**[1999] WASCA 269**

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| **JURISDICTION** | **:** | SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL |
| **CITATION** | **:** | HEALTH DEPARTMENT OF WESTERN AUSTRALIA -v- AUSTRALIAN MEDICAL ASSOCIATION LTD [1999] WASCA 269 |
| **CORAM** | **:** | McKECHNIE J |
| **HEARD** | **:** | 22 SEPTEMBER 1999 |
| **DELIVERED** | **:** | 30 NOVEMBER 1999 |
| **FILE NO/S** | **:** | SJA 1083 of 1999 |
| **BETWEEN** | **:** | HEALTH DEPARTMENT OF WESTERN AUSTRALIA<br>Appellant<br><br>AND<br><br>AUSTRALIAN MEDICAL ASSOCIATION LTD<br>Respondent |

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*Catchwords:*

Freedom of Information - Administrative decision - Extent to which there is judicial review on a question of law - Balancing public interest considerations

*Legislation:*

*Freedom of Information Act 1992* (WA)

*Result:*

Appeal dismissed

**Representation:**

*Counsel:*

| | | |
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| Appellant | : | Ms C J Thatcher |
| Respondent | : | Mr J D Allanson |

*Solicitors:*

| | | |
|---|---|---|
| Appellant | : | State Crown Solicitor |
| Respondent | : | Deacons Graham & James |

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

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24
Minister for Immigration v Eshetu [1999] HCA 21; (1999) 73 ALJR 746
Minister for Immigration v Wu Shan Liang (1996) 185 CLR 259
Minister for Planning v Collins, unreported; SCt of WA (Templeman J); Library No 960668; 22 November 1996
Re Thies v Department of Aviation (1986) 9 ALD 454

**Case(s) also cited:**

DPP v Smith (1991) 1 VLR 63
Hood v Royal Perth Hospital, unreported; FCt SCt of WA; Library No 970658; 5 December 1997
Manly v Ministry of Premier & Cabinet (1995) 14 WAR 550
Re Mann and Australian Taxation Office (1985) 7 ALD 698
Re McCarthy and Australian Telecommunications Commission (1987) 13 ALD

**McKECHNIE J**:

## Introduction

1 The Health Department of Western Australia ("Health") and the Australian Medical Association (WA) ("AMA (WA)") have been engaged in long-running negotiations in an atmosphere of dispute.

2 In the course of that dispute, Australian Medical Association Ltd (AMA), a different body from AMA (WA) has sought access to various Health documents under the provisions of the *Freedom of Information Act 1992* (WA).

3 Various documents have been released. This appeal on a question of law concerns two documents which, with some deletions, the Information Commissioner ordered to be released to the AMA against the arguments of Health.

## Background

4 The facts necessary to understand this appeal can be taken from the Information Commissioner's reasons for decision:

> "1. This is an application for external review by the Information Commissioner arising out of a decision made by the Health Department of Western Australia ('the agency') to refuse the Australian Medical Association Limited ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act'). The agency claims that the requested documents are exempt under clause 6(1) and clause 11(1)(d) of Schedule to the FOI Act.
>
> 2. On 4 September 1995, the then Minister for Health and the Western Australian Branch of the Australian Medical Association Inc ('the AMA (WA)') - an autonomous body entirely independent of the complainant - executed an agreement setting out the terms upon which public hospitals would engage medical practitioners, or permit visiting medical practitioners ('VMPs'), to provide medical services to public patients in public hospitals in Western Australia. That agreement is referred to by the

agency as 'the Head VMP Agreement'. The Head VMP Agreement expired on 4 September 1998.

3. In mid 1997, the agency established a working group, composed of senior officers of the agency, to consider what options and strategies may be available to the agency in relation to negotiating a new VMP agreement with the AMA (WA), taking into account the agency's budgetary constraints; the requirements of public hospitals to obtain the services of generalist and specialist medical practitioners; and the agency's legal advice about the expired agreement. That working group is referred to by the agency as the VMP Working Party.

4. I understand that the AMA (WA) has been in discussions with the agency about the renewal of the Head VMP Agreement, although I understand that negotiations as to its terms have not yet commenced. I also understand that the Minister for Health and the AMA (WA) have agreed that, whilst those discussions are continuing, and until a new VMP agreement is negotiated between the parties, the arrangements that were in place under the expired agreement will continue to apply.

5. In Western Australia, medical practitioners who provide medical services at public hospitals are either employed by the relevant hospital board, on a full time or sessional basis, or they are engaged on a contract for services as a VMP on the terms and conditions contained in the Head VMP Agreement. I understand that the terms of the Head VMP Agreement were incorporated by reference into individual VMP agreements entered into between a public hospital and an individual medical practitioner.

6. At the time of the commencement of this matter, the agency and the AMA (WA) were also negotiating about the terms and conditions of employment of senior salaried medical practitioners who provide medical services at public hospitals in Western Australia, enterprise and workplace agreements for junior salaried practitioners having then been recently finalised. I understand that the negotiations concerning senior salaried practitioners have since been finalised.

7. The legality of the Head VMP Agreement is a matter of dispute between the parties. That dispute concerns the question of whether certain parts of the expired agreement were in breach of the price-fixing prohibitions contained in the *Competition Code* set out in the *Trade Practices Act 1974*. The *Competition Code* applies as a law of Western Australia by virtue of s.5(1) of the *Competition Policy Reform (Western Australia) Act 1996*. However, as noted above, the parties have, by agreement, extended the operative date of the Head VMP Agreement and are continuing negotiations. It is my understanding that, as of the date of this decision, no agreement has been reached.

8. By letter dated 2 December 1997, the complainant lodged an application with the agency seeking access under the FOI Act to documents relating to trade practice issues, competition policy and the terms of the agreement concerning the provision of medical services by VMP's in Western Australia.

9. The agency granted the complainant access to 11 documents but refused access to 23 others on the grounds that those documents are exempt under clauses 1, 6, 7 and 11(1)(d) of Schedule 1 of the FOI Act. The Commissioner of Health confirmed the agency's decision following internal review. By letter dated 9 July 1998, the complainant lodged a complaint with the Information Commissioner seeking external review of the agency's decision.

## The documents under consideration

5 The first bundle of documents, known collectively as document 2, comprised three pages of notes (undated) of a meeting held on 28 October 1997.

6 The meeting was between Health personnel referred to as the Visiting Medical Practitioners Working Party.

7 The second bundle of documents, known collectively as document 16, comprised 25 pages of notes (undated) concerning options for Health relating to Visiting Medical Practitioners.

**The *Freedom of Information Act 1992* relevant provisions**

8 A person has a right to be given access to the documents of an agency subject to and in accordance with the Act (s 10).

9 Pursuant to this right the AMA sought:

> "• Copies of all documents prepared and received for the Health Department of Western Australia that relate to trade practices issues, the Trade Practices Act 1974 and competition policy in the context of the terms of agreement concerning the provision of medical services by visiting medical practitioners in the state government non teaching hospitals of Western Australia.
>
> • The terms of reference and copies of any documents relating to any inquiry or report into the effect of trade practice issues, including competition policy, on the health services obtained or provided by the government of Western Australia."

10 The process of granting the application was leisurely. Following internal review and a draft ruling by the Information Commissioner, only documents 2 and 16 now remain in contention.

11 An agency may refuse access to an exempt document, although if exempt the matter can be edited from a document, the document should be released.

12 Exemptions are extensive and are set out in Sch 1.

13 There are two exemptions of relevance.

14 Clause 6 provides:

> "6. **Deliberative processes**
>
> *Exemptions*
>
> (1) Matter is exempt matter if its disclosure -
>
> (a) would reveal -
>
> (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or

(ii) any consultation or deliberation that has taken place,

in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency; and

(b) would, on balance, be contrary to the public interest.

***Limits on exemptions***

(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1).

(3) Matter that is merely factual or statistical is not exempt matter under subclause (1).

(4) Matter is not exempt matter under subclause (1) if at least 10 years have passed since the matter came into existence."

15 Clause 11 provides:

"11. **Effective operation of agencies**

***Exemptions***

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

(a) impair the effectiveness of any method or procedure for the conduct of tests, examinations or audits by an agency;

(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;

(c) have a substantial adverse effect on an agency's management or assessment of its personnel; or

(d) have a substantial adverse effect on an agency's conduct of industrial relations.

***Limit on exemptions***

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

## The Commissioner's decision

### Exemption under cl 6: Deliberative processes

16 Much information was put before the Information Commissioner (and also before the Court) to show the nature of the dispute and what might be described as the aggressive stance taken by the AMA (WA) in the dispute. The role of the AMA also formed part of the material.

17 The Commissioner reached the view that documents 2 and 16 contained opinions, advice and recommendations that had been obtained, prepared and recorded in the course of deliberations of the VMP Working Party. She was therefore satisfied that each contained matters within the *Freedom of Information Act 1992* Sch 6(1)(a).

18 The onus to establish that release of the material was contrary to the public interest therefore rested on Health: *Freedom of Information Act 1992*, s 102(1). In respect of the documents she concluded:

> "38 I remain of the view (expressed in previous decisions) that it would be contrary to the public interest to prematurely disclose documents while deliberations in an agency are continuing, if there is evidence that the disclosure of such documents would adversely affect the decision-making process, or that disclosure would, for some other reason, be contrary to the public interest. In either of those circumstances, I consider that the public interest is served by non-disclosure. I do not consider that it is in the public interest for any agency to conduct its business with the public effectively 'looking over its shoulder' at all stages of its deliberations and speculating about what might be done and why. Generally, I consider that the public interest is best served by allowing deliberations to occur unhindered and with the benefit of access to all of the material available so that informed decisions may be made."

19 The Commissioner considered that the public interest would be best served by allowing the Health negotiations with the AMA to continue without Health having to disclose material that may weaken or adversely affect Health's negotiating position.

20 The Commissioner noted that the documents were some 14 months old. She specifically considered the potential industrial ramifications of the matter before concluding:

> "54. Balancing all those competing public interests, including the public interest in persons being able to exercise their right of access under the FOI Act, I am of the view that disclosure of the information contained in documents, most of which is outdated and not relevant to the ongoing negotiations, would not on balance, be contrary to the public interest, with the following qualification.
>
> …
>
> 56 I have also considered whether it is practicable, in terms of s 24 of the FOI Act, to give access to Document 2 and Document 16 with that exempt matter deleted. In my view it would be practicable to do so. Therefore, I find that the matter deleted from Document 17 is exempt under clause 6(1). I also find that paragraph (iv) on page 2 of document 2 is exempt under clause 6(1); and that the first, third and fourth dot points on page 18 of Document 16 are also exempt under clause 6(1), for the same reasons."

21 In reaching that decision, the Commissioner nevertheless exempted certain passages of the documents from disclosure.

**Exemption under cl 11: Conduct of industrial relations**

22 After again noting the submissions for both parties, the Commissioner was not persuaded that the disclosure of documents 2 and 16 would have a substantial, if adverse, effect on the conduct of industrial relations by Health.

23 In particular she decided:

> "70. I am not persuaded that the disclosure of Document 2 and Document 16, edited in the manner described in

paragraph 56 above, could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by an agency in Western Australia. I consider that some degree of compromise between parties to an industrial dispute is often necessary before a solution can be reached. In some cases, that compromise position is only reached after industrial disputation has occurred. In the context of the complaint before me, I accept that the exemption is concerned not with adverse effects on industrial relations, but with adverse effects on the conduct of industrial relations. An example might be where the anticipated reaction to the contents of documents actually manifests in a lack of cooperation by the AMA (WA) in subsequent negotiations.

71. However, although I have read all of the extracts submitted to me by the agency, I cannot find any suggestion that the AMA (WA) does not desire a resolution of the issues between the parties. It is one thing to maintain a philosophical position and to drive a hard bargain and another to refuse to bargain or negotiate at all. In any case, having regard to the nature of it, I am not persuaded that the disclosure of the remainder of the matter in Document 2 and Document 16 could have an adverse effect on the conduct of industrial relations, nor that it would have a substantial adverse effect on the conduct of industrial relations. As I have already explained, some of that information has already been disclosed to the complainant in other documents to which access has been granted.

…

78. In any event, I am not satisfied that the potential for some mistrust or suspicion amounts to a serious or significant adverse effect on the conduct of industrial relations as required by the exemption. In my opinion, the degree of gravity of harm encompassed in a *prima facie* claim for exemption under this subclause requires more than mere potential for distrust and suspicion. I would venture to say that a certain degree of tension between the parties to such negotiations is not unnatural, if not to be expected."

## The appeal to this Court

24 The 12 grounds assert in various ways that the Commissioner failed to take into account relevant considerations, took into account irrelevant considerations, misinterpreted terms in the *Freedom of Information Act 1992* and acted unreasonably. It is asserted she misinterpreted and misapplied the public interest test. Her rulings both in respect of the Schedule, cl 6 and cl 11 are challenged.

25 These grounds appear similar in form, though not of course in particulars, to those under consideration in ***Minister for Planning v Collins***, unreported; SCt of WA (Templeman J); Library No 960668; 22 November 1996.

26 As Templeman J noted at 13, the *Freedom of Information Act 1992* does not contain a definition of a public interest test:

> "In reaching a decision on the public interest question the Commissioner must make a judgment. And unless it is shown that the Commissioner has erred in law in so doing, that judgment will stand even though the court hearing an appeal from the Commissioner pursuant to s 85(1) of the Act might have reached a different conclusion."

I agree with this statement.

## The grounds of appeal

### Appeals in relation to cl 6

27 The grounds assert an error of law:

> "**A. As to cl 6(1) of Schedule 1 to Freedom of Information Act 1992 and documents 2 and 16 in that she**
>
> 1. Misinterpreted and misapplied the public interest test
>
> PARTICULARS
>
> The learned Commissioner erred in that she applied a general rule that 'the public is entitled to have access to information that has been gathered by public officials on its behalf and at its expense' to documents which reflected the current thinking of the Appellant in the course of its deliberative

> processes relating to commercial and contractual issues and when those processes had not been completed;"

28 The asserted error which is identified appears in the Commissioner's reasons at par 44:

> "Whilst I accept that some degree of confidentiality is required by government agencies in delivering services to the community, I also consider that, as a general rule, the public is entitled to have access to information that has been gathered by public officials on its behalf and at its expense. I consider that to be particularly so where that information is directly relevant to the rights or interest of the particular applicant as well as to the community as a whole."

29 I do not consider the Commissioner was laying down a general rule of disclosure and ignoring the impact of the schedules on the question of public interest. It is manifest from her reasons that she was acutely conscious of the public interest requirements she was obliged to take into account.

30 The Commissioner was aware that the parties were still in the process of some negotiations. Earlier in her reasons she acknowledged that it would be contrary to public interest to prematurely disclose documents while deliberations within an agency were continuing and that there is a public interest in keeping negotiating positions confidential while discussions were on foot.

31 However, the submission made to the Commissioner by Health acknowledged that strategies identified by the VMP Working Party in 1997 were outdated and that Health's negotiating position had also changed somewhat.

32 Counsel for Health submits that the Commissioner's approach fails to recognise that the public interest in keeping deliberations confidential does not come to an end once the deliberative process has ended.

33 It is argued that the deliberative process is part of the negotiating process which is incomplete and therefore disclosure of the documents is not in the public interest.

34 Counsel argued, using a hackneyed cliché, that the Commissioner's use of the word "premature" in reference to disclosure, shifts the goal

posts in a subtle but very real way not reflected by the *Freedom of Information Act 1992.*

35 I am unable to accept the submissions.

36 As a statement of principle, I consider the Commissioner is right to say that, as a general rule, the public is entitled to have access to information which has been gathered by public officials on its behalf and at its expense.

37 This seems to be the object of the *Freedom of Information Act 1992*. However, clearly there are various important exceptions to the general rule, many of which are set out in the Schedule.

38 In the present case the Commissioner was obviously aware of the relevant exceptions. Her reasons deal extensively with their impact on the documents under consideration.

39 The onus was on Health to satisfy the Commissioner that the disclosure of the documents was contrary to the public interest on the grounds that they formed part of the deliberative processes.

40 The concept of time is relevant to the public interest. After 10 years, the public interest is legislatively pronounced in favour of disclosure.

41 However, there may well be an earlier time when the public interest is served by disclosure rather than non-disclosure.

42 The identification of that earlier time is a matter for the Commissioner's judgment.

43 Her statement about premature disclosure is correct so far as it goes. It does not follow logically that she concluded if disclosure was not premature, the public interest therefore required disclosure. Instead she carefully weighed the arguments for and against disclosure of deliberative processes at the particular time and made a decision. That decision was not an error of law.

**Grounds 2 to 5**

> "2. Failed to take relevant considerations into account and acted unreasonably by failing to give any sufficient weight to the submissions of the Commissioner of Health and the Appellant's senior legal consultant as to the

likelihood of harm to the Appellant's future negotiating position with the Australian Medical Association of Western Australia ('the AMA(WA)') resulting from the disclosure of the documents;

3. Acted unreasonably in failing to find that it was against the public interest to disclose under freedom of information legislation documents pertaining to current and ongoing commercial and contractual issues that were unresolved between the Appellant and the AMA(WA);

4. Acted unreasonably in failing to be satisfied on the evidence before her that the information in the documents could be expected to prejudice the Appellant's negotiating position with the AMA(WA);

5. Failed to take into account a relevant consideration, namely that disclosure of the documents would be likely to affect adversely the ongoing relationship between Appellant and the AMA(WA); and"

44 These grounds were not the subject of specific submission or argument.

45 What counsel for Health said in respect of them was:

> "We were certainly not abandoning them, but the thrust of what the Appellant has to say in relation to them is that the end result, the taking into account of considerations, has been coloured by this process that the Commissioner has gone through."

46 Counsel acknowledged that these grounds would not succeed on their own but depend upon acceptance of the submission that the starting point was wrong.

47 In the circumstances I am able to deal with these grounds relatively briefly.

48 The principles relating to these grounds are set out in many cases and it is convenient to refer simply to ***Minister for Aboriginal Affairs v Peko Wallsend Ltd*** (1986) 162 CLR 24 per Mason J at 39 - 42.

49 Of particular relevance is the comment by Mason J at 41:

> "It follows that, in the absence of any statutory indication of the weight to be given to various considerations, it is generally for the decision maker and not the Court to determine the appropriate weight to be given to the matters which are required to be taken into account in exercising the statutory power…"

50 Applying the principles set out in ***Minister for Aboriginal Affairs v Peko Wallsend Ltd*** (*supra*) to this case, the Commissioner noted carefully the various submissions from either side. It seems to me that she weighed the various factors for and against disclosure ascribing to them such weight as she thought appropriate. Notwithstanding her ultimate decision on disclosure, she nevertheless still exempted certain portions of the documents. She was aware of the continuing relationship between Health and the AMA. There is no evidence that she failed to take relevant considerations into account or took irrelevant considerations into account.

51 The test of unreasonableness in decision-making has been recently revisited by some members of the High Court in ***Minister for Immigration v Eshetu*** [1999] HCA 21; (1999) 73 ALJR 746. The discussion within that case appears to be *obiter dicta*. Nevertheless, the Court continued to affirm the relevance of the test for unreasonableness set out in ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223.

52 In my judgment the decision of the Commissioner on this point reveals no unreasonableness within the ***Wednesbury*** principle.

## Ground B: Sch 1D cl 11(1)(d)

> "6. Acted unreasonably in failing to find on the evidence before her that a substantial adverse effect on the Appellant's conduct of industrial relations could reasonably be expected to follow from the disclosure of the documents;
>
> 7. Acted unreasonably in finding that other than the unsubstantiated assertions of the Appellant, there was nothing before her to establish that the disclosure of the disputed documents could reasonably be expected to inflame the AMA(WA) executive or that any reaction that disclosure might cause would have any serious effect on the Appellant's conduct of industrial relations;

8. Took an irrelevant consideration into account, namely that the material submitted by the Appellant did not suggest that the AMA(WA) did not desire a resolution of the issues between the parties;

9. Failed to take a relevant consideration into account, namely that the conduct of industrial relations is an ongoing matter such that the disclosure of the documents could or would have substantial adverse effects on the conduct of ongoing industrial relations;

10. Misinterpreted the term 'substantial adverse effect' and failed to take a relevant consideration into account by not being satisfied that the potential for distrust and suspicion caused by the disclosure of the documents in the present circumstances amounted to a substantial adverse effect;

11. Took an irrelevant consideration into account, namely that a certain degree of tension between the parties to such negotiations was not unnatural, if not to be expected;

12. Misinterpreted or misapplied the term 'could reasonably be expected' by imposing too high a test on the Appellant;"

53 Grounds 6 to 7 again relate to the unreasonableness of the decision. It is worthwhile returning to first principles and setting out what Greene MR summarised as the law in ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** (*supra*) at 233 - 234:

> "The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, take into account matters which they ought to take into account. or, conversely, have refused to take into account or neglected to Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned

> only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them."

54 The factual finding made by the Commissioner was as follows from par 70:

> "I am not persuaded that the disclosure of Document 2 and Document 16, edited in the manner described in paragraph 56 above, could reasonably be expected to have a substantial adverse effect on the conduct of industrial relations by an agency in Western Australia. …"

55 The effect of this finding is that documents 2 to 16 are not exempt matters within cl 11.

56 The Commissioner further stated at par 72:

> "Clearly, the agency's submissions as to the potential effect of disclosure on the negotiations relating to senior salaried medical practitioners are no longer relevant, those negotiations having been concluded. Accordingly, I have not taken those submissions into account in reaching my decision in this matter."

57 These two findings are at the heart of grounds B 6 and 7.

58 In the course of its submissions to the Commissioner, Health proffered a considerable quantity of paper to justify the view that disclosure of the documents would have a substantial adverse effect on industrial relations. In a letter of 31 December 1998 in response to a point made that Health had not provided any probative evidence:

> "… that either the AMA or the salaried medical practitioners have ever engaged in 'industrial warfare' in the past, or that the AMA executive has a predisposition to encourage its members to engage in industrial action in order to resolve negotiations with government in accordance with its requirements."

Health enclosed a number of documents. The Commissioner read these documents which she referred to as extracts.

59 The argument of Health was that the documents supplied with the letter, together with earlier articles from a journal entitled *Medicus*:

> "… clearly demonstrate that the AMA is prepared to encourage its members to engage in industrial action and is prepared to manipulate information (such as that contained in the disputed documents) to engender 'distrust and conflict' to ensure doctors only negotiate with the Department via the AMA."

60 The Commissioner dealt with this argument in her reasons at par 71:

> "However, although I have read all of the extracts submitted to me by the agency, I cannot find any suggestion that the AMA (WA) does not desire a resolution of the issues between the parties. It is one thing to maintain a philosophical position and to drive a hard bargain and another to refuse to bargain or negotiate at all. In any case, having regard to the nature of it, I am not persuaded that the disclosure of the remainder of the matter in Document 2 and Document 16 could have an adverse effect on the conduct of industrial relations, nor that it would have a substantial adverse effect on the conduct of industrial relations. As I have already explained, some of that information has already been disclosed to the complainant in other documents to which access has been granted."

61 The documents make clear that the negotiation of the VMP agreement was a high priority for the AMA (WA). Furthermore, the AMA had adopted a firm bargaining position.

62 The Commissioner's reference in par 71 that she can find no suggestion the AMA (WA) does not desire a resolution of the issues between the parties may be irrelevant. Very often in industrial relations, both parties desire a resolution and it is the terms of the resolution upon which they differ.

63 However, the Commissioner in any case had regard to the nature of the material contained in documents 2 and 16 in considering the question under the Schedule, cl 11. She noted some of the information had been disclosed in other documents to which access has been granted.

64 I have read documents 2 and 16 in their unedited form. I have read all the extracts of material placed before the Commissioner to establish that the release of the two documents could reasonably be expected to have a substantial adverse effect on Health's conduct of its industrial relations with AMA (WA).

65 The AAT considered a similar provision in the *Freedom of Information Act 1982* (Cth) in ***Re Thies v Department of Aviation*** (1986) 9 ALD 454 concluding:

> "… in order to decide whether a particular effect which would or could reasonably be expected to result from disclosure constitutes 'a substantial adverse effect' it must be viewed, in respect of para (d), against the background of the manner in which the operations of an agency are conducted and, in respect of para (e), against the background of the manner in which its industrial relations are conducted."

66 The particular nature of relations between parties to an industrial dispute has limited relevance to the question in issue which must focus primarily on the effect of the actual documents.

67 The particular relationship is merely indicative of the adverse effect which might flow from release rather than decisive of the question.

68 In my judgment it was open to the Commissioner and therefore reasonable for her to reach the conclusion that release of the documents would not have a substantial adverse effect on industrial relations.

69 Consequently I do not uphold grounds 6 and 7.

70 Although I consider that the desire of AMA (WA) for a resolution of the issues was either irrelevant or marginally relevant, I am not persuaded that by taking it into account the Commissioner erred to such a degree as to make her decision wrong. The Commissioner also examined the actual documents and made a decision in any case upon her reading of those documents and also the fact that some of the information had already been disclosed.

71 The Commissioner knew that negotiations were continuing, noting indeed, that negotiations about the terms of the head VMP agreement had not yet commenced. She was therefore aware that the conduct of these industrial relations was ongoing and made her decision about the effect of the documents in that knowledge. There is no substance in the ground.

72 Grounds 10 and 12 claim the Commissioner misinterpreted the terms "substantial adverse effect" and "could reasonably be expected" within the Schedule, cl 11.

73 On analysis of the grounds and the submissions made by counsel in support of these grounds the real complaint is that the Commissioner was factually wrong in that on the material before her, she should have made a different decision.

74 If there was a wrong finding of fact, it does not ground the error of law required to give this Court jurisdiction to intervene.

75 Whether potential for some mistrust or suspicion amounts to a serious or significant adverse effect on the conduct of industrial relations is a question of degree in every case, as is the question whether such effect could reasonably be expected.

76 This was a decision of an administrative kind by a decision-maker. Parliament has principally entrusted that task to the Commissioner.

77 The reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which reasons are expressed: ***Minister for Immigration v Wu Shan Liang*** (1996) 185 CLR 259 at 272.

78 The decision made by the Commissioner correctly applied the test set out by law under Sch 2. The decision made by her was a reasonable decision on the facts before her.

79 As to ground 11, a certain degree of tension could be expected between the parties. The question was whether the release of the documents would have more than a mere potential for distrust and suspicion or would have a significant effect on tension. I do not regard the Commissioner's observation that a "certain degree of tension between the parties to such negotiations is not unnatural, if not to be expected" as an irrelevant consideration. It is a commonsense observation. There is no substance in ground 11.

## Conclusion

80 The appellant has failed to persuade me that any of the grounds of appeal have been made out. While I can appreciate that Health considers a wrong decision was made, life under the *Freedom of Information Act 1992* is very different from life before it. If an agency fails to resolve a dispute with an applicant, the matters must be determined by the Information Commissioner. Only if in her determination she makes an error of law, does this Court have jurisdiction to intervene. The principal

responsibility for decisions on disputed documents is the Commissioner's alone.

81 This appeal is dismissed.