

WA NEWSPAPERS AND TOURISM

**OFFICE OF THE INFORMATION
COMMISSIONER (W.A.)**

**File Ref: 97088
Decision Ref: D0101998**

Participants:

West Australian Newspapers Limited
Complainant

- and -

Western Australian Tourism Commission
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION – refusal of access – documents relating to a State Government promotion campaign and sponsorship deal - confidential communications – clause 8(1) – scope of exemption - remedies for breach of confidence – meaning of “legal remedy” – meaning of “equitable remedy” – whether breach of contractual obligation of confidence – implied term of contract – criteria to be satisfied to imply a term of contract.

FREEDOM OF INFORMATION – clause 4 – commercial or business information – 4(2) – commercial value – 4(3) – information concerning business, professional, commercial or financial affairs of a person – clause 3(1) – personal information – public interest – editing – whether practicable.

Freedom of Information Act 1992 (WA) ss.3(3); 68(2); 74(1); 74(2); 102(1); 104(3); Schedule 1 clauses 3; 4(2); 4(3); 8(1); 10(3) and 10(4).

Supreme Court Act 1935 s.24(1).

Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another (Information Commissioner WA, 20 October 1997, unreported, D02997);

Willing v Hollobone (1972) 3 SASR 532;

Willing v Hollobone (No.2) (1975) 11 SASR 118;

Attorney General (NSW) v Brewery Employees' Union of NSW (1908) 6 CLR 469;

Barker v R (1983) 153 CLR 338;

Re Frendo and Secretary to the Department of Social Security (1987) 13 ALD 681;

Marine Power Australia Pty Ltd and Another v Comptroller-General of Customs and Others 89 ALR 561;

Re Baron and Director-General of Social Security (1988) 71 FLR 442;

BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 16 ALR 363;

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337;

Byrne v Australian Airlines Ltd (1995) 131 ALR 422;

Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd [1979] 144 CLR 596;

Hospital Products Ltd v United States Surgical Corporation and Others (1984) 156 CLR 41;

Moorgate Tobacco Co. Ltd v Phillip Morris Ltd and Another (No.2) (1984) 156 CLR 414;

Re Precious Metals Australia Limited and Department of Minerals and Energy (Information Commissioner WA, 17 April 1997, unreported, D01297).

DECISION

The decision of the agency is varied. It is decided that Documents 27 and 66, and the matter contained in Documents 30, 31, 36, 39, 40, 81 and 90 described in paragraph 72 of my reasons for this decision, are exempt under Clause 3(1) of Schedule 1 to the *Freedom of Information Act 1992*. The remaining disputed matter, described in the schedule attached to the reasons for this decision, is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

28th April 1998

REASONS FOR DECISION

BACKGROUND

1. This complaint arises out of a decision of the Western Australian Tourism Commission ('the agency') to refuse West Australian Newspapers Limited ('the complainant') access to documents under the provisions of the *Freedom of Information Act 1992* ('the FOI Act').
2. In November 1996 the agency announced that it had secured the services of international Australian celebrity Elle Macpherson to appear in a tourism advertising campaign promoting Western Australia throughout Australia and overseas. The arrangement was to include the agency's sponsorship of a yacht and the Elle Racing Team that would be based in Fremantle. It was proposed that the yacht would be an entrant in the 1997/98 Whitbread Round the World Race ('the Race').
3. Shortly after the agency's public announcement there was substantial media coverage relating to alleged problems being encountered by certain parties to the arrangement and speculation that the arrangement as announced by the agency may not be fully completed. Subsequently, Ms Macpherson completed a series of advertisements that were then utilised through various media outlets. However, that part of the arrangement involving the Elle Racing Team entering a yacht in the Race did not occur as anticipated and, in July 1997, the agency announced that it had terminated its contract with Elle Racing Pty Ltd.
4. By letter dated 17 January 1997, the complainant applied under the FOI Act for access to all documents relating to the State Government's sponsorship deal with Elle Macpherson and the Elle Racing Syndicate. Following certain negotiations with the agency the complainant clarified the specific nature of the documents sought and confirmed the scope of the request to include documents in the following categories:
 - contracts between the agency and Elle Macpherson and the Elle Racing Syndicate;
 - Board papers and minutes relating to the above contracts;
 - correspondence between the State Government and anyone representing Ms Macpherson or the Elle Racing Syndicate;
 - any internal agency correspondence relating to the contracts;
 - summary of payments relating to the contracts;
 - itineraries and running schedules relating to Elle Macpherson's involvement in the production of advertisements for the agency which are the subject of the contracts; and
 - correspondence – Ministerial;

5. By letter dated 26 March 1997, the agency advised the complainant that it had decided to refuse the complainant access to all the requested documents except two. Access to edited copies of those two documents was given. Access to all other documents was refused on the grounds that the documents are exempt under some or all of clauses 3(1), 4(2), 4(3), 8(1), 10(3) and 10(4) of Schedule 1 to the FOI Act. The complainant applied for an internal review of that decision and, on 24 April 1997, the agency's internal reviewer notified the complainant of the decision on internal review. The internal reviewer varied the initial decision. Four additional documents were identified by the agency as being within the scope of the access application and it was decided to give access to parts of four other documents which were initially claimed to be exempt. The balance of the initial decision was confirmed.
6. On 8 May 1997, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

REVIEW BY THE INFORMATION COMMISSIONER

7. The disputed documents were produced to me by the agency. On the basis of the agency's document reference numbers, the agency produced 94 documents to this office which the agency had identified as falling within the scope of the access application and, at that time, remained in dispute. However, after inspecting the documents produced to my office, a number of additional documents were identified and separately described. Another three documents were created by the agency for the purpose of dealing with the access application and do not fall within the scope of the request.
8. For the purpose of dealing with this complaint, an amended schedule was prepared by my office describing 104 documents which I consider fall within the scope of the access application. After a series of negotiations between my office and the complainant, the complainant withdrew from the complaint in respect of 18 documents which are either copies of other documents identified, facsimile cover sheets or documents which are otherwise publicly available, thus leaving 86 documents in dispute. During the process of dealing with this complaint, further efforts were made by my office to negotiate with the agency and a third party, Mr John Harvey, of Elle Racing Pty Ltd, in order to resolve the matter by conciliation. At one stage Mr Harvey agreed to disclosure of the written contract between the agency and Elle Racing Pty Ltd ('the contract'). However, ultimately both the agency and Mr Harvey maintained their respective positions that no matter be disclosed by the agency to the complainant.
9. On 20 January 1998, I informed the parties to this complaint, and Mr Harvey, in writing of my preliminary view of this complaint and my reasons for that view. It was my preliminary view that 32 of the disputed documents may be exempt under clause 8(1) of Schedule 1 to the FOI Act. I was also of the preliminary view that a further 47 of the disputed documents may be exempt in part under clause 3(1) of Schedule 1 to the FOI Act, but the balance of those documents may not be exempt for any reason. Finally, I was of the preliminary view that the remaining 7 of the disputed documents may not be exempt for any reason.

10. The complainant, the agency and Mr Harvey were all invited to reconsider the matter in light of my preliminary view. The complainant withdrew from 31 of the disputed documents which in my preliminary view may be exempt, thus leaving 55 documents then in dispute. The agency maintained its position in respect of its exemption claims under clauses 4(2), 4(3) and 8(1), but withdrew its claims under clauses 3(1), 10(3) and 10(4). The agency also provided a further submission in support of those claims. Mr Harvey has not responded in any manner and, in particular, has not sought to be joined as a party to the complaint and, accordingly, is not a party.

THE DISPUTED DOCUMENTS

11. The disputed documents are all those documents described in the schedule to this decision. They include Board papers; facsimile correspondence between the agency and Mr Harvey; internal memoranda, a “media statement”, a draft “running schedule”; draft ministerial correspondence; and an unexecuted draft agreement.

THE DISPUTED MATTER

12. Initially, the disputed matter consisted of the entire contents of the disputed documents. However, following further negotiations between this office and the complainant, the scope of the request was further reduced. The complainant no longer seeks access to any matter contained in the disputed documents which, in my preliminary view, may be exempt under clause 3(1) of Schedule 1 to the FOI Act. That matter may be generally described as the names and contact details of third parties, home contact details of officers of the agency and all personal signatures appearing in the documents. That matter is, therefore, no longer in dispute. The complainant has advised that it is prepared to accept access to edited copies of those documents. Those documents comprise 50 of the 55 disputed documents. However, the complainant seeks full access to the remaining 5 documents. The matter remaining in dispute is described in the schedule attached to these reasons for my decision.

THE EXEMPTIONS

13. The agency claims that all the disputed documents are exempt under clause 8(1) of Schedule 1 to the FOI Act. Further, the agency claims that certain of the matter contained in 21 of the disputed documents is exempt under clause 4(3) and certain of the matter contained in 4 of the disputed documents is exempt under clause 4(2) of Schedule 1 to the FOI Act. As the complainant has withdrawn from that matter which may be exempt under clause 3(1) and the agency has withdrawn its claims for exemption under clauses 3(1), 10(3) and 10(4), I am not required to deal with those exemptions in this decision. The exemption claims maintained for the matter remaining in dispute are detailed in the schedule attached to these reasons for my decision.

Clause 8 - Confidential communications

14. Clause 8 of Schedule 1 to the FOI Act provides:

“(1) *Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained.*

(2) *Matter is exempt matter if its disclosure -*

(a) *would reveal information of a confidential nature obtained in confidence; and*

(b) *could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemption

(3) *Matter referred to in clause 6 (1) (a) is not exempt matter under subclause (1) unless its disclosure would enable a legal remedy to be obtained for a breach of confidence owed to a person other than -*

(a) *a person in the capacity of a Minister, a member of the staff of a Minister, or an officer of an agency; or*

(b) *an agency or the State.*

(4) *Matter is not exempt matter under subclause (2) if its disclosure would, on balance, be in the public interest.”*

The scope of the exemption

15. In my decision in *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another* (20 October 1997, unreported, D02997), I discussed the meaning and application of the exemption provided in clause 8(1) of Schedule 1 to the FOI Act. In that case, I determined that, because of its particular and unique terms, the exemption provided by clause 8(1) of Schedule 1 to the FOI Act is limited in its application to a breach of confidence for which a remedy is available at common law. That is, for the reasons given in that decision, I am of the view that clause 8(1) does not extend to apply to a breach of confidence for which only an equitable remedy, rather than a legal remedy, is available.

16. The agency takes issue with my interpretation of the term “legal remedy” and submits that, in that respect at least, my decision in *Re Speno* was wrong. My reasons in *Re Speno* have been the subject of the agency’s submissions and, in my view, are equally relevant to this matter. Accordingly, for convenience, I set out the reasons I gave in that case in full below. In that matter I said:

15. *Each Australian jurisdiction provides exemption for “confidential communications”. However, the terms of the exemption provided vary in each jurisdiction. The wording of clause 8(1) is significantly different to other jurisdictions and unique to Western Australia.*
16. *In the Freedom of Information Act 1982 (Commonwealth) (the Commonwealth FOI Act), before its amendment in 1991, section 45(1) provided exemption for a document if its disclosure under that Act “...would constitute a breach of confidence.” That provision was considered in a number of decisions, including the decision of the Commonwealth Administrative Appeals Tribunal in *Re Maher and Attorney-General’s Department (No.2)* (1986) 4 AAR 266, and by the Federal Court of Australia in *Corrs Pavey Whiting and Byrne v Collector of Customs (Vic) and Another* (1987) 74 ALR 428. Both the Tribunal in *Re Maher* and the majority of the Federal Court in *Corrs Pavey Whiting* decided that the term “breach of confidence” in the Commonwealth FOI Act as it then provided was not limited to a breach of confidence that would be actionable under the general law. The provision was considered to have a wider application, being directed at the protection of confidential information generally, so that it covered confidential information received in circumstances imposing an obligation of confidence, even if the protection of the confidence were unenforceable in a court.*
17. *In 1991 section 45(1) was amended to provide exemption for a document if its disclosure under that Act “...would found an action, by a person other than the Commonwealth, for breach of confidence.” Accordingly, the exemption provided by the Commonwealth FOI Act is now limited to circumstances in which disclosure would be actionable at general law. In Queensland and some other Australian jurisdictions, the equivalent exemption is also for documents which, if disclosed, would found an action for breach of confidence.*
18. *In his decision in *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 the Queensland Information Commissioner canvassed at some length the question of the jurisdictional basis of an action for breach of confidence (see pages 288-297). The complexities in both the law relating to breach of confidence and, consequently, the interpretation and application of the exemption were highlighted by the Commissioner in that decision. The Commissioner concluded that the words “an action for breach of confidence” in the Freedom of Information Act 1992 (Qld) (the Qld FOI Act) includes both, inter alia, a cause of action for breach of a contractual obligation of confidence and a cause of action for breach of an equitable duty of confidence. That is, the words include both an action at law and an action in equity.*
19. *The distinction between these jurisdictional bases for an action for breach of confidence is significant in relation to the Western Australian provision also. However, because of the unique wording of the Western Australian provision, the significance is of a somewhat different nature.*

EQUITY AND THE COMMON LAW

20. *Equity is the body of law which originated in the English courts of Chancery, initially developed as principles of fairness to provide redress where none was available at common law. Those principles evolved into a body of law. Since the 1873-75 Judicature Acts in England, both common*

law and equity are administered by the one court. By virtue of s.24 of the Supreme Court Act 1935 (WA), that is also the case in Western Australia, as it is in the other Australian jurisdictions.

21. *The effect of that “fusion” has been the subject of considerable judicial and academic debate, the extent and complexity of which I do not propose to canvas here. It appears to me that, for the present at least, the weight of opinion favours the view that, although now administered by the one court, the two bodies of principle remain separate, although clearly not unconnected in practice. I respectfully agree with the comments of the present Chief Justice of the Supreme Court of Western Australia in this regard, in his paper “The Fusion Fallacy”, delivered in 1992 at a seminar on “Law & Equity - The Fusion Fallacy” held by the Law Society of Western Australia, when His Honour said:*

*“There is nothing in [s.24 of the Supreme Court Act 1935], nor was there in the Judicature Act, which attempts to codify law and equity as one subject matter or to sever the roots of the conceptual distinction between law and equity. Rather, the purpose of the reforms was to combine the administration of law and equity in the one court. This was rather eloquently expressed in the well known statement in *Ashburner on Equity* (2nd ed, p18), quoted by Windeyer J in *Felton v Mulligan* (1971) 124 CLR 367 at 392, that “The result of the ‘fusion’ of law and equity by the Judicature Act is that “the two streams of jurisdiction though they run in the same channel, run side by side and do not mingle their waters””.”*

LEGAL REMEDIES AND EQUITABLE REMEDIES

22. *One significant difference between the two jurisdictions - common law and equity - is the remedies available in each. Legal remedies are almost all monetary, damages being the traditional remedy for breach of a legal right, whereas many equitable remedies are not, and - most importantly - legal remedies are available as of right, whereas equitable remedies are discretionary. This distinction gives particular significance to the use of the term “legal remedy” in clause 8(1) of the FOI Act. Generally, the remedy for a breach of confidence where the obligation arises from contract will be common law damages, that is, a legal remedy (see *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37 at page 43). If a breach is found to have occurred, then some damages must be awarded. Equitable remedies (such as specific performance or injunction) may also be available in respect of such a breach as a result of equity’s auxiliary jurisdiction which enables a court to grant an equitable remedy in aid of a legal right.*
23. *As well as its auxiliary jurisdiction, equity also operates in respect of breaches of confidence independently of any right at common law. Equitable remedies for breach of confidence include: injunction to restrain the breach or prevent further breaches; restitution including an account to the confider of profits made by the confidant from an authorised use of the information provided in confidence; equitable damages; and delivery up and cancellation of documents. These are all equitable and not legal remedies.*
24. *There has been considerable debate arising out of interpretation of s.2 of The Chancery Amendment Act 1858, commonly referred to as Lord Cairns’ Act - which bestowed upon the courts of Chancery the power to award damages in equity and is reflected in the various Australian Supreme Court*

Acts - and several more recent cases (in particular, the English cases: Saltman Engineering Co Ltd v Campbell Engineering Co Ltd (1948) 65 RPC 203; Nicrotherm Electrical Co Ltd v Percy [1957] RPC 207; Seager v Copydex Ltd [1967] RPC 349; and the Australian cases: Interfirm Comparison (Australia) Pty Ltd v Law Society of New South Wales [1977] RPC 137; Talbot v General Television Corporation Pty Ltd [1981] RPC 1), as to the jurisdictional basis for an award of damages for a purely equitable breach of confidence. Comprehensive and helpful discussions of this complex issue are to be found in Breach of Confidence by F. Gurry (Clarendon Press, 1984) and The Action for Breach of Confidence in Australia by J. Kearney (Legal Books Pty Ltd, 1985), amongst others (see also re equitable damages: Equitable Damages by P.M. McDermott and Remedies for Torts and Breach of Contract, 2nd ed., by A Burrows (Butterworths, 1994)).

25. *Having adverted, in his work cited above, to the suggestion that in the action for breach of confidence there is a fusion of law and equity, the learned author Gurry said, at pages 439-440:*

“However, it must be remembered that the authority for such a fusion is rather tenuous, and there are few areas of the law which raise such difficult and controversial legal problems as the fusion of law and equity. Until a definite position is adopted by the courts, one can only point to the existence of the authority which suggests that, in this area, the courts can grant damages either in addition to or in substitution for breach of an equitable obligation. And the prudent approach in every case is still to establish clearly which jurisdiction the court has invoked to determine the defendant’s liability, and to isolate first what remedies should be available on traditional rules to the plaintiff on that basis.”

26. *Having considered the matter at length, I am of the view that it can be said with certainty only that a legal remedy is available for a breach of a common law obligation of confidence. A common law action for breach of confidence appears most often to be founded in contract. Although there is some confusion as to the jurisdictional basis of damages awarded for a purely equitable breach of confidence, it does not appear to me presently to be able to be said that a legal remedy could be obtained for such a breach, and the jurisdictional distinction remains significant.*

Interpretation of “legal remedy” in clause 8(1)

27. *It can be seen therefore that, as far as the law is concerned, there is a distinction between a legal remedy and an equitable remedy. Although the general principle is that words in statutes are to be given their ordinary or popular meaning, if there is something in their context, phrasing or the subject matter with which they deal that leads to the conclusion that they are intended to assume a technical meaning, then that is the meaning that should be given them. The presumption that a technical word is used in a technical sense is even stronger where the word in question is a technical legal term: Marine Power Australia Pty Ltd and Another v Comptroller-General of Customs and Others (1989) 89 ALR 561 at 572. When a statute includes a well-known legal expression, it would normally be taken to be interpreted in its ordinary legal sense: Willing v Hollobone (1972) 3 SASR 532 at 537.*
28. *Given the context in which the term “legal remedy” appears in clause 8(1), the significance of which I have endeavoured to indicate briefly in the preceding paragraphs, I am of the view that it should be given its technical*

legal meaning. Accordingly, in my opinion, the exemption provided by clause 8(1) of the FOI Act extends only to documents the disclosure of which would give rise to a cause of action for breach of a common law obligation of confidence such as a contractual obligation of confidence, and not those the disclosure of which would give rise to a cause of action for breach of an equitable duty of confidence only.”

17. The agency submits that the term “legal remedy” does not constitute “a technical legal term” when used in clause 8(1), and the interpretation in *Re Speno* is at odds with the law in relation to breach of confidence. The agency argues that actions for breach of confidence are much more frequently the subject of equitable relief and there is no logical basis for limiting an exemption designed to protect confidential information to such confined circumstances, particularly given no public interest test attaches to the exemption.
18. The terms “legal remedy” and “equitable remedy” and their meanings are well known in the legal profession, as are the terms “legal estate or right” and “equitable estate or right”. The meanings of, and distinctions between, these terms are taught in law schools and they are well-known legal terms. As I said in *Re Speno*, when used in a statute, well-known legal expressions are generally taken to be used in their specific legal sense: *Willing v Hollobone* (1972) 3 SASR 532 at 537. Similarly, legal phrases in connection with legal proceedings are taken to be used in their specific legal sense when used in a statute: *Willing v Hollobone (No.2)* (1975) 11 SASR 118 at 127. In *Attorney General (NSW) v Brewery Employees’ Union of NSW* (1908) 6 CLR 469 at 531, O’Connor J said that:

“The rule of interpretation to be applied in such a case is well known. Where words have been used which have acquired a legal meaning it will be taken, prima facie, that the legislature has intended to use them with that meaning unless a contrary intention clearly appears from the context.”

19. That view was cited with approval in *Barker v R* (1983) 153 CLR 338, at 341 by Mason J, and at 356 by Brennan and Deane JJ, who described it in their joint judgment as “... the “well-known” rule of statutory construction that, where a technical legal word such as a “trespasser” is used, it is to be presumed that the legislature intends it to have its ordinary common law meaning “unless a contrary intention clearly appears from the context”...”. That view has been accepted in a number of subsequent cases (see for example: *Re Frendo and Secretary to Department of Social Security* (1987) 13 ALD 681; *Marine Power Australia Pty Ltd and Another v Comptroller-General of Customs and Others* (1989) 89 ALR 561, 572; *Re Baron and Director-General of Social Security* (1988) 71 FLR 442). I do not accept, therefore, that the term “legal remedy” is not a well-known legal expression and that it should not be given its well-known legal meaning.
20. Further, reading the clause in the context of the whole FOI Act, I do not consider that interpretation to be inconsistent with other provisions in the FOI Act and the scheme of the statute generally. The objects and intent of the FOI

Act are stated in section 3 as being to enable the public to participate more effectively in governing the State, and to make the persons and bodies that are responsible for State and local government more accountable to the public. The general scheme of the FOI Act is clearly to promote greater openness and accountability of government. Nothing in the FOI Act is intended to prevent or discourage the publication of information or the giving of access to documents (including documents containing exempt matter) otherwise than under the FOI Act if that can properly be done or is permitted or required by law to be done: s.3(3). Unless expressly excluded, the provisions of the FOI Act prevail over any secrecy requirements imposed by other enactments.

21. The FOI Act recognises the need for non-disclosure of certain government documents and information, in order to protect certain public interests – including, amongst others, the effective functioning of Government. Those public interests are recognised in the exemptions provided in Schedule 1 to the FOI Act. The exemptions provided are reasonably confined. All but 4 of the 16 exemptions are subject to some limit; many are limited by a provision that matter is not exempt if its disclosure would, on balance, be in the public interest.
22. I note also, in this context, the various protections afforded in respect of disclosure under the FOI Act. Most notably, section 104 provides that, if access to a document is given under a decision, made in good faith, under the FOI Act, then an action for defamation or breach of confidence does not lie against the Crown, an agency or an officer of an agency merely because of the making of that decision or the giving of access, or against the author of the document or any other person by reason of the author or other person having supplied the document to an agency (although the protection may not extend to the publication of the document by the person to whom access is given: s.104(3)).
23. Given the scheme and context of the whole of the FOI Act, it does not appear to me that it can be said necessarily that the Parliament did not intend the exemption to have a more limited application than contended for by the agency. On the contrary, in the context of the whole of the statute it is more likely in my view that the Parliament did intend the application of the exemption to be limited to those breaches of confidence for which a remedy is available as of right, and not to include those for which only a discretionary remedy might be available.
24. The agency also contends that, if clause 8(1) applies only to cases involving a “legal remedy” then the practical result would be that clause 8(1) would be meaningless because there is no “legal remedy” for a breach of confidence *per se*. The basis of this argument of the agency is that a breach of a contractual obligation of confidence constitutes an action for breach of contract based upon a failure to fulfil a contractual obligation, rather than an action for breach of confidence. The agency argues that, in that case, a breach of contract action, like an equitable action, would be excluded from contemplation in clause 8(1).
25. That argument may have some relevance to a provision, such as in Queensland and the Commonwealth, that requires the disclosure to be of such a nature that it

would found an action for breach of confidence. However, I do not consider that argument to be relevant to clause 8(1). The clause does not require that the action must be an action for breach of confidence. It requires that the breach of confidence must be one for which a legal remedy could be obtained. A breach of a contractual obligation of confidence appears to me to fulfil that requirement. If the disclosure is one that amounts to a breach of confidence which would give rise to an action for breach of contract (for which a legal remedy is available), then, to my mind, it is a breach of confidence for which a legal remedy could be obtained, by means of an action for breach of contract.

26. Finally, the agency argues that there is no real difference between the words “found an action for breach of confidence” and “a breach of confidence for which a legal remedy could be obtained”, when those words are given their ordinary and natural meaning. The agency submits that the approach taken by the Courts and Tribunals which have examined equivalent provisions in the Commonwealth and Queensland FOI statutes is the approach which ought to be followed in interpreting clause 8(1) of Schedule 1 to the FOI Act.
27. As I explained in my decision in *Re Speno* (at paragraphs 15 to 19 of that decision, quoted in paragraph 16 above), I consider there to be a significant difference in the wording of the provision in the FOI Act to the equivalent provisions in the Commonwealth and Queensland legislation. I do not consider that clause 8(1) and the equivalent provisions in those other two statutes can be described as having “slightly different wording” as submitted by the agency.
28. As I said in *Re Speno*, the wording of clause 8(1) is unique to Western Australia and quite different to the wording of equivalent provisions in other jurisdictions. In particular, the provisions in the Commonwealth and Queensland Acts, to which I there referred, are directed at disclosures that would found an action for breach of confidence. That is, it appears to me that they are concerned with disclosures that would found an action for breach of confidence in whatever jurisdiction that action might be based.
29. The Western Australian provision, on the other hand, appears to me to be more specific. It refers to a breach of confidence for which a legal remedy could be obtained. Given my view that the term “legal remedy” has a well-known legal meaning and should be interpreted in that sense, clause 8(1) appears to me to be not concerned with an action for breach of confidence, whatever its jurisdictional basis or bases, but with a particular kind of breach of confidence that is, one for which a legal remedy could be obtained. In my view, that means a breach of confidence giving rise to a common law action and for which a common law (legal) remedy could be obtained. As I said in *Re Speno*, a legal remedy cannot be obtained for an equitable breach of confidence.
30. Although the Courts in recent years have adopted a flexible approach towards the jurisdictional basis of actions for breach of confidence, it is going too far in my view to say that the distinction between equitable actions and actions at law and the equitable remedies and legal remedies available no longer applies. It is

clearly recognised in section 24(1) of the *Supreme Court Act 1935*, which provides that law and equity are to be concurrently administered in the Supreme Court of Western Australia, not that they are fused as principles of law. That provision appears to me to make it clear that its purpose is to avoid multiple actions in respect of the same matter having to be heard separately in separate jurisdictions.

31. Accordingly, for the foregoing reasons, I remain of the view that the exemption in clause 8(1) applies only to breaches of confidence for which a legal remedy would be available and does not extend to breaches of confidence giving rise only to an action in equity, for which only equitable remedies could be obtained.

Implied term of contract

32. The agency also submits that it is an implied term of the contract between the parties that each is required to keep secret and confidential that “confidential information” acquired by each of them in the course of their pre-contractual negotiations prior to the execution of the contract, in addition to any express term in the contract.
33. In discussing that submission, I encounter some difficulty. Section 74(2) of the FOI Act prohibits me from including in these reasons exempt matter. I consider the terms of the contract to be exempt under clause 8(1), for reasons which I have given in detail in writing to the agency and in less detail to the complainant, because of my obligation under s.74(1). I consider, therefore, that I am prohibited from discussing in detail any term of the contract, including any express term it may contain requiring confidentiality. The following reasons are therefore confined to the term the agency argues is implicit, without reference to any express term.
34. There are five criteria that must be satisfied before a term will be implied into a written contract. Those criteria, enunciated in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 16 ALR 363, are that the term to be implied must:
- be reasonable and equitable;
 - be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
 - be so obvious that “it goes without saying”;
 - be capable of clear expression; and
 - not contradict any express term of the contract.
35. Those principles, pronounced in that case by the Privy Council, have subsequently been adopted as authoritative by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 347 and 404; *Byrne v Australian Airlines Ltd* (1995) 131 ALR 422 at 427 and 443; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596 at 605 - 606; *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41 at 65 - 66; 95; 117 - 118;

Moorgate Tobacco Co. Ltd v Phillip Morris Ltd and Another (No.2) (1984) 156 CLR 414 at 435, and other cases.

The first criterion

36. The agency submits that the term to be implied is not to be judged for its reasonableness from the perspective of the interests of one of the parties alone, but must be equitable as between both of the parties. The agency's submission is that it is both reasonable and equitable to imply into the contract between the parties in this matter an obligation of confidence in respect of confidential information obtained by either in the course of pre-contractual negotiations, and that its incorporation will result in the same utility and advantage to each of the parties. It is further argued that, without the incorporation of the implied term suggested, the effect of any existing obligation of confidence could well be rendered nugatory.
37. It does not appear to me, on the face of it, that it would be inequitable as between the parties to the contract, nor unreasonable as between the parties to the contract, to imply the term as suggested. However, there is insufficient information before me to form a concluded view on the point. The other party to the contract has made no submission in respect of it. In any event, that in itself is not sufficient to justify implying a term.

The second criterion

38. The agency submits that that criterion:

“... effectively amounts to a requirement that the implied term must be needed in order to make the agreement work or in order to avoid an unworkable situation (eg BP Refinery (Westernport) at 30). It is not enough that the term would represent a reasonable addition to the contract but, rather that the implication of the term is clearly necessary (Codelfa at 346; Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226 at 241). On the other hand, the requirement that the implied term be necessary does not amount to a requirement that the contract cannot be carried out at all without the incorporation of the implied term. (This is because it may be that the contract could be effective, in one sense, without any reference to situations said to require implied terms; see Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 257). In addition to necessity, considerations such as whether the implied term is practical and/or desirable may also be of relevance (see ESSO Australia Resources Ltd v Plowman (1995) 69 ALJR 404 at 411 to 12.”.

39. The agency submits that, in the present case, the incorporation of the implied term is clearly necessary to avoid the unworkable situation whereby (for example) a party to the contract could release pre-contractual material which contains the same information which the parties are otherwise bound to keep

confidential. In the absence of the implied term, the result of such disclosure would be to thwart any other extant obligation of confidence under the contract. The consequence would be that, in contractual terms, the aggrieved party would be left with no contractual remedy for the disclosure of the information concerned. The agency claims the implied term is both practical and desirable from the perspective of both parties to the contract.

40. In my opinion, it has not been established by the agency that the term is necessary to give business efficacy to the contract (that is, to make the contract work). It appears to me, from my reading of the various cases cited, that this is a key criterion. There has been no evidence presented to me that the contract would not have been commercially effective without the term sought to be implied. It appears to me that the contract could have been effectively performed without the implied term. Further, as I understand it, the contract is now at an end and therefore there is no necessity for the suggested term to be implied for the effectiveness of the contract.
41. I do not accept the argument that disclosure of information concerning the pre-contractual negotiations must necessarily render nugatory any obligation of confidentiality in respect of the terms of the contract. The information in those documents that pre-date the contract is not the same as the information in the contract or in other documents which I consider the parties are bound to keep confidential. The documents containing information of the pre-contractual dealings disclose some of what was proposed and considered by each of the parties, not what was finally agreed. That is shown by the written contract, in respect of which I formed the preliminary view that that document is exempt under clause 8(1), and which has not been disclosed and is no longer in dispute. In respect of Document 45, an unexecuted, draft agreement between the agency and Ms Macpherson, I have taken into account that it appears that it was a proposal by the agency and that the proposed agreement was subsequently superseded and was never executed.
42. The agency argues that it is both practical and desirable from the perspective of both parties to the contract to imply the term as suggested by the agency. I can find no reference to such a consideration in the *Esso Australia* case cited by the agency in support of its contention that that is a relevant consideration. That case appears to me to focus on the necessity or otherwise to imply a term in the circumstances of that matter. Even if it were relevant, it is not sufficient. The fact that a provision would provide a greater protection for a party is not sufficient reason to support the implication of the term: *Secured Income Real Estate (Australia) Ltd* per Mason J at 605. It does not show that implication is necessary. It may be that without the implied term a party would be left with no contractual remedy for disclosure of that information. However, that is not to say that a party would necessarily be left with no remedy should the term not be implied.

The third criterion

43. The agency submits that the third criterion listed in paragraph 34 above “... essentially requires that the implied term reflect what the parties would most likely have agreed, had they considered the point (see *Codelfa* at 346, 355, 374; cf *Con-Stan* at 241).” This, it is submitted, is to be determined by reference to whether reasonable parties – rather than the particular parties – would have agreed on the term in question: *Codelfa* at 353, 374; cf *Con-Stan* at 241.
44. The agency submits that the implied term would most certainly have been agreed to by both parties to the contract had they considered the matter. As I consider that I am constrained from discussing in detail the terms of contract, I can say only, having inspected it, that it appears to me that the matter was considered by the parties and that time-frames for the application of a number of obligations imposed on the parties under the contract were carefully considered. Again constrained from discussing its terms, it appears to me, from the terms of the contract itself, that it could not be said that any obligation of secrecy intended to be imposed on the parties was intended to be absolute. Further, there is no evidence before me that, had the matter not been considered, both parties would necessarily have agreed to the implied term suggested.

The fourth and fifth criteria

45. In respect of the last two criteria listed in paragraph 34 above, I accept that the implied term contended for by the agency may be capable of clear expression and that it probably does not contradict any term of the contract.

Conclusion

46. It can be seen from the above that I do not accept that all the criteria required to be met before a term will be implied into a written contract have been satisfied on this occasion. Further, I consider the written contract to be a detailed, commercial document which, on its face, appears to have been given much consideration by the parties to it. The Courts are reluctant to imply terms into detailed commercial contracts. In the *Codelfa* case at 346 Mason J said:

“For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue.”

47. Not all of the documents remaining in dispute in this matter are documents created prior to the execution of the contract. Many are documents created during the term of the contract. I formed the preliminary view that those documents do not contain information in respect of which there is any obligation of secrecy. I fully informed the agency in detail in writing of my reasons for that view in respect of each of those documents. I informed the complainant as far as I could without breaching my obligation under s.74(1). I consider that to publish

those reasons here would breach my obligation under s.74(2) of the FOI Act, as it would involve disclosure of details of terms of the contract. The agency's subsequent submissions have not dissuaded me from my view in respect of those documents and, for the reasons I gave for my preliminary view, I consider that the disputed matter in those documents is not exempt under clause 8(1) of Schedule 1 to the FOI Act.

48. For the reasons given in my letters dated 20 January 1998 to each of the parties to this complaint, and for the reasons given above, I find that none of the disputed matter is exempt under clause 8(1) of Schedule 1 to the FOI Act.

Clause 4 - Commercial or business information

49. Clause 4 provides:

"4. Commercial or business information

- (1) *Matter is exempt matter if its disclosure would reveal trade secrets of a person.*
- (2) *Matter is exempt matter if its disclosure -*
- (a) *would reveal information (other than trade secrets) that has a commercial value to a person; and*
- (b) *could reasonably be expected to destroy or diminish that commercial value.*
- (3) *Matter is exempt matter if its disclosure -*
- (a) *would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
- (b) *could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*

Limits on exemptions

- (4) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
- (5) *Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of the applicant.*

- (6) *Matter is not exempt matter under subclause (1), (2) or (3) if the applicant provides evidence establishing that the person concerned consents to the disclosure of the matter to the applicant.*
- (7) *Matter is not exempt under subclause (3) if its disclosure would, on balance, be in the public interest."*

(a) Clause 4(2)

50. The agency claims part of Documents 27 and 81 and all of Documents 44 and 45 are exempt under clause 4(2) of Schedule 1. Documents 27, 81 and 44 are facsimile transmissions between the agency and Mr Harvey. Document 45 is an unexecuted draft agreement between the agency and Ms Macpherson. As I said, as I understand it, that draft agreement was superseded and was never executed. Although citing clause 4(2), the agency did not in its notice of decision provide any specific reasons for the decision in relation to that clause. Further, on internal review, the agency merely confirmed the initial decision and nothing more was provided by the agency to the complainant in support of the claim.
51. However, in the agency's final submission to me it contends that it is evident from the documents on their face that their disclosure could reasonably be expected to have the consequences contemplated in subclauses 4(2)(b) and 4(3)(b).
52. Clause 4(2) is concerned with the protection of information which is not a trade secret but which has a "commercial value" to a person. In order to establish an exemption under clause 4(2), the matter for which a claim for exemption is made must be shown to have a commercial value, although, in my view, it is not necessary in order to satisfy the requirements of clause 4(2)(a) that the commercial value be quantified or assessed. However, that alone is not sufficient to establish the exemption. It must also be shown that disclosure could reasonably be expected to destroy or diminish the commercial value of the information in question. Only when the requirements of clause 4(2)(a) are satisfied, am I required to consider the effects of disclosing that kind of matter, to determine whether the potential effect of disclosure claimed is one that could reasonably be expected, in accordance with the requirements of clause 4(2)(b).
53. In *Re Precious Metals Australia Limited and Department of Minerals and Energy* (17 April 1997, unreported, D01297), I considered the meaning of the words "commercial value" in the context of a claim for exemption under clause 4(2) of Schedule 1 to the FOI Act. I am of the view that the discussion in *Re Precious Metals Australia Limited* is equally applicable to the matter now before me. Accordingly, I am satisfied that matter has a "commercial value" if it is valuable for the purpose of carrying on the commercial activities of a person or organisation. As I have previously stated, I consider that it is by reference to the context in which the

information is used, or exists, that the question of whether it has a “commercial value” to a person may be determined.

54. Whilst I am prepared to accept that information describing the commercial or business relationships between parties may, in certain circumstances, have a commercial value, that has not been demonstrated to be the case in this instance. In the absence of any probative material in support of the exemption claim, I have not been able to identify any matter in any of the disputed documents which may be information having a commercial value to a person within the meaning of that phrase in the FOI Act.
55. Therefore, I am not persuaded that any of the matter contained in Documents 27, 44, 45 and 81 is of the kind referred to in clause 4(2)(a). Accordingly, I find that none of that matter is exempt under clause 4(2) of Schedule 1 to the FOI Act.
56. Further, even if I were satisfied that that matter were of a kind within the terms of clause 4(2)(a), which I am not, there is no evidence before me that persuades me that disclosure of the matter could reasonably be expected to destroy or diminish that commercial value as required by clause 4(2)(b).

(b) Clause 4(3)

57. The agency claims all of 13 documents (Documents 20-25, 38, 39, 44, 45, 50, 88 and 89) and part of 8 documents (Documents 27, 30, 31, 36, 37, 40, 80 and 91) are exempt under clause 4(3). Those documents are composed of facsimile correspondence between the agency and Mr Harvey; internal memoranda; and a facsimile transmission from the agency to another third party. As with its claim under clause 4(2), the agency did not provide any specific reasons for the decision in relation to clause 4(3) in its initial notice of decision or its decision on internal review. The agency subsequently made a submission to me on its claim under both clauses 4(2) and 4(3).
58. The exemption in clause 4(3) is more general in its terms than that provided by clauses 4(1) and 4(2). It does not exempt trade secrets or information of the kind covered by clause 4(2). I consider its purpose is primarily to protect from disclosure certain of the business, professional, commercial or financial affairs of any person, including a company or incorporated body, that has business dealings with government agencies. In my view, the exemption is a recognition of the fact that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies nor the business of government should be adversely affected by the operation of the FOI Act.
59. With respect to the requirements of paragraph (b) of the exemption, the agency, in its notices of decision, merely cited the words of the exemption as the basis of the exemption claim. In its final submission, the agency contends that it is evident from the documents on their face that they are exempt.

60. In order to establish the exemption under clause 4(3), it must be shown that disclosure of the matter in dispute would reveal information of the type described in paragraph (a), and that it is reasonable to expect that disclosure would produce some kind of adverse effect on the person's business, professional, commercial or financial affairs, or would prejudice the future supply of information of that kind to the agency.
61. In my view, some of the matter contained in certain of the disputed documents may be described as information which relates to the business, professional, commercial or financial affairs of certain third parties and, therefore, the requirements of clause 4(3)(a) may be satisfied. However, the requirements of paragraph (b) must also be satisfied in order to establish the exemption. It is not apparent to me on the face of the documents themselves that either of the effects described in paragraph (b) could reasonably be expected to follow from disclosure of those documents. And there is nothing before me at present that establishes either of those alternative requirements.
62. The agency claims the documents are exempt under clause 4(3). Under section 102(1) of the FOI Act, the agency bears the onus of establishing that its decision was justified and that the documents are exempt and access should not be given. It has not done so in my view. The agency also suggests that I contact third parties to obtain their views on the implications of disclosure before making my decision.
63. Firstly, the agency should not have claimed the exemption if it did not have reasonable grounds for doing so. Secondly, as the agency did claim exemption under clause 4, it was required by s.68(2) to notify each of the third parties in writing of the complaint to me. Any of those third parties so notified by the agency was entitled to be joined as a party to the complaint on giving me written notice. No third party gave me written (or any other) notice. My office did make contact and have discussions with a third party, Mr Harvey, who did not seek to be joined and provided very little in the way of submissions or helpful information.
64. For the reasons given, I am not persuaded that any of the disputed matter is of a kind that satisfies both paragraphs (a) and (b) of clause 4(3). Accordingly, I find that none of the disputed matter is be exempt under clause 4(3) of Schedule 1 to the FOI Act.
65. Finally, it is clear from the specific words of clause 4 that the exemptions in each of the sub-clauses are directed at protecting different types of information from disclosure under the FOI Act. Whilst it is open to make alternative claims for exemption for documents, or parts of documents, under more than one sub-clause of clause 4, in my view the same information cannot be exempt under more than one of those sub-clauses. However, different matter within a document may be exempt under different sub-clauses of clause 4. In this instance, the agency has claimed that some of the matter contained in the disputed documents is exempt under both clause 4(2)

and clause 4(3). For the reasons given above, I find that the disputed matter is not exempt under either exemption clause.

Clause 3 – Personal information

66. As I have already mentioned, the complainant has withdrawn the complaint in respect of matter that I considered, in my preliminary view, to be exempt under clause 3 of Schedule 1 to the FOI Act. That matter is the names and contact details of any third parties (other than officers of the agency or any other agency), all the personal signatures appearing in the documents and the home contact details (eg. home telephone numbers, private addresses etc.) of officers of the agency or any other agency. The agency has withdrawn its claims under clause 3(1) for that a matter, and therefore it is no longer in dispute. The agency does not maintain a claim that any other matter in the documents is exempt under clause 3(1).
67. I have considered whether any other information contained in the documents is personal information, as defined in the FOI Act, about people other than the access applicant and whether that matter is exempt under clause 3(1) of Schedule 1 to the FOI Act. There is, in my opinion, further information contained in the disputed matter that may be personal information (according to the very broad definition in the FOI Act) about individual third parties and *prima facie* exempt under clause 3(1). However, I am of the view that very little of that is exempt under clause 3(1), when the limit in clause 3(6) is applied.
68. Clause 3 of Schedule 1 to the FOI Act provides:

"3. Personal information

Exemption

(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).

Limits on exemption

(2) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal personal information about the applicant.

(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -

(a) the person;

(b) the person's position or functions as an officer; or

(c) *things done by the person in the course of performing functions as an officer.*

(4) *Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who performs, or has performed, services for an agency under a contract for services, prescribed details relating to -*

(a) *the person;*

(b) *the contract; or*

(c) *things done by the person in performing services under the contract.*

(5) *Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*

(6) *Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

69. The term "personal information" is defined in the Glossary to the Act as follows:

"personal information" means information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead -

(a) *whose identity is apparent or can reasonably be ascertained from the information or opinion; or*

(b) *who can be identified by reference to an identification number or other identifying particular such as a fingerprint, retina print or body sample;"*

70. I have considered whether disclosure of that matter would, on balance, be in the public interest. I recognise a very strong interest in the protection of the personal privacy of individuals about whom information is held in government documents. I also recognise a public interest in the maintenance of the ability of government to function effectively. In favour of disclosure, I consider that there is a public interest in the accountability of government agencies and the actions they undertake on behalf of the community in a democratic society being open and available, so far as possible, for scrutiny.

71. However, I do not consider that much of the remainder of the matter that may be described as "personal information" in accordance with the definition in the FOI Act is information that is of a nature personal to the particular third party and of the private nature that clause 3(1) is designed to protect. It is largely general

information relating to each person's particular role in the official project. I do not consider that the public interest in the protection of personal privacy requires the non-disclosure of that information in this instance. I also do not consider that its disclosure could adversely affect the effective operations of the agency, particularly given that the project is at an end. Accordingly, on balance, I am of the view that disclosure of "personal information", other than that described in paragraph 72 below, would be in the public interest and, therefore, I find that it is not exempt under clause 3(1).

72. However, some of the documents contain personal information that I consider to be personal to the particular individuals to whom it relates and not of such a nature that the public interest in the accountability of government agencies requires its disclosure. I find that matter exempt under clause 3(1). That matter is described as follows:

- Document 27 – the first 5 words of the second line; the last 12 words of the third line; all of the fourth line and the first 6 words of fifth line;
- Document 30 – the last 15 words of the first line; the fifth to seventeenth word inclusive of the third line; the twelfth to nineteenth words inclusive of the first line of the second main paragraph;
- Document 31 – the last two sentences of the second paragraph; the first and last sentence of the third paragraph;
- Document 36 – the third and fourth sentences of the first paragraph;
- Document 39 – the first sentence of the second paragraph under the first heading; and the third and fourth paragraphs under that heading;
- Document 40 – the third sentence commencing in the first line and finishing in the second line;
- Document 66 – the text of the body of the document;
- Document 81 – the second sentence of the last paragraph on the first page; the last 5 words of the first line and the first 2 words of the second line on the second page;
- Document 90 – the second last paragraph (except for the first sentence) and the last paragraph.

73. I have considered whether or not it would be practicable to edit the documents by deleting the matter that I have found to be exempt under clause 3(1). In *Police Force of Western Australia v Winterton* (unreported; Supreme Court of Western Australia; Lib No: 970646; 27 November 1997), Scott J said, at 16:

“Some meaning must be given to the word “practicable” in that subsection [s.24(b)] ... It seems to me that the reference in s24(b)

to the word “practicable” is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context. In that respect, where documents only require editing to the extent that the deletions are of a minor and inconsequential nature and the substance of the document still makes sense and can be read and comprehended in context, the documents should be disclosed. Where that is not possible, however, in my opinion, s24 should not be used to provide access to documents which have been so substantially edited as to make them either misleading or unintelligible.”.

74. In my opinion, reached in the light of his Honour’s comments, I am of the view that Documents 27 and 66 cannot practicably be edited by deleting the matter I consider to be exempt under clause 3(1). Therefore, I find that those documents in their entirety are exempt under clause 3(1). However, in respect of the remaining documents, I am of the view that they can practicably be edited. I find the matter described in paragraph 72 above in Documents 30, 31, 36, 39, 40, 81 and 90 exempt under clause 3(1) and it should be deleted before access to the documents is given.

75.

Finally, Ms Macpherson is clearly an individual third party in this matter and, accordingly, her name wherever it appears in the documents is no longer in dispute and may be deleted by the agency before access is given. However, Ms Macpherson's role in the matter is well known, having been highly publicised and subject to considerable media coverage. Therefore, although if her name is deleted her identity is no longer apparent from the information contained in the documents, it is clearly ascertainable by means of extrinsic materials and knowledge. Apart from any matter that I have found to be exempt under clause 3(1) of Schedule 1 to the FOI Act, as I have said, in my opinion, none of the information remaining in the documents which relates to Ms Macpherson is of a personal and private nature. Accordingly, I would suggest that, other than in any place it may appear in matter I have found to be exempt under clause 3(1), the agency does not delete Ms Macpherson's name from the documents before giving access.

CONCLUSION

76. In summary, for the reasons given in my letters of 20 January 1998 to the parties to this matter informing them of my preliminary view and for the foregoing reasons, I find that those documents and parts of documents described in paragraph 72 above are exempt under clause 3(1). I find that the remaining disputed matter in the documents is not exempt.

SCHEDULE

Doc No.	Document description	Disputed matter	Exemptions claimed
5	Board papers for meeting of 3 September 1996, including copy of minutes of meeting of 6 August 1996	Only those parts not marked by agency as outside the scope of access application, the personal signature of the chairman and the name of an individual third party on p.1 of the August 1996 minutes.	Clause 8(1) - all
6	Board papers for meeting of 8 October 1996, including copy of minutes of meeting of 3 September 1996	Only those parts not marked by the agency as outside the scope of the access application and the personal signature of the chairman.	Clause 8(1) - all
9	Minutes of Special Commission meeting of 18 October 1996 including matter contained in agency doc ref. 1620	As for Document 6, and the name of an individual third party.	Clause 8(1) - part (the balance outside scope of request)
18	Fax J Harvey to S Crockett 8/8/96	All except: the names of individual third parties who are not officers of the agency and the position title and personal signature of the author.	Clause 8(1) - all
20	Facsimile letter dated 22/8/96 from M Rees to J Harvey.	All except: the names of individual third parties who are not officers of an agency; the fax number towards the top of the first page; and the personal signature of an officer of the agency.	Clause 8(1) - all Clause 4(3) - all
21	Fax M Rees to J Harvey 19/9/96	All except: name of individual third party who is not an officer of the agency; that party's fax number; and the personal signature of the author.	Clause 8(1) - all Clause 4(3) - all
22	Fax S Crockett to J Harvey 27/9/96	All except: name of individual third party; that party's fax number; and the personal signature.	Clause 8(1) - all Clause 4(3) - all
23	Fax J Harvey to S Crockett 9/10/96	All except: names of individual third parties who are not officers of an agency and the position title and personal signature of the author.	Clause 8(1) - all Clause 4(3) - all
24	Fax J Harvey to S Crockett 11/10/96	As for Document 23	Clause 8(1) - all Clause 4(3) - all
25	Fax S Crockett to J Harvey 14/10/96	All except: the names of individual third parties who are not officers of an agency; the position title of the addressee; personal signature of the author.	Clause 8(1) - all Clause 4(3) - all
26	Fax J Harvey to S Crockett 15/10/96	All except: the names of individual third parties who are not officers of an agency; the address stated in the text of the document; the position title and personal signature of the author.	Clause 8(1) - all

27	Fax J Harvey to S Crockett 18/10/96	All except: the names of individual third parties who are not officers of an agency and the personal signature of the author.	Clause 8(1) - all Clause 4(2) - part (Sentences 4-5 para 1) Clause 4(3) - part (Sentences 4-5 para 10
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29	Fax letter S Crockett to J Harvey 21/10/96	All except: the name, wherever it appears, and the position title of the addressee and the personal signature of the author.	Clause 8(1) - all
30	Fax J Harvey to S Crockett 21/10/96	All except: the names of individual third parties who are not officers of an agency; the personal signature; and the position title appearing at the bottom of the page.	Clause 8(1) - all Clause 4(3) - part (Paras 1-2)
31	Fax J Harvey to S Crockett 23/10/96	All except: the names of individual third parties who are not officers of an agency; the telephone numbers appearing in the text; and the position title appearing at the bottom of the page.	Clause 8(1) - all Clause 4(3) - part (Paras 1 and 2)
32	Fax J Harvey to S Crockett 30/10/96	All except: the names of individual third parties who are not officers of an agency; the personal signature and position title of the author; and, on the attachment, the name of the addressee wherever it appears and the signature and name of the author.	Clause 8(1) - all
33	Fax J Harvey to S Crockett 30/10/96	All except: the names of the individual third parties who are not officers of an agency and the signature and position title of the author.	Clause 8(1) - all
34	Fax J Harvey to S Crockett 31/10/96	All except: the names of individual third parties who are not officers of an agency and the personal signature and position title appearing below it.	Clause 8(1) - all
36	Fax letter from J Harvey to S Crockett 1/11/96	All except: the names of individual third parties who are not officers of an agency and the signature and position title of the author.	Clause 8(1) - all Clause 4(3) - part (1450 para 1 sentences 3-4)
37	Fax M Rees re agreement 1/11/96	All except: the names of third parties who are not officers of an agency.	Clause 8(1) - all Clause 4(3) - part (point 2)
38	Fax J Harvey to S Crockett 2/11/96	As for Document 36.	Clause 8(1) - all Clause 4(3) - all
39	Fax J Harvey to S Crockett 2/11/96	All except: names of individual third parties; the personal signature on the first page and the position title and personal signature of the author.	Clause 8(1) - all Clause 4(3) - all
40	Fax J Harvey to S Crockett 4/11/96	As for Document 36.	Clause 8(1) - all Clause 4(3) - part (Third sentence)
41	Fax M Rees to J Harvey 4/11/96	All except: the name of individual third party who is not an officer of an agency and the personal signature of an officer of the agency.	Clause 8(1) - all
42	Fax J Harvey to S Crockett 4/11/96	As for Document 36.	Clause 8(1) - all
44	Fax letter S Crockett to J Harvey 4/11/96	All except: the names of individual third parties who are not officers of an agency; the position title of the addressee; and the personal signature of an officer of the agency.	Clause 8(1) - all Clause 4(2) - all Clause 4(3) - all

45	Attachment to Doc 44 (1491) being unexecuted draft agreement between S Crockett (WATC) and Elle McPherson - last page (1500) is blank except for page number at top of page.)	Whole document.	Clause 8(1) - all Clause 4(2) - all Clause 4(3) - all
48	Fax J Harvey to M Rees 4/11/96	All except: the names of individual third parties who are not officers of an agency; the personal signature and position title of the author and the hand-written mobile telephone number.	Clause 8(1) - all
50	Fax M Rees to M Steverson 4/11/96	All except: the names of individual third parties who are not officers of an agency; the home telephone number, mobile telephone number and personal signature of the author.	Clause 8(1) - all Clause 4(3) - all
51	Fax M Rees to M Steverson 4/11/96	All except: the name of an individual third party and the personal signature of the author.	Clause 8(1) - all
53	Fax J Harvey to S Crockett 5/11/96	All except: the name, personal signature and position title of the author.	Clause 8(1) - all
61	Fax S Crockett to J Harvey 5/11/96	Covering letter – all except: the name of an individual third party and the personal signature of an officer of the agency.	Clause 8(1) - all
61 (attachment)	“Media Statement” dated 6/11/96 by WATC	All except: the name of the individual third party who is not an officer of an agency.	Clause 8(1) - all
62	Fax J Harvey to S Crockett 5/11/96	All except: the name, personal signature and position title of the author.	Clause 8(1) - all
62 (attachment)	“Media Statement” dated 6/11/96 by Elle Racing	All except: the names of the individual third parties who are not officers of an agency.	Clause 8(1) - all
66	Fax J Harvey to S Crockett 7/11/96	All except: the names of individual third parties who are not officers of an agency and the personal signature and position title of the author.	Clause 8(1) - all
71	Fax M Rees to J Harvey 12/11/96	All except: the names of individual third parties who are not officers of an agency and the personal signature of an officer of the agency.	Clause 8(1) - all
78	Fax B Ward to Artistmanagement 17/12/96	All except: the names of individual third parties who are not officers of an agency and the personal signature of an officer of the agency.	Clause 8(1) - all
79	Fax B Ward to J Harvey 19/12/96	All except: the names of individual third parties and the personal signature of an officer of the agency.	Clause 8(1) - all
80	Fax S Walsh to J Harvey 23/12/96	All except: the names of individual third parties who are not officers of an agency and the personal signature of the author, an officer of the agency.	Clause 8(1) - all Clause 4(3) - part (Second para point 1 & point 3)

81	Fax J Harvey to B Ward 23/12/96	All except: the names of individual third parties and the personal signature of the author.	Clause 8(1) - all Clause 4(2) - part (0880 last para sentence 2)
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85	Fax S Walsh to J Harvey 3/1/97	All except: the names of individual third parties who are not officers of an agency and the personal signature of the author.	Clause 8(1) - all
88	Memo B Ward to S Crockett 21/8/96	All except: the names of individual third parties who are not officers of an agency and the personal signature of an officer of the agency; and the personal signature on the attachment.	Clause 8(1) - all Clause 4(3) - all
89	Memo B Ward to M Rees 2/9/96	All except: the personal signature of an officer of the agency and the name of an individual third party who is not an officer of an agency.	Clause 8(1) - all Clause 4(3) - all
90	Memo B Ward to M Rees 17/9/96	All except: the address and telephone/facsimile number appearing at the top of the page; the name of an individual third party who is not an officer of an agency; and the personal signature of the author.	Clause 8(1) - all para 4)
91	Mail B Ward to S Crockett 8/10/96	Whole document.	Clause 8(1) - all Clause 4(3) - part (Para 2 sentence 1)
93	Mail S Crockett to M Rees etc 12/11/96	All except: the name of an individual third party who is not an officer of an agency.	Clause 8(1) - all
98	Draft running schedule	All except: the names of individual third parties who are not officers of an agency.	Clause 8(1) - all
99	Cover letter J Aquino to Minister 7/1/97	All except: the name of an individual third party who is not an officer of an agency and the personal signature of the author.	Clause 8(1) - all
100	Attachment to Doc.99 being draft letter from Minister for Tourism to Hon Premier	All except: the names of individual third parties who are not officers of an agency.	Clause 8(1) - all
101	Attachment to Doc.99 being 9 x "Function attendance sheet".	All except: the names of individual third parties who are not officers of an agency.	Clause 8(1) - all
105	Fax letter from CEO's Personal Assistant to Minister's Office dated 21 August 1996	Whole document.	Clause 8(1) - all
106	attachment to Doc 105 (1622) being suggested agenda re: meeting with Minister	Whole document.	Clause 8(1) - all
107	Unexecuted letter from Shane Crockett to Hon Minister dated 21 August 1996 re: meeting of 28 August 1996	Whole document.	Clause 8(1) - all
108	attachment to Doc.107 (1624) re draft letter from Minister for Tourism to Hon Premier	Whole document.	Clause 8(1) - all