. For example, the total number of proceedings for the issue of prerogative writs which were commenced in the Supreme Court of Western Australia over the last six years (in the 12 months ending in July) were as follows:

2008	2009	2010	2011	2012	2013
8	9	32	21	27	24

29. These numbers would not capture all proceedings by way administrative review, as some proceedings would have been brought claiming declaratory relief only. Unfortunately, the statistics maintained by the Court do not distinguish between the many commercial cases in which declaratory relief is the primary relief sought, and administrative law cases in which only declaratory relief is sought. However, cases in the latter category are relatively rare. In most administrative law cases, declaratory relief is sought in addition to a specific form of prerogative relief. Those cases are captured in the numbers above.

30. It is clear from these numbers that the potential ambit of any obligation to provide reasons pursuant to the amendment rules is very small compared to the impact of the statutory provisions to which the Solicitor General refers. I should also note that it is not possible to tell from the data whether reasons had in fact already been provided prior to the commencement of proceedings or to make any assessment of the likelihood of an order for the provision of reasons being made in the course of the proceedings. It can be reasonably assumed that those numbers indicate the upper limit of cases in which reasons might be ordered, and that reasons will only be ordered in a portion of these cases. As I have noted, in the four months since the amendment rules have been in operation, no order for reasons has been sought or made.

31. Lest members of the Committee think that proceedings may be commenced in the Court by a significant number of individuals or corporations for the collateral purpose of obtaining reasons for decision, rather than for the purpose of pursuing a challenge to the validity of the decision in question, it should be remembered that the fee for commencement of proceedings in the Court for individuals is currently $831, and for corporations $1619. Legal costs would have to be added to those fees, in order to get the case to the point where an application for an order for the provision of reasons could be successfully mounted. The economic barriers to such a course would appear to make subversion of the process for the dominant purpose of obtaining reasons highly improbable.

32. The Solicitor General notes that it is only in New South Wales and Western Australia which have promulgated these kinds of rules. But of course, the reason why rules of court have not been promulgated in the ACT, Queensland, Tasmania, Victoria and indeed the Commonwealth is that in those jurisdictions such rules are unnecessary because there is already a legislated general right to reasons.[4]

Paragraphs 42 - 52: the position in New South Wales

33. The Solicitor General refers to the NSW Supreme Court Practice Note 119 which was issued in 2001. It is of some significance that this Practice Note was issued by Chief Justice James Spigelman, who is widely regarded as one of Australia's leading jurists. There can be no doubt that His Honour was aware of the decision in *Osmond'*.[5] It can be inferred that his Honour did not consider the Practice Note to be inconsistent with that decision.

[4] See the Hon Justice Garry Downes AM, 'The State of Administrative Justice in Australia' (Paper presented at Canadian Council of Administrative Tribunals, Fourth International Conference, 7 May 2007). The legislation in each of these state or territory jurisdictions is similar to the *Administrative Decisions (Judicial Review) Act 1977* (Cth) regime (pp 11-12) and much broader than the regime under the *State Administrative Tribunal Act 2004* (WA) legislation.

[5] See for example Hon JJ Spigelman 'Seen to be Done: The Principal of Open Justice' (Keynote address to the 31st Australian Legal Convention, 9 October 1999).

***Whalley v Commissioner of Police* [2003] NSWSC 273**

34. A challenge to the validity of the NSW Practice Note was rejected by Dunford J in *Whalley v Commissioner of Police*. Justice Dunford was a senior and respected member of the judiciary of New South Wales until his retirement.

35. In his advice, the Solicitor General advances three propositions to substantiate his dismissal of the decision in *Whalley*:

- First, it is asserted that "it is patent" that if Mr Osmond had challenged the decision on some ground other than the failure to provide reasons, the decision of the Court would have been the same. However, the Solicitor General cites no portion of the Court's reasons in support of this "patent" proposition and in fact there is no portion of the High Court's reasons which supports the proposition. This is not surprising, as the question of whether the Court had power to order reasons where relevant to a ground of challenge to the legality of the decision was never raised nor decided at any point in the proceedings.

- Second, the Solicitor General draws attention to the observations of Kirby P in the New South Wales Court of Appeal to the effect that "Mr Osmond also sought an order quashing the decision of the Board for want of reasons" [underlining added]. He asserts that this observation "rather confirms that the distinction drawn by Dunford J is misplaced". The distinction drawn by Dunford J was that *Osmond* was about whether a plaintiff was entitled to relief from the Court because of a failure of the decision-maker to give reasons [15] while in *Whalley*, the plaintiffs were not seeking relief because of a failure to give reasons, but having commenced proceedings on other grounds,[3] sought a

[3] See [1] – they claimed the decision was invalid in that it:
i. Failed to take into account or properly take into account relevant material
ii. Took into account irrelevant, inaccurate, biased, or misleading information
iii. Was a breach of procedural fairness

statement of reasons to facilitate the determination of the issues relating to the other grounds [16]. I am unable to see any basis upon which the observations of Kirby P in any way undermine the reasoning of Dunford J. To the contrary, those observations reinforce his Honour's reasoning.

- Third, the Solicitor General asserts that the analysis undertaken by Dunford J was to the effect that the High Court decision in *Osmond* turned on a "decisive fact", namely that Mr Osmond would have succeeded in his effort to get reasons if only he had brought an action to quash the decision first. If Mr Osmond had made out an arguable case that the relevant decision was invalid or illegal on some ground other than the failure to give reasons, and had sought reasons to help make out his case, the outcome may well have been different. But of course this is not what happened, and *Osmond* can only be regarded as authority with respect to the issues which were decided by the Court.

36. Other aspects of the decision in *Whalley* are of assistance. His Honour considered the legal basis for the issue of the Practice Note, the role of the Parliament in relation to that Practice Note, and the other powers which may be available to the Court to order reasons in an appropriate case. He observed:

> 10 Section 122 of the *Supreme Court Act 1970* (the Act) provides for rules of court, whilst s 124(1) gives power to the Rule Committee to alter, add to, or rescind such rules for the purpose of carrying the Act into effect, and it goes on to provide for particular purposes to be achieved by the rules, but those specified purposes are expressed to be without limiting the generality of the foregoing, that is, "for the purpose of carrying the Act into effect".
>
> 11 Amongst other provisions of the Act, which are to be carried into effect, are those found in s 23 (all jurisdiction necessary for the administration of justice in New South Wales) and s 76A (power to give directions, whether or not inconsistent with the rules, for the

iv. Was contrary to reasonable expectations of the plaintiffs that they would be permitted to engage in their secondary employment.

speedy determination of the real questions between the parties to civil proceedings).

12 "Statutory rules" are defined in s 21(1) of the *Interpretation Act 1987* to include rules of court and in addition s 124(11) of the Act provides that a practice note is to be taken to be a statutory rule for the purposes of Part 6 of the *Interpretation Act*.

13 The effect of these provisions is that practice notes, like rules of court, are subject to the scrutiny of Parliament and may be disallowed by resolution of either House of such Parliament: *Interpretation Act,* s 41.

14 There is, therefore, ample statutory authority for the making of the Practice Note and of the particular part of it on which the plaintiffs rely. Even if there were no practice note, I consider I would have authority in an appropriate case to give such a direction by reliance on s 76A alone if such a direction, that is for the provision of reasons, would facilitate the speedy determination of the real questions between the parties. See also Part 1 rule 3 and Part 26 rule 1 of the Rules.

37. Two propositions emerge from these observations.

- First, the Practice Note and the successive practices notes which have been issued and reissued since 2001, and which embody the provision which corresponds with the amendment rules are disallowable instruments. However, so far as I am aware, no step has ever been taken toward the disallowance of the Practice Note or the equivalent provisions governing practice in the Land and Environment Court of New South Wales to which I turn below.

- Second, the general powers of the Court with respect to the facilitation of the speedy determination of the real questions between the parties provides an alternative source of power to order reasons in an appropriate case. This observation reinforces the views which I have expressed in relation to the effect of Order 1 rules 4A and 4B read with Order 4A rule 2, which would, in an appropriate case, empower the Court to order reasons irrespective of rule 5 of Order 56, not to

mention the various other powers of the Court including discovery, the administration of interrogatories and the issue of subpoenas.

38. Finally, before leaving *Whalley*, it should be noted that although Dunford J was satisfied he had power to order reasons to be provided, he declined to exercise that power and the application was dismissed. It is difficult to reconcile that approach with the assertions made by the Solicitor General with respect to the likely effect of the amendment rules in this State.

***Commissioner of Police v Ryan* [2007] NSWCA 196**

39. The relevant provision of the NSW Practice Note was considered by the New South Wales Court of Appeal in *Commissioner of Police v Ryan*. That case concerned a challenge to a decision to direct the temporary closure of licensed premises. The decision was challenged on a number of grounds, including grounds alleging failure to give adequate notice and failure to provide to the licensee the materials upon which decision to close the hotel was based. The latter ground was considered by the Court to be analogous to an argument that the licensee was entitled to reasons for the decision to close the hotel.

40. The leading judgment was written by Basten JA, with whom the other members of the Court (Spigelman CJ and Santow JA) agreed. Basten JA observed:

> 36 There is a well-known debate in administrative law cases concerning the possible obligation of an administrative decision-maker to provide reasons for his or her determination. The obligation to give reasons is expressly laid down by statute in many jurisdictions: see Aronson, op cit, p 555. Under Commonwealth law, the content of the obligation is generally prescribed in s 25D of the *Acts Interpretation Act* 1901 (Cth). However, in some cases the effect of a failure to give a written notice containing reasons is also identified and does not invalidate the decision: see s 501G(4) of the *Migration Act* 1958 (Cth) applied in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* [2003] HCA 56; (2003) 216 CLR 212 at [10] and [31]-[37].

> Absent invalidation, mandamus may lie to compel performance of the duty: *Palme*, at [41] (Gleeson CJ, Gummow and Heydon JJ). Further, as noted by McHugh J at [55]:
>
> > "The prosecutor contends that the Minister's failure to give reasons constitutes jurisdictional error with the result that the Minister had no jurisdiction or power to cancel the visa. Jurisdiction is the authority to decide. It is not easy to accept the notion that a decision is made without authority because subsequently the decision-maker fails to give reasons for the decision. Nevertheless, it is always possible that a statutory scheme has made the giving of reasons a condition precedent to the validity of a decision."
>
> 37 The purpose for conditioning the validity of a decision upon the provision of reasons is sometimes expressed to be found in a principle that the affected party should have the opportunity to understand the basis of the decision so that he or she can decide whether to take appropriate steps to challenge its validity, if some basis for challenge is revealed. That is one rationale for the obligation to give reasons, amongst others, as noted by Kirby J in *Palme* at [105].
>
> 38 Nevertheless, it has been clear since the decision in *Public Service Board (NSW) v Osmond* (1985-86) 159 CLR 656 that, absent the imposition of a statutory obligation, the general law principles of procedural fairness do not require administrative decision-makers to give reasons for the discretionary exercise of a statutory power.

41. So, the principles enunciated in *Osmond* were clearly acknowledged by the Court. However, Basten JA went on to make the following observations:

> 72 … from the perspective of the Respondent, the case may be seen as an example of an attempt to obtain some material upon which to challenge a decision where it is not open to the affected person to seek reasons from the decision-maker. In some cases those difficulties may be ameliorated by seeking a direction in accordance with Practice Note SC CL 3, Supreme Court Common Law Division – Administrative Law List, paragraph 23 of which states:

> "Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Court may, at a directions hearing, direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision ... "

42. It is clear from this decision that the members of Court considered that the relevant Practice Note was consistent with the principles enunciated in *Osmond*. The Solicitor General makes no reference to this decision, notwithstanding that the decision, in effect, confirms the reasoning of Dunford J in *Whalley*. As the decision of an intermediate Australian Court of Appeal, there is no reason to suppose that this decision would not be followed in Western Australia in analogous circumstances.

***Austral Monsoon Industries Pty Ltd v Pittwater Council* [2009] NSWCA 154**

43. The issue came before the Court of Appeal of New South Wales again in *Austral Monsoon Industries Pty Ltd v Pittwater Council*. The case involved an appeal from the Land and Environment Court relating to the refusal of a development application concerning the upgrade and expansion of a marina at Pittwater near Sydney. In the course of the proceedings it was asserted that the relevant Minister (for Planning) had exercised his powers for an improper purpose. A question arose as to whether the Minister's purpose had been established, as a matter of fact. In that context, Spigelman CJ observed:

> 97 Mr Hutley SC submitted that the Briefing Note was evidence of the Minister's purpose because it was signed and thereby adopted by him. However, signature does not necessarily indicate "adoption" of the contents. All the Note itself suggests is that the

Minister "note" its contents. The contents of a departmental memorandum of this character are not usually evidence of what was in the Minister's mind, nor do they establish the Minister's purpose.

98 Establishing the purpose of a decision-maker has always generated difficulty in applications for judicial review of administrative decisions where the decision-maker does not identify his or her reasoning process. That is why it was necessary to enact s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and s 25D of the *Acts Interpretation Act* 1901 (Cth). There are no equivalent provisions in this State.

99 However, there are judicial mechanisms for establishing the purpose of the actual decision-maker. In the present case, interrogatories could have been directed to the Minister with a view to eliciting the relevant evidence. Other powers of the court could be called in aid in order to establish the relevant facts.

100 I refer, for example, to Practice Note SC CL 3 which applies to proceedings in the Administrative Law List in the Supreme Court and which states:

> "23. Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Court may, at a directions hearing, direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision (compare *Administrative Decisions Tribunal Act 1997 (NSW)*, s 49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the List is normally by affidavit."

44. Justices McColl and Handley agreed with Chief Justice Spigelman.

45. Two observations flow from the passage set out above:

- First, plainly the Court saw no inconsistency between the provisions of the Practice Note and the acknowledged lack of any common law right to reasons.

- Second, the Court clearly held that irrespective of the Practice Note, interrogatories could have been administered to the Minister directed at the reasons for his decision.

46. The latter point is directly contrary to contentions made by the Solicitor General with respect to the ambit of interrogatories (at par 63). However, the Solicitor General makes no reference to this decision in his advice either, nor does he provide any authority to support the assertions made with respect to the ambit of interrogatories.

***Haque v Commissioner of Corrective Services* [2008] NSWSC 253**

47. Unsurprisingly, the decisions of the Court of Appeal of New South Wales to which I have referred have been followed in a number of decisions at first instance. In *Haque v Commissioner of Corrective Services*, an issue arose with respect to the admissibility of a file note made by the relevant decision-maker and which purported to record his reasons for the decision which was being challenged in the proceedings. It was the decision-maker who tendered the file note. Fullerton J ruled that the file note was inadmissible. She observed:

> 15 It was common ground that the defendant was not required by statute to provide reasons for his decision. It was also common ground that the plaintiff did not formally request a statement of reasons before commencing the proceedings and that the defendant at no time provided them. I also note that although the matter was before the court on three occasions prior to the hearing, the plaintiff

did not seek directions requiring the defendant to supply a written statement of reasons as provided for in paragraph 23 of Practice Note SC CL 3. Paragraph 23 provides relevantly as follows:

> "Where proceedings have been taken to challenge the decision of a public body or public official, because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Court may, at a directions hearing direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision (compare Administrative Decisions Tribunal Act 1997 (NSW), s 49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the List is normally by affidavit."

...

20 While it is true that there appears to be tension between the procedure for written reasons to be supplied at the Court's direction in the Practice Note and s 69(3) of the *Evidence Act*, given that a direction will only ever be made after proceedings have commenced, this does not entitle me to read down the operation of the business records exception to the hearsay rule. The defendant submitted that this tension might be resolved by invoking the operation of s 11 of the *Evidence Act*. That section provides that:

> "(1) The power of a court to control the conduct of a proceeding is not affected by this Act, except so far as this Act provides otherwise expressly or by necessary intendment.
>
> (2) In particular, the powers of a court with respect to abuse of process in a proceeding are not affected."

> The defendant submitted that paragraph 23 of the Practice Note in combination with s 11 of the Evidence Act represent a "quasi legislative delineation" of the circumstances in which the Court can admit documentary evidence of the reasons of a decision maker in proceedings involving judicial review in circumstances where objection is taken to the tender of a document containing those reasons and where s 69(3) of the Evidence Act is invoked. As Grove J recognised in *R v Richards* [2001] NSWCCA 160; 123 A Crim R 14 at [40], the power of the Court to regulate and control the manner in which evidence is presented or elicited at common law was preserved in s 11 following the enactment of the Evidence Act. However, when considering the reach of the discretion inherent in s 11, his Honour held that it did not extend to the rejection of admissible evidence adduced in response to a question or questions that were not improper. By parity of reasoning I do not consider that the discretion extends to admitting hearsay evidence over a proper and principled objection (see also *Lane v Jurd* (1995) 40 NSWLR 708 at 709). I need only add that it was always open to those conducting the proceedings on the defendant's behalf to obtain evidence of the reasons for his decision in admissible form. The fact that they have not done so means that the defendant's decision falls to be reviewed in the context of there being no evidence of the reasons for it.

48. Two observations may be made arising from this portion of her Honour's reasons:

- First, plainly her Honour did not see any inconsistency between the lack of a right to reasons, and the power of the Court to direct the provision of reasons pursuant to the provisions of the Practice Note.

- Second, this case illustrates the fact that the exercise of the Court's power to direct the provision of reasons may be of assistance to a decision-maker by providing a means by which the reasons for decision may be conveniently established, and also of assistance to the Court in achieving the objectives identified in Order 1 rules 4A and 4B.

49. The latter proposition was endorsed in the next case to which I will refer.

Crawley v Vero Insurance Ltd (No 4) [2012] NSWSC 1582

50. In this case, the plaintiff applied to administer interrogatories in relation to a resolution made by professional indemnity insurers pursuant to s 409 of the *Legal Profession Act 2004* (NSW). In that context, Beech-Jones J observed:

> 18. In this State there is no general entitlement to obtain a statement of reasons for an adverse decision made pursuant to the exercise of a statutory power (cf s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth)). This means that persons can still face the position of not knowing if they have a basis to challenge decisions adverse to them made under New South Wales statutes because they do not know why the decision was made. This difficulty was acknowledged and the means by which it has been partially addressed were explained by Spigelman CJ in *Austral Monsoon Industries Pty Ltd v Pittwater Council* [2009] NSWCA 154; 75 NSWLR 169 at [98] to [100] (McColl JA and Handley AJA agreeing):
>
> > 98 Establishing the purpose of a decision-maker has always generated difficulty in applications for judicial review of administrative decisions where the decision-maker does not identify his or her reasoning process. That is why it was necessary to enact s 13 of the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) and s 25D of the *Acts Interpretation Act* 1901 (Cth). There are no equivalent provisions in this State.
> >
> > 99 However, there are judicial mechanisms for establishing the purpose of the actual decision-maker. In the present case, interrogatories could have been directed to the Minister with a view to eliciting the relevant evidence. Other powers of the court could be called in aid in order to establish the relevant facts.
> >
> > 100 I refer, for example, to Practice Note SC CL 3 which applies to proceedings in the Administrative Law List in the Supreme Court and which states:
> >
> > > '23. Where proceedings have been taken to challenge the decision of a public body or public official,

> because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision, the Court may, at a directions hearing, direct the body or person whose decision has been challenged to furnish to the plaintiff within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the body's or person's understanding of the applicable law and the reasoning processes leading to the decision (compare *Administrative Decisions Tribunal Act* 1997 (NSW), s 49). Otherwise in appropriate cases, orders may be made for such matters to be ascertained by way of particulars, discovery or interrogatories. Subject to this, orders for discovery or interrogatories will only be made in exceptional cases, and such orders will then generally be confined to particular issues. Evidence in matters in the List is normally by affidavit.'"

> 19. The discussion in *Austral Monsoon* of the possibility of administering interrogatories arose in the context of an express allegation in that case that the relevant decision was made for an "improper, collateral purpose" (at [90]). Further, the facility offered by Practice Note 3 of obtaining reasons and failing that ordering interrogatories presupposes that a proper challenge to the validity of an administrative decision has been made in an initiating process. At a minimum there would be [sic] need to be some properly pleaded basis for impugning the decision which would justify the administration of interrogatories, even if the moving party could only provide limited particulars of the relevant allegation.

51. Three propositions can be drawn from these observations:

- First, the capacity of the Court to order the provision of reasons for decision facilities the interests of justice by providing a party to those proceedings with the means to establish their case.

- Second, the power to order reasons or direct the administration of interrogatories will only be exercised if there has been an

arguable challenge to the validity of an administrative decision and the provision of reasons would be relevant to the grounds of challenge. (I digress to observe that this proposition is entirely consistent with the distinction which I have drawn between the issue in *Osmond*, and the issues which arise under Rules of Court concerning proceedings challenging decisions on grounds other than the failure to provide reasons.)

- Third, interrogatories can be administered in order to require a decision-maker to provide reasons in an appropriate case. This third proposition is contrary to the unsubstantiated assertion of the Solicitor General (at 63). It also reinforces the distinction between a claim for reasons only (as in *Osmond*) and a challenge to the legality of a decision in respect of which the reasons for decision are a relevant fact.

The New South Wales Land and Environment Court Rules and Practice Note

52. The New South Wales Land and Environment Court operates in some respects, in effect, as a division of the Supreme Court of New South Wales. The judges of the Land and Environment Court have the same rank, title status and precedence as the judges of the Supreme Court of New South Wales, and an appeal lies from the Land and Environment Court to the Court of Appeal of New South Wales.

53. Rules have been made by the Land and Environment Court pursuant to the rule-making power conferred by the enabling legislation. In the exercise of that power, the Court has promulgated rule 4.3, which is in the following terms:

> In any proceedings in which a public authority's decision is challenged or called into question, the Court may make one or more of the following orders:
>
> (a) an order directing the public authority to make available to any other party any document that records matters relevant to the decision,

(b) an order directing the public authority to furnish to any other party a written statement setting out the public authority's reasons for the decision, being a statement that includes:

(i) the public authority's findings on any material questions of fact, and
(ii) the evidence on which any such findings were based, and
(iii) the public authority's understanding of the applicable law, and
(iv) the reasoning process that led to the decision,

(c) an order for particulars, discovery or interrogatories.

54. The Land and Environment Court has also issued a Practice Note with respect to a class of proceedings (known as Class 4 proceedings) before the Court. The Practice Note commenced operation on 14 May 2007. Paragraphs 14 and 15 of that Practice Note are in the following terms:

14. Where the proceedings involve a challenge to the decision of a public body or public official:

(a) the respondent public body or public official is to make available to the other party or parties the documents it says record matters relevant to the decision, within 14 days of that respondent's appearance;

(b) the Court may, at a directions hearing, direct the respondent public body or public official to furnish to the other party or parties within a specified time, a statement in writing setting out the reasons for the decision including findings on material questions of fact referring to the evidence or other material on which those findings were based, the bodies or person's understanding of the applicable law and the reasoning processes leading to the decision;

(c) otherwise in appropriate cases, the Court may, at a directions hearing, make orders for the matters in (b)

to be ascertained by way of particulars, discovery or interrogatories.

15. Orders for formal discovery and interrogatories will only be made in exceptional cases and such orders will then generally be confined to particular issues.

55. I digress to observe that the terms of this Practice Note reinforce the correspondence between the existing powers of the Court with respect to directing the provision of particulars, discovery or interrogatories, and the specific power to direct the provision of reasons for decision.

***Hodgson v Minister Administering the Water Management Act 2000* [2007] NSWLEC 478**

56. The operation of the Land and Environment Court Practice Note was considered by Talbot J in *Hodgson v Minister Administering the Water Management Act 2000.* In that case, the applicants applied for an order that the respondents provide an affidavit setting out the reasons for various decisions which were said to be connected with the issues in the case. Justice Talbot observed:

> 10 The provisions in clauses 14 and 15 in this Court's Practice Note are derived from Practice Note 119 which relates to proceedings in the Administrative Law List in the Supreme Court.
>
> 11 Practice Note 119 does not contain a corresponding provision to paragraph 14(a) of the Practice Direction in this Court and specifically mentions that any direction in terms of 14(b) is contemplated "because of the difficulties which at times arise in ascertaining the decision making process and the reasons for the decision".
>
> 12 Discovery has already taken place. Interrogatories have been administered and answered while the respondents have also provided answers to a request for further and better particulars. Mr King says, that the responses by the respondents to date in respect of the above mentioned interlocutory processes are inadequate. Moreover, further interrogatories are proposed.

13 The decisions in respect of which the present directions are being sought other than No.1 in the Schedule appear to relate to steps in the process leading up to the ultimate decision to make a WSP. For example there is reference to the public exhibition of the Draft Management Plan pursuant to s 38, which appears to be the subject of decision No. 2 in the Schedule. Moreover, the respondents contend that a number of the decisions are irrelevant to the claim. There is no allegation of a decision in the Points of Claim that answers the description in No. 3 and in any event the respondents have not acted jointly or in concert with the Commonwealth. The Points of Claim do not specify a challenge to the decision referred to in No. 4. The claim to which the decision in No. 5.2 is referable is not being pursued at this point in the litigation. Ms Allars who appears for the respondents, notes that the apparent separate decisions referred to in No. 5.1 are all part and parcel of the one decision to make the plan.

14 It appears to me that the applicants have been seeking to engage the operation of the Practice Note beyond its objective. Although there are difficulties in understanding the claim that arises from the Points of Claim, it seems that the applicants are proceeding on the basis that each step or decision made during the process should be the subject of a separate judicial review rather than just the ultimate decision of the Minister. Furthermore, the Points of Claim make broad allegations of breach in some cases without adequate particulars and in other cases make an allegation of breach in the particulars rather than as a separate ground.

15 Without attempting to fully consider the rationale of the Points of Claim the issue in relation to whether or not the Court should make the orders that the applicants have been seeking is more easily resolved. The statement of the secondary alternatives in paragraphs 14(c) and 15 of the Practice Note makes it clear that the intent of paragraph 14(a) and (b) is to simplify the proof of the decision making process and the reasons for the decision. That objective does no disservice to the general rule at common law that there is no requirement for an administrative decision maker to give reasons for a decision (*Public Service Board of NSW v Osmond* (1986) 159 CLR 656). The intention of the Practice Note is to seek a statement of reasons in order to facilitate the determination of the issues in respect of the alleged breach (see *William J Whalley and Anor v The Commissioner of Police and Anor* (NSWSC) Dunford J unreported, 7 April 2003 No.30012/03).

16 In my view, the "reasons" referred to in 14(b) of the Practice Note are intended to be the reasons for the ultimate decision. It is anticipated by paragraph 14(a) that documents recording matters relevant to the decision will be produced. Paragraph 14(b) anticipates that findings on material questions of fact will be elucidated. That is not a requirement that the reasons behind each interlocutory step are to be contained in a separate statement. Paragraph 14(c) recognises the prospect of the alternative orders when it refers to "otherwise in appropriate cases". The warning in paragraph 15 takes account of the difficulties anticipated by the Supreme Court when drawing Practice Note No. 119.

...

20 What I have said above does not conflict with my understanding of the observations made by the Chief Justice in *Murrumbidgee Groundwater Preservation Association Inc v Minister for Natural Resources* [2005] NSWCA 10; (2005) 138 LGERA 11 at [36] as follows:

> ***[36]*** *Furthermore, allegations of impropriety of this kind cannot be left to mere inference on the basis of so narrow a foundation as the fact that only one management committee had been established in the State. Whether by way of discovery or subpoena or by way of interrogatories or by way of seeking an interlocutory order from the Court directing the Minister to file an affidavit as to the matters he took into consideration in formulating the Plan or failing or refusing, if that be the case, to appoint a management committee to formulate a management plan, the Appellant could have, but did not, lay a factual foundation for its case. There was no evidence as to the Minister's motive for pursuing the course he did, either with respect to the Lower Murrumbidgee Groundwater Management Area or more generally. There is no proper basis for an inference that that motive was improper.*

21 The processes that the Chief Justice contemplated would have overcome the problems experienced by the applicant in the *Murrumbidgee* case. They have already been taken or can be extended in this case. Any defect or lack of adequate response by the respondents can, if necessary, be dealt with in an appropriate manner.

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> 22 I am satisfied that full and complete discovery, provision of adequate responses to any request for further and better particulars and answers to interrogatories should provide the applicants with such evidence that exists to support their case. Matters have progressed far beyond the point where paragraph 14 of the Practice Note has any further relevance. Moreover I do not construe the Practice Note as seeking to elucidate anything except the actual decision the subject of the proceedings. In this case generally speaking the relevant decisions appear to be the making of the WSP and the subsequent decision to make an amended plan.
>
> 23 However, I do not find that the reasons for the making of any decision by the Minister, and possibly the committee, are not relevant pieces of evidence. I reject any suggestion that because a decision is made by an administrative body or is of legislative nature, and therefore there is no duty to give reasons, means that evidence of the reasons for whatever is done is not relevant.
>
> 24 In the circumstances I do not propose to make orders and directions in the context of the Practice Note as proposed by the applicants. However I have made orders in respect of further interrogatories provided they comply with Part 24 rule 1 of the former Supreme Court Rules which still apply in this Court. The parties have accepted the timetable for completion of discovery as it is reflected in orders made by me on 18 July 2007 in matters No.'d 40049 of 2007 and 41292 of 2006.

57. A number of propositions can be drawn from these observations:

- First, the power to order reasons is analogous to the power to order discovery or interrogatories and will be engaged for the same purpose - namely, the elucidation of facts relevant to an issue before the Court.

- Second, there is no inconsistency between the decision in *Osmond* and the provision of a power to order reasons in an appropriate case (following the decision in *Whalley*).

- Third, the lack of a general law duty to give reasons does not mean that evidence of the reasons for a decision is irrelevant.

- Fourth, as evidence of the reasons for decision is relevant, orders can be made by the Court in relation to the provision of that evidence.

- Fifth, reasons will not be ordered as a matter of course but only where necessary for the proper resolution of the issues in the case.

58. Each of these propositions contradicts assertions made by the Solicitor General in his advice.

***Charlton v Moore (No 2)* [2009] NSWLEC 47**

59. In *Charlton v Moore*, an application was made pursuant to rule 4.3 for an order that the respondent provide a statement of the reasons for the impugned decision. Before making the order, Justice Biscoe assessed whether the reasons would be relevant to the issues raised in the proceedings [at 12], and having concluded that they were relevant, proceeded to determine whether an order was appropriate. In that context it was submitted by the respondent that the collegiate nature of the decision-maker (a local government council) made an order for reasons inappropriate. In response to that submission, Justice Biscoe referred to the administration of interrogatories directed to a corporate body.

60. Two propositions can be drawn from the decision in this case:

- First, reasons will only be ordered where relevant to the issues in the case, and where appropriate.

- Second, there is a clear correlation between the power to order reasons and the power to administer interrogatories.

***Hooper v Port Stevens Council & Hallett* [2010] NSWLEC 41**

61. In *Hooper v Port Stevens Council & Hallett*, Justice Biscoe dismissed an oral application for a statement of reasons. The

application was renewed at a later point in the proceedings, on the basis that the circumstances had changed. When the application was renewed, Justice Sheahan (a former Attorney General of New South Wales) described the Land and Environment Court Rule of Court and the Practice Note as:

> … discretionary beneficial provisions designed to work in the public interest by assisting those who seek to expose legal error for them to have reasons they can examine [at 10].

62. In relation to the discretion created by those rules, his Honour observed:

> The discretion should not be lightly exercised as it can impose a serious burden on public and collegiate bodies [at 11].

63. After considering the issues in the case at some length, his Honour observed:

> 37. Biscoe J concluded on 12 February 2010 that he was "*not persuaded that it is appropriate at this stage on the information at the moment before the court to direct the Council to furnish written reasons for its decision*", and I am conscious that an order under par 14(b) and/or rule 4.3 will cause great difficulty for both respondents, and may not resolve Mr Hooper's main concerns.
>
> 38. However, I am concerned and satisfied that these proceedings will not be satisfactorily disposed of to the benefit of all parties without creating the environment in which the challenge will be properly pleaded and the case satisfactorily prepared. Such an environment is in the interests of all parties.
>
> …
>
> 40. With some diffidence I have decided to order the Council to undertake the preparation of a statement of reasons, and to order vacation of the hearing dates.

64. It is clear from this decision that reasons will not be ordered as a matter of course, and will only be ordered where necessary to serve the interests of justice, taking into account the burden

imposed upon the decision-maker. Those propositions are inconsistent with the assertions made by the Solicitor General.

***Shellharbour City Council v Minister for Planning* [2011] NSWLEC 59**

65. In *Shellharbour City Council v Minister for Planning*, applications were made for an order for the provision of reasons and discovery of documents. In that context, Justice Biscoe observed:

> 13. Both the Land and Environment Court and the Supreme Court Practice Notes require relevant documents to be made available and a statement of reasons to be provided to the applicant. The purposes of these requirements include: to enable the existence of a legal error made by the decision-maker to be more readily perceived than otherwise might be the case; and, to engender confidence in the community that the decision-maker has gone about their task lawfully: see the authorities reviewed in *Charlton.* Therefore, relevant documents and reasons may inform an applicant's case. This is consistent with [14] of the Class 4 Proceedings Practice Note. In the present case, there seems little point in requiring the applicant, who seeks documents and reasons, to plead before seeing them, for it then may only have to amend.

66. These observations are consistent with the various other observations to which I have already referred.

Academic Commentary

67. The Solicitor General does not refer to any academic commentary supporting his view of the effect of the *Osmond* decision. Such commentary as I have been able to find on the topic does not identify any inconsistency between the decision in that case, and the power of the Court to order reasons. For example, in 2007 Professor Pittard (of Monash University), after considering *Osmond,* wrote:

> Other ways to access reasons for decision include a judge's order made at directions hearing in proceedings challenging administrative decisions. The New South Wales Supreme Court's Practice Note provides that, in such proceedings, a judge may direct the decision maker to supply written reasons for the decision which has been challenged, plus findings of fact, reference to evidence on which findings are based, the decision maker's understanding of the relevant law and the process of reasoning. In addition, where appropriate, the court could make such orders by way of particulars, discovery or interrogatories. New South Wales remains the only State to provide this vehicle for access to reasons.[7]

68. Professor Pittard does not suggest that there is any inconsistency between the NSW Practice Note and the decision in *Osmond* of the kind identified by the Solicitor General. Her reference to the various sources of the Court's power to order reasons (particulars, discovery or interrogatories) is consistent with the decisions to which I have referred, and inconsistent with the Solicitor General's assertions.

Paragraphs 53 - 66: the rule-making power

69. In paragraph 59 of his advice, the Solicitor General sets out a number of propositions which are said to support his view that the amendment rules exceed the rule-making power of the Court. In that context he describes the relevant rule as a power to order reasons "which might then be challenged on various administrative law grounds". However, with respect, it is clear from the cases to which I have referred that the Solicitor General is proceeding upon a misconstruction of the effect of the rule. Consistently with those cases, reasons will only be ordered under the amendment rules where an applicant has established an arguable basis for a ground of challenge to which the provision of reasons would be relevant.

[7] Marilyn Pittard 'Reasons for administrative decisions: Legal framework and reform' in Matthew Groves and H P Lee *Australian administrative law: Fundamentals, principals and doctrines*, (2007) 179.

70. Next the Solicitor General asserts that prior to the amendment rules, the Court lacked power to require the decision-maker to provide reasons for a decision. This is incorrect as the New South Wales cases show. Those cases are consistent with the established approach in Western Australia. As the Solicitor General acknowledges, it is uncontroversial in Western Australia that the Court has power to order that an administrative decision-maker or defendant give discovery (par 65). But on the approach taken by the Solicitor General, the decision in *Osmond* would preclude the exercise of that power in relation to documents recording the reasons for decision (because discovery of such documents would circumvent the ruling in *Osmond*). However, the Solicitor General does not contend that there is any such limitation, nor is there any authority to support such a limitation.

71. In acknowledging the established power of the Court to order a decision-maker to provide discovery of documents in proceedings for judicial review, the Solicitor General refers to the reasoning of Buss JA in *Cazaly Iron Pty Ltd v The Hon John Bowler MLA* [2006] WASCA 282. Buss JA relied upon the absence of any words of limitation with respect to the nature of the civil proceedings in which discovery may be ordered in the relevant rule of court (Order 26). Equally, there are no words of limitation in the relevant rule of court relating to the administration of interrogatories (Order 27). The power to order interrogatories is commonly seen as a correlative power to the power to order discovery of documents (see for example *Civil Procedure in Western Australia*, Kendall and Curthoys (eds) at 27.0.1). The decisions in New South Wales, including the decision of the Court of Appeal of New South Wales in *Austral Monsoon* make clear that a court would have power to administer interrogatories directed to the reasons of a decision-maker in an appropriate case. The reason for that is, with respect, obvious. No part of the decision in *Osmond* confers upon decision-makers a privilege or immunity with respect to the provision of information concerning decisions which they have made. Accordingly, where the reasons for decision are relevant to a

matter in issue in court proceedings, those reasons are amenable to all the interlocutory processes of the Court including processes relating to the provision of particulars, discovery, interrogatories and subpoena.

72. Returning to par 59 of the Solicitor General's advice, he asserts that the Court would lack power to utilise its interlocutory processes to compel the provision of reasons for a decision under challenge in the Court. He describes this as a "deficit of power" which is "fundamental and derived from deep-seated underlying principles of the common law". However, these assertions again overlook the fundamental distinction which has been drawn in the many cases to which I have referred between the lack of a common law right to reasons, and the power of the Court to direct the provision of information where relevant to the issues before the Court. For the reasons I have given, there is no "deficit" in the power of the Court to direct the provision of information relevant to the issues before the Court, and there is nothing in the reasons in *Osmond* which would suggest that there is a lack of power.

73. In par 61, the Solicitor General asserts that he cannot conceive of any basis upon which it could be contended that the amendment rules provide a means by which substantive rights to seek judicial review of administrative decisions are to be enforced or protected. With respect, the basis of that contention is clear from the line of decisions to which I have referred, and from the other rules of court with which Order 56 must be read. The powers conferred in Order 56 can and will only be exercised as an adjunct to the powers of the Court to resolve issues properly raised within the jurisdiction of the Court.

74. In par 63 the Solicitor General denies any correlation between the power to order reasons and the power of the Court to order interrogatories or to give discovery. Again, with respect, that correlation is made clear by the line of New South Wales cases to which I have referred. The Solicitor General asserts that if an

application were made for interrogatories directed at the reasons for decision, *Osmond* would provide an answer to the application. That proposition is inconsistent with principle and with authority at appellate level in New South Wales and misconstrues the effect of the decision in *Osmond* in the way in which I have described.

75. In par 63 the Solicitor General asserts that if interrogatories were available to compel a decision-maker to give reasons "the practice would be widespread and indeed invariable". That assertion appears to be based upon the assumptions made at pars 9-15 of his reasons which are, with respect, wrong, for the reasons I have set out above.

76. In the same paragraph, the Solicitor General asserts that if interrogatories were available the action in *Osmond* would have been entirely otiose. This overlooks the fact that Mr Osmond did not challenge the relevant decision on any ground other than the failure to give reasons. Accordingly, there was no independent issue, or contentious issue of fact to which interrogatories could properly have been directed. Where there is such an issue - for example, because of an allegation of improper purpose, or taking into account irrelevant considerations, there is no reason in logic or law why interrogatories could not be directed to establishing the relevant facts, including the reasons for decision, in the same way as they can be directed to the establishment of any contentious fact in any area of the Court's jurisdiction.

77. In par 63 the Solicitor General also asserts that if interrogatories were available with respect to reasons for decision, it would render "superfluous the extensive legislation in different Australian jurisdictions providing for the giving of reasons in respect of identified administrative decisions". This assertion elides the vital distinction between provisions such as s 13 of the *Administrative Decisions (Judicial Review) Act*, and s 21 of the *State Administrative Tribunal Act*, which confer a right to reasons irrespective of whether judicial or tribunal proceedings

are contemplated, and the power of the Court to order reasons where necessary and appropriate as an adjunct to the curial process. As I have pointed out, the legislative provisions to which the Solicitor General refers apply to, in the case of the Commonwealth, literally millions of decisions, whereas the potential application of the amendment rules can be measured in terms of tens. The amendment rules are fundamentally different in character to the legislation to which the Solicitor General refers.

78. In par 64 of his advice, the Solicitor General asserts that "it could not be contended" that a provision with respect to the answering of interrogatories would empower the Court to order a decision-maker to give reasons for a challenged decision. However, no reasons are provided for that assertion which is contrary to principle and to the authorities to which I have referred.

Paragraphs 67 - 74: are the rules appropriate for subsidiary legislation?

79. In par 67 the Solicitor General cites a portion of the reasons of Gibbs CJ in support of the proposition that change of the kind suggested by President Kirby in *Osmond* should be achieved by the legislature, rather than the courts.

80. That proposition is uncontroversial. That is because the "change" in question in *Osmond* was the conferral of a general right to reasons upon every person affected by an administrative decision. That is a change of the kind which has been effected by the legislatures in the various jurisdictions to which the Solicitor General refers. It is not a change effected by the amendment rules, which are limited to the provision of reasons where relevant to, and appropriate, in the context of proceedings commenced in the Court challenging administrative decisions on recognised legal grounds.

81. The conclusion drawn by the Solicitor General in par 69 of his advice to the effect that it is inappropriate that the changes sought to be made in the amendment rules be made by subsidiary legislation proceed upon the false premise that the amendment rules are analogous to provisions such as s 13 of the *Administrative Decisions (Judicial Review) Act*. The same false premise undermines the assertion contained in par 70 to the effect that reforms such as those contained in the amendment rules have been implemented by Acts of Parliament. The reforms to which the Solicitor General refers are quite different in character, as they provide a general right to reasons irrespective of the commencement of proceedings and irrespective of whether an arguable case can be made out that the decision is unlawful on the recognised legal grounds.

82. The approach taken in the amendment rules is identical to the approach taken in New South Wales. As I have pointed out, on the only occasion upon which it has been suggested that the approach taken in that State is inconsistent with the decision in *Osmond* (*Whalley*), the proposition was firmly rejected, and the Solicitor General has not identified any authority or academic writing which supports his contention to the contrary.[8]

83. In par 72 the Solicitor General asserts that the amendment rules have been promulgated because the Court "is unhappy with the legislative timetable of successive governments in dealing with substantive reform of the law relating to administrative review". That is not the case. The flaw in the Solicitor General's proposition lies in his assertion that the amendment rules change the substantive law. For all the reasons I have enunciated, the amendment rules deal only with the procedure of the Court with respect to cases commenced within the long-established jurisdiction of the Court.

[8] There was an earlier challenge to an order to provide reasons in *Vasey Housing v Dept Fair Trading* [2001] NSWSC 996. Although the Supreme Court did not need to address the challenge in the circumstances of the case, the challenge was precisely that "His Honour seemed to have made the order under the mistaken belief that the relevant part of practice Note 119 should be applied to all administrative decisions".

84. The same flaw underpins the assertions made by the Solicitor General in pars 73 and 74. Those assertions would be apt if the effect of the amendment rules was to confer a general right to reasons irrespective of the commencement of proceedings in the Court. For all the reasons I have given, that is simply not the case.

The Hon W S Martin AC

28 August 2013

CHIEF JUSTICE OF WESTERN AUSTRALIA
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Our ref: JUDI2001
Your ref: AT:3901/7, A398740 & A40712

17 September 2013

Mr Peter Abetz MLA
Chairman
Joint Standing Committee on Delegated Legislation
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By email: delleg@parliament.wa.gov.au

Dear Mr Abetz

Supreme Court Amendment Rules 2013

Thank you for your letter of 12 September 2013.

Your letter advises that the Joint Standing Committee is of the view that the Amendment Rules do not fall within the powers conferred upon the Court, although no reasons are given for that view. Based on previous correspondence, I assume that the Committee has rejected the advice given by Parliamentary Counsel, and has instead preferred the legal advice proffered by executive government, notwithstanding that:

(a) that legal advice is unsupported by principle or authority, and

(b) executive government obviously has an interest in the subject matter of the rules, as officers and agencies of executive government will often be parties to proceedings covered by the rules.

The position which has been adopted by the Committee on this topic gives rise to an issue of general concern with respect to the administration of government in this State. There will no doubt be instances in which it is clear that delegated legislation exceeds the power conferred by the Parliament. However, in this instance the question of whether the Amendment Rules fall within the powers conferred upon the Court by s 167 of the *Supreme Court Act 1935* (WA), is a question which depends upon the proper legal construction and effect of that section, and the proper legal construction and effect of the Amendment Rules. The resolution of legal issues of that kind has long been recognised as falling most appropriately within the province of the judicial branch of government. Specifically, determination of the legal

question of whether delegated legislation, including Rules of Court, has been validly promulgated has long been recognised as falling within the traditional jurisdiction of the courts of Australia. As I indicated in my previous letter, if a party to proceedings falling within the scope of the Amendment Rules wishes to challenge their validity, the most appropriate place for the determination of that challenge is in the courts (including the High Court of Australia if necessary), and arrangements can be made to ensure the impartial determination of that issue.

Your letter also advises that the Committee is of the view that the Amendment Rules deal with a subject matter which is not appropriate for subsidiary legislation, again without providing the reasons for that view. That conclusion is, with respect, impossible to reconcile with the scope of the rule-making power conferred upon the Court by s 167 of the *Supreme Court Act*, which provides that rules of court may be made for regulating and prescribing the procedure and the practice to be followed in the Supreme Court in all causes and matters whatsoever. For the reasons I have provided in earlier correspondence, the Amendment Rules are only concerned with the procedure and practice to be followed in the Supreme Court in the exercise of its jurisdiction, and have no application whatever beyond the exercise of that jurisdiction. They do not alter the substantive rights of the parties to proceedings before the Court, but regulate the procedure and practice to be followed by the Court, including with respect to the provision of the materials necessary for the fair and just determination of the issues before the Court.

The position which has been adopted by the Committee on this issue gives rise to another broader issue relating to the administration of government in Western Australia. While it is undoubtedly the case that the Parliament has the power to disallow rules of court made pursuant to the *Supreme Court Act* (pursuant to s 170 of that Act), longstanding conventions, consistent with the mutual respect given by each of the branches of government to the other, establish that the Parliament should give full credit and deference to the views of the Court with respect to its practices and procedures before proceeding to exercise that power, in the same way as the Court gives full respect and deference to the practices and procedures of the Parliament. The Judges of the Court have resolved that the Amendment Rules enhance the fairness and efficiency of the processes of the Court when utilised to challenge the legality of administrative decisions, and appropriate respect and deference should be given to that view.

Chief Justice's Chambers, Supreme Court of Western Australia

17 September 2013

Your letter requested that I undertake to repeal the Amendment Rules as soon as possible and not rely upon them in the meantime. With respect, this request is misconceived for a number of reasons.

First, the Amendment Rules were made by the Judges of the Court, and can only be repealed by the Judges of the Court. Within the time-frame allowed by your letter (3 working days), it is plainly impractical to secure a resolution of all the Judges of the Court.

Second, unless and until the Amendment Rules are disallowed by the Parliament, they govern the practice and procedure of the Court, and to that extent, form part of the law of Western Australia. It would not be consistent with the oath of office taken by each member of the Court to provide an undertaking to act otherwise than in accordance with the laws of the State.

I assume that the Committee will provide a report to the Parliament in respect of these matters. I would be grateful if this letter and all my previous correspondence with the Committee could be included within that report.

Yours sincerely

Wayne Martin

The Hon Wayne Martin AC
Chief Justice of Western Australia

17Sep01

APPENDIX 4

LETTER FROM WALTER MUNYARD, PARLIAMENTARY COUNSEL – DATED 5 JULY 2013

APPENDIX 4

LETTER FROM WALTER MUNYARD, PARLIAMENTARY COUNSEL – DATED 5 JULY 2013

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Your ref 3901/7 & A398740
Our ref PCO 2001/02752-17

Dear Mr Abetz

Supreme Court Amendment Rules 2013

You invited me to comment on the view expressed in your letter to the Chief Justice regarding the power to make certain provisions of the Supreme Court Amendment Rules 2013.

I do not agree with that view.

The absence from the common law of a general obligation to give reasons for an administrative decision does not prevent the court from, in the course of exercising its jurisdiction to review the decision, obliging the decision-maker to reveal its reasons to the court.

I would appreciate it if you would be so kind as to provide me with a copy of the views of the Chief Justice when he responds to your letter.

Yours sincerely

Walter Munyard
Parliamentary Counsel

5 July 2013

APPENDIX 5

SOLICITOR GENERAL FOR WESTERN AUSTRALIA

ADVICE

APPENDIX 5

SOLICITOR GENERAL ADVICE

SOLICITOR GENERAL
WESTERN AUSTRALIA

1 August 2013

HON ATTORNEY GENERAL

SUPREME COURT AMENDMENT RULES 2013

1. You have sought my advice in respect of issues raised with you by the Joint Standing Committee on Delegated Legislation concerning the validity of the *Supreme Court Amendment Rules 2013* (*2013 Rules*). The *2013 Rules* seek to amend Order 56 of the *Rules of the Supreme Court*.

2. I have seen the Committee's letter of 2 July 2013 which enclosed its letter to the Chief Justice of Western Australia relating to the above. I have also been provided with the Chief Justice's response to that letter.

3. Although you have asked specifically for my views as to whether, in terms of clause 6.6(a) of the Committee's terms of reference, the *2013 Rules* are within power, you have also asked that I give you my view as to the appropriateness of the amendments sought to be made by the *2013 Rules* being contained in subsidiary legislation, in the sense of clause 6.6(d) of the Committee's terms of reference.

The proposed RSC O56

4. The *2013 Rules* delete *RSC* O56 r 1-9, 11-13, replace them with *RSC* O56 r 1-7 and make other consequential changes to other rules in O56.

5. The most substantial changes to existing law sought to be made by the *2013 Rules* are the introduction of O56 r 2(5) and r 5(2)(c).

6. The *2013 Rules* introduce a new Form 67A which is the initiating process for an application for judicial review of "reviewable conduct" or of a "reviewable decision". "Reviewable decision" and "reviewable conduct" are defined in O56 to mean, in short, any administrative decision or conduct which the Court has power to review.

7. Form 67A contains a box to be ticked if an applicant seeks an order that the decision maker, whose decision is sought to be reviewed, "give adequate reasons".

8. This box to be ticked in Form 67A corresponds to *RSC* O56 r 2(5):

> If adequate reasons for a challenged decision have not been given when an application is made for judicial review of it, the application may include an application for an order that the person who made it must give adequate reasons.

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9. It is immediately apparent that a person seeking review can seek an order that adequate reasons be given, even if the ground upon which review is sought has nothing to do with a failure to provide adequate reasons.

10. It can be expected, indeed it is inevitable, that every person who commences an application for review of a challenged decision under O56 will tick the box seeking the provision of adequate reasons. Why would they not?

11. Order 56 contains a definition of adequate reasons:

> *adequate reasons*, for a decision, means a document that —
>
> (a) states any findings on material questions of fact that led to the decision and refers to the evidence or other material on which those findings were made; and
>
> (b) states the reasons for the decision.

12. Assuming that every person who commences an application for review of a challenged decision under O56 will tick the box seeking the provision of adequate reasons, every application for judicial review will involve a preliminary consideration of whether adequate reasons for a decision have been given. Of course, this preliminary hearing would be an entirely new process.

13. It is axiomatic that if no reasons have been given, then, in terms of *RSC* O56 r 2(5), "adequate reasons for a challenged decision have not been given". Similarly, if oral reasons are given, they can not be adequate reasons.

14. *RSC* O56 r 5(2)(c) then provides that, on any application, the Court can:

> if adequate reasons for the challenged decision have not been given, order the person who made it to give adequate reasons for it to any or all of the following —
>
> (i) the Court;
>
> (ii) the applicant;
>
> (iii) a person served with the application;

15. Of course, the Court has discretion to not order reasons, but it is inevitable that in any application, for any relief, where adequate reasons (as defined) have not been given, the Court will order their provision.

Some background to the proposed *RSC* O56

16. These proposed new requirements are to be understood having regard to what they seek to replace, or overturn.

17. The Committee's letter, and that of the Chief Justice, refer to the decision in *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656. The Chief Justice's letter states that *Osmond* is authority for the proposition that, at common law, the provision of reasons is not a condition of the valid exercise of the power of an administrative decision-maker. His Honour then states that *Osmond* decides that

an administrative decision can not be quashed simply because no or inadequate reasons have been given for it.

18. With respect to the Chief Justice, it seems to me that *Osmond* decides more than this. It decides that courts do not have power to order an administrative decision maker to give reasons, in the absence of a statutory obligation to give reasons.

19. The High Court's (unanimous) decision in *Osmond* must be understood having regard to the facts of the case, the action that was brought by Mr Osmond and the majority decision of the New South Wales Court of Appeal that was overturned.

20. Mr Osmond was a New South Wales public servant. He applied for a promotion. The person deciding the promotion recommended that another person be promoted. Mr Osmond appealed this decision to the Public Service Board of New South Wales pursuant to a statutory right of appeal. The Board heard the appeal and informed Mr Osmond orally that it had dismissed his appeal. Mr Osmond requested the Board to give written reasons for its decision. The Board refused to do so. Mr Osmond commenced proceedings in the Supreme Court of New South Wales.

21. It is important to have regard to the relief that Mr Osmond sought in his action. Mr Osmond sought a "declaration that the Board, in deciding to dismiss his appeal, was obliged to give reasons for its decision". In the alternative, Mr Osmond sought an order, pursuant to s.65 of the *Supreme Court Act 1970* (NSW), "that the Board fulfil its duty by issuing reasons for that decision".

22. At the first hearing, Hunt J held that the Board was not obliged to give reasons for its decision and dismissed Mr Osmond's action. On appeal, a majority of the Court of Appeal reversed this decision.

23. As noted, Mr Osmond sought a declaration that the Board, in deciding to dismiss his appeal, was obliged to give reasons for its decision. The order of the New South Wales Court of Appeal was (at 470) that:

> A declaration be made that the Board, in deciding to dismiss [Mr Osmond's] appeal brought pursuant to s 116 of the 1979 Act, was obliged to give reasons for its decision. There should be an order that the Board perform its legal duty by giving reasons for its decision to dismiss [Mr Osmond's] appeal.

24. As can be seen the entire action was an action seeking reasons for the decision. It was not an action to quash the decision that had been made, though no doubt this was the next logical step, whether reasons were given or not. In passing, I should note that it is difficult to understand why Kirby P, in the Court of Appeal, mentioned (at 451) that Mr Osmond "also sought an order quashing the decision of the Board for want of reasons". This was not mentioned at first instance, in the orders made by the Court of Appeal, or in the subsequent appeal to the High Court. Indeed, at first instance, in *Osmond v Public Service Board of New South Wales* [1983] 1 NSWLR 691 at 696, Mr Osmond attempted to distinguish an earlier case on the ground that the earlier case was an application to quash the Board's decision, whereas he sought only a declaration and an order in the nature of mandamus.

25. In the Court of Appeal, Kirby P delivered a wide ranging judgment, which was (eventually) rather sternly criticised and rejected by all in the High Court. Kirby P's

essential reasoning can be summarised by the following passage from his judgment (at 467):

> The overriding duty of public officials who are donees of statutory powers is to act justly, fairly and in accordance with their statute. Normally, this will require, where they have a power to make discretionary decisions affecting others, an obligation to state the reasons for their decisions. That obligation will exist where, to do otherwise, would render nugatory a facility, however limited, to appeal against the decision. It will also exist where the absence of stated reasons would diminish a facility to have the decision otherwise tested by judicial review to ensure that it complies with the law and to ensure that matters have been taken into account which should have been taken into account or that matters have not been taken into account which ought not to have been taken into account.

26. In the High Court, Gibbs CJ, with whom Wilson, Brennan and Dawson JJ agreed (and at whose conclusion Deane J arrived), described this reasoning of Kirby P as follows (at 662):

> Kirby P. based his conclusion that the Board was bound to give reasons for its decision on the broad principle that the common law requires those entrusted by statute with the discretionary power to make decisions which will affect other persons to act fairly in the performance of their statutory functions.

27. The conclusion of the whole of the High Court, as to this proposition, is best summarised by Gibbs CJ (at 662):

> With the greatest respect to the learned Judges in the majority in the Court of Appeal, the conclusion which they have reached is opposed to overwhelming authority. There is no general rule of the common law, or principle of natural justice, that requires reasons to be given for administrative decisions, even decisions which have been made in the exercise of a statutory discretion and which may adversely affect the interests, or defeat the legitimate or reasonable expectations, of other persons. That this is so has been recognized in the House of Lords (*Sharp v. Wakefield* [1891] AC 173, at p 183; *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] UKHL 1; [1968] AC 997, at pp 1032-1033, 1049, 1050-1054 and 1061-1062) and the Privy Council (*Minister of National Revenue v. Wrights' Canadian Ropes Ltd.* [1947] AC 109, at p 123); in those cases, the proposition that the common law does not require reasons to be given for administrative decisions seems to have been regarded as so clear as hardly to warrant discussion.

28. The very point of the High Court's decision in *Osmond* was that courts, at common law, or in exercise of judicial power at common law, do not have power to order an administrative decision maker to give reasons.

29. On this understanding, it seems to me that *Osmond* decides more than that "an administrative decision cannot be quashed merely because no or inadequate reasons were provided". Not only can an administrative decision not be quashed for this reason, but a court does not have power at common law to order an administrative decision maker to give reasons.

30. *Osmond* remains the common law of Australia and of Western Australia. This has been confirmed in many subsequent decisions of the High Court and countless decisions in lower courts. It is sufficient to refer to *Minister for Home Affairs of the Commonwealth v Zentai* [2012] HCA 28 at [93], *Wainohu v New South Wales* [2011] HCA 24 at [155] and *South Australia v Totani* [2010] HCA 39 at [269].

31. Perhaps the clearest statement, confirming the ongoing authority of *Osmond*, is to be seen in the judgment of Kirby J (after elevation to the High Court) in *Re Minister for Immigration and Multicultural and Indigenous Affairs* [2002] HCA 39; (2002) 191 ALR 569 at [21]:

> Under current doctrine it is not incumbent on an Australian official at common law, deciding even a matter so serious as a decision affecting an application for refugee status, to provide the reasons for that decision. The decision in *Public Service Board of New South Wales v Osmond* reversed a contrary conclusion in which I had participated in the New South Wales Court of Appeal. Again, at this level of decision making, I am obliged to conform to the approach of the Full Court of this Court until it is changed. No submission was made to me that the decision of this Court in *Osmond* was wrong. No statutory obligation was suggested that imposed a duty on Mr Lemaniak to provide reasons for his decision in more detail than appear in the document that he ticked and signed.

32. As to the clarity of this rule of law, it is also appropriate to refer again to the judgment of Gibbs CJ in *Osmond* (at 670), after dealing with the reasoning of Kirby P at considerable length:

> I have dealt with this question at what may be regarded as tedious length in deference to the judgments of the majority of the Court of Appeal. In truth, however, I regard the law as clear. There was no rule of common law, and no principle of natural justice, requiring the Board to give reasons for its decision, however desirable it might be thought that it should have done so.

Statutory changes to the common law position

33. There are many statutory regimes that have changed the common law position and imposed (statutory) obligations upon administrative decision makers to give reasons.

34. Perhaps the best known is that in s.13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

35. It is critical to note, however, in respect of the *Administrative Decisions (Judicial Review) Act 1977* regime, that the Act excludes many decisions from the requirement of s.13 that a decision maker provide "a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision".

36. The classes of decisions excluded in the *Administrative Decisions (Judicial Review) Act 1977* from a requirement to give reasons are extensive. This is exemplified by perusal of Schedule 2 of the Act which catalogues some of the decisions excluded.

37. This model, of the Parliament deciding which decisions require the giving of reasons and which do not, has been uniformly followed. As you are aware, the *State*

Administrative Tribunal Act 2004 (WA) provides (in s.21), in respect of decisions that are reviewable under the Act, that the State Administrative Tribunal can order that reasons be given for such decisions.

38. This sort of regime is common in Australian State and Territory administrative review legislation, where the Parliament decides, in legislation, which administrative decisions must be accompanied by reasons. Another example in Western Australia is s.88G(5) of the *Children and Community Services Act 2004* (WA) dealing with reconsideration of secure care decisions relating to protected children.

39. The Australian Capital Territory, Queensland, Tasmania and Victoria all have legislation providing for the provision of reasons for some administrative decisions. All, however, conform to the model by which Parliament determines, in respect of which administrative decisions, an obligation to give reasons is attracted.

40. All of these statutory means by which administrative decision makers are required to give reasons for a decision are to be understood against the backdrop of the common law.

41. The only jurisdiction which has departed from this model is New South Wales, and now what is proposed in *RSC* O56.

The position in New South Wales

42. As the Chief Justice's letter indicates, the position in New South Wales has inspired O56.

43. In New South Wales, the Supreme Court's power to order administrative decision makers to give reasons was first addressed in *Supreme Court Practice Note 119*. It came into effect on 2 May 2001. The power is now found in *Supreme Court Practice Note SC CL 3*.

44. A challenge to the validity of the New South Wales *Practice Note* was heard in *Whalley v Commissioner of Police* [2003] NSWSC 273. In *Whalley*, the plaintiffs, who are members of the New South Wales Police Service, sought review of a decision of the Commissioner of Police refusing to approve them engaging in "secondary employment". The plaintiffs' grounds of review were rather standard; alleging that the Commissioner failed to take into account relevant material; took into account irrelevant information; did not accord them procedural fairness and that the decision was contrary to their reasonable expectation that they would be permitted to engage in secondary employment.

45. The plaintiffs sought an order pursuant to the *Practice Note* that the Police Commissioner provide reasons for this decision. The Commissioner contended, *inter alia*, that the *Practice Note* was invalid.

46. Dunford J described the contention as follows (at [15]):

> It was, however, submitted on behalf of the defendant that the substantive rule of law laid down in *Public Service Board v Osmond* cannot be changed by a practice note or under the general rule making power contained in s 124 of the Act.

47. His Honour dealt with this contention in (with respect) a rather perfunctory way. The totality of his Honour's reasoning is as follows (at [15]-[17]):

> *Osmond*, and cases like it such as *Taylor v The Public Service Board of New South Wales* [1975] 2 NSWLR 278, were cases where the issue was whether the plaintiff was entitled to relief from the Court on account of the failure of the decision maker to give reasons. That is not the case here.
>
> The plaintiffs do not seek relief because of the failure to give reasons, but having commenced proceedings seeking relief on other grounds they seek a statement of reasons to facilitate the determination of the issues relating to those other grounds.
>
> Accordingly, I do not understand the Practice Note to be contrary to, nor a purported reversal of the principle enunciated in *Public Service Board v Osmond*.

48. With respect, the distinction which Dunford J draws is illusory. Although the action in *Osmond* sought a specific order to provide reasons, it is patent that had Mr Osmond commenced an action seeking to quash the decision for (say) failure to take into account a relevant consideration or any other ground of review, the decision of the Court would have been the same; that is, that in the absence of a statutory obligation to do so, a Court does not have power to order the maker of an impugned administrative decision to give reasons for the decision. As noted above, Kirby P stated (at 451) that Mr Osmond "also sought an order quashing the decision of the Board for want of reasons". Whether this statement of Kirby P was correct or not, it rather confirms that the distinction drawn by Dunford J is misplaced.

49. *Osmond* was not decided on a procedural point to the effect that Mr Osmond would have succeeded in his effort to get reasons if only he had brought an action to quash the decision first. Yet, the consequence of Dunford J's analysis is that the High Court decision turned on this decisive fact.

50. In my opinion, (with the greatest respect) Dunford J's reasoning in distinguishing *Osmond* is plainly wrong. As such, *Whalley* can not be understood as authority supporting the validity of the *2013 Rules*.

51. I should note that, so far as I am aware, *Whalley* has not been further considered in New South Wales, and no other case has been brought challenging the validity of the New South Wales Practice Note. I do not understand why this is or has been, but can only be explained as a decision by the government of New South Wales to accept the outcome of the decision.

52. In my opinion, there is no authority which determines, or can be relied upon to contend, that the *2013 Rules* are valid.

Clause 6.6(a) of the Committee's terms of reference - are the *2013 Rules* are within power?

53. The question then is – in terms of clause 6.6(a) of the Committee's terms of reference, are the *2013 Rules* are within power?

54. The *2013 Rules* have purportedly been made pursuant to s.167(1)(a) of the *Supreme Court Act 1935*. It empowers the making of rules for the purpose of:

> for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Supreme Court in all causes and matters whatsoever in or with respect to which the Court has for the time being jurisdiction (including the procedure and practice to be followed in the offices of the Supreme Court), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications or appeals which under this or any other Act are to be made to the Court shall be made;

55. In my opinion, the *2013 Rules* and the proposed O56 can not be characterised as "regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the Supreme Court".

56. In *Harrington v Lowe* (1996) 190 CLR 311, the High Court considered the validity of rules of the Family Court made pursuant to a statutory power to make rules:

> … providing for or in relation to the practice and procedure to be followed in the Family Court and any other courts exercising jurisdiction under this Act, and for and in relation to all matters and things incidental to any such practice and procedure, or necessary or convenient to be prescribed for the conduct of any business in those courts…

57. In *Harrington v Lowe* the rule made (*FCR* Order 24 r 1(8) and (9)) sought to exclude the use of anything said in the course of a family court mediation conference in any court (whether or not exercising Federal jurisdiction). In a joint judgment, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, concluded (at 325-326) that:

> Order 24 r 1(8) and (9) … does much more than re-state the law as to evidentiary privilege in respect of "without prejudice" communications. That privilege is concerned with the admissibility of evidence at trial after the failure of negotiations and even then does not provide a legal norm which is absolute in nature. Thus, in a proceeding in which the ordinary rules of evidence apply, "without prejudice" material will be admissible if the issue is whether or not the negotiations resulted in an agreed settlement. So also where what is in issue is the entry into an impugned agreement as a consequence of engagement in misleading and deceptive conduct by another party.
>
> To forbid the admission of evidence to establish the central facts in issue in an application under s 79A(1) [of the *Family Court Act*], as the sub-rules do in the present case, is not to facilitate the practice and procedures of the Court in disposing of such an application. Rather, it is to vary or depart from the positive provisions of the Act and to impose an inconsistent regime.

58. Central to their Honours' reasoning leading to this conclusion were a number of observations, encompassed in the following (at 324):

> It should be noted that the regulation-making power... is conferred not upon the Executive but upon the judges of the Family Court. In *R v Davison*, Dixon CJ and McTiernan J, in the course of discussing those functions which might be committed to Ch III courts by the legislature, although the same functions might be performed administratively, said:
>
> > "An extreme example of a function that may be given to courts as an incident of judicial power or dealt with directly as an exercise of legislative power is that of making procedural rules of court. ... (I)t is clear enough that making rules of procedure may in one point of view be regarded as a legislative function, though in another point of view it may be considered as an incident of judicial power." (emphasis added)
>
> The insistence upon the procedural nature of the rule-making power which might be so conferred upon the Ch III court is found in the later emphasis by their Honours upon the distinctive legislative function of changing existing conditions by making a new substantive rule to be applied thereafter to those subject to its operation. The result is to emphasise the constitutional underpinning of the limitation of the power conferred upon the judges of the Family Court by s 123 of the Act to the making of provision for or in relation to practice and procedure.
>
> The power conferred by s 123 makes provision for or in relation to practice and procedure, and matters and things incidental to such practice and procedure or necessary or convenient to be prescribed for the conduct of court business. These are broad but limited terms. The power does not authorise the making of regulations which (i) vary or depart from, and thus are inconsistent with, the positive provisions of the Act such as s 79A(1), or (ii) go beyond the field of operations marked out by the Act, in particular beyond the exercise of federal jurisdiction by courts doing so in respect of matters arising under the Act.

59. It is evident enough that "practice and procedure, and matters and things incidental to such practice and procedure" are broad but limited terms. What is contemplated by the *2013 Rules*, in my opinion, exceeds these bounds. A rule conferring power to order a decision maker to provide "adequate reasons", which might then be challenged on various administrative law grounds, is not, in my opinion, and with the greatest respect to the Chief Justice, procedural. Prior to the *2013 Rules* an applicant to the Court seeking the quashing of a decision on grounds (say) that the decision maker took into account irrelevant considerations, could not require the decision maker to provide the reasons for a decision. The assertion that the decision maker took into account irrelevant considerations would have to be made out from the terms of the decision itself and the drawing of whatever inferences were available at law. The applicant could not seek, and the Court could not order, a decision maker to explain what considerations were actually taken into account and which were not. The Court could not do this because the Court did not have power to do so. This deficit of power was fundamental and derived from deep seated, underlying principles of the common law, explained in (*inter alia) Osmond.* The

2013 Rules purport to give a power to the Court which it lacks and provide a right to a person – to obtain adequate reasons for an administrative decision – which the law denies.

60. As Kirby J (who agreed with the result of the joint judgment) observed in *Harrington v Lowe*, after noting that the terms practice and procedure are to be given a "broad operation" (at 341-342):

> ...a point will be reached where a rule-maker will exceed the boundaries of permissible rule-making on matters in relation to "practice and procedure" and intrude into rule-making with respect to the substantive rights of the parties. I do not pretend that there is a bright line which divides rules with respect to practice and procedure from rules with respect to substantive rights. ... The purpose of the classification here must be kept in mind if it is to be accurately performed. That purpose, relevantly, is to decide whether the subject matter of the challenged rule is no more than a procedural pre-condition to the enjoyment of rights judicially recognised or an abrogation of substantive rights, beyond the power of the subordinate law-maker. ...[I]f the rule goes beyond the provision of the means by which substantive rights are to be enforced or protected, the decision-maker will be entitled to conclude that what has been done, under the guise of a procedural rule, is, in fact, impermissibly to alter substantive rights. By law, that is forbidden to the rule-maker. It is reserved to those with the power to alter substantive rights. This means principally a legislature, the Executive acting under delegated power clearly conferred or judges acting in the time-honoured fashion of the common law. It is not to be done in a quasi-legislative way by rule-making.

61. It is trite that administrative decisions can be judicially reviewed without the applicant being provided with reasons. This is the position at common law today, and has been since time immemorial. I can not conceive of any basis upon which it can be contended that the *2013 Rules* simply provide a means by which substantive rights to seek judicial review of administrative decisions are to be "enforced or protected". This is because, as the history of the law of judicial review proves, reasons are not required to enable to court to exercise power.

62. For these reasons, the *2013 Rules*, and the changes which they propose to make to O56, are, in my opinion, beyond the power of the Court to make pursuant to s.167(1)(a) of the *Supreme Court Act 1935*.

63. I should add that, and again with the greatest respect to the Chief Justice, I do not consider that a power to order an administrative decision maker to provide reasons can be equated to the power in the Rules to order interrogatories or give discovery. I am unaware of any matter in which the Supreme Court of Western Australia has ordered an administrative decision maker to answer an interrogatory administered under *RSC* O27, the purpose of which was to compel the decision maker to give reasons for a decision. Were such an application made, no doubt the party sought to be interrogated would direct the Court to *Osmond* and to the courts deficiency of power. No doubt, were O27, and similar rules in the Rules of other Australian courts, to be understood as empowering a court to order that an administrative decision maker give reasons for a decision by means of answering an interrogatory, this practice would be widespread and indeed invariable. It would also have made the action in *Osmond* entirely otiose and rendered superfluous the extensive

legislation in different Australian jurisdictions providing for the giving of reasons in respect of identified administrative decisions.

64. I note, in passing in this respect, that the new O56 r 5(2)(i) provides that the Court has power to require that the decision maker answer interrogatories. It is unclear to me why this provision is included. As I understand it, it could not be contended that this provision, of itself, would empower the Court to order a decision maker to give reasons for a challenged decision.

65. As to discovery, it is uncontroversial that the Court has power to order that an administrative decision maker/defendant give discovery. A clear exposition of this power can be seen in the judgment of Buss JA in *Cazaly Iron Pty Ltd v The Hon John Bowler MLA, Minister for Resources & Ors* [2006] WASCA 282, in particular at [92]:

> In Western Australia, O 26 does not limit the nature of civil proceedings in respect of which discovery may be ordered. Although, in principle, discovery is available where prerogative relief is claimed, discovery in proceedings of that kind is unusual. But if discovery is necessary for the proper administration of justice, and for disposing fairly of a ground of judicial review, an order for discovery may well be made.

66. Ordering discovery of relevant documents is, of course, an entirely different matter to requiring a decision maker to prepare written reasons.

Clause 6.6(d) of the Committee's terms of reference - are the *2013 Rules* appropriate for subsidiary legislation?

67. Whether the new O56 deals with matters appropriate for subsidiary legislation is not strictly a legal question. That said, in my opinion, it would be appropriate that the Executive Government suggest that the Committee have regard to the following observations, in the judgment of Gibbs CJ in *Osmond* (at 668-670) (I apologise for extracting them at some length):

> … considerations may be advanced in opposition to the suggestion that there should be a general rule requiring the giving of reasons for administrative decisions. These include the possibility that an additional burden will be cast on administrative officers and that increased cost and delay may be entailed and the further possibility that a reform of this kind might in some cases induce a lack of candour on the part of the administrative officers concerned. Kirby P. recognized that any general principle requiring the giving of reasons would need to be subject to exceptions and said that in any case the exercise by the courts of their discretion to refuse relief would prevent any such principle from having an oppressive operation. However, even if it be agreed that a change such as he suggests would be beneficial, it is a change which the courts ought not to make, because it involves a departure from a settled rule on grounds of policy which should be decided by the legislature and not by the courts. Legislatures elsewhere than in New South Wales have introduced statutory reforms of administrative law and have imposed an express requirement that reasons shall, if requested, be given for certain administrative decisions: see s.13 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth), s.8 of the *Administrative Law Act 1978* (Vict.) and s.12 of the *Tribunals*

> *and Inquiries Act 1971* (U.K.). Where these reforms have been introduced they have usually been preceded by an extensive review of the policy considerations involved, and the requirement to give reasons has often been limited so that it does not apply to decisions to which its application is thought, as a matter of policy, to be inappropriate. Section 13 of the *Administrative Decisions (Judicial Review) Act* is an example of a carefully qualified provision. New South Wales has not introduced similar legislation.
>
> ... The common law of New South Wales cannot be judicially modified to make it accord with the statute law of, say, Victoria. The present case in my opinion is one to which the words of Lord Simon of Glaisdale in *Miliangos v. Frank (Textiles) Ltd.* [1976] AC 443, at p 480 can aptly be applied:
>
> > "I do not think that this is a 'law reform' which should or can properly be imposed by judges; it is on the contrary essentially a decision which demands a far wider range of review than is available to courts following our traditional and valuable adversary system – the sort of review compassed by an interdepartmental committee."
>
> I respectfully agree too with the comment made by Glass J.A. in the present case:
>
> > "The proposal (i.e. the submission by counsel for Mr Osmond) would subject New South Wales administrative tribunals to control by the courts in a blunt undiscriminating way as compared with the finely tuned system operating federally [that is, the *Administrative Decisions (Judicial Review) Act*]. I believe that judicial innovation under these circumstances is not justified."
> >
> > (underlining added)

68. As noted, Gibbs CJ's judgment was concurred in by Brennan and Dawson JJ. Wilson J delivered a separate judgment but "agreed entirely" with Gibbs CJ. Gibbs CJ's judgment quoted Glass JA (in dissent) with approval.

69. Although the matter is of course one for the Committee, it is my opinion that the conclusion expressed by Gibbs CJ, Wilson, Brennan and Dawson JJ and Glass JA is compelling, for the reasons which their Honours give. It follows inevitably from these reasons that it is inappropriate that the changes sought to be made by the *2013 Rules* be effected by subsidiary legislation.

70. Further to this, and as noted above, in every Australian jurisdiction except New South Wales, reforms such as those contained in the O56 r 2(5) and r 5(2)(c) have been implemented by Acts of Parliament, not delegated legislation. This is the case with the Commonwealth, Queensland, Tasmania, Victoria, and the Australian Capital Territory. South Australia and the Northern Territory have not altered the position as stated in *Osmond*.

71. In this respect, successive Western Australian Governments have known of ongoing calls for reform of the sort proposed to be introduced by the *2013 Rules*. The Chief Justice, in a paper delivered in 2012, noted the following:

> In 2001, when I was President of the Law Reform Commission of Western Australia, the Commission received, at my request, a reference to inquire into the law relating to judicial review. The Commission's report (report number 95) was published in 2002, and although I was no longer President of the Commission, I must confess to a significant role in the development of that report and its recommendations.
>
> The report was published by the then Attorney General, the Hon Jim McGinty, at a function held at the Parmelia Hilton. In what was I think something of a record for Law Reform Commission reports, not only did the Attorney publish the report, but he simultaneously announced that the government had accepted its recommendations, and had resolved to proceed to implement the substance of those recommendations by legislative change.
>
> That commitment was reiterated by the Attorney General in Parliament the following year when he introduced the legislation to create the State Administrative Appeal Tribunal. Although drafting of the legislation was delayed, a Bill was sufficiently advanced for the Attorney General to give me permission to publish an article dealing with its terms in 2007 (see Admin Review, May 2007 published by the Administrative Review Council). However, the legislation had not been introduced at the time the government lost office in September 2008.
>
> A number of Australian jurisdictions have followed the lead of the Commonwealth and reformed the substantive law and procedure relating to judicial review. Those jurisdictions include Queensland, Victoria, Tasmania and the ACT. Consistently with the recommendations of the Law Reform Commission, the draft legislation in Western Australia was modelled largely upon the Queensland version of the law. In other jurisdictions, procedural reform has been achieved by changes to the rules of court. [this has only been in New South Wales]
>
> The current government has made no statement of its position in relation to legislative reform of the law relating to judicial review, and it seems unlikely that the limited legislative time available in a pre-election year would be devoted to a subject of this kind. As substantive reform of the law relating to administrative review seems unlikely in the short to medium term, the Judges of the Supreme Court have resolved to consider the implementation of procedural reform by way of changes to the Rules of Court.

72. Of course, with the greatest respect to the Chief Justice, and to the Court, it is not uncontroversial that the Court seek to implement major change such as this because it is unhappy with the legislative timetable of successive governments in dealing with "substantive reform of the law relating to administrative review". This might be thought to be particularly so where, as here, and as the Explanatory Memorandum to the *2013 Rules* indicate, the Court undertook consultation about the *2103 Rules* with the Law Society of Western Australia, the Western Australian Bar Association

and the Western Australian chapter of the Australian Institute of Administrative Law, but did not specifically seek the views of the government.

73. The introduction of general legislation imposing an obligation on administrative decision makers to give reasons is not free from controversy. Certain contended benefits have been widely articulated, including transparency, the disincentive to arbitrariness and the prospect of greater care in decision making. As against these putative benefits are countervailing factors that have been noted by (amongst others) Professors Aronson and Groves in the fifth edition of *Judicial Review of Administrative Action* (2013). Many have observed that a general obligation to provide reasons can lead to institutionalised, processed reasons with decision-makers simply 'filling in blanks in precedents'. Further, the preparation of "adequate reasons" results in inevitable and substantial expense and burden on administrative decision makers. The burden to government of every decision maker in government having to have at the ready "adequate reasons", that will be considered with a fine eye by lawyers and Supreme Court justices, is obvious. This is particularly so where this involves the preparation of a document that states any findings on material questions of fact that led to the decision, refers to the evidence or other material on which those findings were made and states the reasons for the decision. Whether these burdens are outweighed by the asserted benefits is a question, it seems to me, of some complexity.

74. In no Australian jurisdiction, other than New South Wales (and now Western Australia), does the judiciary, and not the Parliament or the Executive, determine which decisions - amongst the myriad of administrative decisions made daily by government - attract an obligation to provide "adequate reasons".

GRANT DONALDSON SC
SOLICITOR GENERAL