
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : DEPARTMENT OF STATE DEVELOPMENT -v-
LATRO LAWYERS [2016] WASC 108

CORAM : BEECH J

HEARD : 9 MARCH 2016

DELIVERED : 6 APRIL 2016

FILE NO/S : GDA 5 of 2015

BETWEEN : DEPARTMENT OF STATE DEVELOPMENT
Applicant

AND

LATRO LAWYERS
Respondent

ON APPEAL FROM:

Jurisdiction : INFORMATION COMMISSIONER OF WESTERN
AUSTRALIA

Coram : COMMISSIONER SH BLUEMMEL

File No : F 132 of 2013

Catchwords:

Administrative law - Freedom of information - Procedural fairness - Exempt matter - Whether primary judge erred in approach to question of what could reasonably be expected to follow from disclosure

Legislation:

Freedom of Information Act 1992 (WA), sch 1 cl 4(3)

Result:

Appeal upheld

Category: B

Representation:

Counsel:

Applicant : Mr D E Leigh
Respondent : No appearance

Solicitors:

Applicant : State Solicitor's Office
Respondent : Latro Lawyers

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

Apache Northwest Pty Ltd v Agostino (No 2) [2009] WASCA 232

Apache Northwest Pty Ltd v Department of Mines & Petroleum (No 2) [2011]
WASC 283

Apache Northwest Pty Ltd v Department of Mines & Petroleum [2012]
WASCA 167

Attorney-General v Cockcroft (1986) 10 FCR 180

Collector of Customs v Pozzolanic Enterprises Pty Ltd [1993] FCA 322; (1993)
43 FCR 280

Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd
(1994) 49 FCR 576

McKay v Commissioner of Main Roads [2013] WASCA 135

Mijatovic v Legal Practitioners Complaints Committee [2008] WASCA 115;
(2008) 37 WAR 149

Muin v Refugee Review Tribunal [2002] HCA 30; (2002) 76 ALJR 966

Osland v Secretary to the Department of Justice (No 2) [2010] HCA 24; (2010)
241 CLR 320

Plaintiff S10/2011 v Minister for Immigration and Citizenship [2012] HCA 31;
(2012) 246 CLR 636
Polo Enterprises Australia Pty Ltd v Shire of Broome [2015] WASCA 201;
(2015) 49 WAR 134
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte
Lam [2003] HCA 6; (2003) 214 CLR 1
Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd [2007] WASCA 175;
(2007) 34 WAR 403
Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR
82
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs
[2006] HCA 63; (2006) 228 CLR 152

BEECH J:

Introduction

1 The Department of State Development (DSD) appeals against a
2 decision of the Information Commissioner (the Commissioner)
3 determining that certain documents were not exempt documents under the
4 *Freedom of Information Act 1992* (WA) (the FOI Act). For the reasons
5 that follow, I would uphold the appeal.

6 The respondent did not take any active part in the appeal.

7 Because one of the grounds of appeal is that the Commissioner did
8 not accord procedural fairness to the DSD, it is necessary to outline the
9 procedural history in some detail.

The procedural history

10 By application dated 7 December 2012, the respondent applied to the
11 DSD for access to various documents pursuant to the FOI Act.¹

12 A number of documents fell within the ambit of the application.
13 This appeal relates to only two of those documents, referred to as
14 document 1 and document 18 (the Disputed Documents).

15 On 23 January 2013, the DSD issued a notice of decision refusing
16 access to various documents, including the Disputed Documents, falling
17 within the scope of the application.²

18 The respondent applied for an internal review of the original
19 decision. On 11 March 2013, the DSD issued a notice of decision
20 confirming the original decision.³

21 On 10 May 2013, the respondent applied to the Information
22 Commissioner for external review of the DSD decision.

23 On 1 August 2014, an officer of the office of the Commissioner sent
24 an email to the DSD.⁴ Among other things, the email:

- (1) stated that at this stage there was insufficient evidence before the
 Commissioner to establish a claim for exemption under cl 4(3) of

¹ Affidavit of Stephen Melville sworn on 2 February 2016 attachment SJM 1.

² Affidavit of Stephen Melville attachment SJM 2.

³ Affidavit of Stephen Melville attachment SJM 4.

⁴ Affidavit of Stephen Melville attachment SJM 7, 62 - 63.

sch 1 to the FOI Act in relation to documents including the Disputed Documents;

- (2) stated the Commissioner's view that private organisation or persons having business dealings with government must necessarily expect greater scrutiny of and accountability for those dealings than in respect of other dealings but should not suffer commercial disadvantage because of them, referring to earlier decisions of the information Commissioner;
- (3) invited the DSD to provide the Commissioner with submissions in support of its claims for exemption of the Disputed Documents under cl 4(3) of sch 1 to the FOI Act.

10 On 25 August 2014, the DSD provided submissions in that respect by email.⁵ In relation to document 1, the email contained the following submissions:

1. Document 1 is a Pipeline Approvals Proposal for Buru Energy dated 9 December 2011 prepared by OSD Pipelines, a consultant to Buru Energy.
2. The document has a *Limitations Statement* that reads:

This proposal has been prepared by OSD Pipelines for the exclusive consideration of the client. The proposal is 'Commercial in Confidence' and must not be distributed or used by a third party without the express written permission of OSP Pipelines (p1).
3. The *Limitations Statement* states that the document contains commercial in confidence information. We submit that statement is consistent with the contents of the document.
4. By way of background, this document was prepared in 2011, prior to the State Agreement. The document sets out information about the possible route of a pipeline to be constructed. It also sets out the location of land parcels which may be impacted, by the development of Buru Energy's gas pipeline. The route of the gas pipeline is still under consideration, by Buru Energy.
5. Under the state Agreement, Buru Energy must seek Ministerial approval for the pipeline corridor. This approval cannot be sought before 31 December 2014 and, in all likelihood, will not be sought for a few years.

⁵ Affidavit of Stephen Melville attachment SJM 7, 58 - 60.

6. The document further sets out OSD Pipeline's view of the various environmental and native title approvals which may be required.
7. Limb (a) of clause 4(3) requires that disclosure of matter would reveal information about the business, professional, commercial or financial affairs of a person. It is our submission that Document 1 clearly relates to the business, or commercial affairs of Buru Energy and therefore limb (a) of clause 4(3) is satisfied.
8. The next question is whether limb (b) is satisfied and the disclosure of this type of information could reasonably be expected to prejudice the flow of further information of this kind to the Government or an agency.
9. Firstly, Buru Energy was under no obligation to provide this document to the agency. The agency relies upon companies such as Buru Energy providing confidential commercial information, in order to fully appreciate the development which is, of may be, proposed by that company and (using information from other companies also known to the agency) to understand the 'big picture' of state development in various industries. The agency is not able to obtain this information through other sources. Moreover, Buru Energy does not necessarily obtain a direct benefit from disclosing this information to the agency (unlike, say seeking a contract or a grant), rather it is part of the ongoing relationship between parties to a State Agreement to ensure mutual understanding of the Buru Energy business.
10. Secondly, the disclosure of this information publicly could have a substantial adverse impact on Buru Energy. The document includes details of landholders who will be affected by the pipeline corridor and native title holders who will need to give consent. Negotiation with each of these parties include a clear commercial element and, if the proposed path of the pipeline is published, the cost to Buru Energy of obtaining the necessary tenure, approvals and consents may increase.
11. As such, given that Buru Energy is under no obligation to provide the information, and would be put at a commercial disadvantage if the information was released, it is our strong submission that to disclose this information would prejudice the flow of this type of information to the agency in the future. We are of that view because Buru Energy are unlikely to provide information to the agency when it is aware that the agency will disclose that information pursuant to the FOI Act and that Buru Energy will suffer a commercial disadvantage (and there is no corresponding commercial advantage) from the disclosure. As such, in our view, limb (b) of clause 4(3) is satisfied.

11 In relation to document 18 the email contained the following submissions:

1. Document 18 records an exchange between agency officers and Mr Tom Streitberg, head of strategy at Buru Energy in which Mr Streitberg addresses various aspects of the (then) draft State Agreement at a general level, and discloses Buru Energy's commercial priorities in the development of the Joint Venture to which the state Agreement pertains.
2. The document includes reference to Buru Energy's preferences and targets in relation to gas export volumes, gas reserve targets and pipeline sizes.
3. Limb (a) of clause 4(3) requires that disclosure of matter would reveal information about the business, professional, commercial or financial affairs of a person. It is our submission that Document 18 clearly relates to the business or commercial affairs of Buru Energy and limb (a) of clause 4(3) is satisfied.
4. In relation to limb (b) of clause 4(3), in the agency's view much of the basis for the claim in relation to document 1 is equally applicable to the claim in relation to document 18.
5. However, rather than detailing a process for obtaining certain approvals and identifying specific tenure to be obtained (as was the case with document 1), document 18 deals with commercial projections for Buru Energy in relation to gas production and sale.
6. If information of this type was disclosed, it could affect the position of Buru Energy vis a vis the market and allow competitors to Buru Energy an understanding of its commercial strategy.
7. On that basis (and on the basis of the submissions set out in relation to document 1), in our view, limb (b) of clause 4(3) is satisfied.

12 By letter of 9 December 2014, the Commissioner set out his preliminary views in relation to the application including, relevantly, his preliminary view that the Disputed Documents were not exempt under cl 4(3).⁶ In his preliminary decision the Commissioner:

- (a) summarised DSD's submissions;
- (b) found that the requirements of cl 4(3)(a) were satisfied;
- (c) stated that it was necessary for the DSD to also show that the requirements of par b of cl 4(3) were satisfied;

⁶ Affidavit of Stephen Melville attachment SJM 6.

- (d) referred to the decision in *Attorney-General v Cockcroft*⁷ as to the meaning of the words 'could reasonably be expected to';
- (e) stated that the DSD has not provided any evidence that disclosure could reasonably be expected to cause the third party to suffer adverse effects to his business, profession or commercial or financial affairs nor that businesses could reasonably be expected to be reluctant to provide this type of information to government when negotiating substantial infrastructure and resource agreements of significant mutual benefit;
- (f) stated that the DSD has not provided evidence as to how and in what respect the anticipated adverse effects could come to pass;
- (g) stated that in the Commissioner's view business is well aware that engaging with government, especially on major infrastructure projects, necessarily attracts a greater level of public interest and scrutiny than would be the case in private commercial ventures;
- (h) stated that there was no evidence currently before him to suggest that, as a consequence of certain documents being made public, a business would be reluctant to deal with the state in the future in respect of large infrastructure projects;
- (i) stated that, on the material currently before him, he was not persuaded that disclosure of the Disputed Documents could reasonably be expected to have an adverse effect on the business or commercial affairs of the third party nor to prejudice the future supply of information of that kind to government.

13 In his letter of 9 December 2014 to the DSD, the Commissioner:

- (1) requested any further submissions in support of the claim for exemption be provided by 24 December 2014;
- (2) made a direction pursuant to s 70(4) of the FOI Act that the letter not be released into the public domain until the matter is finalised, stating that the letter could be shown to others only for the purpose of assisting in the preparation of any further submissions the DSD wished to make.

⁷ *Attorney-General v Cockcroft* (1986) 10 FCR 180, 190.

14 On 19 December 2014, the Director General of the DSD wrote to the Commissioner in response to the letters of 9 December 2014. The Director General's letter included the following:

Documents 1 and 18

Document 1 is a Pipeline Approvals Proposal from Buru Energy of 9 December 2011 prepared by OSD Pipelines, a consultant to Buru Energy.

Document 18 is an email marked 'Commercial in Confidence' from Mr Tom Streitberg to Mr Giles Nunis, Deputy Director General setting out Buru's commercial priorities and those of the Joint Venture in this Project.

I refer to the email of 25 August from this Agency to your Ms Lloyd. I reiterate and again repeat the submissions made in that email under heading 'Documents 1 and 18'. It is attached for ease of reference and marked as attachment 'B'.

You indicate that you do not accept that release of the disputed documents could reasonably be expected to have an adverse effect on the business and commercial affairs of the Company, (Buru) or to prejudice the future supply of information of that kind from such companies to Government. You state that there is 'no evidence currently before me that as a consequence of certain documents being made public, business would be reluctant to deal with the State in future'.

I have made lengthy submissions to you on the nature of this Agency and the general commercial negotiations it undertakes particularly in relation to State Development Agreements and State Agreements. I have made specific submissions on the nature of documents 1 and 18 in particular and why, given the very nature of the documents, their release could reasonably be expected to prejudice future supply of such information by business to this Agency. It is the Agency's contention that commercial entities who present information to this Department on the basis that they see it as 'Commercial in Confidence' expect and are entitled to expect that the Department will treat it as such. To disregard the current company's position would more generally damage this Department's dealings with companies and would see a decline in the supply of this kind of information in the future.

It must be noted also that much of the confidential commercial information provided to this Department is over and above what companies are strictly required to provide under law or contract. This enables this Department to better assess the proposals, their viability and the impact of a Project on communities and on social infrastructure among other things. If the information is sterilised or inadequate it will affect the ability of this Department to perform a key task for Government. The Agency has established solid relationships with most of the commercial entities who engage in State Agreements. The flow of information to the Department

would be severely prejudiced in the event of companies becoming aware that such information was likely to be released to the public at large (which obviously includes their competitors).

I accept that simply labelling a document 'Commercial in Confidence' or 'Confidential' is not of itself sufficient to establish a claim for exemption. It is clear that documents 1 and 18 not only are so marked but also in fact contain confidential information of a commercial nature. As stated in the Agency's submission of 25 August document 1 sets out the possible route of a gas pipeline including potentially impacted land parcels. The document includes various native title approvals and environmental approvals which may be necessary.

The route of the pipeline requires Ministerial approval which may not be sought ' for some years and under the State Agreement cannot be sought before 31 December 2014. I again repeat my comments at paragraphs 9 - 16 of the email of 25 August.

Document 18 is an exchange between Mr Tom Streitberg, Head of Strategy at Buru Energy and Mr Giles Nunis, Deputy Director General. It is headed 'Commercial in Confidence' and clearly contains commercial and confidential material namely Buru Energy's preferences and targets on gas export volumes, gas reserve targets and pipeline sizes in relation to this Project. Again I reiterate my Agency's previous submission in particular paragraphs 1 - 9 on page 4 of the email of 25 August.

15 The Director General's letter also requested that the s 70(4) limitation on release of the letter into the public domain be lifted to enable the DSD to obtain the specific evidence required by the Commissioner from the companies affected and from other companies who may be affected in the future. The Director General's letter stated that, while he took this approach reluctantly, he considered that he had no option but to address specifically the Commissioner's preliminary view of a lack of evidence and that could be done only if the Commissioner 'untie[d] his hands with respect to confidentiality'.⁸

16 On 15 January 2015, an officer of the office of the Commissioner telephoned an officer of the DSD. The Commissioner's officer stated that the Commissioner was inclined to seek the views of the relevant third party regarding the Disputed Documents, and proposed a meeting.⁹

17 The DSD sent further emails to the Commissioner's office. The upshot was that they did not propose to have a meeting and were awaiting a reply to the Director General's letter of 19 December 2014.

⁸ Affidavit of Stephen Melville attachment SJM 7.

⁹ Affidavit of Stephen Melville attachment SJM 8.

18 By email of 22 January 2015, an officer of the Commissioner stated that the Commissioner had written to a third party to seek its views regarding release of the Disputed Documents stating that the third party had also been invited to be joined in the complaint. The email stated that the third party submissions were due by 6 February 2015 and that she would contact the DSD again once those submissions were received.¹⁰

19 Contrary to what had been said in the email of 22 January 2015, the office of the Commissioner did not contact the DSD again prior to providing the Commissioner's decision.¹¹

The Commissioner's decision

20 On 17 April 2015, the Commissioner provided his decision to the DSD by a letter.¹² The Commissioner decided that the Disputed Documents were not exempt under cl 4(3). The Commissioner set out his reasoning in relation to the Disputed Documents in pars 72 - 100 of his reasons.

21 Paragraphs 72 - 77 and 79 - 82 reflect matters stated by the Commissioner in his preliminary decision and which I have already outlined. Paragraph 77 is in the following terms:

The agency has not provided any evidence that disclosure could reasonably be expected to have an adverse effect on the third party's business, professional, commercial or financial affairs, nor that the businesses could reasonably be expected to be reluctant to provide this type of information to the government when negotiating substantial infrastructure and resource agreements of significant mutual benefit. While asserting that disclosure could have a substantial adverse effect on the third party, the agency has not provided evidence as to how and in what respect the anticipated adverse effects could come to pass.

22 The reasons also:

- (1) stated that the agency's acknowledgment in its notice of decision that substantial information about the project was already in the public domain and readily accessible to the public at large seems inconsistent with its assertion that disclosure of the Disputed Documents could reasonably be expected to have an adverse effect

¹⁰ Affidavit of Stephen Melville attachment SJM 11.

¹¹ Affidavit of Stephen Wood sworn on 18 November 2015 [11].

¹² Affidavit of Stephen Melville attachment SJM 12 (the Commissioner's Reasons).

on the business affairs of the third party or prejudice the future supply of such information;¹³

- (2) referred to years having passed since the Disputed Documents came into existence;¹⁴
- (3) referred to ASX announcements dated 7 November 2012 and 19 June 2013 announcing the state agreement between the third party and the State government and making statements about various aspects of the effect of that agreement;¹⁵
- (4) also referred to a media statement by the Premier of Western Australia¹⁶ and other publicly available information;¹⁷
- (5) stated that the third party has not provided evidence of the disadvantage it says will accrue upon disclosure and has not provided 'probative evidence' of the misinformation it says will circulate, concluding that such claims were speculative and not supported by any probative evidence;¹⁸
- (6) concluded that, given the amount of material concerning the project readily available in the public domain, the Commissioner was not persuaded by the DSD or the third party that disclosure of information in the Disputed Documents was such that it could reasonably be expected to have the effects they suggest.¹⁹

The FOI Act

23 The long title of the FOI Act provides that, among other things, it is an act to provide for public access to documents. The objects of the Act are to enable the public to participate more effectively in governing the State; and make the persons and bodies that are responsible for State and local government more accountable to the public.²⁰ One of the means by which those objects are to be achieved is by creating a general right of access to State and local government documents.²¹

¹³ The Commissioner's Reasons [78].

¹⁴ The Commissioner's Reasons [83] - [84].

¹⁵ The Commissioner's Reasons [87] - [91].

¹⁶ The Commissioner's Reasons [92].

¹⁷ The Commissioner's Reasons [93] - [95].

¹⁸ The Commissioner's Reasons [96].

¹⁹ The Commissioner's Reasons [97].

²⁰ The FOI Act s 3(1).

²¹ The FOI Act s 3(2)(a).

BEECH J

24 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 Act. An agency is a minister, a public body or office. The DSD is an agency.

25 The general right of access to documents of an agency is subject to exceptions. One of the exceptions is that the agency may refuse access to a document if the document is an 'exempt document'.²² An exempt document means a document that contains exempt matter. Exempt matter is defined to mean matter that is exempt under sch 1 to the FOI Act.

26 Schedule 1 contains a number of clauses specifying circumstances in which matter will be exempt matter. Clause 4(3) is the relevant limb of cl 4. Clause 4(3) provides as follows:

(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.

27 In the proceedings before the Commissioner, the onus was on the DSD to establish that its decision that the Disputed Documents were exempt was justified.²³

28 Where an application is made for access to documents which contain information of a commercial value to a third party or concerning the business or commercial affairs of a third party, an agency may not give access to an applicant until it has taken such steps as are reasonably practicable to obtain the views of the third party as to whether the document contains exempt matter.²⁴

29 Section 70 sets out the procedure for dealing with a complaint to the Commissioner. It provides as follows:

²² The FOI Act s 23(1)(a).

²³ The FOI Act s 102(1).

²⁴ The FOI Act s 33.

Complaint, procedure for dealing with

- (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.

30 Section 74 provides that in dealing with a complaint the Commissioner has to give such directions and do such things as the Commissioner thinks necessary to avoid the disclosure of exempt matter or information as to the existence or non-existence of a document containing matter exempt under cl 1, 2 or 5 of sch 1. By s 74(2), the Commissioner is not to include exempt matter or information as to the existence or non-existence of a document containing matter exempt under cl 1, 2 or 5 in a decision on a complaint or in reasons given for the decision.

31 By s 76(3), the Commissioner has to make a decision on the complaint within 30 days after the complaint was made unless the Commissioner considers that it is impracticable to do so.

32 By s 85(1), an appeal lies to this court on any question of law arising out of any decision of the Commissioner on a complaint relating to an access application.

33 By s 90, in hearing and determining review proceedings, the court has to avoid the disclosure of exempt matter or information as to the existence or non-existence of a document containing matter exempt under cl 1, 2 or 5 of sch 1.

The nature of the appeal

34 Under s 85 of the FOI Act, an appeal lies only on a question of law. Appeals under s 85 of the FOI Act are proceedings in the nature of judicial review, rather than conventional appeals.²⁵

35 The powers of an appellate court in proceedings of this nature must be exercised with restraint to avoid an appeal on a question of law opening the door to an appeal by way of rehearing.²⁶ The reasons of an administrative decision-maker are not to be construed minutely and with an eye 'keenly attuned to the perception of error'.²⁷

Grounds of appeal

36 DSD's grounds of appeal are as follows:

- (1) The Information Commissioner failed to afford the Appellant procedural fairness.
 - (a) the Information Commissioner failed to afford the Appellant a reasonable opportunity to make submissions in respect of matters on which he based his decision that documents numbered 1 and 18 did not satisfy the requirements under clause 4(3)(b) of schedule 1 to the *Freedom of Information Act 1992* (being, in particular, matters discussed a paragraphs [83], [84] and [85] to [95] of the decision);
 - (b) the Information Commissioner failed to allow the Appellant to release to third parties his preliminary view of the complaint, so as to allow the Appellant 'to obtain the specific evidence' demonstrating that the documents numbered 1 and 18 satisfied the requirements of clause 4(3)(b) of the Schedule 1 to the *Freedom of*

²⁵ *Osland v Secretary to the Department of Justice (No 2)* [2010] HCA 24; (2010) 241 CLR 320 [18]; *Apache Northwest Pty Ltd v Department of Mines & Petroleum (No 2)* [2011] WASC 283 [28].

²⁶ *Osland* [20].

²⁷ *Collector of Customs v Pozzolanic Enterprises Pty Ltd* [1993] FCA 322; (1993) 43 FCR 280, 287; *Apache Northwest Pty Ltd v Department of Mines & Petroleum* [2012] WASCA 167 [36].

Information Act 1992, in circumstances where the Appellant had requested such release; and

- (c) having advised the Appellant that he would contact the Appellant again before making his decision, the Commissioner proceeded to determine the complaint without contacting the Appellant, thereby depriving the Appellant the opportunity to provide further submissions and evidence.
- (2) The Information Commissioner erred in law by unreasonably failing to allow the Appellant to obtain evidence from third parties, in circumstances where he considered such evidence essential to satisfying the requirements of clause 4(3)(b) of Schedule 1.
- (3) The Information Commissioner erred in law by misconstruing the phrase 'could reasonably be expected' in clause 4(3)(b) of Schedule 1 to the *Freedom of Information Act 1992*, and wrongly determining that the test set out in that clause could only be satisfied by way of probative evidence.

Ground 1: procedural fairness

37 Generally speaking, absent a clear legislative intention to the contrary, a statutory power must be exercised in a way that affords procedural fairness to a party whose interests might be adversely affected by its exercise.²⁸

38 The content of the requirements of procedural fairness is flexible and varies with the circumstances of the case and, especially, the statutory context.²⁹

39 A court required to determine whether a decision-maker has departed from the requirements of procedural fairness must analyse all the facts and circumstances relevant to the purported exercise of the power, viewed in the context of the statutory framework conferring the relevant power for the purpose of ascertaining whether there has been practical injustice in the particular case.³⁰

²⁸ *Plaintiff S10/2011 v Minister for Immigration and Citizenship* [2012] HCA 31; (2012) 246 CLR 636 [97]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [2003] HCA 6; (2003) 214 CLR 1 [81] - [83]; *Re Minister for Resources; Ex parte Cazaly Iron Pty Ltd* [2007] WASCA 175; (2007) 34 WAR 403 [267].

²⁹ *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* [2006] HCA 63; (2006) 228 CLR 152; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* [37]; *Polo Enterprises Australia Pty Ltd v Shire of Broome* [2015] WASCA 201; (2015) 49 WAR 134 [114].

³⁰ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [37]; *Mijatovic v Legal Practitioners Complaints Committee* [2008] WASCA 115; (2008) 37 WAR 149 [4].

40 In *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd*³¹ the Full Court of the Federal Court said:

Where the exercise of statutory power attracts the requirement for procedural fairness, a person likely to be affected by the decision is entitled to put information and submissions to the decision-maker in support of an outcome that supports his or her interests. That entitlement extends to the right to rebut or qualify by further information, and comment by way of submission, upon adverse material from other sources which is put before the decision-maker. It also extends to require the decision-maker to identify to the person affected any issue critical to the decision which is not apparent from its nature or the terms of the statute under which it is made. The decision-maker is required to advise of any adverse conclusion which has been arrived at which would not obviously be open on the known material. Subject to these qualifications however, a decision-maker is not obliged to expose his or her mental processes or provisional views to comment before making the decision in question.

41 This statement of principle has been applied in many cases. It was referred to with evident approval by Buss JA in *Apache Northwest Pty Ltd v Agostino (No 2)*,³² and by Murphy JA in *McKay v Commissioner of Main Roads*.³³

42 In *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs*³⁴ the High Court said that caution was needed in applying the principles stated in that passage. It is wrong to assume that the question of what was required by procedural fairness involves a choice between a dichotomy of two categories (conclusions not obviously open on the known materials; and mental processes of decision-making). Those two categories do not necessarily cover the universe of possibilities. Moreover, such an approach may distract attention from the fundamental principle. The fundamental principle is that an opportunity to be heard would 'ordinarily require the party affected to be given the opportunity of ascertaining the relevant issues and to be informed of the nature and content of adverse material',³⁵ and then, I would add, to put information and submissions to the decision-maker.³⁶

43 In *Apache Northwest*, Buss JA stated (Wheeler and Newnes JJA agreeing)³⁷ that, generally, procedural fairness does not require the

³¹ *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576, 591 - 592.

³² *Apache Northwest Pty Ltd v Agostino (No 2)* [2009] WASCA 232 [217].

³³ *McKay v Commissioner of Main Roads* [2013] WASCA 135 [157].

³⁴ *SZBEL* [30] - [32].

³⁵ *SZBEL* [32].

³⁶ *Commissioner for Australian Capital Territory Revenue v Alphaone* (561).

³⁷ *Apache Northwest* [1].

decision-maker to reveal a proposed conclusion to a person to whom procedural fairness must be accorded but, in a particular case, it may be necessary for an adverse conclusion to be disclosed with an opportunity to make submissions, if the proposed conclusion could not reasonably have been anticipated.³⁸

44 In the present case, the contents of requirements of procedural fairness is informed by div 3 of pt 4, namely s 65 - 78, and especially, s 70. While, generally speaking, the Commissioner may determine the procedure for investigation and dealing with complaints, and need not hold any formal hearings, the Commissioner has to ensure that parties to a complaint are given a reasonable opportunity to make submissions to the Commissioner.³⁹ That statutory requirement defines, at least in part, the content of the requirement of procedural fairness that a party is given a reasonable opportunity to present his or her case.

45 In my opinion, for the reasons that follow, the Commissioner failed to afford procedural fairness to the DSD in that it did not provide the DSD with a reasonable opportunity to make submissions.

46 The Commissioner's letter of 9 December 2014 to the DSD requested submissions from the DSD. On the face of things, the provision of that letter provided to the DSD an opportunity to make further submissions. However, in my opinion, when regard is had to the course of communications between the DSD and the Commissioner following the letter of 9 December 2014, the proper conclusion is that the DSD was denied a reasonable opportunity to present submissions.

47 If an administrative decision-maker misleads, whether inadvertently or not, a party as to the procedure to be adopted, and if, as a result, the party did not take an opportunity to submit material or make submissions, there may thereby be a denial of procedural fairness.⁴⁰ The position is otherwise if it is established that the party would not have acted differently in the absence of the misleading impression conveyed by the decision-maker.⁴¹

48 By the Director General's letter of 19 December 2014, the DSD sought to have the Commissioner lift the confidentiality direction made

³⁸ *Apache Northwest* [217] - [218].

³⁹ The FOI Act s 70(3).

⁴⁰ *Re Refugee Review Tribunal; Ex parte Aala* [2000] HCA 57; (2000) 204 CLR 82 [3] - [4], [103], [128], [208], [209], [213]; *Muin v Refugee Review Tribunal* [2002] HCA 30; (2002) 76 ALJR 966 [63], [171], [194], [256] - [257].

⁴¹ *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* [19], [36] - [38], [106], [114], [122], [149].

pursuant to s 70(4) of the Act. It was clear from the letter of 19 December 2014 that the Director General considered that the confidentiality order tied his hands, so as to prevent him obtaining the further evidence invited by the Commissioner's letter. It is not necessary to dwell on the question of whether, in that respect, the Director General was correct. What is important is that the letter made clear that that was the understanding of the DSD. Emails sent by the DSD to the Commissioner's office in January 2015 made it clear that the DSD was awaiting a reply of the Director General's letter of 19 December 2014. The last communication between the parties, prior to the Commissioner making his decision, was the email of 22 January 2015 from an officer of the Commissioner to the DSD. The email stated that submissions had been invited from third parties and that, once the submissions were received, the officer would contact the DSD again.

49 In my opinion, the correspondence objectively conveyed to the DSD that:

- (a) once submissions were received from the third party, the Commissioner (or an officer) would contact the DSD;
- (b) at that stage, a response would be given to the DSD to the request made in the Director General's letter of 19 December 2014;
- (c) in light of that response, the DSD would be invited to submit further information and make its further submissions;
- (d) by necessary implication, no decision adverse to the DSD would be made prior to the Commissioner making further contact with the DSD as contemplated in the email.

50 Had the Commissioner done as had been foreshadowed, the DSD would have obtained further evidence and provided further evidence and submissions to the Commissioner.⁴² The prospect that that further evidence and submissions may have affected the Commissioner's decision cannot be excluded.

51 In those circumstances, in my respectful opinion, the DSD was in substance deprived of the opportunity to make submissions.

52 For these reasons, I am satisfied that the Director erred in law in that he denied procedural fairness to the DSD. Consequently, I would uphold ground 1.

⁴² Affidavit of Stephen Wood [12].

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53 In light of that conclusion it is not necessary to deal with ground 2. I
turn to ground 3.

Ground 3

54 Ground 3 asserts that the Information Commissioner erred in law in
that he misconstrued the phrase 'could reasonably be expected' as
requiring objective or probative evidence that must be found outside of
the submissions of a party.

55 The merits of ground 3 turn upon how the reasons of the
Commissioner are read. As the DSD accepts on this appeal,⁴³ if the
Commissioner's reasons are read as involving no more than a conclusion
that the submissions of the DSD and of the third party failed to satisfy the
Commissioner that the disclosure of the Disputed Documents could
reasonably be expected to have an adverse effect on the third party's
affairs or to prejudice the flow of such information in the future, no error
of law would be revealed.

56 As I have said, the reasons of the Commissioner must be read as a
whole, and must not be read with an eye keenly attuned to identifying
error.

57 For the reasons that follow, I am satisfied that, when the reasons of
the Commissioner are read as a whole, and in light of the submissions that
had been put to him by the DSD, the Commissioner erred in the manner
alleged by ground 3.

58 In both the preliminary decision, and in his (final) reasons for
decision, on many occasions the Commissioner referred distinctly to
submissions and to evidence.

59 The rules of evidence do not apply to a decision of the
Commissioner.⁴⁴ The Commissioner may be taken to understand that
basic feature of the procedural law regulating his decision-making. In
referring to evidence, I take the Commissioner to be referring to
information or material that is probative, and that goes beyond mere
assertion by a party.

60 The submissions made by the DSD to the Commissioner went well
beyond mere assertion.

⁴³ Appeals 5.

⁴⁴ The FOI Act s 70(2).

61 The DSD's submissions drew attention to the nature and contents of the Disputed Documents in support of a conclusion that release of them could reasonably be expected to prejudice the future supply of information to the DSD from those who engage in commercial negotiations with the DSD. More particularly, those submissions argued that consideration of the nature and contents of the Disputed Documents demonstrated that the information in them was of a commercially confidential character. For each of the disputed documents, the submission identified in a specific way the character of what was said to be confidential information and the nature of the harm to the third party that could be expected if the document were released. In relation to document 1, the information as to the proposed path of the pipeline could enable those with whom the third party had to negotiate for consent to extract a higher price from the third party. In relation to document 18, the release of the third party's proposed projections for gas production and sale to its competitors would put the third party at a competitive disadvantage. The submissions went on to assert that because much of the information in the Disputed Documents was material the third party was not obliged to disclose to the DSD, disclosure of the Disputed Documents could reasonably be expected to prejudice the future supply of information to the DSD from those who engage in commercial negotiations with the DSD.

62 The Commissioner's reasons did not explain why the DSD's submissions as to the inferences to be drawn from the nature and contents of the Disputed Documents were not to be accepted. The Commissioner's reasons did not mention what was said in the DSD's submissions as to the nature of the information contained in the Disputed Documents and the inferences that could be drawn from it. In his reasons the Commissioner did not say that the DSD's submissions failed to satisfy him as to what could reasonably be expected to result from disclosure. Nor did he say the DSD had not provided sufficient evidence in that respect. Rather, the Commissioner stated that the DSD had not provided **any** evidence in that respect.⁴⁵

63 Even if the rules of evidence applied (which they do not), the contents of documents and the inferences that can be drawn from those contents are evidence. To my mind, the DSD's submissions plainly included evidence in support of the conclusions they invited. In that context, the Commissioner's statement that the DSD had provided no evidence seems to me to reveal an erroneous approach on the part of the

⁴⁵ The Commissioner's Reasons [77].

Commissioner in drawing a hard and fast distinction between evidence and anything contained in the DSD's submissions.

64 In his reasons the Commissioner further stated that 'while asserting that disclosure could have a substantial adverse effect on the third party, the [DSD] has not provided evidence as to how and in what respect the anticipated adverse effects could come to pass'.⁴⁶ In my view, the DSD's submissions explained in detail how and in what respect the anticipated adverse effects could come to pass. As I have said, the submissions explained that document 1 would reveal the intended route of the pipeline, disadvantaging the third party in negotiations with parties whose consent it required to construct the pipeline. The DSD submissions said that the release to the third party's competitors of the third party's projected gas production and sale in document 18 would put it at a competitive disadvantage.

65 In my respectful opinion, the Commissioner's statement that the DSD had not provided any evidence as to how and in what respect the anticipated adverse effects could come to pass is a further indication that the Commissioner erroneously considered that whether the flow of information could reasonably be expected to be prejudiced had to be established by objective evidence that must be found outside of the Commissioner's submissions. That approach reveals and reflects an error of law on the part of the Commissioner.

66 For these reasons I would uphold ground 3.

Conclusion

67 For these reasons I would allow the appeal, set aside the Commissioner's decision and order that the matter be remitted to the Commissioner for rehearing.

⁴⁶ The Commissioner's Reasons [77].