



THE LAW REFORM COMMISSION
OF WESTERN AUSTRALIA

Project No 26 – Part II

**Judicial Review of
Administrative Decisions:
Procedural Aspects and
the Right to Reasons**

REPORT

JANUARY 198

The Law Reform Commission of Western Australia was established by the *Law Reform Commission Act 1972-1978*.

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To: **THE HON J M BERINSON MLC**
ATTORNEY GENERAL

In accordance with the provisions of section 11(3)(b) of the Law Reform Commission Act 1972-1978, I am pleased to present the Commission's report on procedural aspects of the judicial review of administrative decisions and the right to reasons.

J A Thomson
Chairman

10 January 1986

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Part I: Introduction

Chapter 1

INTRODUCTION

1. TERMS OF REFERENCE

1.1 The Commission was asked to consider and recommend the principles and procedures which should apply in Western Australia in relation to the review of administrative decisions¹ both by way of appeal and by way of the supervisory jurisdiction of the Supreme Court.²

1.2 The Commission decided to deal with the matters raised by these terms of reference in a number of parts. In Part I the Commission examined the law relating to existing statutory rights of appeal from administrative decisions and a report was submitted in January 1982. The report recommended a rationalised appellate structure based on an Administrative Law Division of the Supreme Court, uniform procedural rules, rules as to costs, a right to reasons in regard to decisions subject to appeal, and the establishment of an ongoing review body. The Government has announced that it has approved recommendations contained in the report in principle but that further studies are required before legislation can be drafted.³

2. THE WORKING PAPER AND CONSULTATIONS

1.3 In June 1981, the Commission issued a working paper⁴ on the supervisory jurisdiction of the Supreme Court to inform the public of the issues involved and elicit comment. The paper discussed the desirability of -

¹ The term "administrative decisions" as used in the terms of reference excludes decisions made by private bodies, such as professional or trade associations and sporting clubs. Decisions of such bodies may be reviewed by declaration or injunction but generally not by the prerogative writs: S D Hotop, *Principles of Australian Administrative Law* (1985), 271-272.

The terms of reference include all decisions made by State authorities in Western Australia including judicial bodies of inferior jurisdiction. They do not apply to administrative decisions made by or on behalf of the Commonwealth Government.

² This jurisdiction enables the Supreme Court to review decisions by way of the prerogative writs, declaration and injunction to ensure the lawfulness of administrative action.

An explanation of these terms, and certain other legal terms used in this report, is contained in Appendix I.

³ Ministerial Statement by the Attorney General, the Hon J M Berinson MLC, Western Australian Parliamentary Debates (Legislative Council) 26 September 1985, 1630.

⁴ *The Judicial Review of Administrative Decisions*. Referred to in this report as the "Working Paper".

- (a) making changes to the procedures for obtaining judicial review;
- (b) codifying and amending the grounds for obtaining judicial review;
- (c) clarifying and possibly changing the rules of standing;
- (d) enacting a general requirement that administrative decision-makers give reasons for their decisions; and
- (e) repealing, or restricting the effect of, statutory provisions which exclude judicial review.

1.4 The Commission received many valuable comments on the issues raised in the Working Paper, both in correspondence and through personal discussion. The names of those who assisted the Commission are listed in Appendix II. The Commission gratefully acknowledges their help and the time and effort they took.

3. THE COMMISSION'S APPROACH

1.5 After taking into account these views, the Commission has decided to confine this report to recommending -

- (a) a reform of the procedures for judicial review;
- (b) a requirement, subject to exceptions, that, on request, administrative decision-makers give the reasons for their decisions to persons affected by them.

The Commission has decided to deal with (b) at this stage because a requirement to give reasons has a very important part to play in ensuring the effectiveness of the procedural reforms recommended in this report.⁵

⁵ Reforming legislation in the United Kingdom, the Commonwealth of Australia and Victoria has given a right to obtain reasons in certain circumstances: paras 6.3 to 6.7 below.

1.6 The Commission has deferred a consideration of -

- (a) the *grounds* of review (as distinct from the *procedure* for obtaining review);
- (b) the rules of standing; and
- (c) the statutory exclusion of judicial remedies.⁶

1.7 The principal reasons for this approach are that -

- (a) reforms in the federal sphere, which encompass both the grounds of review and the rules of standing, are presently being considered by the Administrative Review Council⁷;
- (b) implementation of the procedural reforms recommended in this report may reduce the significance of some of the apparent difficulties associated with the grounds of review and the rules of standing.⁸

1.8 Implementation of the reforms recommended in this report would not preclude reform of the areas reserved for later examination. In the United Kingdom,⁹ New South Wales,¹⁰ New Zealand,¹¹ and Victoria,¹² procedural reforms have proceeded without changes to the substantive law. Only in the federal sphere¹³ has procedural reform been accompanied by reform of the substantive law.

⁶ In a further report, the Commission will also examine the principles which should govern the question whether or not a right of appeal should be created from administrative decisions.

⁷ The Council has published an Issues Paper, *Review of the Administrative Decisions (Judicial Review) Act 1977* (1984). The Australian Law Reform Commission has very recently published a report on the rules of standing in public interest litigation: *Standing in Public Interest Litigation* (1985).

⁸ At present the rules of standing vary depending on the nature of the remedy being sought. This situation has developed because the remedies have different historical origins. A change in the rules of procedure could lead to the development of a single standing rule irrespective of the remedy being sought.

⁹ Paras 4.2 to 4.11 below.

¹⁰ Paras 4.12 to 4.15 below.

¹¹ *Judicature Amendment Act 1972-1977* (NZ)

¹² *Administrative Law Act 1978-1984*. (Vic)

¹³ *Administrative Decisions (Judicial Review) Act 1977-1985* (Cwth).

Part II: Judicial Review

Chapter 2

CHALLENGING ADMINISTRATIVE DECISIONS

2.1 During this century and especially since World War II the activities of government have become more extensive. Many bodies have been given authority by Parliament to make decisions affecting the rights or interests of individuals and groups in the community. These bodies include the Governor, individual ministers, courts, commissions, tribunals, boards, local authorities and public servants. The range of decisions which might thus bind or otherwise affect the rights or interests of persons in the State includes, for example, decisions with respect to town planning, rates and taxes, public health, child welfare, licensing of various professions and occupations, mining, agriculture, conservation, environmental protection, prison administration and employment.

2.2 Judicial review by means of the prerogative writs of certiorari, prohibition and mandamus¹ and actions for declaration and injunction has two major aspects. First, it is concerned with ensuring that duties imposed on decision-makers by Parliament are performed. A decision-maker who fails to perform such a duty can be compelled to perform it by the Supreme Court. Secondly, judicial review is concerned with ensuring that a decision is within the power of the decision-maker. A decision-maker can only lawfully make a decision where authorised to do so and only then in the manner authorised. The concept of power or authority goes to the procedure as well as the substance of what is done.

2.3 Judicial review is a traditional and long standing means for ensuring that government authorities act in accordance with their lawful powers and duties. The remedies are the result of developments over centuries and are generally accepted as one of the most important

¹ These are not the only prerogative writs. This report also refers to the prerogative writ of quo warranto: see footnote 41 to chapt 4 and Appendix IV, cl 4. Another very important prerogative remedy is the writ of habeas corpus, a process for securing the speedy release of a person from illegal detention or custody. Unlike certiorari, prohibition and mandamus it is available against any person and not just an "administrative decision-maker". For this reason and because of the special procedural rules relating to it and its special constitutional purpose it has not been considered in this report and it is not intended that the recommendations contained in this report should apply to the writ of habeas corpus.

factors in maintaining the rule of law. It is therefore important to ensure that the procedures for obtaining the remedies are as simple as possible and that no undue impediment is placed in the path of the court's power to grant relief where the case requires. It is true that other means of challenging decisions of government authorities have been developed. These include internal review by the relevant government department or the responsible minister, and investigation of administrative complaints by the Parliamentary Commissioner for Administrative Investigations. In some cases rights of appeal from decisions of various bodies have been created by statute. However, although these alternative methods are very significant they do not, in the Commission's view, replace the need for the ultimate control of administrative action by the courts.

2.4 Chapters 2, 3 and 4 of the Working Paper contain a brief account of the law relating to judicial review. A more detailed account of the law can be found in a number of textbooks on administrative law.² The limitations, uncertainties and inconsistencies of the law in this area have been the basis for numerous calls for reform throughout the common law world.³

² P P Craig, *Administrative Law* (1983).
 S A de Smith, *Judicial Review of Administrative Action* (4th ed edited by J M Evans, 1980), cited as "de Smith".
 S D Hotop, *Principles of Australian Administrative Law* (1985), cited as "Hotop".
 P Jackson, *Natural Justice* (2nd ed 1979).
 L A Stein (ed), *Locus Standi* (1979).
 E I Sykes, D J Lanham and R R S Tracey, *General Principles of Administrative Law* (2nd ed 1984), cited as "Sykes, Lanham and Tracey".
 H W R Wade, *Administrative Law* (5th ed 1982).
 H Whitmore and M Aronson, *Review of Administrative Action* (1978).

³ Paras 3.9 and 3.10 below, and Appendix III.

Chapter 3

THE NEED FOR PROCEDURAL REFORM

1. INTRODUCTION

3.1 Judicial review of administrative decisions has developed on a case by case basis over a long period of time. Although the five major remedies of certiorari, prohibition, mandamus, declaration and injunction together provide considerable scope for controlling the exercise of administrative power, there has been extensive criticism of the procedural difficulties associated with their use.

2. NECESSITY FOR CHOICE OF FORM OF PROCEEDING

3.2 These various remedies must be sought by wholly distinct forms of proceedings. One form is applicable to the prerogative writs of certiorari, prohibition and mandamus, in which leave is required and other special rules apply, and other forms are applicable to the private law based remedies of injunction and declaration, in which leave is not required and which are governed by rules generally applicable in civil proceedings. An applicant may therefore be faced with a difficult choice in selecting the most appropriate form of proceeding. The prerogative writs cannot be joined with the private law based remedies. This formal distinction arises from the differing historical origins of these remedies. The prerogative writs of certiorari, prohibition and mandamus were and are issued in the name of the Sovereign for the public law purpose of controlling judicial officers of inferior courts and public administrators.¹ Declaration and injunction, on the other hand, were originally used in private law matters. They later came to be used also for public law matters. In deciding whether to apply for either one or more of the prerogative writs or one or both of the private law based remedies, the applicant must consider differences in the scope, purpose, grounds and rules of standing of the various remedies. The choice of a remedy which is not the most appropriate in the circumstances of the case can mean that an otherwise justifiable claim will be defeated

¹ Working Paper, para 1.8.

if out of time or that the applicant will be faced with the additional cost and delay involved in starting again and seeking another remedy.²

3.3 Aspects of the development of the substantive law also, in some cases, make the choice of the most appropriate remedy difficult. First, there is doubt as to the kinds of decision which may be reviewed by means of certiorari and prohibition. For example, there is doubt as to whether or not these remedies are available only where the decision-maker is required to act judicially or where the decision is merely recommendatory.³ Secondly, while non-jurisdictional error of law is available as a ground of review by certiorari this is limited to cases in which the error appears on the face of the record.⁴ There is some doubt as to which documents comprise the record and, in particular, whether or not the reasons for a decision form part of the record.⁵ In Western Australia the uncertainty over the scope of certiorari appears to have led to reliance being placed on declaration as a form of relief. Declaration may also be preferred because the procedure involved, an ordinary civil action, is one with which legal practitioners are more familiar. It also has an advantage over certiorari in that proceedings may be commenced without leave. However, since declarations can only be used to declare rights and not to quash a decision, the remedy is generally not appropriate for non-jurisdictional errors of law.⁶

² See, for example, *Punton v Ministry of Pensions and National Insurance (No 2)* [1964] 1 All ER 448, and recently in *Western Australia R v Gething; ex parte Centamin Exploration (WA) Pty Ltd and Mangowa Nominees Pty Ltd* (unreported) Full Court of the Supreme Court of Western Australia No 1178 of 1982, 28 May 1982.

³ In *Testo Bros Pty Ltd v Tait* (1963) 109 CLR 353, this was one ground of the majority for refusing to grant relief. In *Brettingham-Moore v St Leonard's Municipality* (1969) 121 CLR 509, 522, however, Barwick CJ said by way of obiter dictum:

"... so far as my own view is concerned, I would not regard the fact that the report is not self-executing or that the discretion of the Executive is interposed between it and any actual consequence to the person in the situation of the respondent as necessarily preventing the making of the appropriate order at the instance of such a person."

Testo Bros Pty Ltd v Tait has been followed in this State: see *R v Gething; ex parte Centamin Exploration (WA) Pty Ltd and Mangowa Nominees Pty Ltd* (unreported) Full Court of the Supreme Court of Western Australia No 1178 of 1982, 28 May 1982. See generally Hotop, 272-275.

⁴ The opportunity for review on this ground is more restricted in Western Australia than it is, for example, in England, where a large number of tribunals are required to give reasons for their decisions and these reasons form part of the record: *Tribunals and Inquiries Act 1971-1984* (UK), s 12.

⁵ Sykes, Lanham and Tracey, 218-219, paras 2037 and 2038. In *R v The District Court at Sydney; ex parte White* (1966) 116 CLR 644, 658 Windeyer J reserved the general question as to what documents comprise the record for the purpose of review by certiorari.

⁶ de Smith, 520-521.

3. STANDING

3.4 The differences⁷ in the rules of standing of the various remedies, particularly between certiorari and prohibition on the one hand and declaration and injunction on the other, exacerbate the procedural problems.⁸ For example, the rules of standing for certiorari and prohibition seem to be more liberal than those for declaration and injunction. If at the outset an applicant for judicial review were not forced to elect the remedy sought, the question of standing as between the remedies would assume less importance.

4. TIME LIMITS ON COMMENCING PROCEEDINGS

3.5 At present there are different time limits for commencing proceedings for certiorari and mandamus. The period for certiorari is six months from the date on which the decision sought to be reviewed was made, unless the delay is accounted for to the satisfaction of the court.⁹ The time limit for applications for mandamus is two months.¹⁰ There is no express time limit imposed by the Supreme Court Rules on applications for prohibition. There does not appear to be any limitation period for commencing proceedings for injunction and declaration.¹¹ Because of the need to elect between remedies, the applicant who chooses the wrong remedy may be out of time for the appropriate remedy.

5. INTERLOCUTORY PROCEEDINGS

3.6 While interlocutory proceedings, such as interrogatories and the discovery and inspection of documents, are available in an action for declaration or injunction, they are not available on an application for certiorari, prohibition or mandamus.¹²

⁷ These differences are based on, and reflect, the differing historical origins of the remedies.

⁸ Working Paper, paras 3.18 to 3.27. Where a person in his own capacity does not have standing to seek a remedy it is necessary to obtain the Attorney General's consent: Working Paper, paras 3.25 and 3.26.

⁹ *Rules of the Supreme Court 1971-1985*, O 56 r 11. It is not clear how the time limits for certiorari or mandamus were selected. The period of six months in the case of certiorari may have been based on an *Imperial Act ((1740) 13 Geo 2, c 18, s 5)* which imposed a six month time limit on applications for certiorari against justices.

¹⁰ *Id.*, O 56 r 27.

¹¹ The limitation period of one year imposed by the *Crown Suits Act 1947-1983* (s 6) and the *Limitation Act 1935-1983* (s 47A) in respect of proceedings involving the Crown or any public authority or person acting in or failing to act in pursuance of any public duty does not apply to proceedings for injunction or declaration where the real object of the action is protection for the future: *Council of City of Brisbane v Attorney General for Queensland (Ex rel Isles)* (1906) 4 CLR 241, 248-249.

¹² Interlocutory proceedings are available in respect of a "cause or matter": *Rules of the Supreme Court 1971-1985*, Os 26 and 27. The Commission understands that in practice Os 26 and 27 have been regarded as associated only with a cause or matter which relates to an action commenced by writ of

3.7 The absence of interlocutory proceedings can mean that an applicant may not be able to obtain access to information that is essential to satisfy a judge that an order nisi for one of the prerogative writs should be issued. The importance of such procedures has been demonstrated by cases in which a declaration or injunction was sought and in which interlocutory proceedings led to the disclosure of information which was essential if the plaintiffs were to succeed.¹³

6. ADDING A CLAIM FOR DAMAGES

3.8 Where the applicant wishes to make a claim for damages,¹⁴ the existence of two alternative forms of proceedings also presents a difficulty. While a claim for damages can be joined with a claim for declaration or injunction, it cannot be joined with an application for certiorari, prohibition or mandamus. Where one of the latter remedies is being sought, for example, to quash the decision, separate proceedings for damages must be pursued.

7. CALLS FOR REFORM

3.9 Professor S A de Smith's summation of the state of the law in 1957 appears to be as well founded in Western Australia today as it was then in England:¹⁵

"Until the Legislature intervenes, therefore, we shall continue to have two sets of remedies against the usurpation or abuse of power by administrative tribunals - remedies which overlap but do not coincide, which must be sought in wholly distinct forms of proceedings, which are overlaid with technicalities and fine distinctions, but which would conjointly cover a very substantial area of the existing field of judicial control. This state of affairs bears a striking resemblance to that which obtained when English civil procedure was still bedevilled by the old forms of action."

3.10 Apart from writers and the courts, the need for reform has been recognised by law reform bodies in Australia, Canada, New Zealand, the United Kingdom and Ireland.¹⁶ A

summons and not to an application for a prerogative writ. In England, in *Barnard v National Dock Labour Board* [1953] 2 QB 18 at 43 Denning LJ held that there was no discovery in certiorari proceedings.

¹³ See, for example, *Barnard v National Dock Labour Board* [1953] 2 QB 18.

¹⁴ For example, where as a result of the decision sought to be reviewed a person has committed a trespass and caused damage.

¹⁵ *Report of the Committee on Administrative Tribunals and Enquiries* (1957 Cmnd 218), Minutes of Evidence, Appendix I, 10.

common feature of reforms in other jurisdictions studied by the Commission is the provision of a single procedure for obtaining relief in the nature of certiorari, prohibition, mandamus, declaration and injunction. This is also the basis of the recommendations in this report.¹⁷

¹⁶ See Appendix III which contains a list of law reform bodies proposing reform of the judicial review of administrative decisions.

¹⁷ As explained in para 1.7 above this has not been accompanied by an attempt to rationalise the existing substantive law.

Chapter 4

THE COMMISSION'S APPROACH TO PROCEDURAL REFORM

1. INTRODUCTION

4.1 A number of different approaches to procedural reform have been adopted in the jurisdictions studied by the Commission.¹ A notable contrast may be observed by examining the changes which have been made in the United Kingdom and New South Wales. The United Kingdom reform involves the creation of a new remedy under which relief may be granted which could previously be granted by orders for certiorari, prohibition or mandamus.² In New South Wales, on the other hand, the procedure involved in obtaining relief in the nature of certiorari, prohibition and mandamus has been assimilated to that for obtaining declaration, injunction or damages.

2. THE UNITED KINGDOM³

4.2 In the United Kingdom applications for mandamus, prohibition and certiorari must be made by an application for judicial review.⁴ A declaration may be made or an injunction granted in any case where an application for judicial review seeking that relief has been made if the court considers that, having regard to:

¹ These approaches were examined in chapt 6 of the Working Paper and need not be examined again in detail in this report.

² In some jurisdictions, while a new remedy has been introduced, the prerogative writs have been retained. This has occurred, for example, in Victoria, New Zealand and the Commonwealth of Australia. This approach makes it necessary to define the scope of the new remedy. In Victoria this has been done by providing that "a decision of a tribunal" may be reviewed by the new remedy. In New Zealand, on the other hand, an application for review may be made in respect of the ". . . exercise, refusal to exercise, or proposed or purported exercise by any person of a statutory power". In the Commonwealth the new remedy applies to "a decision of an administrative character made, proposed to be made, or required to be made, as the case may be . . . under an enactment, other than a decision by the Governor-General" or certain decisions set out in Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977-1985*. The nature of "decision of an administrative character" has caused uncertainty: see N Hennessy and J Goldring, "Administrative Character" (1985) 59 ALJ 659.

³ The reform discussed below followed a report of the Law Commission in 1975, *Remedies in Administrative Law*: Cmnd 6407. The Commission's recommendations were substantially adopted by an amendment to the Rules of the Supreme Court in 1977 and confirmed by section 31 of the *Supreme Court Act 1981-1984*. The new remedy is called an "application for judicial review". The application is heard either by a judge or a Divisional Court of the Queen's Bench Division: *Rules of the Supreme Court 1965-1980* (UK) O 53 r 5 (1) and (2).

⁴ *Supreme Court Act 1981-1984* (UK), s 31.

"(a) the nature of the matters in respect of which relief may be granted by orders of mandamus, prohibition or certiorari;

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case,

it would be just and convenient for the declaration to be made or the injunction to be granted, as the case may be."

More than one form of relief can be claimed in the one application if the claim arises out of the same matter.⁵

4.3 The procedure involves a two stage process. In the first stage the applicant must obtain the leave of the court. The court cannot grant leave "unless it considers that the applicant has a sufficient interest in the matter to which the application relates".⁶ The application for leave is made *ex parte*. The judge need not sit in open court and the application for leave may be determined on the basis of a notice of application for leave to apply for judicial review supported by an affidavit, without a hearing.⁷ If leave is refused without a hearing, the application may be renewed in which case the application is heard by a single judge sitting in court or by a Divisional Court of the Queen's Bench Division (if the Court so directs). Where the application is renewed the single judge:⁸

". . . may order that the proposed respondent should be notified of the application and be invited to attend on the oral hearing and, if necessary, to argue against the application. The oral *ex parte* application may be treated as the application for judicial review itself, thus substantially truncating the time and cost of the whole procedure . . . If the appeal to the single judge is refused after an oral hearing, . . . there is a right of appeal to the Court of Appeal."

4.4 In those cases in which leave is granted on the initial application, the second stage involves the hearing of the application for judicial review. This application must be made by an originating motion to a judge sitting in open court, unless the court directs that it be made

(a) by originating summons to a judge in chambers; or

⁵ *Rules of the Supreme Court 1965-1980* (UK), O 53 r 2.

⁶ *Supreme Court Act 1981-1984* (UK), s 31(3).

⁷ *Rules of the Supreme Court 1965-1980* (UK), O 53 r 3(2) and (3).

⁸ L Blom-Cooper, *The New Face of Judicial Review: Administrative Changes in Order 53* [1982] Public Law 250, 258.

- (b) by originating motion to a Divisional Court of the Queen's Bench Division.⁹

An application may also be made for interlocutory proceedings such as interrogatories and the discovery and inspection of documents.¹⁰ Proceedings are usually conducted on the basis of affidavit evidence. However, on application, the court may order the attendance for cross-examination of the person making an affidavit.¹¹

4.5 An application for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose, unless the court considers that there is good reason for extending the period.¹²

4.6 On the hearing of the application for judicial review the court has power to award damages to the applicant if -

- (a) the application is joined with a claim for damages arising from any matter to which the application relates, and
- (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages.¹³

4.7 The courts have concluded that the provision of a requirement to seek leave, the absence of an automatic right to discovery and interrogatories or cross-examination of deponents on their affidavits and the short limitation period were designed to provide protection for public authorities. Consequently, it has been held that, as a general rule, it would be:¹⁴

⁹ *Rules of the Supreme Court 1965-1980* (UK), O 53 r 5(2).

¹⁰ Id, O 53 r 8.

¹¹ Id, O 53 r 8 and O 38 r 2(3). Pleadings (O 18) and a summons for directions (O 25), which are available in proceedings commenced by writ, are not available on applications for judicial review.

¹² Id, O 53 r 4(1).

¹³ *Supreme Court Act 1981-1984* (UK), s 31(4).

¹⁴ *O'Reilly v Mackman* [1983] 2 AC 237, 285. See also *Heywood v Board of Visitors of Hull Prison* [1980] 1 WLR 1386. The Law Commission did not intend that the application for judicial review should be "exclusive in the sense that it would become the only way by which issues relating to the acts or omissions of public authorities could come before the courts": The Law Commission, *Remedies in Administrative Law* (1975, Cmnd 6407), 17.

". . . contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Order 53 for the protection of such authorities."

A distinction must, therefore, be made between cases falling within the sphere of public law and those which raise only issues of private law. The former should be pursued by an application for judicial review, with its limitations; the latter by a civil action for declaration, injunction or damages.¹⁵

4.8 As a result of this reasoning it has been held that a civil action is appropriate where a claim for damages is based on a contract,¹⁶ or arises from negligent advice given by a local authority or its officers¹⁷ or a mixture of public and private law issues is involved, such as where the case involves selling milk at prices contrary to law so as to cause damage to another body's business.¹⁸ In a case involving an application for judicial review of a decision of the BBC to dismiss an employee for disciplinary reasons and the managing director's decision to uphold the decision on appeal, it was held that as the disciplinary procedure arose out of a contract of employment and was purely private or domestic in character, the applicant was not entitled to relief by way of judicial review.¹⁹

4.9 On the other hand it was held that a plaintiff who sought a declaration, a mandatory injunction and damages in respect of an alleged failure by a local authority to perform a statutory duty to provide housing for a homeless person should proceed by way of an

¹⁵ In *O'Reilly v Mackman* Lord Diplock referred to the rule as being subject to exceptions. One exception is "where the invalidity of the decision arises as a collateral issue in a claim for infringement of a right of the plaintiff arising under private law". A second is "where none of the parties objects to the adoption of the procedure by writ or originating summons": [1983] 2 AC 237, 285. Another exception was expounded by the House of Lords in *Wandsworth London Borough Council v Winder* [1985] 1 AC 461. In this case it was held that Order 53 did not prevent a person from challenging the validity of a decision of an authority in the course of *defending* an action (the action being one by the Council for arrears of rent and for possession of a property rented by Winder from the Council) so as to protect an existing private right, that is, a right to remain a tenant of the Council at a particular rent. See also *Gillick v West Norfolk and Wisbech Area Health Authority and the Department of Health and Social Security* [1985] 3 WLR 830.

¹⁶ *Law v National Greyhound Racing Club Ltd* [1983] 1 WLR 1302. In this case it was held that it was appropriate to commence proceedings by an originating summons because the matter in dispute arose out of a contract between the plaintiff and the defendants and involved a domestic tribunal.

¹⁷ *Davy v Spelthorne Borough Council* [1984] AC 262.

¹⁸ *An Bord Bainne Co-Operative Ltd (Irish Dairy Board) v Milk Marketing Board* [1984] 2 Common Market LR 584.

¹⁹ *R v British Broadcasting Corporation, Ex parte Lavelle* [1983] 1 WLR 23. See also *R v East Berkshire Health Authority, Ex parte Walsh* [1985] 1 QB 152.

application for judicial review and not by way of an ordinary civil action because the matter involved a public duty and not a private right.²⁰

4.10 One aspect of this problem was contemplated by the legislation. Order 53 rule 9(5) of the *Rules of the Supreme Court 1965-1980* provides:

"Where the relief sought is a declaration, an injunction or damages and the Court considers that it should not be granted on an application for judicial review but might have been granted if it had been sought in an action begun by writ by the applicant at the time of making his application, the Court may, instead of refusing the application, order the proceedings to continue as if they had been begun by writ."²¹

In the BBC case this discretion was exercised and the court considered the issue raised by the application on the basis that the matter had been begun by writ.

4.11 The present state of the law in the United Kingdom has been strongly criticised by Professor H W R Wade. Referring to the dichotomy between private and public law he states:²²

". . . the emergence of this dichotomy must be accounted a setback. It has already been the cause of about a dozen reported cases, several of which have reached the House of Lords, and in which a great deal of litigants' money and judicial time and effort have been unprofitably expended on mere matters of procedure. . . The primary object of the reform was to stop a good cause being lost by choice of the wrong procedure. But this has happened far more often already than it did in several decades beforehand, if one may judge from the law reports. Have we then a case of the remedy being worse than the disease?"

3. NEW SOUTH WALES

4.12 In contrast to the United Kingdom, in New South Wales proceedings for judicial review are commenced in the same manner as an ordinary civil action.²³ Proceedings for

²⁰ *Cocks v Thanet District Council* [1983] 2 AC 286. See also *R v Secretary of State For the Home Department, Ex parte Benwell* [1985] 1 QB 554.

²¹ However, the rules do not provide that, if the relief claimed in a civil action ought to have been claimed by an application for judicial review, the court may direct that the proceedings be continued as an application for judicial review. It would, however, be difficult to develop a rule to this effect. For example, it would be necessary to provide for the applicant to obtain leave to apply for judicial review and for the application to be made within any time limit on commencing proceedings for judicial review.

²² *Procedure and Prerogative in Public Law* (1985) 101 *Law Quarterly Review* 180, 181-182.

²³ *Rules of the Supreme Court 1970-1984* (NSW) Pt 4 r 1. The distinction between court and chambers has been abolished in New South Wales and all matters, whether commenced by summons or statement of claim, are taken to be conducted in court: *Supreme Court Act 1970-1984* (NSW), s 11.

relief against administrative decisions which formerly would have been granted by writ of certiorari, prohibition or mandamus must be commenced by summons.²⁴ Proceedings for an injunction or a declaratory order may be commenced by either a summons or a statement of claim.²⁵ In neither case is leave required. The major distinction between a statement of claim and a summons is that proceedings commenced by way of a statement of claim may involve interlocutory proceedings, such as interrogatories, the discovery and inspection of documents and oral evidence, whereas proceedings commenced by summons are generally disposed of summarily without any interlocutory proceedings and without oral evidence. It is therefore preferable to commence proceedings by way of a statement of claim where there is likely to be a dispute of fact.

4.13 If the form in which proceedings were commenced is not considered to be suitable by the Court, the proceedings need not be dismissed²⁶ but the Court may give directions to ensure that the action proceeds in the proper manner.²⁷ Importantly, the court has power to grant any appropriate remedy notwithstanding that the remedy was not sought in the summons or statement of claim.²⁸

4.14 Unlike the position in the United Kingdom, there are no provisions giving special protection to public authorities. Actions against public authorities are not, however, entirely without control. The matters are dealt with in the Administrative Law Division of the Supreme Court.²⁹ Control is exerted at a weekly directions hearing of the Division.³⁰ When the matter first comes before the court the judge gives directions on matters such as the filing of points of claim and defence, affidavits in reply and discovery or interrogatories (if any are appropriate). Frequently the evidence given on affidavit is sufficient to enable the case to go

²⁴ *Rules of the Supreme Court 1970-1984* (NSW), Pt 54 rr 3 and 4.

²⁵ A statement of claim would be appropriate, for example, where a claim was also made for damages: *Rules of the Supreme Court 1970-1984* (NSW), Pt 4 r 2(1)(a)-(c).

²⁶ *Supreme Court Act 1970-1984* (NSW), s 81(2).

²⁷ Where proceedings are commenced by a statement of claim (which involves interlocutory proceedings) and the proceedings should have been commenced by summons or the court is of opinion that they might more conveniently continue as if commenced by summons, the court may order that a summons be filed and that the proceedings continue as if so commenced: *Rules of the Supreme Court 1970-1984* (NSW) Pt 4 r 2B. Where proceedings have been commenced by a summons the Court may order that they continue on pleadings and that any affidavits stand as pleadings, or may make orders for the filing of a statement of claim or other pleadings: *id*, Pt 5 r 11. The usual order is that the plaintiff file and serve a statement of claim within 14 days and that thereafter pleadings be filed in accordance with the Rules.

²⁸ *Rules of the Supreme Court 1970-1984* (NSW), Pt 40 r 1.

²⁹ The rules for determining the matters that are to be so dealt with are contained in Schedule H Part 2 of the *Rules of the Supreme Court 1970-1984* (NSW)

³⁰ This Division is constituted by four judges who also sit in the Common Law Division. They set aside a part of their time each month to the Administrative Law Division and take it in turn to control the list of the Division and to ensure that actions are disposed of promptly.

straight to trial especially where the only issue is one of law. In fact it is uncommon for there to be a substantial factual issue.

4.15 Although the English Law Commission considered recommending the application of the existing civil forms of action in England to proceedings for certiorari, prohibition and mandamus, an approach which received "considerable support" during its consultations,³¹ the Law Commission ultimately favoured the approach now adopted in the United Kingdom.³² The Law Commission suggested that it may be undesirable to assimilate proceedings for the judicial review of administrative decisions to that for ordinary civil actions because ". . . the procedure applicable to private law actions has its own difficulties and, in particular, opportunities for delay".³³ These delays could arise from the need to deliver pleadings and to conduct interlocutory proceedings. According to the information available to the Commission this has not been the experience in New South Wales. Under the procedure in New South Wales interlocutory proceedings are not used in every case. In any case, a tight control is maintained over the conduct of proceedings at the directions hearings. The Commission understands that the administrative arrangements in New South Wales are flexible and that matters which involve a question of law and which do not require interlocutory proceedings can be dealt with promptly.

4. THE COMMISSION'S MAIN RECOMMENDATIONS

4.16 As indicated above, the Commission sees a number of difficulties with the existing procedure for obtaining judicial review of administrative decisions. The many trenchant criticisms of that procedure³⁴ are testimony to the need for reform. A fundamental difficulty is that the prerogative writs of certiorari, prohibition and mandamus cannot be sought in the same proceeding as an application for a declaration or an injunction or a claim for damages.³⁵

4.17 In all of the jurisdictions studied by the Commission an attempt has been made to overcome the procedural difficulties referred to earlier.³⁶ The simplest approach is that

³¹ One of those who advocated this approach was Professor H W R Wade, an approach which he still advocates: see *Procedure and Prerogative in Public Law* (1985) 101 Law Quarterly Review 180, 184 and 189.

³² Paras 4.2 to 4.11 above.

³³ The Law Commission, *Remedies in Administrative Law* (1975, Cmnd 6407), 17, para 36.

³⁴ Paras 3.9 and 3.10 above.

³⁵ Paras 3.2 and 3.8 above.

³⁶ See generally chapt 3.

adopted in New South Wales where proceedings for judicial review may be commenced in the same form as other actions in the Supreme Court. In the other jurisdictions a new remedy has been created. However, as can be seen from the experience in the United Kingdom, the problem of choosing the correct form for seeking relief can still arise because there are still two possible ways of commencing proceedings: the application for judicial review or an ordinary civil action for a declaration or an injunction.

4.18 As mentioned above, in the United Kingdom the courts have concluded that the procedural limitations associated with the new remedy were designed to protect public authorities from vexatious litigation and to ensure that the initiation and completion of litigation, in some cases having wide effects, is not too long delayed. The Commission considers however that a reasonable balance between the need to provide protection for public authorities from unwarranted actions and the interests of individuals in effectively challenging the validity of decisions of public authorities can be achieved with an approach similar to that adopted in New South Wales. Moreover those interests can be balanced without creating formal dichotomies, particularly in the commencement of proceedings, similar to those which cause difficulty at present in this State and which continue to cause difficulty in the United Kingdom. Adequate protection of public authorities can be provided by other means such as a directions hearing³⁷ and the striking out of unwarranted actions³⁸ or actions which raise no matter of substantial importance or injustice.³⁹ The judicial discretion to refuse relief or to dismiss the action on the ground of undue delay⁴⁰ in commencing proceedings should encourage aggrieved persons to prosecute claims promptly. Usually it will be in a person's interest to pursue an action promptly because the decision in question will have been to his or her prejudice. For example, it may involve the denial of a right or privilege or the imposition of an obligation.

4.19 An approach similar to that adopted in New South Wales has other advantages: it avoids the need to create a further form of action, and it involves the use of procedures with which legal practitioners are familiar. Inquiries which the Commission has made of a judge of the Administrative Law Division of the New South Wales Supreme Court, of barristers in New South Wales and of the New South Wales State Crown Solicitor's Office indicate that

³⁷ Para 5.10 below.

³⁸ Para 5.8 below.

³⁹ Para 5.9 below.

⁴⁰ Para 5.7 below.

the New South Wales procedure works satisfactorily in practice and that no significant difficulties have been encountered.

4.20 *The Commission accordingly recommends* that the existing procedures for obtaining certiorari, prohibition and mandamus be replaced with a procedure whereby relief in the nature of these remedies would be obtained by an order⁴¹ in an ordinary civil action, commenced either by a writ of summons or an originating motion as is appropriate in the particular case. A writ of summons would be more appropriate where there was likely to be a dispute as to facts, where there is otherwise a need for interlocutory proceedings, or where there was also a claim for damages. In most cases an originating motion would be more appropriate than a writ of summons, which involves pleadings, because there would be no dispute of fact and the real issue would be one of law. The facts would be elucidated by affidavit. An applicant should not, however, be disadvantaged by choosing a means of commencing proceedings which was not the most appropriate in the circumstances. *Accordingly the Commission recommends* that the court should have power at any time during proceedings to determine whether the proceedings should continue on the basis of affidavits or on pleadings.⁴²

4.21 The use of the existing civil forms of action for relief in the nature of certiorari, prohibition, mandamus, and for declaration, injunction and damages (where damages are available under the existing law) should remove the difficulties which can arise at present from the need to select the most appropriate remedy. If there is doubt as to the most appropriate relief to be sought, two or more forms of relief could be sought in the one action.

5. SUGGESTED IMPLEMENTATION OF THE COMMISSION'S RECOMMENDATIONS

4.22 Appendices IV, V and VI to this report contain drafts of statutory provisions and Rules of the Supreme Court which would give effect to the recommendations contained in this report. A discussion of other recommendations which are given effect to in the drafts is contained in the following two chapters. The Commission recognises, however, that these

⁴¹ Para 5.11 below. Proceedings in the nature of quo warranto are also available by the same procedure which is applicable to certiorari, prohibition and mandamus. As the Commission's recommendation involves the replacement of this procedure with the procedure for an ordinary civil action, it is recommended that relief in the nature of quo warranto be obtained instead by a declaration and injunction: see Appendix IV, cl 4.

⁴² Appendix V, rr 3 and 4.

recommendations may be implemented in other ways and by different drafting techniques. The Commission also recognises that consequential amendments may be required to other legislation, for example, sections 113-119 the *Local Courts Act 1904-1985*, and that transitional provisions may be required.

Chapter 5

THE REVIEW COURT, ITS POWERS AND OTHER MATTERS

1. THE REVIEW COURT

5.1 At present, an application for certiorari, prohibition or mandamus is heard by the Full Court of the Supreme Court (usually comprised of three judges), unless the matter appears to be one of urgency, in which case it may be heard by a single judge either in open court or in chambers.¹ Proceedings for declaration or injunction are heard by a single judge in open court.

5.2 In the Working Paper the Commission sought comments on whether or not proceedings for certiorari, prohibition and mandamus should in general be heard by a single judge of the Supreme Court.² In its comments on the Working Paper, the Law Society submitted that all such proceedings should be heard by a single judge of the Supreme Court or, for cause shown, by the Full Court, and that a single judge should have power to refer the matter to the Full Court. This approach was also supported by the Chief Justice, Sir Francis Burt, and by Mr Justice Brinsden and Mr Justice Kennedy.

5.3 The Commission agrees with these views. It considers that the existing provision for hearings of prerogative writ applications before the Full Court is unwarranted. It considers that there is no need to depart from the usual practice of hearings being conducted before a single judge except for cause shown³ and *recommends accordingly*. The decision whether a

¹ *Rules of the Supreme Court 1971-1985*, O 56 r 3.

² In England and New South Wales, for example, judicial review matters are usually heard by a single judge.

³ *Supreme Court Act 1935-1984*, s 43 which provides that:

"(1) Any Judge, whether sitting in court or in chambers, may, in the exercise of civil or criminal jurisdiction, at any time before final judgment, and whether before or after argument, reserve any case, or any point or question in a case, for the consideration of the Full Court, or may at any such time as aforesaid direct any case, point, or question to be argued before the Full Court, or may give judgment in any cause or matter subject to the judgment of the Full Court on any point or question arising in such cause or matter, and may reserve such point or question for such judgment, and the Full Court shall thereupon hear and determine such case, point, or question."

The Commission suggests that a master, being a member of the Court, should also have power to refer such proceedings to the Full Court.

matter should be referred to the Full Court could be made at a directions hearing.⁴ In accordance with the existing provision for appeals from a judge of the Supreme Court⁵ there would be an appeal to the Full Court of the Supreme Court.

2. TIME LIMITS

5.4 At present the law relating to time limits for the commencement of proceedings varies for the different remedies.⁶ There are various reasons for having limitation periods.⁷ Generally, it is in the public interest for disputes to be resolved as quickly as possible and as close in point of time to the events upon which they are based so that the recollections of any witnesses are still clear. It is also important to protect defendants from claims relating to incidents which occurred many years before and about which they, and their witnesses, may have little recollection and may no longer have records. In the case of administrative decisions which may affect many people there is also an interest in the finality of decisions so that a public authority will know whether or not its actions are valid.

5.5 In other jurisdictions the time limits for commencing proceedings in administrative law matters vary considerably. In the Commonwealth of Australia the period is generally 28 days.⁸ The court may allow an extension of time.⁹ In the United Kingdom the period is three months, unless the court considers that there is good reason for extending the period.¹⁰ In New Zealand rather than a specific limitation period, the court has a discretion to refuse to grant relief if there has been undue delay by the applicant.¹¹ In New South Wales there is no time limit on the commencement of these proceedings.

If an Administrative Law Division of the Supreme Court were established, proceedings for judicial review should normally be heard by a judge of that Division. The establishment of an Administrative Law Division was recommended by the Commission in its Report, *Review of Administrative Decisions: Part I - Appeals* (1982), 24-25.

⁴ Para 5.10 below.

⁵ *Supreme Court Act 1935-1984*, s 58.

⁶ Para 3.5 above.

⁷ See Law Reform Commission of Western Australia, *Report on Limitation and Notice of Actions: Latent Disease and Injury* (1982), para 1.10.

⁸ *Administrative Decisions (Judicial Review) Act 1977-1985* (Cwth), s 11.

⁹ *Id.*, s 11(1)(c).

¹⁰ Para 4.5 above.

¹¹ *Judicature Amendment Act 1972-1977* (NZ), s 4(3).

5.6 In Western Australia, the time limit for commencing *appeals* from those administrative decisions from which there is such a right varies considerably.¹² The appellate process may be distinguished from judicial review in one important respect. The right of appeal usually involves a review of the merits of a decision whereas judicial review is principally concerned with whether or not a decision is within power. Judicial review involves the protection both of a private right or interest and of the public interest in ensuring that public authorities act lawfully and fairly. Accordingly it is necessary to consider not only the public interest in the finality of administrative decisions but also the public interest in ensuring that public authorities act lawfully and fairly.

5.7 In order to provide a balance between these interests, *the Commission recommends* that instead of the existing limitation periods of six months for certiorari and two months for mandamus, a person seeking relief in the nature of certiorari, prohibition or mandamus should be required to commence proceedings promptly and in any event within six months from the date when grounds for the action first arose. The Court should have power at any stage to enforce this requirement by dismissing an action. The Court, however, should have a discretion to extend the six month period, either before or after it has expired, if there is good reason for doing so. This approach gives an aggrieved person a reasonable opportunity to challenge a decision. A person may wish, for example, to pursue less formal means of challenging a decision such as contacting the responsible minister. Delay may also be caused by the need to obtain information about the decision and legal advice on the chances of successfully challenging a decision. Any chance of deliberate delay would be tempered by the discretion of the court to dismiss an action or refuse relief where there had been undue delay by the applicant, even though an application had been made within the prescribed period¹³ and by the provision that interlocutory relief could not be obtained until a proceeding was commenced.¹⁴

¹² In general it seems that the period is short, for example, 21 days in the case of appeals from the Licensing Court to the Supreme Court (*Rules of the Supreme Court 1971-1985*, O 65 r 3(1)), one month for appeals from the Real Estate and Business Agents Supervisory Board to the District Court (*Real Estate and Business Agents Act 1978-1984*, s 23(2)), and 42 days for appeals to a Land Valuation Tribunal from a decision of the Valuer General or any rating or taxing authority (*Land Valuation Tribunals Act 1978*, s 20), but as long as 60 days for some appeals to the Town Planning Appeal Tribunal (*Town Planning Appeal Tribunal Rules 1979-1982*, r 5(1)).

¹³ Compare *R v Inner London Crown Court, Ex parte London Borough of Greenwich* [1976] 1 All ER 273.

¹⁴ Para 5.12 below.

3. NO REQUIREMENT FOR LEAVE

5.8 At present an application for a writ of certiorari, prohibition or mandamus involves a two stage process. The first stage involves an *ex parte* application for a writ by means of a motion for an order to show cause. This procedure in effect means that it is necessary to obtain the leave of a judge of the Supreme Court before a proceeding can be instituted. This requirement is designed to provide protection for public authorities by preventing unmeritorious applications from proceeding. However, leave is not required for proceedings for declaration or injunction. In New South Wales such leave is not required in administrative law matters.¹⁵ This has not proved to be the cause of any large number of vexatious or untenable actions. Such proceedings can be dealt with by other means. Under the procedure recommended in this report, whereby the procedure would be assimilated to that relating to ordinary civil actions, there would be no requirement for leave. However, under that procedure, where a proceeding is commenced an application to strike out the pleadings and dismiss the action can be made on the ground that:¹⁶

- "(a) it discloses no reasonable cause of action . . .; or
- (b) it is scandalous, frivolous or vexatious; or
- ...
- (d) it is otherwise an abuse of the process of the court."

5.9 Some commentators suggested that Order 20 rule 19 of the *Rules of the Supreme Court 1971-1985* may not be wide enough to cover some cases in which at present leave would, or might, not be granted, such as matters in which delay has led to the acquisition by third parties of rights or potential rights or in which the proceedings would be futile or in which the grant of relief would be refused because the proceedings raise no matter of substantial importance or injustice. The Commission acknowledges the force of this argument and *accordingly recommends* that the court should be empowered to dismiss the proceedings on the ground that no matter of substantial importance is involved or that in all the circumstances such a dismissal will impose no substantial injustice upon the plaintiff.¹⁷ This power is intended to apply to proceedings for relief in the nature of certiorari, prohibition

¹⁵ Although leave is still required in England, it is usually dealt with on the papers without an appearance. There is no requirement for leave in New Zealand, Ontario and the Commonwealth of Australia, and a recommendation was made against such a requirement in Alberta: Institute of Law Research and Reform, *Judicial Review of Administrative Action: Application for Judicial Review* (1984), 66-67.

¹⁶ *Rules of the Supreme Court 1971-1985*, O 20 r 19. There is a similar provision in New South Wales: *Rules of the Supreme Court 1970-1984* (NSW), Pt 13 r 5.

¹⁷ This recommendation derives substantially from s 4(2) of the *Administrative Law Act 1978-1984* (Vic).

and mandamus and for declaration or injunction in respect of the exercise or purported exercise of or the refusal or failure to exercise a public function by -

- (a) persons holding or acting in public offices of the State required to perform or performing public duties;
- (b) bodies of persons, whether corporate or unincorporate, required to perform or performing public duties.

4. DIRECTIONS HEARING

5.10 In order to facilitate an application by a defendant to have proceedings for relief in the nature of certiorari, prohibition or mandamus, or for a declaration or an injunction in respect of the exercise of or the failure to exercise a public function,¹⁸ dismissed on these grounds, and also to allow other matters to be settled before the hearing, *the Commission recommends* that provision be made for a compulsory directions hearing.¹⁹ Apart from allowing a defendant to apply for the dismissal of an action this hearing would provide an opportunity for a judge or master to exercise control over the conduct of the proceedings and to make orders for the purpose of ensuring that the application was determined in a convenient and expeditious manner. Such a hearing would replace, and could indeed improve upon, the existing use of the leave application in relation to the prerogative writs as a screening process in respect of procedural matters and matters concerning standing. It is envisaged that at this hearing a judge or master could -

- (a) order, in the case of proceedings for relief in the nature of certiorari, prohibition or mandamus, that the action be dismissed if it has not been commenced promptly and in any event within six months from the date when grounds for the action first arose;²⁰
- (b) dismiss the proceedings or order that judgment be entered on one or more of the grounds stated in Order 20 rule 19 of the *Rules of the Supreme Court*;²¹

¹⁸ Para 5.9 above.

¹⁹ If an Administrative Law Division of the Supreme Court is established (para 1.2 above), a member of that Division could hold the compulsory directions hearing. This is the position in New South Wales.

²⁰ Para 5.7 above.

²¹ Para 5.8 above.

- (c) dismiss the proceedings on the ground that no matter of substantial importance is involved or that in all the circumstances such a dismissal will impose no substantial injustice upon the plaintiff;²²
- (d) where relief in respect of more than one cause of action is claimed, direct that one or more of the causes of action be severed and be dealt with separately;
- (e) determine whether the matter should be heard by the Full Court of the Supreme Court;²³
- (f) direct which persons should be joined, or need not be joined, as parties, or direct that the name of any party be added or struck out;²⁴
- (g) direct which parties should be served with a copy of the originating motion or writ;
- (h) settle the issues to be determined, require any party to make admissions in respect of questions of fact, or make orders in respect of the filing of pleadings or statements setting out the points of claim or defence;
- (i) require any party to make discovery of documents or to permit any party to administer interrogatories or to make orders as to the examination or cross-examination of witnesses;
- (j) irrespective of the manner in which the proceedings were commenced, determine whether the proceedings should continue on affidavits or on pleadings;
- (k) make other interlocutory²⁵ or interim orders;

²² Para 5.9 above.

²³ Para 5.3 above.

²⁴ It is not intended that the law relating to the right of the Attorney General to intervene in proceedings be altered.

²⁵ The scope of these powers is dealt with in greater detail in para 5.12 below.

- (l) give such other or consequential directions as may be necessary for the convenient and expeditious determination of the proceedings.

5. POWERS OF THE COURT

5.11 At present the powers of the Supreme Court under the remedies vary. By means of a writ of certiorari it can quash a decision; by a writ of prohibition or an injunction, it can prohibit the making of a decision or the continuation of a course of action based on a decision already made; and by a writ of mandamus it can order or direct a decision-maker to perform a public duty. It can also make a declaration of the rights of the parties or make an order for damages in appropriate cases. In order to make the form in which these various types of relief are granted consistent with those used in ordinary civil proceedings, *the Commission recommends*, following New South Wales,²⁶ that the Court should have power, instead of issuing a writ of certiorari, prohibition or mandamus, to grant relief by way of an order under the *Supreme Court Act 1935-1984* and the *Rules of the Supreme Court 1971-1985*.²⁷ Of course the grant of that relief would continue to be discretionary.

5.12 The Commission considers that two ancillary matters should also be dealt with by the Rules or the Supreme Court Act. At present where the court grants an order nisi for certiorari or prohibition it may direct that the order nisi operate as a stay of the proceedings in question until the determination of the application or until the court otherwise orders.²⁸ Any party to a cause or matter may also apply for an interlocutory injunction to preserve the status quo.²⁹ In order to make it clear that similar relief is available under the procedure recommended in this report, the Commission *recommends* that the Supreme Court should expressly be given power to make interlocutory orders for a stay of proceedings or to preserve the status quo where proceedings have been commenced for relief in the nature of certiorari or prohibition.³⁰ The Court already has such powers in respect of proceedings for a declaration or injunction and those powers should continue.

²⁶ *Supreme Court Act 1970-1984* (NSW) s 69.

²⁷ See Appendix IV, cl 1.

²⁸ *Rules of the Supreme Court 1971-1985*, O 56 r 5(2).

²⁹ *Id*, O 52 r 1.

³⁰ Cf *Judicature Amendment Act 1972-1977* (NZ), s 8 and *Administrative Decisions (Judicial Review) Act 1977-1985* (Cwth) s 15. See Appendix IV, cl 3.

In New South Wales there is doubt as to whether or not the Supreme Court has power to grant interlocutory orders which have the effect of staying the decisions subject to review.

5.13 There is in addition a need to provide the Supreme Court with a further power which it presently lacks. The Supreme Court should be given power, where a decision is quashed or set aside, to make an order referring the matter to which the decision relates to the person or authority who made the decision for further consideration, subject to such directions as the court thinks fit.³¹ Such a power would permit the decision-maker to reconsider the matter in accordance with any directions of the court having regard to any evidence or information previously given without the necessity for a complete rehearing of the matter in question with a resultant saving of time and expense. *The Commission so recommends.*

6. COSTS

5.14 At present the Supreme Court has a discretion to make an award of costs where an order nisi for a writ of certiorari, prohibition or mandamus is made absolute.³² The Court also has such a discretion in the case of proceedings for injunction or declaration.³³ These discretions must be exercised judicially.³⁴ Generally, a successful party is entitled to recover his costs from an unsuccessful party. A successful party may, however, be deprived of the whole or part of his costs if, for example, his conduct has materially increased the cost of the proceedings.³⁵

5.15 Under the procedure recommended in this report, costs and security for costs would continue to be in the discretion of the Court.³⁶

5.16 The Commission considers that it is appropriate that these rules should apply to the recommended procedure and that no sufficient case has been made out for a special costs rule.³⁷

³¹ Cf *Administrative Decisions (Judicial Review) Act 1977* 1985 (Cwth), s 16(1)(b), *Judicature Amendment Act 1972-1977* (NZ), s 4(5)-(6) and *Supreme Court Act 1981-1984* (UK), s 31(5). See Appendix IV, cl 2. *Rules of the Supreme Court 1971-1985*, O 56 r 9(2).

³² *Supreme Court Act 1935-1984*, s 37.

³³ See generally E Campbell, *Award of Costs on Applications for Judicial Review*, (1983) 10 Syd LR 20.

³⁴ *Keddie v Foxall* [1955] VLR 320.

³⁵ *Supreme Court Act 1935-1984*, s 37; Companies (Western Australia) Code, s 533 and *Rules of the Supreme Court 1971-1985*, Os 25 and 66.

³⁶ The case of appeals from administrative decisions raises different issues: see *Review of Administrative Decisions: Part I - Appeals* (1982), paras 5.21 to 5.23.

7. EXCLUSION OF JUDICIAL REVIEW

5.17 Parliament has enacted a number of provisions which exclude or limit the review of administrative decisions by the courts, in particular by means of "privative" or "ouster" clauses.³⁸ Some of these provisions expressly refer to the prerogative writs and may need to be amended to ensure that they are not overridden by the procedural reform recommended in this report.³⁹ It is not intended that the reforms recommended in this report should affect the operation of these provisions.

³⁸ Working Paper, paras 4.1 to 4.4.

³⁹ The Commission intends to examine at a later date the question of whether or not privative or ouster clauses should be retained: para 1.6 above.

Part III: Reasons for decisions

Chapter 6

REASONS FOR DECISIONS

1. THE POSITION AT COMMON LAW

6.1 Until recently, it has generally been accepted that, unless there is an express statutory provision to the contrary, a State or local government decision-maker is not required to give reasons for a decision¹ or to state findings of fact.² Courts including courts of inferior jurisdiction and other judicial bodies are however generally under a duty to give reasons for their decisions.³

2. STATUTORY PROVISIONS ELSEWHERE

6.2 In a number of jurisdictions studied by the Commission various administrative decision-makers are required by statute to give reasons for their decisions.

6.3 In the United Kingdom, the tribunals specified in Schedule 1 of the *Tribunals and Inquiries Act 1971-1984* and ministers who make a decision after a statutory inquiry are required to furnish, on request, a statement, either written or oral, of the reasons for the decision.⁴ The statement may be refused on the grounds of national security or because the person seeking the statement is not primarily concerned with the decision and the tribunal or minister is of the opinion that to furnish it would be contrary to the interests of any person

¹ de Smith, 148. In *Osmond v Public Service Board of New South Wales* [1984] 3 NSWLR 447, it was held, however, by a majority, that the principles of natural justice required the Board to give reasons for its decision. The Commission understands that the Board has obtained special leave to appeal against the decision to the High Court of Australia.

² M Taggart, *Should Administrative Tribunals Be Required To State Findings of Fact?* (1980) 9 NZULR 162, 170.

³ See *Australian Timber Workers' Union v Monaro Sawmills Pty Ltd* (1980) 42 FLR 369 and *Baker v Flynn* [1982] WAR 289, 292.

⁴ *Tribunals and Inquiries Act 1971-1984* (UK) s 12(1).

primarily concerned.⁵ A statement given under these provisions must be taken to form part of the decision and to be incorporated in the record.⁶ This provision overcomes the doubt as to whether the reasons for a decision are part of the record⁷ and consequently facilitates the use of certiorari to quash a decision for non-jurisdictional error of law on the face of the record.

6.4 In the Commonwealth sphere the *Administrative Decisions (Judicial Review) Act 1977-1985* provides⁸ that a person entitled to apply for review of a decision may obtain reasons for the decision. The person entitled to review may request the decision-maker to furnish a statement in writing giving reasons for the decision, setting out the findings on material questions of fact and referring to the evidence or other material on which those findings were based.⁹ If there is a dispute as to whether or not a person who has applied for reasons is entitled to make the request, the issue can be determined by the Federal Court.¹⁰ Unless there is such a dispute, the decision-maker must comply with the request as soon as practicable, and in any event within 28 days after receiving the request.¹¹

6.5 The requirement that a decision-maker must give reasons for a decision and state findings on material questions of fact and refer to the evidence or other material on which those findings were based is circumscribed in a number of ways. First, the provision does not apply to a decision within any of the classes of decision set out in Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977-1985*.¹² Secondly, regulations may declare a class or classes of decisions to be decisions that are not decisions to which the provision applies.¹³ Thirdly, a decision-maker should not disclose information which relates to the personal affairs or business affairs of a person, other than the person making the

⁵ Id, s 12(2).

⁶ Id, s 12(5).

⁷ Sykes, Lanham and Tracey, 218-219, paras 2037-2038.

⁸ S 13. See generally R Burnett, *The Giving of Reasons* (1983) 14 Fed LR 157, 164-171.

⁹ The enactment of such a provision was recommended by both the Commonwealth Administrative Review Committee in its report in 1971 (the "Kerr Committee") (at 78-79) and the Committee of Review of Prerogative Writ Procedures in 1973 (the "Ellicott Committee") (at 8-9).
Administrative Decisions (Judicial Review) Act 1977-1985, s 13(3)-(4A).

¹¹ The requirement to give reasons may be enforced by mandamus: *Clanwilliam Pty Ltd v Bartlett* (1984) 6 Admin Law Notes N61; [1984] Aust Current Law Digest 472.

¹² *Administrative Decisions (Judicial Review) Act 1977-1985*, s 13(11)(c). The Administrative Review Council is reviewing the operation of Schedule 2 and the classes of decision set out in that schedule, decisions which are not subject to the requirement to give reasons, as part of its general review of the *Administrative Decisions (Judicial Review) Act 1977-1985*.

¹³ *Administrative Decisions (Judicial Review) Act 1977-1985*, s 13(8).

request, or information of a confidential nature.¹⁴ Fourthly, a disclosure of information may be prevented if the Attorney General certifies that:¹⁵

". . . the disclosure of information concerning a specified matter would be contrary to the public interest -

- (a) by reason that it would prejudice the security, defence or international relations of Australia;
- (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet; or
- (c) for any other reason specified in the certificate that could form the basis for a claim in a judicial proceeding that the information should not be disclosed."

Fifthly, a request may not be made in respect of a decision that includes or was accompanied by a statement setting out findings of fact, a reference to the evidence or other material on which those findings were based and the reasons for the decision.¹⁶

6.6 A person who receives a statement and considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision may apply to the Federal Court for an order that the decision-maker provide further and better particulars in relation to any or all of those matters.¹⁷ Further and better particulars cannot be obtained where the decision-maker has given a person a statement voluntarily.

6.7 In Victoria any person affected by a decision made by a tribunal¹⁸ is entitled to obtain a statement of its reasons from the tribunal.¹⁹

¹⁴ Id, s 13A.

¹⁵ Id, s 14(1).

¹⁶ Id, s 13(11)(b).

¹⁷ Id, s 13(7).

¹⁸ Tribunal means an authority (not being a court) which, in arriving at the decision in question, is required by law to act in a judicial manner to the extent of observing one or more of the rules of natural justice: *Administrative Law Act 1978/1984* (Vic), s 2.

¹⁹ Id, s 8.

3. DISCUSSION

6.8 The introduction of a statutory provision requiring reasons and findings on material questions of fact to be disclosed and referring to the evidence or other material on which those findings were based would have four significant advantages.

6.9 First, a person affected by an administrative decision would be in a better position to assess whether or not there was a good ground for seeking judicial review. For example, if the reasons for a decision are not stated it may be difficult to allege or establish that an irrelevant consideration has been taken into account. Provision of reasons for a decision could also mean that judicial review would not be sought if the person were satisfied, after seeing the reasons, that the decision was not arbitrary or contrary to law.²⁰

6.10 Secondly, provision of reasons might enable such a person to choose between different means of challenging a decision. For example, he or she might decide that it was more appropriate to lay a complaint with the Parliamentary Commissioner for Administrative Investigations or make representations to the responsible Minister.

6.11 Thirdly, if decision-makers were required to provide reasons for decisions and to state the findings on which the decisions were based it could promote better decision-making. It would also tend to make government decision-making more open and accountable.

6.12 Fourthly, reasons would assist the Court in determining whether or not a decision under review was open to attack on any of the grounds upon which relief may be granted.

6.13 Such a provision would, of course, impose additional burdens on decision-makers. These additional burdens will arise in two ways. First, in some cases where a record of the reasons for a decision is not maintained at present it will be necessary to do so, whether or not a request for reasons is made. Secondly, where a request for reasons is made financial and personnel resources will be required to prepare the reasons and to provide the other information required to be disclosed. The resources required will vary depending upon the complexity of the decision involved. The burden imposed on State and local government

²⁰ 2,677 requests for statements of reasons were made in 1984 under the *Administrative Decisions (Judicial Review) Act 1977-1985* (Cwth) but only 248 applications for judicial review were made in that year: Administrative Review Council, *Ninth Annual Report 1984-1985*, Appendix 6, Tables 1 and 5.

decision-makers will also be related to the number of decisions made by them and the number of requests made to them. In the Commonwealth sphere the number of requests made varies greatly between various departments and authorities.²¹ The average time required to prepare each response also varies considerably between departments.²² In 1984, under the Commonwealth provisions, a total of 13,076 hours²³ was required to process the applications for reasons, an average of 6.35 hours per application.²⁴

6.14 It is difficult to assess the impact of a statutory requirement to give reasons on the State government and local authorities in the light of the Commonwealth experience.²⁵ There are important differences, for example, between the Commonwealth and State governments. While the Commonwealth government serves approximately 15 million people the State government serves approximately 1.5 million people. On the other hand, the number of matters on which the Commonwealth Parliament can legislate is more limited than those on which the State Parliament can legislate. In any case, as the Commonwealth experience shows, the number of requests for reasons and the time required to compile reasons can vary significantly depending on the type of decision involved. In the Commission's estimation the benefits which would flow from a requirement for reasons would outweigh any administrative inconvenience and expense that is likely to be caused.

4. THE COMMISSION'S RECOMMENDATIONS

6.15 The Commission considers that, as a matter of principle, any person sufficiently affected by an administrative decision should be entitled to obtain a statement from the decision-maker of his reasons for having made that decision. The Commission recognises, however, that there are a number of legitimate exceptions to this principle, examples of which are given below.²⁶

²¹ In 1984, for example, of the 2,677 requests for reasons, 907 were made to the Public Service Board, 121 to the Australian Taxation Office, 94 to the Health Department and 24 to the Department of Primary Industry: Administrative Review Council, *Ninth Annual Report 1984-1985*, Appendix 6 Table 1.

²² In 1984 it ranged from 31.42 hours for the Reserve Bank of Australia, to 11.76 hours for the Social Security Department, 6.01 hours for the Department of Employment and Industrial Relations and 0.44 hours for the Department of Resources and Energy: id, Appendix 6 Table 3.

²³ That is, the equivalent in personnel resources of approximately 7 staff.

²⁴ Administrative Review Council, *Ninth Annual Report 1984-1985*, Appendix 6 Table 3.

²⁵ For a recent account see L Curtis, *The Impact of Recent Administrative Law Reform on Public Sector Managers*, The Australian Accountant, April 1985, 18.

²⁶ Para 6.17.

6.16 Accordingly, *the Commission recommends* that a provision along the lines of that set out in Appendix VI below should be enacted.²⁷ In summary the provision provides that any person with a "sufficient interest" in a decision made in the exercise of a public function²⁸ should be entitled to obtain a statement in writing setting out -

- (i) the findings on material questions of fact;
- (ii) referring to the evidence or other material on which those findings were based; and
- (iii) giving the reasons for the decision.²⁹

The word "decision" here is intended to include cases where there has been a simple refusal or failure to exercise a power. By the term "sufficient interest" the Commission intends to include only persons who have an interest beyond that of the public generally. On the other hand, the term should not be equated with standing requirements for commencing judicial review proceedings. This is because the reasons could be required for purposes other than judicial review. For example reasons may assist in deciding whether to lodge a complaint with the Parliamentary Commissioner for Administrative Investigations. Given what is involved is a requirement to provide reasons, it would be expected that the term "sufficient interest" would be interpreted in a more liberal manner by decision-makers than occurs when commencing judicial review proceedings. As is the case in the United Kingdom,³⁰ the reasons should be deemed to form part of the decision and to be incorporated in the record of the decision-maker.

6.17 *The Commission recommends* that the exceptions to the above requirement should include the following -³¹

- (a) Decisions of the Governor or the Governor in Council.³²

²⁷ Whilst reasons for some decisions may be available at common law, the Commission favours implementation of the above recommendation by an express statutory provision because it provides an opportunity to set out with more certainty the decisions for which reasons would be required and the procedure to be followed in seeking and giving reasons.

²⁸ Para 5.9 above.

²⁹ The Law Society of Western Australia also favoured such a provision.

³⁰ Para 6.3 above.

³¹ Appendix VI contains a draft of the exceptions referred to below. Items (c), (e), (f), (h), (i), (j), (k), (m), (n) and (o) are based on the provisions of the *Administrative Decisions (Judicial Review) Act 1977-1985*.

³² Whilst there will be many decisions of the Governor which will be of a constitutional nature for which a right to reasons should not be created there are many others for which reasons might properly be required.

- (b) Decisions of the Parliament or of either House or of a Committee of either House of Parliament or of a joint Committee of the Houses of Parliament.
- (c) Matters in which the disclosure would be contrary to the public interest -
 - (i) by reason that it would prejudice the security, defence or international relations of Australia or relations between the State and the Commonwealth or any other State or Territory or any other country; or
 - (ii) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet.
- (d) Recommendations of Electoral Commissioners under the *Electoral Districts Act 1947-1985*.³³
- (e) Information in respect of which a claim could be made in a judicial proceeding that it not be disclosed.
- (f) Decisions or acts of a legislative character such as the making of regulations or by-laws.³⁴
- (g) Decisions of courts or tribunals which are under a duty at common law or under a written law to give reasons for their decisions.
- (h) Decisions in connection with the investigation or prosecution of persons for any offence against a law of the State including decisions in connection with the issue of search warrants.³⁵

However, the Governor in these cases is usually acting with the advice and consent of the Cabinet and is not in a position to provide independent reasons. Note, however, the first point made in para 6.19 below.

³³ The Electoral Commissioners must act under the statute in accordance with a fixed procedure and a fixed statutory formula. There is provision under the Act for objections to be made.

³⁴ These decisions usually involve a formal expression of policy and are subject to scrutiny by Parliament.

³⁵ The disclosure of information relating to the investigation or prosecution process could be used to hamper or frustrate or prejudice investigations or the prosecution of offences.

- (i) Decisions in connection with the institution or conduct of proceedings in a civil court.³⁶
- (j) Decisions in connection with the prevention or settlement of industrial disputes.
- (k) Information relating to a person other than the person making the request if -
 - (i) the information was supplied in confidence;
 - (ii) furnishing the information would reveal a trade secret;
 - (iii) it was furnished in compliance with a duty imposed by a written law; or
 - (iv) the furnishing of the information by the public body or officer would contravene a statutory duty.
- (l) Decisions of a recommendatory nature,³⁷ unless they are required by a written law before a decision can be made or action taken.³⁸
- (m) Decisions of public authorities involved in commercial activities in respect of those activities.³⁹
- (n) Decisions in connection with personnel management (including recruitment, appointment or engagement, promotion and organisation) with respect to the

³⁶ These decisions, made by a government authority, generally involve the protection of the "private law" rights or interests of the government or local authorities.

³⁷ The person who finally makes a decision may well be subject to the requirement to give reasons. To allow preliminary recommendations at whatever level in the decision-making process to be subject to a requirement to give reasons is therefore unnecessary and could also be unduly burdensome.

³⁸ For example, various mining tenements may be declared forfeited by the Minister only after receiving a recommendation from a mining warden. However, as before making a recommendation, a mining warden is required to conduct a hearing in open court (*Mining Act 1978-1983*, ss 98 and 99) such a recommendation would be excluded under (g) above.

³⁹ A number of government authorities operate as commercial enterprises and consequently make decisions of a commercial nature. To require them to give reasons and information relating to these decisions could hamper their activities and provide a commercial advantage to any competitors they might have or to any consumers of the service they provide or the product they produced. Exclusion from such a requirement would place them on an equal footing with private commercial enterprises.

State Public Service or the staff of any government authority or of a local authority,⁴⁰ unless they relate to the rights or interests of a particular person.

- (o) Decisions accompanied by a statement setting out the reasons for the decision, findings on material questions of fact and the material on which the findings were based.

6.18 The list of exceptions is not intended to be exhaustive. If the recommendation made in this chapter that public officers or bodies be required to give reasons on request is accepted in principle, no doubt further detailed consultation with government authorities will be necessary to ensure that the list of appropriate exceptions is comprehensive. For example, the Commission's recommendation would include local government decision-makers and bodies concerned with the custody of prisoners, mental patients and wards of the State. The Commission has not attempted to exhaust all the possibilities.

6.19 Two further points should be made. Exclusion of a class of decisions from a statutory requirement to give reasons would not imply that reasons should never be given in such cases. The relevant authority may decide to give reasons in a particular case both as a matter of good administration and as a matter of fairness to the applicant. Secondly, the requirement to give reasons and any exclusion from that requirement is not intended to affect the general rights of a party to proceedings to obtain discovery or administer interrogatories.

⁴⁰ Such decisions raise issues of a general policy nature.

Part IV: Summary of the Commission's recommendations

Chapter 7

SUMMARY OF THE COMMISSION'S RECOMMENDATIONS

JUDICIAL REVIEW PROCEDURE

Use of existing civil forms of action

1. The existing procedures for obtaining certiorari, prohibition, mandamus and quo warranto should be replaced with a procedure whereby relief in the nature of these remedies would be obtained by an order in an ordinary civil action, commenced either by a writ of summons or an originating motion.

(Paragraphs 4.20 and 5.11)

2. The power of the Supreme Court to grant such relief should continue to be discretionary.

(Paragraph 5.11)

3. The Court should have power at any time during proceedings to determine whether the proceedings should continue on the basis of affidavits or on pleadings.

(Paragraph 4.20)

The review court

4. Proceedings for relief in the nature of certiorari, prohibition or mandamus should generally be heard by a single judge of the Supreme Court, unless a matter is referred to the Full Court for cause shown.

(Paragraph 5.3)

Appeals

5. There should be a right of appeal from a single judge to the Full Court of the Supreme Court.

(Paragraph 5.3)

Time limits

6. A person seeking relief in the nature of certiorari, prohibition or mandamus should be required to commence proceedings promptly and in any event within six months from the date when grounds for the action first arose.

(Paragraph 5.7)

7. The Court should be empowered to dismiss an action which has not been so commenced.

(Paragraph 5.7)

8. The Court should be empowered to extend the six month period for commencing proceedings, either before or after it has expired, if there is good reason for doing so.

(Paragraph 5.7)

Additional powers of the court

9. The Court should be empowered to dismiss proceedings in respect of officers or bodies exercising a public function on the ground that no matter of substantial importance is involved or that in all the circumstances such a dismissal will impose no substantial injustice upon the plaintiff.

(Paragraph 5.9)

10. Provision should be made for a compulsory directions hearing to be conducted following the commencement of proceedings for judicial review. At such a hearing a judge or master should have power to give such directions or make such orders as may be necessary for the convenient and expeditious determination of the proceedings, including an order dismissing the proceedings on the ground that no matter of substantial importance is involved

or that in all the circumstances such a dismissal will impose no substantial injustice upon the plaintiff.

(Paragraph 5.10)

11. The Court should have power to make interlocutory orders for a stay of proceedings or to preserve the status quo.

(Paragraph 5.12)

12. The Court should have power, where a decision is quashed or set aside, to make an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions as the Court thinks fit.

(Paragraph 5.13)

Costs

13. There should be no special costs rule.

(Paragraph 5.16)

REASONS FOR DECISIONS

14. Any person with a sufficient interest in a decision made in the exercise of a public function should be entitled to obtain a statement in writing from the decision-maker setting out -

- (i) the findings on material questions of fact;
- (ii) referring to the evidence or other material on which those findings were based;
and
- (iii) giving the reasons for the decision.

(Paragraph 6.16)

15. The reasons should be deemed to form part of the decision and be incorporated in the record of the decision-maker.

(Paragraph 6.16)

16. Exceptions to the requirement to disclose reasons, findings on material questions of fact and the material on which the findings were based should be provided such as decisions of the Governor or the Governor in Council, decisions of the Parliament or of either House or of a Committee of either House of Parliament or of a joint Committee of the Houses of Parliament, or matters in which the disclosure would be contrary to the public interest.

(Paragraph 6.17)

J A Thomson
Chairman

H H Jackson
Member

P W Johnston
Member

C W Ogilvie
Member

Daryl R Williams
Member

10 January 1986

Appendix I

EXPLANATION OF CERTAIN LEGAL TERMS USED IN THIS REPORT¹

CERTIORARI	Certiorari is a form of proceeding by which decisions of an administrative or judicial type may be quashed or set aside. In more technical language, the writ of certiorari is a prerogative writ which may be issued by the Supreme Court ordering a decision-maker to bring the official record of a decision into the Court so that the decision may be quashed.
DECLARATION OR DECLARATORY JUDGMENT	A statement by the Supreme Court declaring the legal rights and duties of the parties before the Court.
INJUNCTION	An order of the Supreme Court by which a person is required either to do (mandatory injunction), or refrain from doing (prohibitory injunction), a particular act.
INTERROGATORIES	Interrogatories are written questions which any party to a civil action may serve on the other party. The recipient of the questions is required to answer them in writing.
JURISDICTIONAL ERROR	An error of law or fact which takes a decision-maker beyond the power conferred by Parliament.
MANDAMUS	Like certiorari, a writ of mandamus is a prerogative writ which may be issued by the Supreme Court. It is used to command a decision-maker to perform a public duty imposed on him or her.
PREROGATIVE WRITS	This is a collective name for certain writs, the most important of which are certiorari, prohibition, mandamus and habeas corpus. They are called prerogative writs because they were initially used to preserve or support the royal power. There are other prerogative writs such as procedendo and quo warranto which are of lesser importance.
PRIVATIVE CLAUSES	A statutory provision which excludes or limits the review of administrative decisions by the courts. These provisions are also referred to as ouster clauses.

¹ For more detailed and precise descriptions see Jowitt's *Dictionary of English Law* (2nd ed 1977) and Stroud's *Judicial Dictionary* (4th ed 1971).

PROHIBITION

A writ of prohibition is another prerogative writ which may be issued by the Supreme Court. It is used to restrain a decision-maker from making a decision not yet made or to prohibit action being taken to give effect to or to enforce a decision.

QUO WARRANTO

Quo warranto is a prerogative writ which may be issued against any person who claims or usurps any office to inquire into his authority to hold the office.

STANDING

Standing refers to the rules relating to the entitlement of a person to apply to the Supreme Court for the judicial review of an administrative decision. Sometimes this is referred to as *locus standi*.

ULTRA VIRES

A decision is *ultra vires* if a decision-maker has exceeded his or her authority or acted beyond power. A statute or subordinate legislation, such as a regulation, is *ultra vires* if it is beyond the power of the Parliament or other body by which it was enacted or prescribed.

Appendix II

LIST OF THOSE WHO COMMENTED ON THE WORKING PAPER OR OTHERWISE PROVIDED ASSISTANCE TO THE COMMISSION

D M J Bennett, QC

R C H Briggs, Secretary, Justice - All Souls Review of
Administrative Law in the United Kingdom

The Hon Mr Justice Brinsden, Supreme Court of Western Australia

The Hon Sir Francis Burt KCMG, Chief Justice of Western Australia

Professor E Campbell, Monash University

Crown Law Department, Western Australia

R A C Cullen

J Dainton

Professor J M Evans, Osgoode Hall Law School

A M Gleeson, QC

Dr J E Griffiths, formerly Director of Research, Administrative Review Council

The Hon Mr Justice Kennedy, Supreme Court of Western Australia

The Hon Mr Justice Lee, Supreme Court of New South Wales

A E Lynn, Bank Solicitor, The Rural and Industries Bank of Western Australia

Law Society of Western Australia

Professor J P W B McAuslan, University of Warwick

M S Ng, Principal Registrar, Supreme Court of Western Australia

Professor D C Pearce, Australian National University

J D Pope, Director - Legal Division, Commonwealth Secretariat

The Hon Mr Justice Rowland, Supreme Court of Western Australia

P L Seaman QC, Master, Supreme Court of Western Australia

State Crown Solicitor's Office, New South Wales

G T Staples, Master, Supreme Court of Western Australia

Associate Professor L A Stein, University of Western Australia

R R S Tracey, University of Melbourne

Professor H W R Wade QC, University of Cambridge

Professor D G T Williams, University of Cambridge

The Hon Mr Justice Woolf, Queen's Bench Division, England

Appendix III

LAW REFORM BODIES PROPOSING REFORM OF JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

United Kingdom

- * Justice:¹ *Administration Under Law* (1971)
- * The Law Commission: *Remedies in Administrative Law* (1975 Cmnd 6407)
- * Justice - All Souls: *Review of Administrative Law in the United Kingdom* (Discussion Paper, 1981)

New Zealand

- * Public and Administrative Law Reform Committee: *Fourth Report* (1971) and *Fifth Report* (1972)

Canada

- * Ontario Royal Commission Inquiry into Civil Rights, *Report No 1 (Vol 1)* (1968)
- * Law Reform Commission of British Columbia: *Civil Rights: Part 4 - A Procedure for Judicial Review of the Actions of Statutory Agencies* (1974)
- * Law Reform Commission of Canada: *Judicial Review and the Federal Court* (1980)
- * Alberta Institute of Law Research and Reform: *Judicial Review of Administrative Action - Application for Judicial Review* (1984)

Ireland

- * Law Reform Commission of Ireland: *Judicial Review of Administrative Action: The Problem of Remedies* (Working Paper No 8, 1979)

Australia

- * Statute Law Revision Committee (Victoria): *Prerogative Writs* (1971)
- * Commonwealth Administrative Review Committee Report (1971 Parliamentary Paper No 144), referred to as the "Kerr Committee"

¹ Justice is the British Section of the International Commission of Jurists

- * Committee of Review (Cwth): *Prerogative Writ Procedures* (1973 Parliamentary Paper No 56), referred to as the "Ellicott Committee"
- * Queensland Law Reform Commission: *Reform of the Supreme Court Acts and Ancillary Acts Regulating Civil Proceedings in the Supreme Court* (1982, QLRC 32)
- * Law Reform Committee of South Australia: *Report Relating to Administrative Appeals* (1984)

Appendix IV

SUGGESTED PROVISIONS TO BE INCLUDED IN THE SUPREME COURT ACT 1935-1984

Mandamus, Certiorari or Prohibition

1. Where formerly the Court had jurisdiction to grant any relief or remedy by writ of Mandamus, Certiorari or Prohibition then the Court shall continue to have jurisdiction to grant that relief or remedy but shall not issue any such writ and shall grant that relief or remedy by way of an order under this Act and the rules of court.

Supreme Court Act 1970-1984 (NSW), s 69.

Additional power where relief in the nature of certiorari granted

2. Where the Court quashes or sets aside a decision, the Court may remit the matter to the court, tribunal, authority or decision-maker concerned, with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

Supreme Court Act 1981-1984 (UK), s 31(5).

Interlocutory orders

3. (1) This section applies to proceedings for a judgment or order for any relief or remedy which formerly could have been granted by writ of Mandamus, Certiorari or Prohibition or by a declaratory order or an injunction in respect of the exercise or purported exercise of or the refusal or failure to exercise a public function¹ by -

- (a) persons holding or acting in public offices of the State required to perform or performing public duties;

¹ Function is defined in s 5 of the *Interpretation Act 1984* as including "powers, duties, responsibilities, authorities, and jurisdictions".

- (b) bodies of persons, whether corporate or unincorporate, required to perform or performing public duties.

(2) Subject to subsection (3), at any time before the final determination of proceedings to which this section applies, and on the application of any party, the Court may, if in its opinion it is necessary to do so for the purpose of preserving the position of the plaintiff, make an interlocutory order for all or any of the following purposes -

- (a) Prohibiting any defendant to the proceedings from taking any further action that is or would be consequential on the exercise of the public function;
- (b) Prohibiting or staying any proceedings, civil or criminal, in connection with any matter to which the proceedings relate;
- (c) Declaring any licence or registration that has been revoked or suspended in the exercise of the public function, or that will expire by effluxion of time before the final determination of the proceedings, to continue and, where necessary, to be deemed to have continued in force;
- (d) Suspending the operation of any disqualification.

(3) Where the Crown is the defendant (or one of the defendants) to the proceedings the Court shall not have power to make any order against the Crown under paragraph (a) or paragraph (b) of subsection (2), but, in any such case, the Court may, by interlocutory order, -

- (a) Declare that the Crown ought not to take any further action that is or would be consequential on the exercise of the public function;
- (b) Declare that the Crown ought not to institute or continue with any proceedings, civil or criminal, in connection with any matter to which the proceedings relate.

(4) Any order under subsection (2) or subsection (3) may be made subject to such terms and conditions as the Court thinks fit, and may be expressed to continue in force until the proceedings are finally determined or until such other date, or the happening of such other event, as the Court may specify.

Judicature Amendment Act 1972-1977(NZ), s 8.

Quo Warranto

4. (1) Proceedings in the nature of Quo Warranto are abolished.

Supreme Court Act 1970-1984 (NSW), s 12.

(2) Where any person acts or purports to act in an office in which he is not entitled to act and proceedings in the nature of Quo Warranto would, but for subsection (1), lie against him, the Court may grant an injunction restraining him from so acting and may (if the case so requires) declare the office to be vacant.

Supreme Court Act 1970-1984 (NSW), s 70.

(3) The *Supreme Court Act 1935-1984* is amended by repealing section 36.

Appendix V

SUGGESTED ORDER 56 OF THE RULES OF THE SUPREME COURT

JUDICIAL REVIEW OF ADMINISTRATIVE DECISIONS

1. GENERAL

Application

1. This Order applies to proceedings for any relief or remedy which formerly might have been granted by writ of Mandamus, Certiorari, Prohibition or by proceedings in the nature of Quo Warranto.

Commencement of proceedings

2. (1) Subject to sub-rule (2), proceedings to which this Order applies may be commenced by a writ or an originating motion.

(2) Proceedings shall be commenced by an originating motion where -

(a) the sole or principal question at issue is, or is likely to be, a question of law;
and

(b) in which there is unlikely to be any substantial dispute of fact.

(3) Where proceedings to which this Order applies are commenced by a writ or an originating motion the plaintiff may also seek a declaration or an injunction by the writ or motion.

(4) Proceedings commenced by an originating motion shall be supported by an affidavit or affidavits verifying -

- (a) the grounds of the plaintiff's claim;
- (b) the material facts on which it is based; and
- (c) the relief or remedy sought.

(5) Proceedings to which this Order applies shall be commenced promptly and in any event within six months from the date when grounds for the action first arose unless the Court considers that there is good reason for extending the period of six months either before or after the expiration of the period.

(6) Where the relief sought is an order for relief in the nature of certiorari in respect of any judgment, order, conviction or other proceeding, the date when grounds for the action first arose shall be taken to be the date of that judgment, order, conviction or proceeding.

Rules of the Supreme Court 1965-1980 (UK), O 53 r 4.

(7) The Court may, at any stage of proceedings to which this Order applies, order that the action be dismissed if the action has not been commenced promptly or in any event within six months from the date when grounds for the action first arose.

Continuation on pleadings

3. The Court may order that proceedings commenced by an originating motion continue in Court as if the proceedings had been begun by writ and order that the originating motion and affidavits stand as pleadings or make orders for the filing of a statement of claim or other pleadings.

Rules of the Supreme Court 1970-1984 (NSW), Pt 5 r 11.

Inappropriate commencement by writ

4. Where proceedings to which this Order applies or proceedings for declaration or injunction in respect of the exercise or purported exercise of or the refusal or failure to exercise a public function by -

- (a) persons holding or acting in public offices of the State required to perform or performing public duties;
- (b) bodies of persons, whether corporate or unincorporate, required to perform or performing public duties,

are commenced by a writ but might in the opinion of the Court more conveniently continue as if commenced by an originating motion -

- (a) the proceedings shall be well commenced for all purposes on the date of the issue of the writ;
- (b) the Court may order that the plaintiff file an originating motion claiming the relief which he claims in the writ.

Rules of the Supreme Court 1970-1984 (NSW) Pt 4 r 2B.

Service of a writ or notice of originating motion

5. (1) Unless upon application, which may be made ex parte, the Court otherwise orders, there shall be at least 7 clear days between service of the notice of originating motion and the day named therein for hearing the motion.

Rules of the Supreme Court 1971-1985 (WA), O 54 r 4 and O 56 r 4(1).

(2) Where a writ or notice of originating motion relates to any proceedings in or before a court, and the object is either to compel the court or an officer of the court to do an act in relation to the proceedings, to quash the proceedings or any order made therein or to prohibit or restrain the court or an officer of the court from performing or purporting to perform any act, the writ or notice shall be served on the clerk or registrar of the court, the other parties to the proceedings, and where an objection to the conduct of the judge or magistrate or justices constituting the court is to be made, on the judge, magistrate or justices.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 4(2).

(3) An affidavit of service shall be filed before the notice of originating motion is placed in the list for hearing, and if any person who ought to be served under this Rule has not

been served, the affidavit must state that fact and the reason why service has not been effected.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 4(3).

(4) If on the hearing of the motion, the Court is of opinion that any person who ought to have had notice of the motion has not been served, whether or not that person should have been served under or pursuant to the foregoing provisions of this Rule, the Court may direct service on that person, and adjourn the hearing in the meantime on such terms, if any, as the Court directs.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 4(4).

Directions hearing

6. (1) For the purpose of ensuring that proceedings for an order for any relief or remedy which formerly might have been granted by writ of Mandamus, Certiorari or Prohibition or by a declaratory order or injunction in respect of the exercise or purported exercise of or the refusal or failure to exercise a public function by -

- (a) persons holding or acting in public offices of the State required to perform or performing public duties;
- (b) bodies of persons, whether corporate or unincorporate, required to perform or performing public duties,

may be determined in a convenient and expeditious manner, and that all matters in dispute may be effectively and completely determined, the plaintiff shall at the time when proceedings are commenced take out a summons for a directions hearing which may be presided over by a Judge or a Master.

(2) If the plaintiff so fails to take out such a summons, such a summons may be taken out by the defendant or any other person with an interest in the proceedings.

- (3) At any directions hearing the Judge or Master may -

- (a) order, in the case of proceedings for relief in the nature of certiorari, prohibition or mandamus, that the action be dismissed if it has not been commenced promptly and in any event within six months from the date when grounds for the action first arose;
- (b) dismiss the proceedings or order judgment to be entered on one or more of the grounds stated in Order 20 rule 19 of the rules of court;
- (c) dismiss the proceedings on the ground that no matter of substantial importance is involved or that in all the circumstances such a dismissal will impose no substantial injustice upon the plaintiff;
- (d) where relief in respect of more than one cause of action is claimed, direct that one or more of the causes of action be severed and be dealt with separately;
- (e) direct which persons shall be joined, or need not be joined, as parties, or direct that the name of any party be added or struck out;
- (f) direct which parties should be served with a copy of the originating motion or writ;
- (g) settle the issues to be determined, require any party to make admissions in respect of questions of fact or make orders in respect of the filing of pleadings or statements setting out the points of claim or defence;
- (h) require any party to make discovery of documents or to permit any party to administer interrogatories or to make orders as to the examination or cross-examination of witnesses;
- (i) irrespective of the manner in which the proceedings were commenced, determine whether the proceedings should continue on affidavits or on pleadings;
- (j) make other interlocutory or interim orders;

(k) give such other or consequential directions as may be necessary for the convenient and expeditious determination of the proceedings.

(4) At any directions hearing a Judge may determine whether the action should be heard by the Full Court of the Supreme Court.¹

Applicant limited to grounds etc in notice of originating motion

7. (1) Where proceedings are commenced by an originating motion or an originating motion is filed under rule 4, if the plaintiff intends to seek at the hearing any amendment of the grounds or relief or remedy sought he shall give notice to the other parties of such intention and of the proposed amendment.

(2) The Court may allow any amendment which it thinks necessary for the advancement of justice, but except by leave of the Court a ground shall not be relied on or relief sought on the hearing other than a ground set out or relief sought in the notice of originating motion.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 6.

Right to be heard in opposition

8. (1) On the hearing the Court shall hear any person who desires to oppose or support the application for the remedy or relief sought, and appears to the Court to be a proper person to be heard, notwithstanding that such person has not been served with a writ or a notice of originating motion.

(2) A person who is heard under this Rule, may, in the discretion of the Court, be ordered to pay costs.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 7.

¹ In footnote 3 to chapter 5 the Commission suggested that a master, being a member of the Court, should also have power to refer proceedings to the Full Court.

Additional affidavits, determination of issue etc

9. (1) Where an affidavit or affidavits has been filed the Court may, on the hearing, allow any party to use further affidavits upon such terms as to adjournment or costs as the Court thinks fit.

(2) Where any party intends to ask to be allowed to use further affidavits, he must give reasonable notice of his intention to every other party.

(3) When any question or issue of fact arises upon the affidavits the Court may give such directions as it thinks fit for the determination of the question or issue by trial or inquiry.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 8.

2. ORDER FOR RELIEF IN THE NATURE OF CERTIORARI

Copy of warrant, order etc to be produced

10. An order to quash a warrant, order, conviction, inquisition or record shall not be granted unless a copy of the warrant, order, conviction, inquisition or record, verified by affidavit has been filed, or the failure of the plaintiff to do so is accounted for to the satisfaction of the Court hearing the application.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 12.

3. ORDER FOR RELIEF IN THE NATURE OF MANDAMUS

Proceedings in nature of interpleader

11. When upon proceedings for an order in the nature of Mandamus it appears that some person other than the plaintiff claims that the person against whom it is proposed that the order should be made shall do some act inconsistent with the act which the plaintiff claims to have done, the person against whom it is proposed to make the order may apply to the Court for an order that that person be substituted for him or joined with him in all subsequent proceedings, and the Court may make such order on the application as is just.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 25.

Proceedings not to abate

12. Proceedings for an order in the nature of Mandamus shall not abate or be discontinued by reason of the death, resignation, retirement or removal from office of the person to whom it is proposed to direct the order, but may be continued and carried on either in his name or otherwise.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 26.

No action against party obeying order

13. An action or proceeding shall not be commenced or prosecuted against any person in respect of anything done in obedience to an order in the nature of Mandamus or an order of the Court for relief of the like nature issued by the Court.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 29.

4. ORDER FOR RELIEF IN THE NATURE OF PROHIBITION

Writ of Procedendo

14. (1) Where an order in the nature of Prohibition has been made and it is afterwards made to appear to the Court that relief ought to be given against the order on a ground on which relief might be given against a judgment in an action, the Court may direct that a writ of Procedendo shall be issued commanding the judicial tribunal against which the order was made to proceed to hear or determine the matter in question or otherwise proceed therein as if the order had not been made.

(2) A writ of Procedendo shall be in Form No 70.

Rules of the Supreme Court 1971-1985 (WA), O 56 r 32.

Appendix VI

SUGGESTED PROVISIONS FOR AN ADMINISTRATIVE DECISIONS (REASONS) ACT

Interpretation

1. (1) In this Act, "decision to which this section applies" means a decision made, proposed to be made, or required to be made, as the case may be (whether in the exercise of a discretion or not), in the exercise of a public function by -

- (a) persons holding or acting in public offices of the State required to perform or performing public duties;
- (b) bodies of persons, whether corporate or unincorporate, required to perform or performing public duties,

but does not include -

- (a) a decision that includes, or is accompanied by a statement setting out, findings of facts, a reference to the evidence or other material on which those findings were based and the reasons for the decision; or
 - (b) a decision included in any of the classes of decisions set out in the Schedule.
- (2) In this Act, a reference to the making of a decision includes a reference to -
- (a) making, suspending, revoking or refusing to make an order, award or determination;
 - (b) giving, suspending, revoking or refusing to give a certificate, direction, approval, consent or permission;

- (c) issuing, suspending, revoking or refusing to issue a licence, authority or other instrument;
- (d) imposing a condition or restriction;
- (e) making a declaration, demand or requirement;
- (f) retaining, or refusing to deliver up, an article; or
- (g) doing or refusing to do any other act or thing.

Administrative Decisions (Judicial Review) Act 1977-1985 (Cwth), s 3(2).

Reasons for decision etc

2. (1) Any person with a sufficient interest in any decision to which this section applies may, by notice in writing giving details of his interest in the matter served on the person who made or is under a duty or has power to make the decision, request that person to furnish 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 or the refusal or neglect to make the decision.

(2) Where such a request is made, the person to whom it is directed shall, subject to this section, as soon as practicable, and in any event within 28 days, after receiving the request, prepare the statement and furnish it to the person who made the request.

(3) Where a person to whom a request is made under subsection (1) is of the opinion that the person who made the request was not entitled to make the request, the first-mentioned person may, within 28 days after receiving the request -

- (a) give to the second-mentioned person notice in writing of his opinion; or
- (b) apply to the Court under subsection (5) for an order declaring that the person who made the request was not entitled to make the request.

(4) Where a person gives a notice under subsection (3), or applies to the Court under subsection (5), with respect to a request, that person is not required to comply with the request unless the Court, on an application under subsection (5), declares that the person who made the request was entitled to make the request, in which case, the person who gave the notice shall prepare the statement to which the request relates and furnish it to the person who made the request within 28 days after the decision of the Court.

(5) The Court may, on the application of -

- (a) a person to whom a request is made under subsection (1); or
- (b) a person who has received a notice under subsection (3),

make an order declaring that the person who made the request concerned was, or was not, entitled to make the request.

(6) A person to whom a request for a statement in relation to a decision is made under subsection (1) may refuse to prepare and furnish the statement if -

- (a) in the case of a decision the terms of which were recorded in writing and set out in a document that was furnished to the person who made the request - the request was not made on or before the twenty-eighth day after the day on which that document was so furnished; or
- (b) in any other case - the request was not made within a reasonable time after the decision was made,

and in any such case the person to whom the request was made shall give to the person who made the request, within 14 days after receiving the request, notice in writing stating that the statement will not be furnished to him and giving the reason why the statement will not be so furnished.

(7) For the purpose of subsection (6)(b), a request for a statement in relation to a decision shall be deemed to have been made within a reasonable time after the decision was made if the Court, on application by the person who made the request, so declares.

(8) If the Court, upon application for an order under this subsection made to it by a person to whom a statement has been furnished in pursuance of a request under subsection (1), considers that the statement does not contain adequate particulars of findings on material questions of fact, an adequate reference to the evidence or other material on which those findings were based or adequate particulars of the reasons for the decision, the Court may order the person who furnished the statement to furnish to the person who made the request for the statement, within such time as is specified in the order, an additional statement or additional statements containing further and better particulars in relation to matters specified in the order with respect to those findings, that evidence or other material or those reasons.

(9) The Governor may make regulations declaring a class or classes of decisions to be decisions that are not decisions to which this section applies.

(10) Regulations made under subsection (9) may specify a class of decisions in any way, whether by reference to the nature or subject matter of the decisions, by reference to the written law or provision of a written law under which they are made, by reference to the holder of the office by whom they are made, or otherwise.

(11) A regulation made under subsection (9) applies only in relation to decisions made after the regulation takes effect.

Administrative Decisions (Judicial Review) Act 1977-1985 (Cwth), s 13.

(12) Any statement setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based or giving the reasons for a decision made in the exercise of a public function by -

- (a) persons holding or acting in public offices of the State required to perform or performing public duties;

- (b) bodies of persons, whether corporate or unincorporate, required to perform or performing public duties,

shall be deemed to form part of the decision and accordingly to be incorporated in the record.

Tribunals and Inquiries Act 1971-1984 (UK), s 12(5).

Certain information not required to be disclosed

3. (1) This section applies in relation to any information to which a request made to a person under subsection 2(1) relates, being information that -

- (a) relates to the personal affairs or business affairs of a person, other than the person making the request; and
- (b) is information -
 - (i) that was supplied in confidence;
 - (ii) the publication of which would reveal a trade secret;
 - (iii) that was furnished in compliance with a duty imposed by a written law;
or
 - (iv) the furnishing of which in accordance with the request would be in contravention of a written law, being a written law that expressly imposes on the person to whom the request is made a duty not to divulge or communicate to any person, or to any person other than a person included in a prescribed class of persons, or except in prescribed circumstances, information of that kind.

(2) Where a person has been requested in accordance with subsection 2(1) to furnish a statement to a person -

- (a) the first-mentioned person is not required to include in the statement any information in relation to which this section applies; and
 - (b) where the statement would be false or misleading if it did not include such information - the first-mentioned person is not required by section 2 to furnish the statement.
- (3) Where, by reason of subsection (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement -
- (a) in a case where information is not included in a statement - stating that the information is not so included and giving the reason for not including the information; or
 - (b) in a case where a statement is not furnished - stating that the statement will not be furnished and giving the reason for not furnishing the statement.
- (4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court.

Administrative Decisions (Judicial Review) Act 1977-1985 (Cwth), s 13A.

Attorney General may certify that certain information not required to be disclosed

4. (1) If the Attorney General certifies, by writing signed by him, that the disclosure of information concerning a specified matter would be contrary to the public interest -
- (a) by reason that it would prejudice the security, defence or international relations of Australia or relations between the State and the Commonwealth or any other State or Territory or any other country;
 - (b) by reason that it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

the following provisions of this section have effect.

(2) Where a person has been requested in accordance with section 2 to furnish a statement to a person -

- (a) the first-mentioned person is not required to include in the statement any information in respect of which the Attorney General has certified in accordance with subsection (1); and
- (b) where the statement would be false or misleading if it did not include such information - the first-mentioned person is not required by that section to furnish the statement.

(3) Where, by reason of subsection (2), information is not included in a statement furnished by a person or a statement is not furnished by a person, the person shall give notice in writing to the person who requested the statement -

- (a) in a case where information is not included in a statement - stating that the information is not so included and giving the reason for not including the information; or
- (b) in a case where a statement is not furnished - stating that the statement will not be furnished and giving the reason for not furnishing the statement.

(4) Nothing in this section affects the power of the Court to make an order for the discovery of documents or to require the giving of evidence or the production of documents to the Court.

Administrative Decisions (Judicial Review) Act 1977-1985 (Cwth), s 14.

Schedule

CLASSES OF DECISIONS THAT ARE NOT DECISIONS TO WHICH SECTION 2 APPLIES

- (a) Decisions of the Governor or the Governor in Council.
- (b) Decisions of the Parliament or of either House or of a Committee of either House of Parliament or of a joint committee of the Houses of Parliament.
- (c) Information in respect of which a claim could be made in a judicial proceeding that it not be disclosed.
- (d) Recommendations of Electoral Commissioners under the *Electoral Districts Act 1947-1985*.
- (e) Decisions or acts of a legislative character.
- (f) Decisions of a court or tribunal which is under a duty at common law or under a written law to give reasons for its decisions.
- (g) Decisions relating to the administration of criminal justice, and, in particular -
 - (i) decisions in connection with the investigation or prosecution of persons for any offences against a law of the State;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
 - (iii) decisions in connection with the issue of search warrants under a law of the State; and

- (iv) decisions under a law of the State requiring the production of documents, the giving of information or the summoning of persons as witnesses.

- (h) Decisions in connection with the institution or conduct of proceedings in a civil court, including decisions that relate to, or may result in, the bringing of such proceedings for the recovery of pecuniary penalties arising from contraventions of a written law, and, in particular -
 - (i) decisions in connection with the investigation of persons for such contraventions;
 - (ii) decisions in connection with the appointment of investigators or inspectors for the purposes of such investigations;
 - (iii) decisions in connection with the issue of search warrants; and
 - (iv) decisions under a written law requiring the production of documents, the giving of information or the summoning of persons as witnesses.

- (i) Decisions in connection with the enforcement of judgments or orders for the recovery of moneys by the State or a local authority or by an officer of the State or of a local authority.

- (j) Decisions of a recommendatory nature, unless they are required by a written law before a decision can be made or action taken.

- (k) Decisions in connection with the prevention or settlement of industrial disputes, or otherwise relating to industrial matters.

- (l) Decisions of any of the following authorities in respect of their commercial activities -

Rural and Industries Bank of Western Australia

State Energy Commission

State Government Insurance Office

Water Authority of Western Australia.¹

- (m) Decisions in connection with personnel management (including recruitment, appointment or engagement, promotion and organisation) with respect to the State Public Service or the staff of a State government authority or local authority, other than a decision relating to, and having regard to the particular characteristics of, or other circumstances relating to, a particular person.

¹ This list is not intended to be exhaustive, but merely illustrative.