[2011] WASC 283

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	APACHE NORTHWEST PTY LTD -v- DEPARTMENT OF MINES AND PETROLEUM [No 2] [2011] WASC 283
CORAM	**:**	EDELMAN J
HEARD	**:**	4-5 AUGUST & 5 SEPTEMBER 2011
DELIVERED	**:**	17 OCTOBER 2011
FILE NO/S	**:**	GDA 1 of 2011
BETWEEN	**:**	APACHE NORTHWEST PTY LTD Appellant AND DEPARTMENT OF MINES AND PETROLEUM First Respondent LANDER AND ROGERS, LAWYERS Second Respondent

ON APPEAL FROM:

Jurisdiction	**:**	INFORMATION COMMISSIONER OF WESTERN AUSTRALIA
Coram	**:**	COMMISSIONER S H BLUEMMEL
File No	**:**	F 37 of 2009

Catchwords:

Freedom of information - Exempt matter - Construction of cl 4(2), cl 4(3), cl 5(1)(e), cl 5(1)(f), cl 5(1)(g) of sch 1 of the *Freedom of Information Act 1992* (WA)

Administrative law - Whether findings made by the Information Commissioner that a document did not contain material of commercial value and that the Appellant would be likely to continue to use documents after they were released were findings which were not open to him

Administrative law - Whether conclusion by Information Commissioner that a measure of restricting access to information would remain in place even though the documents were released was perverse

Administrative law - Whether findings were irrational, illogical, and not based upon findings or inferences of fact supported by logical grounds

Administrative law - Natural justice - Nature of obligation of 'procedural fairness' - Whether Information Commissioner was required to allow the Appellant an opportunity to make oral submissions or present expert evidence

Legislation:

Freedom of Information Act 1992 (WA), s 3(1), s 3(2)(a), s 10, s 23(1)(a), s 76(4), s 85, s 87, s 88, s 102(2), sch 1, cl 4(2), cl 4(3), cl 5(1)(e), cl 5(1)(f), cl 5(1)(g)

Result:

Appeal dismissed

Category: B

Representation:

Counsel:

Appellant	:	Mr P J Hanks QC & Mr L Brown
First Respondent	:	Ms F Seaward
Second Respondent	:	Mr N J O'Bryan AM SC & Mr B Reilly

Solicitors:

Appellant	:	Middletons
First Respondent	:	State Solicitor for Western Australia
Second Respondent	:	Lander & Rogers

Case(s) referred to in judgment(s):

Attorney-General's Department & Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180
Australian Broadcasting Tribunal v Bond [1990] HCA 33; (1990) 170 CLR 321
Azzopardi v Tasman UEB Industries Ltd (1985) 4 NSWLR 139
Borden v Walters (Unreported, QSC, 17 September 1999)
Centrelink v Dykstra [2002] FCA 1442
Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 456; (1993) 43 FCR 280
Cox v Land & Water Journal Company (1869) LR9Eq 324
Health Department of Western Australia v Australian Medical Association Ltd [1999] WASCA 269
Heatley v Tasmanian Racing & Gaming Commission (1977) 137 CLR 487
Holland v Federal Commissioner of Taxation [1999] FCA 1125; (1999) 42 ATR 418
Kioa v West (1985) 159 CLR 550
Manly v Ministry of Premier & Cabinet (1995) 14 WAR 550
Maxwell v Department of Trade & Industry [1974] 1 QB 523
McKinnon v Secretary, Department of Treasury [2006] HCA 45; (2006) 228 CLR 423
Minister for Immigration and Ethnic Affairs v Wu Shan Liang [1996] HCA 6; (1996) 185 CLR 259
Minister for Immigration and Multicultural and Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12; (2004) 78 ALJR 992
Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation (1963) 113 CLR 475
Osland v Secretary to the Department of Justice [2010] HCA 24; (2010) 241 CLR 320
Osland v Secretary, Department of Justice [2008] HCA 37; (2008) 234 CLR 275
Police Force of Western Australia v Winterton (Unreported, WASC, Library No 970646, 27 November 1997)
R v District Court of Sydney; Ex parte White (1966) 116 CLR 644

Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 [2003] HCA 30; (2003) 77 ALJR 1165

Re Public Interest Advocacy Centre & Community Services (No 2) (1991) 23 ALD 714

Re R H Burton; Ex parte Steven Burns t/as Burns Corporation (Unreported, WASCA, Library No 980154, 6 February 1998)

Re Sitel Australia Pty Ltd and Employment Advocate [2005] AATA 617; (2005) 40 AAR 552

Re Thies & Department of Aviation (1986) 9 ALD 454

Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue [2001] HCA 49; (2001) 207 CLR 72

Searle Australia Pty Ltd v Public Interest Advocacy Centre [1992] FCA 241; (1992) 36 FCR 111

University of Ceylon v Fernando [1960] 1 All ER 631

Water Corporation v McKay [2010] WASC 210

White v Ryde Municipal Council [1977] 2 NSWLR 909

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EDELMAN J:

Introduction

1 This is an appeal from a decision of the Information Commissioner to allow access to some documents relating to the oil, condensate and gas activities of Apache Northwest Pty Ltd on Varanus Island. The appeal is brought under the *Freedom of Information Act 1992* (WA) (the FOI Act). The FOI Act aptly describes the proceedings as 'review proceedings'. The appeal is in the nature of a judicial review.

2 In ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** [1996] HCA 6; (1996) 185 CLR 259, 272 it was said that in proceedings of this nature a decision-maker's reasons are 'not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed' (Brennan CJ, Toohey, McHugh & Gummow JJ). There is a section of these reasons which explains this point in detail. It is necessary to explain this point because the submissions on behalf of Apache Northwest Pty Ltd, although extremely thorough and clearly presented, were sometimes focused upon the minutiae of single words or phrases in the decision of the Information Commissioner in an attempt to create a perception of inadequacy or error. When the lens is drawn back to a focus upon the reasons as a whole, any perceived inadequacy disappears.

3 The grounds, and sub-grounds, of appeal focus very heavily upon the Information Commissioner's construction of words and phrases in sch 1 of the FOI Act. They also raise questions of whether the Information Commissioner made findings which cannot be sustained on the material before him, and whether the Information Commissioner denied natural justice to Apache Northwest Pty Ltd.

Background

4 Seventy-five kilometres off the Western Australian coast is an island called Varanus Island. Varanus Island is a critical infrastructure hub. There are a number of joint ventures that operate there. These joint ventures produce oil, condensate and gas.

5 On 3 June 2008 a gas pipeline ruptured on Varanus Island. There was a huge explosion. The explosion caused the Varanus Island plant to cease operation for approximately two months. Western Australia's natural gas supply was consequently reduced by approximately 30% for this period.

6 The operator of the facilities on Varanus Island and in the surrounding off-shore area is a company called Apache Northwest Pty Ltd (Apache). Apache is also a participant in a joint venture on Varanus Island and is one of the licensees of the pipeline which serves the facilities there.

7 Apache's operations and facilities on Varanus Island are regulated by a number of different Acts and Regulations. These include the *Petroleum Act 1967* (WA), the *Petroleum and Geothermal Energy Resources Act 1967* (WA), the *Petroleum (Submerged Lands) Act 1982* (WA), the *Petroleum Pipelines Act 1969* (WA) and Regulations under those Acts (collectively referred to as 'the Regulatory Regime').

8 The Regulatory Regime is administered by the Department of Mines and Petroleum. The Department of Mines and Petroleum was established on 1 January 2009 after a departmental restructure. The predecessor of the Department was the Department of Industry and Resources. For convenience these two departments will be referred to as 'the Department'.

9 On 15 September 2008, Lander and Rogers Lawyers (Lander and Rogers) made an application to the Department under the FOI Act. Lander and Rogers sought access to 28 documents, or categories of documents, relating to Apache or Apache's facilities on Varanus Island. Five of those documents are relevant to this appeal. These are documents numbered 1, 3, 4, 4A and 9 (the Documents). In these reasons I will focus only upon the background and findings of the Information Commissioner in relation to those Documents.

10 In accordance with the Regulatory Regime, Apache supplied the Department with a number of documents which were relevant to the request from Lander and Rogers. On 21 October 2008, the Department wrote to Apache and asked for Apache's views in relation to disclosure of some of the documents which Apache had provided to the Department.

11 On 30 October 2008, Apache made submissions to the Department in a letter concerning the disclosure. The Department refused Lander and Rogers access to the Documents.

12 On 8 December 2008, Lander and Rogers sought internal review of the Department's decision to refuse access to the Documents. On 22 December 2008, the internal review decision-maker allowed Lander and Rogers access to the Documents.

13 On 22 January 2009, Apache applied to the Information Commissioner for external review of the Department's decision to give Lander and Rogers access to the Documents.

14 As part of the review by the Information Commissioner, both Apache and Lander and Rogers made submissions in writing. Apache's submissions relied upon its letter to the Department dated 30 October 2008, a letter to the former Acting Information Commissioner dated 22 January 2009, and letters to the Office of the Information Commissioner dated 5 June 2009 and 8 July 2009. Lander and Rogers provided submissions on 5 August 2009.

15 On 16 April 2010, the Information Commissioner wrote to Apache, Lander and Rogers, and the Department, explaining his preliminary view. His preliminary view was that apart from a small amount of information contained in the Documents, none of the Documents was exempt from production under the FOI Act. The Information Commissioner invited the parties to respond in writing by 14 May 2010.

16 Neither Lander and Rogers nor the Department made any further submissions to the Information Commissioner. But on 25 June 2010, after extensions of time, Apache made further detailed submissions to the Information Commissioner. The Information Commissioner considered those submissions and obtained further information in order to assist his understanding of the matter (see Information Commissioner's reasons [37]).

17 On 30 December 2010, the Information Commissioner delivered his decision. That decision is discussed in more detail below. Apart from some small exceptions, the Information Commissioner allowed access to the Documents.

The operation of the FOI Act

18 The introduction of freedom of information statutes, such as the FOI Act in 1992, marked a fundamental shift in norms of public administration. The legislation transformed a history of government secrecy into an era of accountability in order 'to reinforce "the three basic principles of democratic government, namely, openness, accountability and responsibility"': ***Osland v Secretary, Department of Justice*** [2008] HCA 37; (2008) 234 CLR 275, 302 [62]. In making this break from the past, the legislation assigned 'very high importance to a public interest in greater openness and transparency in public administration' (303) [66].

19 The FOI Act is based upon these same principles and falls to be interpreted against this history. The long title of the FOI Act provides, in part, that it is an Act to provide for public access to documents. Section 3(1) provides that its objects are to enable the public to participate more effectively in governing the State and to make the persons and bodies responsible for government more accountable to the public. One means by which those objects are to be achieved by the FOI Act is by 'creating a general right of access to State and local government documents': s 3(2)(a). In ***Water Corporation v McKay*** [2010] WASC 210 [38], Kenneth Martin J emphasised that the expressed objects in the FOI Act 'form the essential bedrock of open, democratic government'.

20 Section 10 of the FOI Act gives a person a right to access the documents of an agency subject to, and in accordance with the FOI Act. 'Agency' is defined in the glossary to the FOI Act as a Minister or a public body or office. The Department is an agency within the definition in the FOI Act.

21 The regime of access to documents created by the FOI Act is subject to exceptions. The onus lies upon any third party (such as Apache), who initiates proceedings opposing the giving of access to a document, to establish that access should not be given or that a decision adverse to the access applicant should be made: s 102(2) FOI Act.

22 One exception is where a document is an 'exempt document': s 23(1)(a). If it is established that a document is an exempt document then the Information Commissioner does not have the power to make a decision that access should be given to the document: s 76(4).

23 An exempt document is defined in the glossary to the FOI Act as 'a document that contains exempt matter'. The term 'exempt matter' is then defined as 'matter that is exempt matter under Schedule 1'. In both written and oral submissions before me, as well as before the Information Commissioner, all counsel referred interchangeably to 'matter' and 'information' contained in the Documents. In these reasons I have followed the same course. Although it is not defined, the term 'matter' encompasses the 'information' within the Documents: see eg cl 5(4)(a)(i) of sch 1 to the FOI Act.

24 The relevant clauses of sch 1 for this application are cl 4 and cl 5. I refer in detail to issues concerning those clauses below so I have set them out fully here.

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.

(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 matter under subclause (3) if its disclosure would, on balance, be in the public interest.

4A. Information provided to Treasurer under section 22 of *Bank of Western Australia Act 1995*

Matter is exempt matter if it consists of information provided to the Treasurer under section 22 of the *Bank of Western Australia Act 1995*.

5. Law enforcement, public safety and property security

(1) Matter is exempt matter if its disclosure could reasonably be expected to -

(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;

(b) prejudice an investigation of any contravention or possible contravention of the law in a particular case, whether or not any prosecution or disciplinary proceedings have resulted;

(c) enable the existence, or non-existence, or identity of any confidential source of information, in relation to the enforcement or administration of the law, to be discovered;

(d) prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings;

(e) endanger the life or physical safety of any person;

(f) endanger the security of any property;

(g) prejudice the maintenance or enforcement of a lawful measure for protecting public safety; or

(h) facilitate the escape of any person from lawful custody or endanger the security of any prison.

(2) Matter is exempt matter if it was created by -

(a) the Bureau of Criminal Intelligence, Protective Services Unit, Witness Security Unit or Internal Affairs Unit of the Police Force of Western Australia; or

(b) the Internal Investigations Unit of Corrective Services.

(3) Matter is exempt matter if it originated with, or was received from, a Commonwealth intelligence or security agency.

(4) Matter is not exempt matter under subclause (1) or (2) if -

(a) it consists merely of one or more of the following

(i) information revealing that the scope of a law enforcement investigation has exceeded the limits imposed by the law;

(ii) a general outline of the structure of a programme adopted by an agency for dealing with any

contravention or possible contravention of the law; or

(iii) a report on the degree of success achieved in any programme adopted by an agency for dealing with any contravention or possible contravention of the law;

and

(b) its disclosure would, on balance, be in the public interest.

(5) In this clause -

Commonwealth intelligence or security agency means

(a) the Australian Security Intelligence Organization;

(b) the Australian Secret Intelligence Service;

(c) that part of the Department of Defence of the Commonwealth known as the Defence Signals Directorate; or

(d) that part of the Department of Defence of the Commonwealth known as the Defence Intelligence Organisation.

contravention includes a failure to comply;

the law means the law of this State, the Commonwealth, another State, a Territory or a foreign country or state.

The Information Commissioner's decision

25 The submissions before the Information Commissioner with which this appeal is concerned related to whether the Documents were exempt documents because they contained exempt matter within sch 1 of the FOI Act.

26 The Information Commissioner concluded at [188] that, subject to exceptions, the Documents were not exempt under cl 4(2), cl 4(3), cl 5(1)(a), cl 5(1)(b), cl 5(1)(d) or cl 5(1)(g) of sch 1 to the FOI Act. The exceptions were that some of the information in the Documents was exempt under cl 5(1)(e) and cl 5(1)(f) of sch 1 to the FOI Act. That information included items, figures, tables, plans, schematics and diagrams and the information was set out in an appendix to the Information Commissioner's reasons on pages 50 - 51 of his decision.

27 The appeal to this court raises numerous grounds of appeal which focus in minute detail on the Information Commissioner's reasons in relation to each of those clauses.

The proper approach to an appeal from the Information Commissioner

28 Section 85 of the FOI Act creates a right of appeal to this court 'on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application'. The FOI Act aptly uses the description 'review proceedings' to describe the proceedings brought under s 85: see s 88 FOI Act. In the context of a similar provision concerning appeals from decisions made under s 50(4) of the *Freedom of Information Act 1982* (Vic), French CJ, Gummow and Bell JJ explained in ***Osland v Secretary to the Department of Justice*** [2010] HCA 24; (2010) 241 CLR 320, 331 - 332 [18] (***Osland*** [2010]) that '[d]espite the description of proceedings under the section as an "appeal", it confers original not appellate jurisdiction; the proceedings are "in the nature of judicial review"'. See also ***Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue*** [2001] HCA 49; (2001) 207 CLR 72, 79 [15] (Gaudron, Gummow, Hayne & Callinan JJ).

29 In ***Osland*** [2010], French CJ, Gummow and Bell JJ explained that the powers of an appellate court in these 'appeals' must be exercised with restraint; otherwise 'a question of law would open the door to an appeal by way of rehearing' (333) [20]. The reference to 'restraint' is a shorthand description of the principles of restraint which underlie judicial review proceedings generally. Those principles have been described as 'well settled': ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (272) (Brennan CJ, Toohey, McHugh & Gummow JJ). They include principles that a court should not be 'concerned with looseness in the language ... nor with unhappy phrasing' of the decision-maker, and that the reasons for the decision under review should not be 'construed minutely and finely with an eye keenly attuned to the perception of error': ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (272) (Brennan CJ, Toohey, McHugh & Gummow JJ); ***Collector of Customs v Pozzolanic Enterprises Pty Ltd*** [1993] FCA 456; (1993) 43 FCR 280, 287 (Neaves, French & Cooper JJ).

30 The ultimate foundation of these principles may be the statute which itself creates the review proceedings. As McKechnie J observed in ***Health Department of Western Australia v Australian Medical Association Ltd*** [1999] WASCA 269 [76], in an administrative decision

of this nature, 'Parliament has principally entrusted that task to the [Information] Commissioner'.

The grounds of appeal

31 This appeal is brought under s 85 of the FOI Act. That section permits appeals to the Supreme Court on any question of law arising out of any decision of the Information Commissioner on a complaint relating to an access application. Possible orders on an appeal from a decision of the Information Commissioner are provided in s 87. They are confirming the decision; varying the decision; setting aside the decision and making a new decision in substitution; or setting aside the decision and remitting the matter to the Information Commissioner.

32 If it is established that a document is an exempt document then the Supreme Court does not have power to order that access be provided to the document: s 87(3).

33 The grounds of appeal raised by Apache are as follows:

> 1. The Information Commissioner made findings that were not open on the material before the Information Commissioner, namely, that:
>
> 1.1 Document 1 did not contain material of commercial value to the Appellant;
>
> 1.2 ~~the commercial value to the Appellant of the material in Documents 3, 4, 4A and 9 could not reasonably be expected to be diminished by the release of those documents~~;
>
> 1.3 the Appellant would be likely to continue to use Documents 3, 4, 4A and 9 after they were released; ~~and~~
>
> 1.4 ~~a distinction can be drawn between the two categories of information contained in Documents 1, 3, 4, 4A and 9 as outlined in paragraph 170 of the Information Commissioner's decision~~.
>
> 2. The Information Commissioner misconstrued clause 4(2)(a) of Schedule 1 to the Freedom of Information Act 1992 and thereby failed to ask and answer an essential question - namely, whether the information in Document 1 had a current commercial value to the Appellant.
>
> 3. The Information Commissioner misconstrued clauses 4(2)(a) and 4(2)(b) of Schedule 1 to the Freedom of Information Act 1992 and thereby failed to ask and answer an essential question - namely:

3.1 whether, although Documents 1, 3, 4, 4A and 9 contained some information that was publicly available, the compilation of the information in those documents had a commercial value to the Appellant; and

3.2 if so, whether disclosure of each compilation could reasonably be expected to diminish that commercial value.

4. The Information Commissioner misconstrued the phrase 'could reasonably be expected', as used in clauses 4(2)(b), 4(3)(b) and 5(1) of Schedule 1 to the Freedom of Information Act 1992, and thereby wrongly required the Appellant:

4.1 to establish on the balance of probabilities the matters necessary to satisfy that part of the test for exemption prescribed by each of those clauses;

4.2 under cl 4(2)(b), to satisfy the Commissioner that the relevant documents contained sufficient detail that would enable competitors to enhance their operations;

4.3 under cl 4(3)(b), to satisfy the Commissioner how the Appellant's competitive position would be significantly impacted by the release of relevant documents;

4.4 under cl 4(3)(b), to satisfy the Commissioner how the Appellant would suffer the adverse effects that it argued it could suffer by the release of relevant documents; and

4.5 under cl 5(1)(g), to satisfy the Commissioner that the maintenance or enforcement of a lawful measure for protecting public safety would be prejudiced by the release of relevant documents.

5. The Information Commissioner misconstrued clause 4(3)(b) of Schedule 1 to the Freedom of Information Act 1992, by finding that the steps that the Appellant might take to correct any misinformation arising from use of the released documents would counteract the adverse effect that disclosure of information about the Appellant's business affairs could reasonably be expected to have on those affairs.

6. The Information Commissioner misconstrued clauses 5(1)(e) and 5(1)(f) of Schedule 1 to the Freedom of Information Act 1992 and thereby wrongly required the Appellant to establish that particular harm or consequences would follow from the release of Documents 1 3,4, 4A, and 9.

7. The Information Commissioner misconstrued clause 5(1)(g) of Schedule 1 to the Freedom of Information Act 1992 and thereby:

7.1 wrongly confined clause 5(1)(g) to safeguarding lawful measures put in place to protect public safety from violations of the law or breaches of the peace;

7.2 wrongly failed to ask and answer a question posed by clause 5(1)(g) - namely, whether restricting access to the information contained in the documents was a 'lawful measure for protecting public safety'; and

7.3 perversely concluded that the measure of restricting access to the information would remain in place even though the relevant documents were released.

8. The Information Commissioner failed to observe the requirements of s 70 of the Freedom of Information Act 1992, by failing to allow the Appellant an opportunity to make oral submissions or present expert evidence to the Information Commissioner and thereby:

8.1 failed to observe the requirement to give the Appellant a reasonable opportunity to make submissions to the Information Commissioner; and

8.2 failed to afford the Appellant procedural fairness.

The grounds of appeal which were abandoned are struck through above.

34 The remaining grounds of appeal can be collected into the four groups below.

(1) Appeal ground 4: did the Information Commissioner misconstrue the phrase 'could reasonably be expected' in cl 4(2)(b), cl 4(3)(b) and cl 5(1) of sch 1 to the FOI Act?

(2) Appeal ground 1: did the Information Commissioner reach conclusions that cannot be sustained on the material that was before him?

(3) Appeal grounds 2, 3, 5, 6, 7: did the Information Commissioner otherwise misconstrue the FOI Act?

(4) Appeal ground 8: did the Information Commissioner fail to observe the requirements of procedural fairness?

Appeal ground 4: did the Information Commissioner misconstrue the phrase 'could reasonably be expected' in cl 4(2)(b), cl 4(3)(b) and cl 5(1) of sch 1 to the FOI Act?

35 The appeal grounds in this group are grounds 4.1, 4.2, 4.3, 4.4 and 4.5. They raise similar, although not identical, issues. One core issue was whether the Information Commissioner erred in the way that he approached the phrase 'could reasonably be expected to' in each of cl 4(2)(b), cl 4(3)(b), and cl 5(1) of sch 1 to the FOI Act. Each of those clauses provides that matter is exempt matter if its disclosure 'could reasonably be expected to' have an effect referred to in each of those subsections. The issue which arises from the Information Commissioner's reasons is whether he applied the correct test in relation to that phrase.

36 In making the submission that the Information Commissioner erred in his approach to the phrase 'could reasonably be expected to', senior counsel for Apache relied heavily upon the decision of the Full Federal Court in ***Attorney-General's Department & Australian Iron and Steel Pty Ltd v Cockcroft*** (1986) 10 FCR 180.

37 In ***Cockcroft***, Australian Iron and Steel Pty Ltd had provided information to the National Committee on Discrimination in Employment and Occupation. The information was provided on a confidential basis and it included the reasons why Australian Iron and Steel Pty Ltd had not employed Mr Cockcroft. Access to the documents was sought by Mr Cockcroft under the *Freedom of Information Act 1982* (Cth).

38 One basis upon which the appellants claimed that the documents were exempt from disclosure was by relying upon s 43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth). In broad terms, s 43 provided that a document was an exempt document if its disclosure would disclose particular information, the disclosure of which 'could reasonably be expected to prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law of the Commonwealth ... or the administration of matters administered by an agency'.

39 The Administrative Appeals Tribunal rejected the appellants' arguments that various documents were exempt within this subsection. Access was granted to those documents.

40 One aspect of the appeal to the Full Federal Court in ***Cockcroft*** was based on a submission that the Administrative Appeals Tribunal had erred in its approach to the words 'could reasonably be expected to'. Bowen CJ

and Beaumont J explained that the tribunal had said that the phrase 'means whether it is more probable than not, looked at from an objective point of view, that the consequences will follow' (189). Their Honours held that this was an error by the tribunal (190):

> In our opinion, in the present context, the words 'could reasonably be expected to prejudice the future supply of information' were intended to receive their ordinary meaning. That is to say, they require a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect that those who would otherwise supply information of the prescribed kind to the Commonwealth or any agency would decline to do so if the document in question were disclosed under the Act. It is undesirable to attempt any paraphrase of these words. In particular, it is undesirable to consider the operation of the provision in terms of probabilities or possibilities or the like ... [to do so] is, in our view, to place an unwarranted gloss upon the relatively plain words of the Act. It is preferable to confine the inquiry to whether the expectation claimed was reasonably based.

41 Their Honours concluded, therefore, that by departing from the terms of the section ('could reasonably be expected to') and requiring the appellants to establish a case on the balance of probabilities, the majority of the tribunal had erred. In a separate judgment, Sheppard J agreed that the appeal should be allowed. His Honour also considered that it is unwise to overanalyse a provision such as s 43(1)(c)(ii) and that there are dangers in attempting to gloss the words of the section (194). But he nevertheless suggested that the words meant that the decision-maker had to have 'real and substantial grounds' for the expectation, so that a balance of probabilities approach was incorrect (196).

42 It was common ground that the approach taken in ***Cockcroft*** was the approach which the Information Commissioner should have followed. That common ground is correct. In ***Searle Australia Pty Ltd v Public Interest Advocacy Centre*** [1992] FCA 241; (1992) 36 FCR 111, 123 the Full Court of the Federal Court approved the decision in ***Cockcroft*** and said of the words 'could reasonably be expected' that they 'meant what they said'.

43 ***Cockcroft*** was also followed in this court in ***Manly v Ministry of Premier & Cabinet*** (1995) 14 WAR 550**.** In ***Manly***, Owen J held that cl 4(3)(b) of the FOI Act did not require the decision-maker to conclude on the balance of probabilities that disclosure could have a particular adverse effect. His Honour followed Sheppard J from ***Cockcroft*** and held that the material before the decision-maker needed to be persuasive in the

sense that 'it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker' (573).

44 As Owen J said in ***Manly*** (573), and the Full Court of the Federal Court said in ***Searle*** (123), there is no necessary inconsistency between the approach taken in ***Cockcroft*** by Bowen CJ and Beaumont J and the paraphrase of the legislation by Sheppard J in the same case. The same is true of the paraphrase of the legislation in ***Centrelink v Dykstra*** [2002] FCA 1442 [26], 'a realistic and material possibility'.

45 Counsel for Apache properly accepted that no error would arise from a decision based on such paraphrases as 'realistic and material possibility' (ts 90). However, it would be more accurate to focus upon the words of the statute ('could reasonably be expected to') rather than a paraphrase of those words ('real and substantial grounds'; 'realistic or material possibility'). The words of the statute are at least as clear as those potential pleonasms. It will 'seldom be helpful, and it will often be misleading, to adopt some paraphrase of [statutory words]': ***McKinnon v Secretary, Department of Treasury*** [2006] HCA 45; (2006) 228 CLR 423, 445 [60] (Hayne J referring to a paraphrase of 'reasonable grounds' as 'not irrational, absurd or ridiculous').

46 Apache's submission was that the Information Commissioner erred in his approach to the phrase 'could reasonably be expected'. Apache said that the Information Commissioner's approach was not a minor rephrasing but a substantive error concerning the standard of proof. Apache referred to several passages in the Information Commissioner's substantial reasoning on this issue. In particular, Apache focussed upon the Information Commissioner's consideration of the decision of this court in ***Police Force of Western Australia v Winterton*** (Unreported, WASC, Library No 970646, 27 November 1997) and upon [93] of the Information Commissioner's reasons.

47 In ***Winterton***, Scott J considered the standard of proof in relation to cl 5(1)(b) of sch 1 of the FOI Act. In a passage quoted by the Information Commissioner, Scott J referred to the decision of Bowen CJ and Beaumont J in ***Cockcroft*** and said:

> With respect to their Honours, for my part, I can see no other sensible meaning for the words 'could reasonably be expected to' than to conclude that the intention of Parliament was that the standard of proof should be that it was more likely than not that such was the case. In any event, whether that view is correct or not, the Western Australian provisions, are different to the Commonwealth Act in that the Commonwealth Act

> expressly refers to 'prejudice' in relation to the future supply of information. The Western Australian *FOI Act* has no equivalent provision so that the reasoning referred to by Bowen CJ and Beaumont J in ***Attorney General's Department v Cockroft*** does not apply to the case presently under consideration. I am therefore of the view that for the purposes of the relevant clause in the Western Australian *FOI Act*, the standard is the balance of probabilities so that the appellant has to establish that it is more likely than not that the documents come within the exemption (12).

48 The Information Commissioner was placed in a dilemma. The reasoning of Scott J in ***Winterton***, if read literally, appears to be very similar to the type of reasoning which the Full Federal Court in ***Cockcroft*** had held to be erroneous. Apache's ground of appeal 4.1 therefore asserted also that the Information Commissioner had applied an approach which 'required Apache to establish on the balance of probabilities the matters necessary to satisfy that part of the test for exemption prescribed by each of those clauses'.

49 The conclusion reached by the Information Commissioner in relation to the ***Winterton*** decision was to separate the standard of proof into what he described as two 'limbs', namely that (1) a person must prove on the balance of probabilities, and (2) that a certain outcome could reasonably be expected [93]. As a matter of epistemic modal logic it is arguable that this approach was correct. In other words, it might be said that the Information Commissioner needed to be satisfied that a certain outcome could reasonably be expected. If the Information Commissioner thought that, on balance (ie on the balance of probabilities), he did not reasonably expect the outcome then it might be said that the statutory test has been applied.

50 But, whatever the position in strict logic, to speak of two different standards of proof is apt to confuse and to mislead: ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (282 - 283) (Brennan CJ, Toohey, McHugh & Gummow JJ). The best approach to provisions such as cl 4(2)(b) is simply to ask whether disclosure 'could reasonably be expected to' have the relevant effect.

51 Although the Information Commissioner's attempt to reconcile ***Winterton*** with ***Cockcroft*** might have had the potential to lead to error, it is essential to consider the reasoning of the Information Commissioner on this point as a whole. Without a consideration of the remainder of the Information Commissioner's reasons concerning the phrase 'could reasonably be expected to', the submissions by Apache take on a hew of a

minute construction 'with an eye keenly attuned to the perception of error' (above at [29]).

52 The Information Commissioner first addressed the phrase 'could reasonably be expected' in his consideration of cl 4(2)(b) of sch 1 of the FOI Act, which began at [83]. Apache did not, and could not, dispute that there were a number of passages in that section of the reasons in which the Information Commissioner took an approach to the phrase which was correct. These were as follows.

(a) In the heading immediately before [83] the Information Commissioner correctly set out the requirement that 'disclosure [could] reasonably be expected to destroy or diminish the [sic that] commercial value' to which reference is made in cl 4(2)(a).

(b) At [83], the Information Commissioner then correctly set out the test again.

(c) At [84], the Information Commissioner accurately described the decision in ***Cockcroft*** that the words 'could reasonably be expected' should bear their ordinary meaning.

(d) At [85], the Information Commissioner referred to the decision of Owen J in ***Manly*** that 'could reasonably be expected' does not have to amount to proof on the balance of probabilities but that evidence in support must be 'persuasive in the sense that it is based on real and substantial grounds'.

(e) At [94], the Information Commissioner repeated the observations of Owen J in ***Manly*** and described the case as 'the most instructively expressed precedent'.

(f) At [102], the Information Commissioner described as speculative, Apache's claim that detailed descriptions contained in the Documents could be adapted and adopted by its competitors to enhance their own operations. The Information Commissioner described the claims as being 'that the disclosure of the Information could reasonably be expected to destroy or diminish its commercial value'.

(g) At [105], the Information Commissioner referred to Apache's submission relating to its costs in creating the Documents and concluded that he was not persuaded that 'disclosure could

reasonably be expected to destroy or diminish any commercial value in [the Documents]'.

(h) At [106], the Information Commissioner concluded that Apache had not satisfied the requirements of cl 4(2)(b) in relation to Documents 3, 4, 4A, and 9.

53 Considered in light of [52](a) - (h) above, [87] - [93] of the Information Commissioner's reasons in relation to the ***Winterton*** decision do not disclose that the Information Commissioner applied the wrong legal test. Rather, the Information Commissioner started with the words of the legislation as the test of 'could reasonably be expected to'; he referred to the decision of ***Cockcroft*** with approval; immediately after his discussion of ***Winterton*** he explained that he was proceeding on the basis 'most instructively expressed' by Owen J in ***Manly*** (which, it was common ground in this appeal, was the correct approach); and he concluded by applying a test in terms of the words of the legislation.

54 The approach taken by the Information Commissioner to cl 4(2)(b) of sch 1 to the FOI Act was not in error. For the same reasons, the Information Commissioner did not err in his approach to cl 4(3)(b), and cl 5(1) of sch 1, despite his references to those clauses in his discussion of the ***Winterton*** decision.

55 Finally, the correct test of 'could reasonably be expected to' was applied in relation to cl 4(3)(b) at [123] and [129]. The correct test of 'could reasonably be expected to' was applied in relation to cl 5(1)(e) and cl 5(1)(f) at [162], [169] and [170]. This further reinforces the conclusion that the Information Commissioner's discussion of the ***Winterton*** decision did not lead him to apply a test of balance of probabilities as ground 4.1 asserts, or lead him otherwise into an erroneous application of the statutory test. I consider a point made in relation to cl 5(1)(g) separately below.

56 I reject ground 4.1.

57 Ground 4.2 asserts a separate, but related, error in relation to cl 4(2)(b). In relation to that clause, Apache had submitted before the Information Commissioner that disclosure of the Documents would reveal information that has a commercial value to Apache (cl 4(2)(a)) and that disclosure could reasonably be expected to destroy or diminish that commercial value (cl 4(2)(b)).

58 At [54](a) - (g), the Information Commissioner summarised the reasons for Apache's submission that disclosure of the Documents could reasonably be expected to destroy or diminish their commercial value. Those submissions broadly referred to a number of ways in which competitors could use various information (see [50](d)) about the Varanus Island facilities to 'enhance their operations' (ground 4.2). The Information Commissioner considered these matters raised in Apache's submission but rejected them.

59 Apache argued that the Information Commissioner applied the wrong test in his rejection of these submissions in relation to cl 4(2)(b) because in considering some of Apache's submissions the Information Commissioner did not use the phrase 'could reasonably be expected to'. Apache pointed to a reference where the Information Commissioner said that disclosure would not diminish the commercial value of the relevant Documents because 'such disclosure *would not* harm the Varanus Island operations' [99] (emphasis added). Further, at [100] - [103], the Information Commissioner explained that Apache had only made assertions that the relevant information was part of its competitive advantage [101], and concluded that he was '*not satisfied* that those documents contain sufficient detail to enable competitors to enhance their own operations' [102] (emphasis added).

60 The Information Commissioner's primary point was that Apache had not identified any evidence to support its assertions that cl 4(2)(b) was satisfied. This complaint was repeated at [104], 'again, I consider that to be merely speculative'.

61 It would have been preferable if the Information Commissioner had used the modal auxiliary verb 'could' rather than 'would' in [99]. It would also have been preferable if the Information Commissioner had explained (again) in [101] that he was applying a test of 'could reasonably be expected to'. But, to reiterate my comments above (see [51]), these infelicities in the language used by the Information Commissioner must be read in light of his reasons as a whole. They should not be read with eyes searching for error.

62 Paragraph 52(a) - (h) above sets out the reasons why the Information Commissioner was applying a 'could reasonably be expected to' test in the context of cl 4(2)(b). His accuracy on these other occasions is a reason not to infer error due to infelicities in language in this section of his reasons. But, in addition, the Information Commissioner's consideration of cl 4(2)(b) proceeded in the following manner.

(a) He summarised the submissions as involving a claim that disclosure 'could reasonably be expected to destroy or diminish their commercial value': [54].

(b) He introduced his discussion of the arguments by reference to the test of 'could reasonably be expected': [94].

(c) He emphasised that cl 4(2)(b) uses the less onerous word 'could' in 'could reasonably be expected' than the word 'would' in cl 4(2)(a): [95].

(d) In relation to various of the arguments, he iterated, and reiterated, the cl 4(2)(b) test of 'could reasonably be expected to': [101], [105].

63 A passage which is directly applicable here is the comment in the joint judgment of Brennan CJ, Toohey, McHugh and Gummow JJ in ***Minister for Immigration and Ethnic Affairs v Wu Shan Liang*** (271). After approving of a statement by the Full Court that the decision-maker had been aware of the correct test to apply, and that her reasons 'are entitled to a beneficial construction' the joint judgment said this:

> In other words, the delegate starts and finishes with the correct test; it is only some phraseology in between which provides the basis for a conclusion that she had slipped from an assessment of real chance to an assessment of balance of probabilities.

64 So too with this case. I reject ground 4.2.

65 Grounds 4.3 and 4.4 are, again, concerned with an infelicity in the language used by the Information Commissioner. This time, the focus is on the reasons of the Information Commissioner concerning cl 4(3)(b).

66 In relation to cl 4(3)(b), Apache submitted that the disclosure of the Documents could reasonably be expected to have an adverse effect on Apache's business affairs for a number of reasons [113]. One of those reasons was that disclosure of information concerning Apache's confidential operational procedures and facility status has the potential 'to significantly impact' upon Apache's competitive position [113](b).

67 The Information Commissioner responded to this submission by Apache concerning significant impact at [121]. In that paragraph the Information Commissioner referred to the submission and then said that

> Apache provided me with examples of ways in which its business affairs could be adversely affected by the disclosure of the disputed documents

> but has not explained to me exactly how the disclosure of any particular information in the documents would have the adverse effects claimed.

The Information Commissioner then concluded at [122] that he was not satisfied that the disclosure of the Documents or any particular information in the Documents 'could reasonably be expected to have the adverse effects claimed'.

68 Ground 4.3 is a complaint by Apache that the Information Commissioner required Apache to show that its competitive position would be 'significantly impacted' by the release of the relevant Documents.

69 The Information Commissioner did not require Apache to show this at all. The reference to 'significant impact' was a reference to the submissions made by Apache. In other words, Apache's complaint in this ground of appeal is not even to an infelicity in the language used by the Information Commissioner but to the language used by Apache itself. The conclusion by the Information Commissioner at [122] states the test in cl 4(3)(b) accurately and is irrefragable.

70 As to ground 4.4, Apache focused on the reference by the Information Commissioner, in [121], to Apache's failure to explain how the disclosure of the disputed Documents *would have* the adverse effects claimed. Again, Apache pointed to the failure of the Information Commissioner to use the modal auxiliary verb 'could' rather than 'would'.

71 It is noteworthy that in Apache's written submissions of 25 June 2010 to the Information Commissioner, it was suggested that the disclosure of the Documents '*would,* or could reasonably be expected to, have an adverse effect on those [business] affairs' (par 3.5(a)) (emphasis added). It appears that the reference to 'would' in the Information Commissioner's reasons was in response to the submissions from Apache.

72 In any event, the reference to 'would' by the Information Commissioner needs to be considered in light of his reasons as a whole. The Information Commissioner clearly said at [95] that cl 4(3)(b) required a lower standard of 'could'. The Information Commissioner used a heading immediately above [117], in relation to this point about cl 4(3)(b), entitled 'Could disclosure reasonably be expected to have an adverse effect on the business affairs of Apache?'. And, most importantly, in [122], where the Information Commissioner set out his conclusions on cl 4(3)(b), he applied the 'could reasonably be expected to' test from cl 4(3)(b).

73 Grounds 4.3 and 4.4 are rejected.

74 Ground 4.5 is concerned with cl 5(1)(g). Apache had submitted that the Documents contained exempt matter under this clause because disclosure could reasonably be expected to prejudice the maintenance or enforcement of a lawful measure for protecting public safety. Ground 4.5 focussed, once again, upon the use of the word 'would' in one paragraph of the Information Commissioner's reasons [177], this time in relation to cl 5(1)(g). After reciting Apache's argument in relation to cl 5(1)(g), the Information Commissioner concluded in that paragraph that he did 'not consider that the maintenance or enforcement of those measures *would* be prejudiced' (emphasis added).

75 Once again, this single inaccuracy needs to be read in context. There are three reasons why, in its proper context, the use of 'would' rather than 'could reasonably be expected to' does not mean that the Information Commissioner erred in his approach to the subclause.

76 First, Apache did not make any submissions specifically concerning cl 5(1)(g). Rather, as the Information Commissioner remarked in his reasons, Apache repeated several of its submissions in respect of cl 5(1)(e) and cl 5(1)(f) and said that those submissions applied to cl 5(1)(g): [172]. The alleged flaws in his reasoning in relation to cl 5(1)(g) should therefore be read in light of the Information Commissioner's approach to cl 5(1)(e) and cl 5(1)(f). The Information Commissioner applied the correct test of 'could reasonably be expected to' in relation to cl 5(1)(e) and cl 5(1)(f) at [162], [169] - [170].

77 Secondly, in the concluding sentence of [177], the Information Commissioner turned his attention directly to cl 5(1)(g) and held that the Documents were not exempt under that subclause. The Information Commissioner had earlier emphasised that in cl 5(1)(e) and cl 5(1)(f) the word 'would' is not the same standard as 'could reasonably be expected': [95].

78 Thirdly, in the section of his reasons which I have discussed above at [52] - [55], the Information Commissioner focused on the meaning of 'could reasonably be expected to' in clauses which included cl 5(1) generally. Any alleged error in his discussion of cl 5(1)(g) must be read in light of the clear view expressed earlier by the Information Commissioner that cl 5(1) required consideration of the phrase 'could reasonably be expected to': see, for instance [85], [95].

79 I dismiss ground 4.5.

Appeal ground 1: did the Information Commissioner reach conclusions that cannot be sustained on the material that was before him?

80 These issues concern grounds of appeal which allege errors of law by the Information Commissioner in reaching conclusions which could not be sustained on the material before him.

81 It was once thought that the threshold for a successful claim based on this 'no evidence' type ground of review was not satisfied even if the conclusions drawn from the evidence were 'demonstrably unsound' or a 'faulty (eg illogical) inference of fact': ***R v District Court of Sydney; Ex parte White*** (1966) 116 CLR 644, 654 (Menzies J). It was also said that there will be no error of law provided that conclusions are 'barely conceivable' on the relevant material: ***Holland v Federal Commissioner of Taxation*** [1999] FCA 1125; (1999) 42 ATR 418, 419 [7] (Lee J).

82 Although the threshold remains high, more recent authorities may have liberalised the test. The approach which is now to be applied is whether conclusions reached are 'irrational, illogical, and not based on findings or inferences of fact supported by logical grounds': ***Minister for Immigration and Multicultural and Indigenous Affairs v SGLB*** [2004] HCA 32; (2004) 207 ALR 12; (2004) 78 ALJR 992, 998 [38] (Gummow & Hayne JJ); see also ***Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002*** [2003] HCA 30; (2003) 77 ALJR 1165, 1175 [52] (McHugh & Gummow JJ). It may be that there is now a close association between this 'no evidence' ground and the ground of review which is usually described as *Wednesbury* unreasonableness: see ***Australian Broadcasting Tribunal v Bond*** [1990] HCA 33; (1990) 170 CLR 321, 359 (Mason CJ).

83 Grounds of appeal 1.2 and 1.4 which concerned these issues were abandoned (ts 115, 128). There were two remaining grounds of appeal brought by Apache from findings by the Information Commissioner. I deal with each of these in turn.

84 The first ground of appeal concerns the finding by the Information Commissioner that Document 1 did not contain material 'that has a commercial value' to Apache: FOI Act, sch 1, cl 4(2)(a); ground of appeal 1.1.

85 Essentially, the argument of Apache on this ground of appeal was that the Information Commissioner erroneously reasoned that the information no longer had a commercial value because it was contained in Document 1 which had been superseded by Document 3: Information

Commissioner's reasons [66] - [67], [82]. Apache says that the superseded Document still contained information which was largely current and which had commercial value.

86 The submission by Apache was essentially a simple syllogism: Document 3 has commercial value; Document 3 replicated Document 1; therefore Document 1 has commercial value. There is an obvious flaw in this syllogism. If the commercial value in Document 3 related only to its use, and not to the content of the information itself, then Document 1 would have no commercial value once it was no longer in use. This was essentially the finding of the Information Commissioner.

87 The reasoning of the Information Commissioner in relation to this point is set out from [55] - [82]. The Information Commissioner explained that Apache's submission was that the commercial value resides in *both* the operational nature of the Documents, as well as the information (defined at [50](d)) contained in the Documents [64]. However, the Information Commissioner concluded that the commercial value of Document 3 was *only* in its operational value; there was nothing in the underlying information which was itself of commercial value. The Information Commissioner explained that his view might have been different if Apache had been able to persuade him that the Safety Case documents 'contain[ed] some novel approach or particular process, strategy or matter that a competitor could use to achieve better results or a more cost-efficient process' [79]. But that information was never provided by Apache.

88 The Information Commissioner gave two examples which illustrated the distinction he drew between information which was valuable because it was operational and information which was valuable because of its content. Both examples were drawn from Apache's submissions. The first example was that Document 3 would have commercial value because it would be included in any sale of Varanus Island assets as a current operational document, required for the functioning of the facilities. But, that commercial 'operational' value was independent of the value of the information in the underlying Documents because the operational value would remain even if the Documents were in the public domain [80].

89 The second example given by the Information Commissioner was in response to a submission by Apache giving an analogy of a top ten client list which was superseded by a new list containing the same names but updated phone numbers. The Information Commissioner explained that the analogy was inapt because the clients' names have commercial value

due to the importance of the information to the profitability or viability of the business. But that is not the case in relation to Document 3 [67]. Again, the point being made by the Information Commissioner was that the commercial value of Document 3 was only in its operational use. The value was not in the content of the underlying information. Hence, the replication of any content from Document 1 (which was not operational) had commercial value in Document 3 only in its operational use.

90 The conclusion that Document 3 was a document with commercial value, but that Document 1 was not, was open to the Information Commissioner. His 27 paragraphs of reasons on this point were a principled justification for his conclusion.

91 Ground 1.1 is dismissed.

92 Ground of appeal 1.3 concerns the finding in relation to Documents 3, 4, 4A and 9 that Apache would be likely to continue to use those Documents after they were released, so that disclosure could not 'reasonably be expected to destroy or diminish that commercial value': FOI Act, sch 1, cl 4(2)(b); ground of appeal 1.3.

93 Apache had submitted to the Information Commissioner that it had incurred significant costs in creating the Documents and that those costs would be lost, and commercial value in the Documents would be destroyed or diminished, if the Documents were disclosed. The Information Commissioner rejected this argument at [105] - [106], saying that he was not persuaded that disclosure could reasonably be expected to destroy or diminish the commercial value in the Documents because 'Apache would still use, for example, the SMS [safety management system] at each of its owned and operated facilities' [105].

94 The submission on appeal by Apache was essentially that there was no probative material before the Information Commissioner to support his conclusion that Apache was likely to continue to use those Documents after they were released.

95 As with the previous ground of appeal, the 'no evidence' ground upon which this submission was based has a high threshold: see above [82].

96 I consider that there was probative material upon which the Information Commissioner could have reached the conclusion that Apache would continue to use documents, such as the SMS, and that his conclusion was reasonable. The following reasoning of the Information

Commissioner, itself based on probative material, supported his conclusion.

(a) The Information Commissioner had concluded that the only commercial value in the Documents was their operational value (including copyright), not any value in the subject matter of the information itself, such as unique operational methods or novel approaches: [81].

(b) The Information Commissioner also explained that a 'good deal of the material' in Documents 3, 4, 4A, and 9 is 'very site-specific': [98].

(c) The Information Commissioner reiterated that the commercial value in those Documents lies in the *operation* of particular facilities: [98]. Further, the processing facilities on Varanus Island are typical of Apache's competitors' facilities in the North West Shelf region, and the basic process by which oil and gas are extracted and processed is generally common to all such facilities: [100]. This latter fact was not disputed by Apache (ts 100).

97 Each of these matters emphasises the significance of the Documents in an *operational* sense only rather than in relation to any uniqueness in subject matter. Each therefore provides probative support for the conclusion of the Information Commissioner that Apache would continue to use documents such as the SMS in its operations even if the Documents were disclosed.

98 I would dismiss ground 1.3.

Appeal grounds 2, 3, 5, 6, 7: did the Information Commissioner otherwise misconstrue the FOI Act?

99 These five grounds of appeal raise the question whether the Information Commissioner misconstrued various provisions of the FOI Act. Each of these grounds are considered in turn below.

100 Ground of appeal 2 alleges that the Information Commissioner failed to ask, and answer, the question whether the information in Document 1 had a current commercial value to Apache.

101 The question raised by cl 4(2)(a) is whether disclosure of the matter would reveal information that has a commercial value to a person. The Information Commissioner concluded at [82] that the requirements of

cl 4(2)(a) of sch 1 of the FOI Act were not satisfied in relation to Document 1. Hence, Document 1 could not be exempt under cl 4(2) of sch 1.

102 In ***Re Sitel Australia Pty Ltd and Employment Advocate*** [2005] AATA 617; (2005) 40 AAR 552, 561 [49], the Senior Member of the Administrative Appeals Tribunal considered the meaning of 'information having a commercial value' in s 43 of the *Freedom of Information Act 1982* (Cth). The Senior Member suggested that the term 'commercial value' has two meanings: (1) if it is valuable for the purposes of carrying on a commercial activity in which the entity is engaged; and (2) if a genuine arms-length buyer is prepared to pay to obtain the information.

103 There is always a danger in attempting to provide a complete factual taxonomy of the circumstances which fall within a statutory term, especially one as broad as 'commercial value to a person'. However, it was common ground that these two senses were an appropriate description of 'commercial value'. They approximate the well known economic division between value in use and value in exchange: Adam Smith, *The Wealth of Nations* (1998 reprint) 34.

104 Senior counsel for Apache submitted that the Information Commissioner had failed to address commercial value in either of the senses described in ***Re Sitel*** and had not reached any conclusion concerning whether the information in Document 1 had a commercial value.

105 This ground of appeal can be dealt with simply. First, the Information Commissioner directly addressed the senses in which information could be valuable at [55]. He described the two instances of commercial value which are set out in ***Re Sitel***. The Information Commissioner then addressed the two senses in which Apache submitted that the information in the Documents was commercially valuable; in the operational nature of the Documents and in the information itself: [64].

106 The Information Commissioner held (as Apache had conceded) that Document 1 had been superseded as an operational document: [66]. Hence, no commercial value could derive from a status of Document 1 as an operational document, since it was not of that status.

107 As for whether information in Document 1 could have commercial value apart from its (superseded) operational value, the Information Commissioner explained that his preliminary conclusion had been that the underlying information did not have commercial value: [67]. At

[68] - [81] the Information Commissioner then considered, and assessed, Apache's responses to his preliminary view and Apache's submissions why the information in the Documents had a commercial value. He concluded at [82] that Document 1 did not satisfy the requirements of cl 4(2)(a). The issue in cl 4(2)(a) is asked, and answered, by the Information Commissioner in relation to Document 1.

108 Appeal ground 2 is dismissed.

109 Ground of appeal 3 alleges that the Information Commissioner erred by failing to ask a relevant question concerning cl 4(2) of sch 1 of the FOI Act. The question which Apache said the Information Commissioner failed to ask was whether the *compilation* of information in the Documents had a commercial value to Apache and whether the disclosure of each compilation could reasonably be expected to be destroyed or diminished by disclosure.

110 At [62] the Information Commissioner concluded that information which is in the public domain has no commercial value that can be destroyed or diminished by disclosure. Hence, he held that the information which was in the public domain was not exempt from disclosure under cl 4(2) of sch 1.

111 The submission by Apache in the third ground of appeal was that it was not sufficient for the Information Commissioner to conclude that some of the information in the Documents was already in the public domain, because the *aggregation* of the information in those Documents was not in the public domain. The Information Commissioner should have asked whether the commercial value of the information *as a compilation* would be destroyed or diminished by disclosure.

112 There is no reference in cl 4(2) to a compilation of information as something of commercial value. In ***Searle*** the Full Court of the Federal Court described a submission which had been made to the Administrative Appeals Tribunal in relation to s 43(1)(b) of the *Freedom of Information Act 1982* (Cth). The Full Court quoted from the conclusions of the tribunal that this '"compilation" argument ... seeks to circumvent the application of that section and is contrary to the intention of the Act' (124). The Full Court of the Federal Court did not decide whether this conclusion was correct, although it did not cast any doubt on this conclusion of the tribunal either. The decision of the tribunal was overturned on a different point (the failure by the tribunal to make

findings concerning whether the nature of and techniques used in ***Searle's*** tests had commercial value).

113 I have doubt about the conclusion of the tribunal in ***Searle***, and the conclusion of the tribunal in ***Re Public Interest Advocacy Centre & Community Services (No 2)*** (1991) 23 ALD 714, 724, that a 'compilation argument' would circumvent freedom of information legislation. Clause 4(2)(a) provides that 'matter' is exempt matter if its disclosure would reveal 'information ... that has a commercial value to a person'. A compilation of material may have commercial value independent of the value of the individual parts of the material. When Samuel Johnson published *A Dictionary of the English Language* there was no value in any individual word, or perhaps even any individual entry, but the compilation was immensely valuable. It is, at least, arguable that such a compilation is 'information' independent of the information in any individual word or entry: compare ***Cox v Land & Water Journal Company*** (1869) LR 9 Eq 324, 332 (Sir Malins VC).

114 It is strongly arguable that disclosure of a compilation of publicly accessible material would be a disclosure of exempt matter within cl 4(2) unless (i) the disclosure of the compilation would not reveal any further information beyond the publicly available material; or (ii) unless the information revealed has no commercial value to a person; or (iii) unless the commercial value is not such that it could reasonably be expected to be destroyed or diminished by disclosure.

115 Although this was the first basis upon which Lander and Rogers resisted appeal ground 3, it is not necessary for me to decide this point because this ground of appeal fails for a different reason. Apache simply made no submission before the Information Commissioner that there was any value in publicly available information as a compilation.

116 Senior counsel for Apache submitted that it was the Information Commissioner who 'put this very argument into play' by concluding, consistently with the authorities, that information which is in the public domain has no value that can be destroyed or diminished by disclosure (ts 243). But the onus was upon Apache to satisfy the Information Commissioner that information in the Documents had a commercial value to a person which it could be reasonably expected would be destroyed or diminished by disclosure.

117 If Apache wanted to prove that there was some commercial value in the material as a compilation then it needed to adduce evidence and make

submissions on that point. Apache neither produced evidence, nor made submissions, on this compilation issue. The Information Commissioner did not make an error by failing to address evidence or submissions which were not before him.

118 Appeal ground 3 is dismissed.

119 Ground of appeal 5 concerns whether the Information Commissioner erred in relation to cl 4(3)(b) by treating the steps that Apache might take to correct any misinformation that might arise from the use of the released Documents as counteracting any adverse effect that disclosure of information about Apache's business affairs could reasonably be expected to have on those affairs.

120 Apache had submitted to the Information Commissioner that information in the Documents could reasonably be expected to have an adverse effect on Apache's business affairs because 'a significant risk exists of uninformed public debate taking place and misinformation spread regarding Apache safety facilities, systems, processes and procedures': Apache's 25 June 2010 submissions, par 3.5(b).

121 It might be thought that disclosure of this information would be likely to *reduce* the risk of uninformed public debate and misinformation rather than increase it. Further, a competitor 'bent on deception' could provide misinformation whether or not the Documents were disclosed: [104]. These were perhaps the reasons why the Information Commissioner requested specific details from Apache concerning how uninformed public debate or misinformation could occur as a result of disclosure.

122 As the Information Commissioner observed, although he requested Apache to provide specifics, Apache did not do so: [118]. The Information Commissioner was left with the assertion that disclosure of the Documents could somehow permit uninformed public debate and misinformation.

123 At [119] the Information Commissioner accepted that it is possible for any information or document to be taken out of context but said that he considered that it was open for Apache to correct any misinformation or to add the appropriate context through its website and media releases, as it has taken the opportunity to do on a number of occasions in the past.

124 Apache submitted that any steps that it could take to correct any misinformation are a matter of speculation and are irrelevant to the

question of whether disclosure of information about its business affairs could reasonably be expected to have an adverse effect on those affairs.

125 Once again, the conclusions of the Information Commissioner on this point must be taken in the context of the rest of his reasons. Apache had made a submission, which might be thought to be counterintuitive, that disclosure of information in the Documents could permit uninformed debate and misinformation. The Information Commissioner had requested specifics. He had received none. At [119], the Information Commissioner postulated that it was 'possible' for any information or document to be taken out of context (not that he had a reasonable expectation of that: see [104]) but, based on his finding of fact that Apache had corrected misinformation and added appropriate context in the past, he concluded that it was open for Apache to do so in the future. This was relevant to whether there could be a reasonable expectation of any adverse effect of disclosure on Apache's business affairs. And the Information Commissioner's conclusions of fact on this point were conclusions which were open to him.

126 Ground of appeal 5 is dismissed.

127 Ground of appeal 6 alleges that the Information Commissioner misconstrued cl 5(1)(e) and cl 5(1)(f) and erroneously required Apache to establish that a particular kind of harm or consequences would follow from the release of the Documents. It was submitted that the Information Commissioner ought only to have required Apache to establish that disclosure 'could reasonably be expected to endanger the life or physical safety of any person' or 'could reasonably be expected to endanger the security of any property' under those subclauses.

128 Apache's 25 June 2010 submissions commenced with argument concerning why, contrary to the Information Commissioner's preliminary view, the Documents were said to be exempt under cl 5(1)(e) and cl 5(1)(f) of sch 1. The submissions set out information in the Documents relevant to those clauses and the risks posed by the release of that information. The submissions were that the Documents contained matter the disclosure of which could reasonably be expected to endanger the life or physical safety of any person (cl 5(1)(e)) or could reasonably be expected to endanger the security of any property (cl 5(1)(f)).

129 The Information Commissioner set out the submissions and his consideration of cl 5(1)(e) and cl 5(1)(f) at [156] - [171]. Apache's ground of appeal 6 alleged that the Information Commissioner incorrectly

required Apache to prove that disclosure could reasonably be expected to cause the harm described in those clauses (harm to life or physical safety or harm to property) if disclosure occurred. Apache said that the Information Commissioner did not apply the statutory test of whether disclosure could reasonably be expected to *endanger* life or physical safety, or security of any property. Apache focussed particularly upon two paragraphs of the reasons of the Information Commissioner, [162] and [164].

130 At [162], the Information Commissioner said the following.

> Documents 1, 3, 4, 4A and 9 will be exempt under clauses 5(1)(e) and 5(1)(f) if their disclosure could reasonably be expected to cause the harm described in those provisions. I accept the Applicant's submission that, in the context of clause 5, whether disclosure of the documents in question could reasonably be expected to result in the harm claimed, is to be judged objectively in light of all relevant information.

131 At [164], the Information Commissioner said this:

> I accept that there are inherent dangers in working on and around Varanus Island and that any accidents, sabotage or attack on the Facilities could have potentially catastrophic consequences. However, the question for my consideration is whether those consequences to personnel and property could reasonably be expected from the disclosure of Documents 1, 3, 4, 4A and 9.

132 These paragraphs do not demonstrate that the Information Commissioner asked the wrong question in relation to cl 5(1)(e) or cl 5(1)(f). Once again, they must be put into context. That context includes the following matters.

(a) The Information Commissioner began his discussion of these subclauses by setting out the submissions in relation to them. On numerous occasions he referred to the requirement that disclosure could reasonably be expected to '*endanger*' life or physical safety of any person or security of any property: [157], [160(c)], [160(d)].

(b) The statement by the Information Commissioner in [162] to 'the harm described in those provisions' must be read together with the provisions to which he refers. Those provisions refer to the endangerment of any person's life or physical safety or endangerment of the security of any property. It is not an abuse of language to refer to this endangerment as a type of harm. In any event, there is no other harm described in those provisions.

(c) At [167], the Information Commissioner referred to whether the publicly available information in the Documents 'could reasonably be expected to have the *effects* claimed in clauses 5(1)(e) and 5(1)(f)' (emphasis added). The Information Commissioner was here referring to 'effects' (ie of endangerment) interchangeably with his earlier reference to 'harm'. Any objection to the use of the word 'harm' in [162] must be read together with the reference to 'effects' here.

(d) The passage to which Apache objects in [164] is prefaced by the words 'I accept that there are inherent *dangers*' (emphasis added).

(e) The reference in [164] to 'potentially catastrophic consequences' uses the same language that Apache used in its submission of 25 June 2010 at par 1.68. It appears to be a reference to Apache's submission. In any event, Apache was correct to direct the Information Commissioner's attention to possible consequences of disclosure, since that information could be relevant to an assessment of whether disclosure could reasonably be expected to endanger life or physical safety of any person or endanger the security of any property.

(f) At [169] the Information Commissioner concluded that some of the information in the Documents could, if disclosed, 'reasonably be expected to *endanger* the life or physical safety of persons and the security of Apache's property' (emphasis added). Here, Apache did not dispute that the Information Commissioner was applying the correct test.

(g) At [170], the Information Commissioner again referred to, and excluded from disclosure, information which 'could reasonably be expected to *endanger* the life or physical safety of any person or the security of any property' (emphasis added). Again, Apache does not dispute that this was a correct application of the test in cl 5(1)(e) and cl 5(1)(f).

Once [162] and [164] are read in context, the Information Commissioner did not misapply the test in cl 5(1)(e) or cl 5(1)(f) of sch 1 of the FOI Act.

133 For completeness, I should also address a further submission made by Apache concerning the Information Commissioner's verbal formulation of his findings at [170]. Apache's submission on this point was made as part of ground of appeal 1.4 which it abandoned. However, in oral submissions senior counsel for Apache referred to this verbal

formulation, although saying that the submission was only because 'it is related to the earlier paragraph, 164' (ts 123).

134 The complaint concerned the division by the Information Commissioner in [170] of the information in the Documents into two categories relevant to possible dangers. The first category was information relevant to gradual damage or natural events (corrosion, storms, earthquakes). The second category was information relating to instantaneous damage or malicious damage (eg fire or explosion). The distinction between these two categories was essentially a distinction between matters for which planning might be easier (gradual damage and natural events) and matters for which planning might be more difficult (instantaneous or malicious damage).

135 Senior counsel for Apache rightly pointed out that these categories do not derive from the provisions of sch 1 of the FOI Act. But it was not suggested, nor could it be suggested, by Apache that the Information Commissioner had erred in his finding of fact that disclosure of information relating to gradual damage or natural events could not reasonably be expected to endanger the life or physical safety of any person or the security of any property.

136 Appeal ground 6 is dismissed.

137 Ground 7 of the appeal concerns whether the Information Commissioner made errors of law in considering whether, under cl 5(1)(g) of sch 1 of the FOI Act, disclosure of information contained in the Documents could reasonably be expected to prejudice the maintenance or enforcement of a lawful measure for protecting public safety.

138 Before the Information Commissioner, Apache submitted that the Documents contained exempt matter within cl 5(1)(g) of sch 1 because disclosure of the matter in the Documents could reasonably be expected to prejudice the maintenance and enforcement of a lawful measure for protecting public safety. The lawful measure to protect public safety which Apache submitted would be prejudiced was its ability to restrict access to Varanus Island and to material describing the facilities on Varanus Island [177].

139 The Information Commissioner doubted whether 'Apache's ability to restrict access to the Facilities and/or information about the Facilities' could be described as a lawful measure for protecting public safety [177]. The Information Commissioner concluded that that maintenance or enforcement of those measures would not be prejudiced by disclosure of

the Documents because those measures would remain in place. He emphasised that unlike cl 5(1)(a), the provisions of cl 5(1)(g) do not refer to prejudice to the 'effectiveness' of the measures. Instead, cl 5(1)(g) refers to prejudice to the 'maintenance and enforcement' of measures (lawful measures for protecting public safety).

140 Apache submitted that the reasoning of the Information Commissioner in relation to cl 5(1)(g) is flawed for four reasons.

(1) The Information Commissioner took too narrow an approach to cl 5(1)(g) by confining the concept of 'public safety' in the phrase 'a lawful measure for protecting public safety' to 'safety from violations of the law or breaches of the peace': appeal ground 7.1.

(2) The Information Commissioner failed to answer the question of whether restricting access to the information was a 'lawful measure for protecting public safety': appeal ground 7.2.

(3) The Information Commissioner's reason for deciding that maintenance or enforcement of the measures would not be prejudiced - his reason that those measures would remain in place - does not answer the question whether maintenance or enforcement of the measures could reasonably be expected to be prejudiced: appeal ground 7.3.

(4) The Information Commissioner incorrectly used the words 'would be' rather than 'could reasonably be expected' in [177]: appeal ground 4.5. I have dealt with this point above at [74] - [79].

141 As to (1) (appeal ground 7.1), it was submitted by Apache that the Information Commissioner had relied on the decision of the Administrative Appeals Tribunal in ***Re Thies & Department of Aviation*** (1986) 9 ALD 454 in reaching his conclusion that cl 5(1)(g) 'is intended to safeguard lawful measures put in place to protect public safety from violations of the law or breaches of the peace'.

142 In ***Re Thies***, Captain Thies was piloting an aircraft when he received a message from his employer. The message was transmitted to him by radio from the Department of Aviation. A dispute arose between him and his employer about the content of the message. Captain Thies sought from the Department of Aviation copies of the transcript of that radio communication under the *Freedom of Information Act 1992* (Cth). One ground upon which the Department of Aviation resisted access was s 37(2)(c) of that Act which provided that a document is exempt from

disclosure if its disclosure 'would, or could reasonably be expected to, prejudice the maintenance or enforcement of lawful methods for the protection of public safety'. The Full Tribunal concluded that the transcript was not an exempt document, saying the following at [37]:

> In our view, Mr Cavanough [as his Honour then was] is correct; 'public safety' in s 37(2)(c) does not extend beyond safety from violations of the law and breaches of the peace. It does not extend to air travel safety, except to the extent that might be put at risk by such violations or breaches. Possibly, if disclosure of the transcript would, or could reasonably be expected to, endanger the lives or the physical safety of passengers and crews of aircraft, it would be an exempt document under s 37(1)(c).

143 Senior counsel for Apache and senior counsel for Lander and Rogers made extensive submissions concerning the correctness of the decision in ***Re Thies.*** There are several (related) difficulties with the approach of the tribunal in ***Re Thies***. The first difficulty is that there is no obvious linguistic construction of cl 5(1)(g) which would permit the words 'public safety' in that subclause to be read as if they referred only to 'safety from violations of the law and breaches of the peace'.

144 The second difficulty is that the heading to cl 5 (which forms part of the relevant interpretative materials (*Interpretation Act 1984* (WA) s 19(1)) is 'Law enforcement, public safety and property security'. It does not suggest any limitation on the concept of public safety to safety only from violations of the law and breaches of the peace. The reference to law enforcement as a separate category suggests that 'public safety' should have a broader meaning than violations of the law and breaches of the peace.

145 The third difficulty is that cl 5(1)(a) and cl 5(1)(b) are concerned with situations where disclosure could reasonably be expected to impair or prejudice (respectively):

(i) the effectiveness of lawful methods and procedures in relation to contraventions or possible contraventions of the law (defined as a failure to comply with the law: cl 5(5)); or

(ii) investigations of a possible contravention of the law.

The words 'measure for protecting public safety' stand in contradistinction with the focus in cl 5(1)(a) and cl 5(1)(b) on law. This suggests that 'public safety' should not be interpreted narrowly to mean only violations of the law and breaches of the peace.

146 Consequentialist arguments were also made that the purpose of the legislation would be defeated by a construction inconsistent with ***Re Thies***. It was suggested that a construction inconsistent with ***Re Thies*** would render a vast array of documents that would otherwise be available to be exempt because the agency involved (the police, the fire brigade, the ambulance service) would say that the documents have some connection with public safety.

147 If this were correct then there would be a serious conflict with the nature and purpose of the FOI Act, as an Act creating fundamental reform of democratic government which I have described above at [18] - [19]. But the spectre of large swathes of documents held by those authorities being exempt is one which might be unlikely to eventuate. It is impossible to know without evidence on the issue, but it might be expected that (i) not all documents held by those agencies will be related to measures *for* protecting public safety (ie a causal requirement might not be satisfied); and (ii) disclosure of those documents might not be reasonably expected to *prejudice* maintenance and enforcement of a lawful measure for protecting public safety.

148 On the other hand, there are consequentialist arguments which oppose the ***Re Thies*** conclusion of a narrow reading of 'public safety'. In the final sentence which I quoted above, the tribunal places an immediate qualification on their own narrow construction of 'public safety' to cover a possible circumstance where the lives or physical safety of passengers and crews of the aircraft were shown to be in danger. This qualification apparently applies even if the measure is not for protecting violations of the law or breaches of the peace.

149 For these reasons, if the correctness of the Information Commissioner's decision on cl 5(1)(g) were to depend upon the narrow construction adopted in ***Re Thies***, then I might have had doubt whether to follow that decision.

150 However, despite extensive submissions on this point, and although this point was at the forefront of submissions by Apache and Lander and Rogers, it is not necessary to decide the correctness of ***Re Thies***. Nor is it necessary to decide whether the words 'protection of public safety' should be read down in some manner to prevent the purposes of the FOI Act being undermined. I do not express any conclusion on these points.

151 The reason why it is unnecessary to decide this point is because, as senior counsel for Lander and Rogers submitted, the Information Commissioner's decision did not depend upon it.

152 Apache had relied only upon one 'lawful measure for protecting public safety', the maintenance and enforcement of which it said could reasonably be expected to be prejudiced. That measure was 'to restrict access to the Facilities and to material describing the Facilities' [172], [177]. At [177] the Information Commissioner assumed that this measure *was* a lawful measure to protect public safety. His conclusion in that paragraph was expressed as follows:

> *[E]ven if* Apache's ability to restrict access to the Facilities could arguably be described as a lawful measure or measures to protect public safety - which in my view is *doubtful* - I do not consider that maintenance of those measures would be prejudiced. (emphasis added)

153 Paragraph 177 is the only place at which the Information Commissioner expresses a conclusion on whether Apache's measure was a 'lawful measure … to protect public safety'. The words 'even if' and his expression of doubt do not constitute a rejection of Apache's argument.

154 In supplementary written submissions which I invited on this point, Apache argued that this interpretation of the Information Commissioner's decision 'would make redundant the preceding discussion (in paragraphs 173 - 176 of the Reasons) of the proper interpretation of "public safety"'. It is true that those paragraphs are not essential to his reasons for decision, although the common phrase '*obiter dicta*' (something said, by the way) might be a better description than 'redundant'. Those paragraphs explain the reason why the Information Commissioner had doubts about whether Apache's measure was 'a lawful measure … to protect public safety'. But the Information Commissioner's conclusion did not depend on a construction of the words 'public safety' because he assumed that Apache's measure fell within those words.

155 Appeal ground 7.1 is dismissed.

156 As to appeal ground 7.2, numbered (2) at [140] above, this must be dismissed for the same reason. The ground of appeal that the Information Commissioner failed to answer the question of whether restricting access to the information was a lawful measure for protecting public safety must be dismissed because the Information Commissioner did not need to

decide that point. He had assumed it in favour of Apache but decided against Apache on other grounds.

157 Ground of appeal 7.2 is dismissed.

158 Appeal ground 7.3, numbered (3) at [140] above, asserts that the Information Commissioner's conclusion concerning cl 5(1)(g) is 'perverse'. I take this reference to be to the ground of review which has been described 'gross error, manifest illogicality and unreasoned perversity': ***Azzopardi v Tasman UEB Industries Ltd*** (1985) 4 NSWLR 139, 151 (Kirby P). I have discussed these principles of judicial review above at [82].

159 In order to determine whether the conclusion is perverse, in the modern sense in which that term must be understood, it is again necessary to place in context the Information Commissioner's decision on this point. The Information Commissioner concluded that since the measures for protecting public safety would remain in place, the maintenance or enforcement of those measures could not reasonably be expected to be prejudiced by disclosure of the Documents.

160 The relevant context of the Information Commissioner's decision is the ways in which Apache submitted that maintenance or enforcement of its measures for protecting public safety (ie its non-disclosure of documents 'to restrict access to the Facilities and to material describing the Facilities') could reasonably be expected to be prejudiced.

161 The reasonable expectation of prejudice relied upon by Apache arose from four matters which the Information Commissioner set out at [160]: see also [172]. Those matters ([160](d) - (g)) concerned issues such as individuals intent on causing harm, attacks on critical process juncture points central to the operation of the facility, national security and transnational terrorism concerns.

162 The Information Commissioner addressed those matters in his consideration of cl 5(1)(e) and cl 5(1)(f). He held that some of the information in the Documents concerned matters relating to the security and protection of the facilities from persons with malicious intent. He described matters such as the layout of the facilities on Varanus Island, facility schematics, process flow diagrams, and the stock level and location of hazardous substances: [168] - [169]. That information is not publicly accessible and the Information Commissioner accepted that it could assist in aiding any planned attack on the facilities. He listed that

information in an appendix to his decision and excluded it from disclosure: [169].

163 It was in this context that the Information Commissioner in [177] turned to consider Apache's submission that its maintenance and enforcement of a lawful measure for protecting public safety (ie restricting access to the facilities and material describing the facilities: [172]) could reasonably be expected to be prejudiced by the matters mentioned above (such as individuals intent on causing harm).

164 The Information Commissioner's reference at [177] to a lack of prejudice because 'those measures would remain in place' was a reference to the fact that, as a consequence of the Information Commissioner's decision not to allow access to information concerning those matters, Apache's measures for restricting access to the facilities and material describing the facilities would remain in place. This conclusion follows as a matter of common sense. It is not 'perverse'.

165 Appeal ground 7.3 is dismissed.

Appeal ground 8: did the Information Commissioner fail to observe the requirements of 'procedural fairness'?

166 These final grounds of appeal (grounds 8.1 and 8.2) essentially concern whether the Information Commissioner failed to afford procedural fairness to Apache. The essence of Apache's complaint was that the Information Commissioner's procedure failed to give Apache the opportunity to make oral submissions or to present expert evidence.

167 Ground of appeal 8.1 referred, apparently separately from the allegation of procedural unfairness (par 8.2), to an alleged failure by the Information Commissioner to give the appellant a reasonable opportunity to make submissions. As I explain below, Apache had considerable opportunity to make submissions and it did make substantial submissions. In oral argument it was clear that this ground of appeal was also concerned with alleged procedural unfairness by failing to give Apache the opportunity to present oral submissions or expert evidence.

168 The underlying nature of this submission is well known in this branch of administrative law. Submissions such as this are usually characterised by labels such as procedural 'fairness', 'fair' hearing, and a common law duty to act 'fairly'. There are dangers associated with this common nomenclature. One danger is that the usual references to 'fairness' could be taken as an invitation for the application of an

unrestrained, idiosyncratic discretion. Lawton LJ has suggested that defining fairness in this area is '[l]ike defining an elephant, it is not easy to do, although fairness in practice has the elephantile quality of being easy to recognise': ***Maxwell v Department of Trade & Industry*** [1974] 1 QB 523, 539.

169 It may be that the umbrella concept of 'fairness' distracts from the question of the requirements of the modern concept of natural justice. But whatever language is preferred it is clear that the assessment of the justice which is 'natural' or the procedure which is 'fair' is an assessment which must focus closely upon the statutory framework. In ***Kioa v West*** (1985) 159 CLR 550, 584, Mason J said that where a decision is made by statute, 'the application and content of the ... duty to act fairly depends to a large extent on the construction of the statute'.

170 It is not the case that every tribunal is required to exercise the same procedure in order to afford natural justice to a party: 'what the procedure is to be in detail must depend on the nature of the tribunal' and full effect must be given 'to the particular statutory framework within which the proceeding takes place': ***Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation*** (1963) 113 CLR 475, 503 - 504 (Kitto J); ***University of Ceylon v Fernando*** [1960] 1 All ER 631, 637 (PC). All of the circumstances must be considered in that framework, including the nature of the inquiry and the subject matter of the inquiry.

171 The statutory framework for hearings by the Information Commissioner is set out in s 70 of the FOI Act. That section provides:

> **70. Procedure**
>
> (1) In order to deal with a complaint the Commissioner may obtain information from such persons and sources, and make such investigations and inquiries, as the Commissioner thinks fit.
>
> (2) Proceedings are to be conducted with as little formality and technicality, and with as much expedition, as the requirements of this Act and a proper consideration of the matters before the Commissioner permit, and the Commissioner is not bound by rules of evidence.
>
> (3) The Commissioner has to ensure that the parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner.

> (4) The Commissioner may determine the procedure for investigating and dealing with complaints and give any necessary directions as to the conduct of the proceedings.
>
> (5) For example, the Commissioner may -
>
> (a) deal with the complaint without holding formal proceedings or hearings;
>
> (b) direct that all submissions are to be in writing;
>
> (c) require parties to attend compulsory conferences.
>
> (6) If a party is required or permitted to appear before the Commissioner the party may be represented by a legal practitioner or by any other person.

172 Section 70 does not remove the need for an oral hearing if one is otherwise required, in all the circumstances, for a reasonable opportunity to make submissions: s 70(3). However, it is significant that it is implicit in s 70 that the reasonable opportunity to make submissions need not always involve oral submissions and that the Information Commissioner has a discretion to direct that submissions be in writing (s 70(5)(b)). That discretion must be exercised judicially, but one relevant factor is the requirement that proceedings are to be conducted with as much expedition as the FOI Act and proper consideration of the matters before the Information Commissioner permits (s 70(2)).

173 The lack of a requirement in s 70 for an oral hearing always to be afforded to a party is consistent with earlier authority: ***Heatley v Tasmanian Racing & Gaming Commission*** (1977) 137 CLR 487, 516 (Aickin J); ***White v Ryde Municipal Council*** [1977] 2 NSWLR 909, 923 (Reynolds JA). Again, the question is what is required in all the circumstances, in the context of the relevant statutory framework.

174 One circumstance in which, within the statutory framework, natural justice could require an oral hearing is where there is a 'real issue of credibility or a significant conflict of evidence': ***Re R H Burton; Ex parte Steven Burns t/as Burns Corporation*** (Unreported, WASCA, Library No 980154, 6 February 1998) 21 (Malcolm CJ). A circumstance which involves issues of credibility is important. If a finding is to be made that an individual's evidence is disbelieved then natural justice may require that the individual be given the opportunity to respond to the allegation in person.

175 Another relevant circumstance is the extent of the opportunity which a party has had, or has been given, to present written submissions. In this case, the Information Commissioner had submissions from Apache as follows (see [33] of the Information Commissioner's reasons):

(a) Apache's submissions in its letter to the Department dated 30 October 2008;

(b) Apache's submissions in its letter to the former Acting Information Commissioner dated 22 January 2009;

(c) Apache's submissions in its letter to the Office of the Information Commissioner dated 5 June 2009;

(d) Apache's submissions in its letter to the Office of the Information Commissioner dated 8 July 2009; and

(e) 51 pages of written submissions accompanying a letter dated 25 June 2010.

176 The 25 June 2010 written submissions were in response to the Information Commissioner's preliminary decision which had been communicated to Apache. In Apache's 25 June 2010 written submissions, par 1.67, Apache said this:

> If, notwithstanding the submissions above, you are not persuaded that the Documents are exempt in their entirety under Clauses 5(1)(e) and (f) of Schedule 1 to the FOI Act, then Apache requests, before you make any final decision, as a matter of procedural fairness, an opportunity for a hearing before you at which time Apache can make oral submissions and you may be assisted by expert evidence.

177 This was a single paragraph in the course of a 51 page submission, the fifth set of submissions which the Information Commissioner had received. The paragraph did not explain why Apache needed an oral hearing if the Information Commissioner was not persuaded by Apache's written submissions. The paragraph did not explain what matters would be the subject of oral submissions. It did not explain why oral submissions would be required on these matters in addition to the substantial written submissions which had been provided. It did not explain what further expert evidence would, or could, be given. It did not explain why expert evidence might be needed in addition to the matters addressed in the 51 page submission. It did not explain why this expert evidence needed to be given orally, if it was even proposed to give that evidence orally which is unclear.

178 There is also an element of prestidigitation in the manner in which this paragraph later morphed into the ground of appeal. After seeking an opportunity to be heard, Apache had said in par 1.67 '*and* you *may* be assisted by expert evidence'. The sentence reads as an invitation to the Information Commissioner to call upon Apache if he considered that he needed expert evidence on an issue. But this morphed into a ground of appeal which complained that Apache was not given the opportunity to make oral submissions *or* to present expert evidence.

179 Even after receiving the 25 June 2010 submissions, the Information Commissioner did not preclude Apache from applying to adduce even further submissions, or any expert report, which Apache considered relevant.

180 Apache argues that the written submissions provided to the Information Commissioner (above at [175]) were not sufficient for it to be afforded natural justice. Apache says that the Information Commissioner should have offered either the opportunity for an oral hearing to address any of his concerns or the opportunity to lead any expert evidence. Apache refers to the large volume of highly technical and confidential material, produced by Apache, and says that this was produced at great expense.

181 I do not consider that any of these matters is sufficient in these circumstances for natural justice to have required the Information Commissioner to afford Apache 'an opportunity to make oral submissions or present expert evidence'. There was no issue of credibility before the Information Commissioner. Nor was there a conflict of evidence the resolution of which required the Information Commissioner to hear oral evidence. The Information Commissioner was required to conduct proceedings with as little formality and technicality, and with as much expedition, as the requirements of the FOI Act and a proper consideration of the matters before the Commissioner permitted. The Information Commissioner had been provided with numerous written submissions by Apache, including submissions after a preliminary opinion had been notified to Apache. It was not suggested by Apache that the Information Commissioner misunderstood any technical material or that the material could not be understood without oral submissions. Apache was not precluded from submitting, or applying to submit, written expert evidence to the Information Commissioner. And Apache did not suggest that there was any matter on which it needed to present expert evidence to the Information Commissioner, in addition to the submissions it had previously made.

182 For these reasons, ground 8 of the appeal is dismissed. In any event, it might be doubted whether the expense which Apache had incurred in producing the material is relevant to the issue of whether natural justice required an oral hearing. The cost of producing material says nothing about its content. Further, a circumstance involving a large volume of confidential material (putting aside its technical nature) might militate *against* allowing an oral hearing. It may also be that in such circumstances, where expedition is a relevant factor, confining the parties to written submissions might even be more appropriate. In ***Borden v Walters*** (Unreported, QSC, 17 September 1999), an application was brought under s 20(2)(a) of the *Judicial Review Act 1991* (Qld) on the basis that a breach of the rules of natural justice had occurred by the failure to allow an oral hearing. The context of the application concerned the *Anti-Discrimination Act 1991* (Qld) which, as Mackenzie J observed, did not require the Anti-Discrimination Commissioner to conduct an oral hearing. His Honour concluded that natural justice did not require this. He explained that there was a large volume of detailed information before the decision-maker and that the case was not one where there were any apparent reasons on the face of the material why this was necessary.

Conclusion

183 The reasons for decision of the Information Commissioner were delivered on 30 December 2010 after extensive submissions, particularly from Apache. They included 51 pages of detailed, single-spaced submissions provided on 25 June 2010. The Information Commissioner's reasons dealt comprehensively with the submissions before him. Although Apache's eight grounds, and sub-grounds, of appeal have subjected those reasons to an extremely searching analysis, none of the grounds or sub-grounds of appeal can be sustained, particularly in review proceedings of this nature. The appeal is dismissed.