OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Refs: F2006197 & F2006237
Decision Ref: D0202007

Participants:

West Australian Newspapers Limited
and
Civil Service Association of WA Inc.
Complainants

- and -

Salaries and Allowances Tribunal
First Respondent
and
Mercer (Australia) Pty Ltd
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access – whether agency is a tribunal – whether requested document is a 'document of a court' for the purposes of clause 5 of the Glossary to the FOI Act – section 102(1) - onus of proof – clause 3(1) – personal information – meaning of 'personal information' - whether disclosure would reveal personal information about an individual – limits on exemption in clauses 3(2) to 3(6) – public interest - clause 4(1) – trade secrets - whether disclosure of disputed document would reveal a trade secret of any person – clause 4(2) – commercially valuable information when information in the public domain – whether disclosure of disputed document would reveal commercially valuable information – clause 4(3) – information about the business, professional, commercial or financial affairs of a person – whether disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of a person -

LEGISLATION

Freedom of Information Act 1992: sections 3(1); 10; 23(1)(b); 32; 39(3)(a); 102(1); Schedule 1, clauses 3(1); 4(1); 4(2); 4(3); Schedule 2, Glossary, clause 1; clause 3; clause 5;
Freedom of Information Regulations 1993: regulation 9

Salaries and Allowances Act 1975: sections 5(1);5(2); 5A(5); 5A(6); 5A(7); 5A(8); 6; 6(1)(d); 6(1)(e); 6(2)(c); 6(3); 6(4); 6B; 6B(3); 7; 7(4); 7(5); 8; 9; 10(1); 10(2); 10(4);

Salaries and Allowances Regulations: regulation 3

Freedom of Information Act 1982 (Cth): section 6(1); 43(1); Schedule 1

Interpretation Act 1984: sections 18; 19;

Corruption and Crime Commission Act 2003;

CASES

Re Bartucciotto and State Administrative Tribunal [2006] WAICmr 9;
N v Director general, Attorney-General's Department [2002] NSWADTAP 41;
Sherritt Gordon Mines Ltd v FCT (1976) 10 ALR 441;
Douglas v Minister for Torres Strait and Islander Affairs (1994) 34 ALD 192;
Police Force of WA v Kelly (1997) 17 WAR 9;
Minister for Transport v Edwards [2000] WASCA 349;
General Manager, WorkCover Authority of NSW v Law Society of NSW [2006] NSWSCA 84;
Channel 31 TV Ltd v Inglis (2001) 25 WAR 147;
Information Commissioner for Western Australia v Ministry of Justice (2001) WASC 3;
Re Monger; Ex parte WMC Resources Ltd and Anor [2002] WASCA 129;
Re Carey; Ex parte Exclude Holdings Pty Ltd and Others (2006) 32 WAR 501;
Re Bartucciotto and Guardianship and Administration Board [2004] WAICmr 16;
Re Geary and Others and Ministry of Justice [1995] WAICmr 29;
Re Monger; Ex parte Western Power Corporation [2000] WASC 271;
Re Rakich and Guardianship and Administration Board [2000] WAICmr 3;
Re Greg Rowe and Associates and Minister for Planning and Anor [2001] WAICmr 4;
Searle Australia v Public Interest Advocacy Centre (1992) 36 FCR 111;
Re Organon (Aust) Pty Ltd v Department of Community Services and Health (1987) 13 ALD 588;
Re Public Interest Advocacy Centre v Schering Pty Ltd (1991) 23 ALD 714;
Gill v Department of Industry, Technology and Resources (1987) VR 681;
Lansing Linde Ltd v Kerr (1990) 21 IPR 529;
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550;
Re Ryan and City of Belmont [2000] WAICmr 55;
Re Cannon and Australian Quality Egg Farms Ltd (1994) QAR 491;
Re Hassell and Health Department of Western Australia [1994] WAICmr 25;
Re E and L Metcalfe Pty Ltd and Western Power Corporation [1996] WAICmr 23;
Re Yerilla Gems Pty Ltd, Gembank Limited, WA Gem Exporters and Department of Minerals and Energy [1996] WAICmr 58;
Re Precious Metals Australia Limited and Department of Minerals and Energy [1997] WAICmr 12;
Re Cockburn Cement Ltd and Department of Environment, Water and Catchment Protection and Kwinana Progress Association [2003] WAICmr 23;

Re Prosser Management Pty Ltd and City of Bunbury [2003] WAICmr 30;
Re Rogers and Water Corporation and Guppy and KG & GS Nominees Pty Ltd [2004] WAICmr 8;
Re Kimberley Diamond Company NL and Department of Resources Development and Argyle Diamond Mines Pty Ltd [2000] WAICmr 63;
Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University and Others [2001] WAICmr 1;

TEXTS

Pearce, D C and Geddes, R S, *Statutory Interpretation in Australia*, 6th Edition, Butterworths, 2006

DECISION

The decision of the agency to refuse the complainant access to the disputed document is set aside. I find that:

- The agency is not a "*court*" within the meaning of the *Freedom of Information Act 1992* ('the FOI Act');
- Pages 13-15; 25; the table on page 26, pages 28, 30, 34-36, 55, 56 and Appendix C (pages 51-53) of the disputed document are not exempt under clauses 4(1), 4(2) or 4(3) of Schedule 1 to the FOI Act, as claimed by the agency;
- The tables on pages 13-15; the charts on pages 28-31; the coordinates on pages 51-53, inclusive, and pages 62-65 and 67-71, inclusive, are not exempt under clause 4(2) of Schedule 1 to the FOI Act, as claimed by Mercer;
- The information about the relevant officer holders identified in the disputed document is not exempt under clause 3 of Schedule 1 to the FOI Act.

C P SHANAHAN SC

A/INFORMATION COMMISSIONER

10 December 2007

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REASONS FOR DECISION

SECTION 1 BACKGROUND

1. In April 2006 the Salaries and Allowances Tribunal ('the agency') received two applications under the *Freedom of Information Act 1992* ('the FOI Act') for access to a report, dated 8 March 2006, entitled "*Review of Grading and Remuneration Rates – Special Division Office Holders*" ('the Report') by Mercer Human Resource Consulting Pty Ltd, now Mercer (Australia) Pty Ltd ('Mercer'), an independent consultant.

2. The applications were made by the Civil Service Association of Western Australia Inc ('the CSA') on 13 April 2006, and by West Australian Newspapers Limited ('WAN') on 20 April 2006. The CSA and WAN are the complainants in this matter.

3. The purpose of the Report was to review the grading and remuneration rates for holders of offices included in the Special Division of the Public Service in Western Australia and persons holding offices prescribed in regulation 3 of the *Salaries and Allowances Regulations 1975*, including the former Acting Information Commissioner, Ms Darryl Wookey ('the former A/Commissioner').

4. The Report addresses matters which were the subject of an inquiry by the agency under section 6(1)(d) and (e) of the *Salaries and Allowances Act 1975* ('the SAT Act') and is part of the material upon which the agency based its determination dated 7 April 2006, which set the remuneration to be given to the relevant office holders.

5. While the agency has an Executive Officer, Mr Michael Hollier, who is appointed by the Department of Premier and Cabinet ('the Department'), the Department assists the agency with administrative matters concerning the agency, such as FOI requests. Mr Hollier is the "*principal officer*" of the agency for the purposes of the FOI Act (s.100).

6. On 13 June 2006, the Executive Officer of the agency provided each of the CSA and WAN with Notices of Decision in respect of their applications for access to the Report, both of which refused access to the Report on the ground that it was not a document of the agency pursuant to s.23(1)(b) of the FOI Act. Those decisions were made by the agency's principal officer, and therefore internal review was not available to the complainants (see s.39((3)(a)). Subsequently, on 16 June 2006, WAN applied directly to the former A/Commissioner for external review of the agency's decision, as did the CSA on 19 July 2006 (the 'applications for external review').

SECTION 2 CONDUCT OF EXTERNAL REVIEW

7. Following receipt of the applications for external review, the former A/Commissioner considered that there might be a perception of bias if she dealt with them because the Report dealt with her emoluments. As a consequence, on 10 April 2007, I was appointed as Acting Information Commissioner under the FOI Act for the purpose of dealing with those applications (the 'complaints').

8. In the course of my dealing with the complaints, I have had access to the files of the Office of the Information Commissioner ('the OIC'). Those files show that, prior to my appointment, Ms Anne Marshall, Legal Officer at the OIC, wrote a fourteen page letter to the agency dated 27 July 2006 dealing with the question of whether the agency is a "*tribunal*" and, thus a "*court*" for the purposes of the FOI Act ("the Marshall Letter"). The purpose of the Marshall Letter was to determine whether the WAN complaint could be conciliated. Mr Hollier, on behalf of the agency, responded to Ms Marshall by letter dated 17 August 2006 ("the Hollier Letter").

9. Following my appointment, on 14 May 2007, I provided the agency and the complainants with a letter setting out my preliminary view of the agency's contention that it is a "*tribunal*" and therefore a "*court*" for the purposes of the FOI Act. The agency made further submissions to me in response to that letter, including claims, in the alternative, that the Report is exempt under clause 4 of Schedule 1 to the FOI Act. Subsequently, on 20 July 2007, Mercer was joined as a party to each of the complaints. Mercer was invited to, and did, provide me with submissions in support of its claim that certain specified parts of the Report are exempt under clause 4(2).

10. On 23 October 2007, I provided the agency, the complainants and Mercer with a letter setting out my preliminary view of the agency's and Mercer's claims in respect of clause 4. In particular, I asked Mercer to provide me with clarification as to why the specific information it claimed was exempt had a "*commercial value*".

11. My preliminary view was that the agency was not a "*tribunal*" and, thus neither was it, a "*court*" for the purposes of the FOI Act and consequently the Report was not exempt as claimed. I therefore instructed the OIC to contact all of the office holders who were referred to in the Report, pursuant to my obligations under section 32 of the FOI Act, to obtain their views as to whether the Report contains matter that is exempt under clause 3(1).

12. On 15 November 2007, in response to my letter of 23 October 2007, the agency advised me that it maintained its view that it is a "*tribunal*" and therefore a "*court*" for the purposes of the FOI Act but made no further submissions in relation to clause 4.

13. On 19 November 2007, following the grant of a short extension of time in which to respond, Mercer provided me with a detailed 13-page submission in support of its view that certain information in the Report is exempt under clause 4 but withdrew its claim for exemption for some of the information that it previously claimed was exempt.

14. Since the complaints deal with the same document and the claims made by the agency and Mercer in relation to both complaints are similar, I have decided to publish one decision in respect of both complaints.

SECTION 3 AGENCY REFUSES ACCESS TO THE REPORT

15. By its Notices of Decision dated 13 June 2006, the agency refused the complainants access to the Report pursuant to section 23(1) of the FOI Act, which provides: -

> "***23. Refusal of access***
>
> *(1) Subject to section 24 the agency may refuse access to a document if -*
>
> *(a) the document is an exempt document;*
>
> *(b) the document is not a document of the agency; or*
>
> *(c) giving access to the document would contravene a limitation referred to in section 7.*"

16. By its Notices of Decision, the agency asserted that it is a "*tribunal*" and therefore a "*court*" for the purposes of the FOI Act and that a document relating to a "*court*" is only to be regarded as "*a document of the court*" - as set out in clause 5 of the Glossary to the FOI Act - if it relates to matters of an administrative nature. The agency determined that, as the Report does not relate to administrative matters, it is not a document of the agency.

SECTION 4 WHY THE AGENCY REFUSED ACCESS

17. The agency asserts that the Report is not a document of the agency because the agency is a court. Clause 5 of the Glossary to the FOI Act provides:

> ***"5. Documents of a court***
>
> *A document relating to a court is not to be regarded as a document of the court unless it relates to matters of an administrative nature."*

The word "*court*" is defined in clause 1 of the Glossary as follows:

> "'***court***' *includes a tribunal*".

18. The agency notes that the right of access to documents of a court (or tribunal) is limited to documents relating to matters of an administrative nature. The agency submits that the Report was created in the course of the agency's judicial or quasi-judicial functions and is not, therefore, a document relating to matters of an administrative nature.

SECTION 5 IS THE AGENCY A 'COURT'?

19. The first question for my consideration is whether the agency is a "*court*" for the purposes of the FOI Act. If the answer to the question is in the affirmative, the second question is whether the Report is "*a document of the court*". The Report will be "*a document of the court*" if "*it relates to matters of an administrative nature*".

20. Section 10 of the FOI Act gives every person a right of access to the documents of an agency, other than an exempt agency, subject to and in accordance with the provisions of the FOI Act. The agency is not an exempt agency as listed in Schedule 2 to the FOI Act and as defined in clause 1 of the Glossary.

21. Clause 1 of the Glossary defines "*agency*" to mean:

> "*(a) a Minister; or*
>
> *(b) a public body or office*",

and defines "*public body or office*" to mean - among other things:

> *"(e) a body or office that is established for a public purpose under a written law"*.

22. The agency is established under section 5 of the SAT Act, the long title of which provides that it is:

> *"[a]n Act to establish a Tribunal to determine or report upon the remuneration to be paid or provided to the Governor and to holders of ministerial, parliamentary, judicial and certain other public offices, to determine certain matters relating to the superannuation of members of Parliament, to repeal the* Parliamentary Salaries and Allowances Act 1967*, to authorise the making of arrangements for the payment of certain travelling expenses, and for incidental and other purposes."*

23. The FOI Act provides that a "*court*" is an "*agency*". Clause 3 of the Glossary states:

> ***"3. Courts are agencies but judges, etc., are not***
>
> *For the purposes of this Act -*
>
> *(a) a court is an agency;*
>
> *(b) a registry or other office of a court and the staff of such a registry or other office are part of the court;*
>
> *(c) a person holding a judicial office or other office pertaining to a court, being an office established by the written law establishing the court, is not an agency and is not included in an agency."*

5.1 The Agency's Submissions

24. The agency's submissions in relation to the question of whether it is a "*court"* for the purposes of the FOI Act are set out in its Notices of Decision dated 13 June 2006, the Hollier Letter and its letter to me of 31 May 2007, in response to my preliminary view of that question. In the latter, the agency accepts that it … *is clearly an agency for the purposes of the FOI Act in that it falls within the definition of a "public body or office" in the Glossary to the Act."*

25. The agency makes the following submissions:

25(1) With regard to the question of whether or not the agency is a "*tribunal*" for the purposes of the FOI Act, the agency submits, at p.2 of the Hollier Letter, that "*as a matter of commonsense, where Parliament has established a body as a 'tribunal', such as in the case of the Salaries and Allowances Tribunal, the presumption must be that that body is a 'tribunal'."* In its letter of 31 May 2007, the agency submits that the following points should be considered when construing the word "*tribunal*" in the FO1 Act:

25(1)(i) The agency was established by the Parliament of Western Australia as a 'Tribunal' under s.5(1) of the SAT Act. Consequently, the agency is *prima facie* a "*tribunal*" and therefore a "*court*" for the purposes of the FOI Act.

25(1)(ii) The word 'tribunal' should be construed according to its ordinary and natural meaning, as noted by the former A/Commissioner in *Re Bartucciotto and State Administrative Tribunal* [2006] WAICmr 9 at [89] ('*Bartucciotto* No.2') by reference to the definition of 'tribunal' in the *Australian Concise Oxford Dictionary* (4th edition, 2004) as being:

> "*1 an adjudicative body. 2 a court of justice. 3 a seat or bench for a judge or judges. 4 (a) a place of judgment. (b) judicial authority...".*

The agency also notes the similar definition in *N v Director General, Attorney-General's Department (GD)* [2002] NSWADTAP 41. The agency contends that the first of those alternative dictionary definitions is the appropriate one and submits that the agency is clearly an adjudicative body which was established by the SAT Act to "*determine or report upon the remuneration to be paid or provided"* to various office holders as set out in the long title to the SAT Act.

The agency says that it adjudicates upon questions concerning the remuneration and benefits payable to specified office holders and, in order to do so, the SAT Act requires the agency to make inquiries into those matters and determine them. In order to do that the SAT Act bestows a wide range of powers on the agency (which are referred to in detail in paragraph 45 of these submissions below). For example, among other things, the agency is required, - either annually or at the request of the Premier - to make inquiries into, and determine, the remuneration to be paid to various officers of the executive government, pursuant to ss.5A and 6 of the SAT Act. In light of that information, the agency submits that it clearly adjudicates the matters into which it is required to make inquiries, determinations and reports, subject only to the possibility of Parliamentary disallowance of recommendations.

25(1)(iii) The word 'tribunal' should be considered in the context in which it is used. That is, in the definition of "*court*" in clause 1 of the Glossary to the FOI Act, the word "*tribunal*" is clearly intended to mean something different to the word "*court*" and "*was used to enlarge the ordinary meaning of the word 'court'. (It is for this reason that it is inappropriate to give to the term 'tribunal' the second dictionary meaning noted above, namely a 'court of justice')."* The word "*includes*" in that definition of "*court*" is used to include items which would fall outside the ordinary meaning of the defined word: (see *Sherritt Gordon Mines Ltd v FCT* (1976) 10 ALR 441 at 455; *Douglas v Minister for Torres Strait and Islander Affairs* (1994) 34 ALD 192 at 203; and Pearce and Geddes, *Statutory Interpretation in Australia*, 5th edition, 2001 at para. 6.56). It follows that the word "*tribunal*" is used in clause 1 of the Glossary to enlarge the ordinary meaning of "*court*" and, in this context, it would be contrary to the clear intention of the Parliament to construe "*tribunal*" as meaning a tribunal which is analogous to a court or which is, in substance, a 'court-substitute'.

25(1)(iv) The FOI Act contains textual considerations which indicate that the term "*tribunal*" in clause 1 of the Glossary was intended by Parliament to encompass bodies other than tribunals analogous to a court. For example, clause 3(b) of the Glossary refers to a "*a registry or other office of a court and the staff of such a registry or other office*". Tribunals which are closely analogous to courts (such as the State Administrative Tribunal) ordinarily have registries at which documents may be filed by parties to proceedings. Tribunals which are not analogous to courts but which nevertheless are adjudicative bodies may not necessarily have a registry of this kind, but may be administratively supported simply by an office.

Similarly, clause 3(c) of the Glossary refers to "*a person holding a judicial office or other officer pertaining to a court, being an office established by the written law establishing the court ...*". Clearly, Parliament contemplated that defining "*court*" to include a "*tribuna*l" would encompass bodies with statutorily appointed officers who did not hold an office able to be described as a 'judicial office'. Although the agency's members do not hold judicial offices, they are appointed by the Governor to offices established by s.5(2) of the SAT Act.

25(1)(v) The word "*tribunal"* in clause 1 of the Glossary definition of "*court*" should not be defined narrowly.

On the basis of the authorities in *Police Force of WA v Kelly* (1997) 17 WAR 9; *Minister for Transport v Edwards* [2000] WASCA 349 at [31] per Hasluck J and *General Manager, WorkCover Authority of NSW v Law Society of NSW* [2006] NSWSCA 84 at [150]-[151], the correct approach to the interpretation of the word "*tribunal*" in the FOI Act is to give it its ordinary meaning and not to give it a narrow interpretation in reliance on the decision by Hasluck J in *Channel 31 TV Ltd v Inglis* (2001) 25 WAR 147 at 156 and observations made by Wheeler J in *Information Commissioner for Western Australia v Ministry of Justice* [2001] WASC 3 at [21].

The decisions by the Supreme Court of Western Australia in *Re Monger; Ex parte WMC Resources Ltd and Anor* [2002] WASCA 129 and by the Court of Appeal in *Re Carey; Ex parte Exclude Holdings Pty Ltd and Others* (2006) 32 WAR 501 provide no assistance in the proper construction of the word "*tribunal*" in the FOI Act because the court in each of those cases was considering the nature of the body in question in an entirely different context to the present case.

Clause 5 of the Glossary to the FOI Act excludes from access certain documents of a court or tribunal and it is not appropriate to assume that Parliament must have intended the meaning of "*tribunal*" be narrowly construed so that only tribunals of a limited kind would benefit from that exclusion.

25(2) In the alternative, the agency submits that "*even if it is appropriate to consider whether the* [agency] *exercises functions which are analogous to the functions exercised by a court*", it disagrees with a number of points made in my letter of 14 May 2007:

25(2)(i) The agency does not accept my preliminary view that some of the agency's determinations are not conclusive of the matters it is required to determine. The agency advises that, although determinations as to the Governor's remuneration are subject to review by the Premier, the agency is required to give the Premier the opportunity to agree or disagree with the agency's determination. After that, the agency has to either amend or reaffirm its determination and that determination applies: see ss.5A(6)-(8) of the SAT Act.

In relation to the agency's reports on judicial remuneration, the agency submits that the option to disallow a recommendation made under s.7(5) of the SAT Act does not support the conclusion that the agency lacks independence from the executive government. The determination of the salaries of judicial officers must necessarily be determined by an independent body.

Furthermore, the fact that either House of Parliament may disallow the recommendation does not mean that the recommendation is not conclusive of the question of an alteration in judicial salaries. Section 7(4) of the SAT Act provides that the agency's recommendation comes into force on the date specified in the recommendation. The recommendation is thus of the same effect as other determinations of the agency, the only difference being that the former may be disallowed by either House of Parliament. If the recommendation has come into operation by the time that disallowance takes place, it ceases to have force or effect after the disallowance resolution is passed. However, the recommendation is not deprived of its force or effect for any intervening period: s.7(5)(b) of the SAT Act.

25(2)(ii) The agency does not accept my preliminary view that it is "*relevant ... that the* [agency] *does not receive claims or applications initiated by the parties and does not determine claims following a process which involves examining submissions, receiving evidence and assessing evidence by reference to standards of proof."* The agency submits that the question of whether the application is initiated by the parties is not material to the question of the whether the agency is a 'tribunal' and says, on page 5 of the Hollier Letter: "[t]*he legislation itself provides that proceedings before the* [agency] *are initiated not by the parties (as is the case with most courts) but by virtue of the legislative requirement in section 8 of the* [SAT Act] *for a determination to be issued every 12 months."*

25(2)(iii) With regard to the formal and procedural attributes of the agency, the agency submits that the degree of informality in its methods of inquiry by virtue of s.10(1) of the SAT Act is not conclusive of whether or not it is a "*tribunal*" for the purposes of the FOI Act. For example, the procedures of the State Administrative Tribunal are relatively informal - for instance, the rules of evidence do not apply - but the former A/Commissioner has held that that body is a "*tribunal*" for the relevant purpose: see *Bartucciotto* No.2.

The fact that the agency has the powers of a Royal Commission under s.10(2) of the SAT Act, which include the power to summons witnesses and documents, means that the agency's formal and procedural attributes are sufficiently similar to those of a court for it to be a "*tribunal*" for the purposes of the FOI Act.

Other factors - which indicate that the agency is a 'tribunal' and, thus, an adjudicative body - are the requirements to conduct inquiries; to make findings of fact (about which there may be considerable dispute); and to make determinations which must be published. The agency has wide powers to obtain evidence, including the power to take evidence on oath. Although it is not required to conduct its 'proceedings' in a formal manner nor be bound by rules of evidence, it is nonetheless "*an adjudicative body set up by government to investigate particular matters"* and *"a place or seat of judgment"* within the meaning of the word 'tribunal' adopted by the Appeals Panel of the NSW Administrative Decisions Tribunal in *N's* case.

In addition, the agency has the power to receive written and oral submissions and to conduct informal hearings with the assistance of persons appointed under s.10(4) and through the exercise of the powers given to a Royal Commission (s.10(2)). The agency submits that the Report constitutes evidence given to the agency in the course of its inquiry made under sections 6(1)(d) and 6(1)(e) of the SAT Act. The agency also notes that its determinations concerning the remuneration payable to the officer holders referred to in ss.6(1) and 6B of the SAT Act, apply of their own force, pursuant to ss.6(4) and 6B(3). In addition, the agency's recommendations, in its reports on judicial remuneration under s.7 - which are not, of themselves, "determinations" - will come into operation unless disallowed by either House of Parliament (ss.7(4) and 7(5)).

The agency does not accept that the agency is not a "*tribunal*" - and thus a "*court*" - for the purposes of the FOI Act because it conducts primarily inquisitorial rather than adversarial hearings. The agency submits that, if this were the case, a body such as the Coroner's Court, which does not conduct proceedings *inter partes* and where proceedings are inquisitorial rather adversarial, would not be a "court" for the purpose of the FOI Act.

25(3) The Report is similar in nature to social work reports and doctors' reports given to the Guardianship and Administration Board in *Re Bartucciotto and Guardianship and Administration Board* [2004] WAICmr 16 ('*Bartucciotto* No.1') and the documentary exhibits tendered in the Children's Court in *Re Geary and Others and Ministry of Justice* [1995] WAICmr 29. The agency said, that in both cases, the Information Commissioner had considered those documents to be so closely connected with the judicial function of the court or tribunal that they did not constitute "*documents of a court*" for the purposes of the FOI Act.

The Report is appropriately characterised as a matter considered by the agency in the course of its judicial or quasi-judicial functions as a Tribunal under the SAT Act. Consequently, the agency submits that the Report is not accessible under the FOI Act because it is not a document relating to matters of an administrative nature concerning the agency and, thus, it is not a "*document of the court*" for the purposes of clause 5 of the Glossary.

5.2 The Complainants' Submissions

26. In its letter of 19 June 2006 to the former A/Commissioner seeking external review, WAN stated:

> "*… I would argue that release of this report, which led to some members of the public sector receiving pay rises of between 7 and 24 per cent, is very much in the public interest. Not only did it increase bureaucrats' salaries, it also led to the downgrading of three public sector watchdogs, including that of the Information Commissioner. It is in the public interest to understand why this occurred and to open the decision to scrutiny. Further, the report itself cost taxpayers $185,000. It is in the public interest for a report funded by the public, and which made recommendations impacting upon the public purse, to be disclosed …*".

27. Similarly, in its letter of 19 July 2006 to this office seeing external review, the CSA made a number of submissions, which I set out, in brief, as follows:

- The agency's formal and procedural attributes are not similar to those of a court since its proceedings are not initiated by parties; there is no power to compel witnesses to attend; no oaths are taken; and there is no requirement to follow the rules of evidence.

- The agency makes a determination that relates to the salaries of senior officers in government agencies; the agency does not resolve disputed questions of law.

- The agency is not a "*tribunal*" for the purposes of the FOI Act but a body to determine wages and conditions.

The CSA also made a number of submissions as to why it is in the public interest to disclose the Report.

5.3 Determination

28. In relation to the public interest arguments raised by the complainants, I note that the decisions made by the agency to refuse access to the Report were not made on public interest grounds. The agency's decisions were made on a technical basis in that the agency asserts that it is a "*tribunal*" within the definition of "*court*" in the FOI Act.

29. Under the *Freedom of Information Act 1982* (Cth**)** ('the CFOI Act') - which seeks to draw a similar distinction between 'administrative' and 'non-administrative' matters when seeking to apply the rules relating to access to documents of courts and tribunals under that Act - s.6 provides that the bodies caught are identified in Schedule 1: -

> ***"6. Act to apply to certain tribunals in respect of administrative matters***
>
> *For the purposes of this Act:*
>
> *(a) each tribunal, authority or body specified in Schedule 1 is deemed to be a prescribed authority;*
>
> *(b) the holder of an office pertaining to a tribunal, authority or body specified in Schedule 1, being an office established by the legislation establishing the tribunal, authority or body so specified in his or her capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department; and*
>
> *(c) a registry or other office of or under the charge of a tribunal, authority or body specified in Schedule 1, and the staff of such a registry or other office when acting in a capacity as members of that staff, shall be taken as a part of the tribunal, authority or body so specified as a prescribed authority;*
>
> *but this Act does not apply to any request for access to a document of a tribunal, authority or body so specified unless the document relates to matters of an administrative nature*" (my underlining).

30. Bodies listed in Schedule 1 of the CFOI Act include: the Australian Industrial Relations Commission; the Australian Fair Pay Commission, and the Industrial Registrar and Deputy Industrial Registrars.

31. Unlike the CFOI Act, the FOI Act does not schedule a list of the tribunals to whom the administrative - non-administrative dichotomy is to be applied.

32. Thus, in order to apply the FOI Act it is necessary to have regard to the meaning of "*tribunal*" in clause 1. In this matter, attention focuses on the meaning of the word "*tribunal*" in the definition of the word "*court*" in clause 1 of the Glossary to the FOI Act.

5.3.1 Statutory Interpretation

33. In Pearce, D C, and Geddes, R S, *Statutory Interpretation In Australia* (6th Edition, Butterworths, 2006) ("Pearce and Geddes"), the authors draw a distinction between the courts' approach to determining the meaning of 'legal technical words' and 'non-legal technical words'. On any proper understanding of the words 'tribunal' or 'court' they fall into the former rather than the latter category.

34. In *Re Monger Ex parte WMC*, the Full Court of the Supreme Court of Western Australia (Murray, Anderson and Scott JJ) was required to consider Order 56 rule 11(1) of the *Supreme Court Rules 1971* ('the Rules'). That rule provides for the circumstances in which the Supreme Court of Western Australia may make:

> "…[a]*n order nisi for a writ of Certiorari to remove a judgment order conviction or other proceeding of an inferior court or tribunal, or of a magistrate or justices for the purpose of being quashed*".

35. The issue was whether the Director of the Conciliation and Review Directorate ('the Director') appointed under the *Workers' Compensation and Rehabilitation Act 1981* ('the WC Act') was a "*tribunal*" for the purposes of Order 56 rule 11 of the Rules, making his determinations susceptible to prerogative relief by way of the issue of a writ of Certiorari. It was submitted that the decision of Owen J in *Re Monger ex parte Western Power Corporation* [2000] WASC 271 - that the Director was a "*tribunal*" within the meaning of Order 56 rule 11 - was erroneous and should not be followed.

36. The judgment of Anderson J provides some insight into how courts deal with such construction arguments and how the meaning of the word "*tribunal*" is to be understood (albeit that the terms of the particular legislation in which the expression is used will always be of primary importance, and must be given effect):

> ***"[76]*** *I would accept Mr Zelestis' submission that the Director, exercising his statutory duty to decide whether a dispute has been properly referred to him under s 93D(5), is a not "tribunal". The word in its ordinary meaning signifies something more than an official performing this function. The dictionaries tell us that, in its primary sense, "tribunal" means a place or seat of judgment (Shorter Oxford Dictionary), a body appointed to adjudicate disputes (Butterworths Australian Legal Dictionary) and (according to the Dictionary of English Law) a person or body exercising judicial or quasi-judicial functions outside the regular judicial system, and, in these senses, the word is quite inapt to describe the office of Director in the performance of the essentially administrative task of examining doctors' reports for compliance with the medical evidence requirements of s 93D(6) of the Workers' Compensation and Rehabilitation Act and deciding whether they do or do not comply. To my mind, confirmation that "tribunal" is intended to have its primary meaning in O 56 r 11(1) is to be found in the syntactical arrangement of that rule; the word "tribunal" appears between the words "inferior court" and "or of a magistrate or justice". I would accept the submission made on behalf of the applicants that the arrangement of the words and phrases in the rule strongly suggests that the word "tribunal" is intended to signify a body of the same genus as "inferior court", "magistrate" and "justices".*

> ***[77]*** *The Director is not a judicial officer. He does not perform any judicial or quasi-judicial function. He has no duty to evaluate the worth of medical evidence that is presented to him by the worker. He merely sees that it is in the form required by s 93D(6). (If it is not, presumably the worker can get another report.) He does not conduct a hearing. The view to which the Director comes is not definitive of any legal rights. He does not resolve adverse claims. The consequence of his decision (right or wrong) that the worker's reference is supported by the requisite medical evidence is only that the conciliation and review process starts. If the dispute goes to review, which it may or may not do, the review officer will make up his/her own mind on the question of the worker's level of disability. The Director has no role to play in that process of review. The "medical evidence" upon which the review officer acts may or may not include the medical evidence on which the Director acted. There is no duty on the Director to supply the review officer with that evidence. The review officer starts afresh as regards evidence. In my opinion, the applicants' submission that it is going too far to hold that the Director is a "tribunal" within the meaning of O 56 r 11(1) when forming a view that a matter has been properly referred to him must be accepted. It follows that, in my opinion, Re Monger; ex parte Western Power Corporation should not be followed and extensions of time are not required."*

37. I note the definitions of "*tribunal*" referred to by Anderson J at paragraph [76]. Such definitions provide some indication of the ordinary and natural meaning of the word "*tribunal*" and this a starting point when seeking to identify the meaning of "*tribunal*" used in the definition of "*court*" and the status of the agency under the FOI Act. What then are the role, function and powers of the agency? Is it "*a person or body exercising judicial or quasi-judicial functions outside the regular judicial system*"? The answers to those questions necessitate some consideration and construction of the SAT Act.

38. Whilst I am not bound by the rules of evidence and may obtain information from such persons and sources, and make such investigations and inquiries as I think fit under s.70 of the FOI Act, I note the rules of statutory interpretation legislated for by the *Interpretation Act 1984* ("Interpretation Act") which are to be applied in any construction of the FOI Act or the SAT Act.

5.3.2 Objects

39. Before turning to the provisions of the SAT Act that create the agency, it should be emphasised that in construing the SAT Act (and indeed the FOI Act) one must give effect to the approach required by the Interpretation Act. Section 18 of the Interpretation Act provides:

> ***"18. Purpose or object of written law, use of in interpretation***
>
> *In the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to a construction that would not promote that purpose or object."*.

40. Thus, in this State a construction that "*would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not)*" is to be preferred to a construction that would not promote that purpose or object.

41. Hasluck J, in the *Channel 31* case at page 156, observed that, "*the objects of the Freedom of Information Act are to be achieved by creating a general right of access to State and local government documents*". Those observations reflected His Honour's reasons in his earlier decision in *Edward*'s case at [14], which stated:

> "*Section 3 sets out the objects and intent of the FOI Act. The objects of the Act are to enable the public to participate more effectively in governing the State and to make the persons and bodies that are responsible for State and Local Government more accountable to the public. The objects are to be achieved by creating a general right of access to State and Local Government documents. Nothing in the Act is intended to prevent or discourage the giving of access to documents (including documents containing exempt matter) otherwise than under the Act, if that can be properly done, or is permitted, or required by law to be done. Section 5 provides that the Act binds the Crown."*

42. I also note Wheeler J's observations regarding the objects of the FOI Act in *Information Commissioner for Western Australia* at [21]:

> ***"Objects of the Act***
>
> *[21] I do not think it is necessary in determining this question to consider whether the interpretation of the Act generally should be approached by leaning towards a wide interpretation of the access provisions or whether, as Anderson J suggested in* Police Force of Western Australia v Kelly *(1997) 17 WAR 9 at 12, the Act balances competing public interests in allowing and denying access to government records, so that the ordinary meaning of the words and the subject matter of the Act show where the line is to be drawn. I do note, however, that in relation to the somewhat different objects provision of the Victorian* Freedom of Information Act, *the High Court in* Victorian Public Service Board v Wright *(1986) 64 ALR 206 suggested at (212) that it was proper to give*

to the relevant provisions of the Act "a construction which would further, rather than hinder, free access to information". This case does not appear to have been cited to Anderson J in Police Force of Western Australia v Kelly. *It would, if accepted as a proper way to view the objects and principles sections of the Act, be a further reason for adopting the construction which I have in any event preferred*."

5.3.3 Extrinsic Material

43. At s.19 of the Interpretation Act provision is made as to the use to which extrinsic evidence may be put in seeking to interpret statutes in Western Australia:

> ***"19. Extrinsic material, use of in interpretation***
>
> *(1) Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material:-*
>
> *(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or*
>
> *(b) to determine the meaning of the provision when: -*
> *(i) the provision is ambiguous or obscure; or*
> *(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or is unreasonable.*
>
> *(2) Without limiting the generality of subsection (1), the material that may be considered in accordance with that subsection in the interpretation of a provision of a written law includes: -*
>
> *(a) all matters not forming part of the written law that are set out in the document containing the text of the written law as printed by the Government Printer;*
> *(b) any relevant report of a Royal Commission, Law Reform Commission, committee of inquiry or other similar body that was laid before either House of Parliament before the time when the provision was enacted;*
> *(c) any relevant report of a committee of Parliament or of either House of Parliament that was made to Parliament or that House of Parliament before the time when the provision was enacted;*
> *(d) any treaty or other international agreement that is referred to in the written law;*

(e) any explanatory memorandum relating to the Bill containing the provision, or any other relevant document, that was laid before, or furnished to the members of, either House of Parliament by a Minister before the time when the provision was enacted;

(f) the speech made to a House of Parliament by a Minister on the occasion of the moving of a motion that the Bill containing the provision be read a second time in that House;

(g) any document (whether or not a document to which a preceding paragraph applies) that is declared by the written law to be a relevant document for the purposes of this section; and

(h) any relevant material in any official record of proceedings in either House of Parliament.

(3) In determining whether consideration should be given to any material in accordance with subsection (1), or in considering the weight to be given to any such material, regard shall be had, in addition to any other relevant matters, to: -

(a) the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; and

(b) the need to avoid prolonging legal or other proceedings without compensating advantage."

5.3.4 The Agency

44. The powers of the agency are established by section 5 of the SAT Act, which provides:

"5. Establishment of Tribunal

(1) For the purposes of this Act there is hereby established a Tribunal to be known as the Salaries and Allowances Tribunal.

(2) The Tribunal shall consist of 3 members appointed by the Governor.

(3) Subject to this Act a member shall hold office for a period of 3 years, but a member appointed on the occasion when the Tribunal is first constituted shall hold office for such period not exceeding 3 years as is specified in his instrument of appointment, and any member is eligible for reappointment."

45. The powers of the agency as they relate to the Determination are set out at ss.6, 8, 9 and 10 of the SAT Act (emphasis added):

> ***"6. Other inquiries into and determinations of remuneration***
>
> *(1) The Tribunal shall, from time to time as provided by this Act, inquire into, and determine, the remuneration to be paid or provided to: -*
>
> *(a) Ministers of the Crown and the Parliamentary Secretary of the Cabinet;*
>
> *(ab) subject to section 44A(4) and (5) of the Constitution Acts Amendment Act 1899, a Parliamentary Secretary appointed under section 44A(1) of that Act;*
>
> *(b) officers and members of the Parliament including additional remuneration to be paid or provided to a member, other than an officer, of Parliament who is the Chairman, Deputy Chairman or a member of a standing committee of a House or a joint standing committee of both Houses;*
>
> *(c) Clerk of the Legislative Council or Clerk of the Legislative Assembly or the Deputy Clerk of either House;*
>
> *(d) officers of the Public Service holding offices included in the Special Division of the Public Service; and*
>
> *(e) a person holding any other office of a full-time nature, created or established under a law of the State, that is prescribed for the purposes of this section, but not being an office the remuneration for which is determined by or under any industrial award or agreement made or in force under any other law of the State.*
>
> *(2) A determination of the Tribunal: -*
>
> *(a) shall be in writing;*
>
> *(b) shall be signed by the members; and*
>
> *(c) shall come into operation, or shall be deemed to have come into operation, on such date as is specified therein.*
>
> *(3) A copy of every determination made by the Tribunal, shall be published in the* Government Gazette.
>
> *...*

8. Tribunal to report and make a determination annually

The Tribunal shall ensure that -

(a) not more than a year elapses between one determination under section 6(1) in respect of an office or other position referred to in that subsection and another;

(b) not more than a year elapses between one report under section 7(1) and another; and

(c) not more than a year elapses between one report under section 7A and another.

9. Meetings of the Tribunal

(1) The Chairman may convene meetings of the Tribunal and shall preside at all meetings of the Tribunal at which he is present.

(2) In the event of the absence of the Chairman from a meeting:

(a) another member nominated by the Chairman for that purpose shall preside; or

(b) if another member has not been so nominated by the Chairman, another member nominated by the Minister for that purpose shall preside.

(3) At a meeting of the Tribunal: -

(a) the procedure shall be as determined by the Tribunal;

(b) 2 members constitute a quorum;

(c) all questions shall be decided by a majority of the votes of the members present and voting;

(d) the member presiding has a deliberative vote; and

(e) in the event of an equality of votes being cast on any question, the question shall be deferred until a subsequent meeting of the Tribunal.

10. Method of inquiry by Tribunal

(1) In the performance of the functions of the Tribunal -

(a) the Tribunal may inform itself in such manner as it thinks fit;

(b) the Tribunal may receive written or oral statements;

(c) the Tribunal is not required to conduct any proceeding in a formal manner; and

(d) the Tribunal is not bound by the rules of evidence.

(2) For the purposes of the exercise and performance of its powers and functions under this Act, the Tribunal has all the powers, rights and privileges that are specified in the Royal Commissions Act 1968, as appertaining to a Royal Commission and the provisions of that Act have effect as if they were enacted in this Act and in terms made applicable to the Tribunal.

(3) The Minister may, if he thinks fit, appoint a person or persons to assist the Tribunal in an inquiry.

(4) Without limiting the provisions of subsection (3) the Minister shall –

(a) appoint a person nominated from time to time in writing by the President of the Legislative Council and the Speaker of the Legislative Assembly to assist the Tribunal in an inquiry in so far as it relates to the remuneration of Ministers of the Crown, a Parliamentary Secretary appointed under section 44A(1) of the Constitution Acts Amendment Act 1899, the Parliamentary Secretary of the Cabinet and officers and members of the Parliament;

(b) appoint a person nominated from time to time in writing by the chief executive officer of the department principally assisting the Minister in the administration of the Public Sector Management Act 1994 to assist the Tribunal in an inquiry in so far as it relates to the remuneration to be paid or provided to the officers and persons referred to in section 6(1)(d) and (e); and

(c) appoint a person nominated from time to time in writing by the chief executive officer of the department principally assisting the Minister in the administration of the Local Government Act 1995 to assist the Tribunal in an inquiry in so far as it relates to the remuneration to be paid or provided to chief executive officers of local governments referred to in section 7A."

46. The powers conferred on the agency pursuant to s.10(2) of the SAT Act include, *inter alia*: -

- power to obtain information from a public authority or officer (s.8A of the *Royal Commissions Act 1968* ("RC Act"));
- power to obtain documents and other things by issuing a notice for their production (s.8B of the RC Act);
- power to summons witnesses and documents (s.9 of the RC Act);
- power to examine on oath (s.11 of the RC Act);
- power to punish by presenting a certificate to the Supreme Court (s.15B of the RC Act);
- power to issue a warrant for the arrest of a witness failing to appear (s.16 of the RC Act), and
- power to inspect and retain documents (s.21 of the RC Act).

47. The SAT Act, in its current form, contains no express statements of its objects. The absence of such an express statement of legislative intent requires consideration of the agency's legislated nature, processes and functions. Whilst the agency's functions focus on inquiries into, and determinations of, the remuneration to be paid or provided to various persons holding an office created or established under a law of the State, as specified in the SAT Act, I consider some reference to extrinsic material identified in s.19 of the Interpretation Act may assist in identifying the objects of the SAT Act for the purposes of s.18 (objects) of the Interpretation Act.

48. The original long title of the SAT Act was:

> *"AN ACT to establish a Tribunal to determine or report upon the salaries and certain allowances payable to holders of ministerial, parliamentary, judicial and certain other public offices, to repeal the Parliamentary Salaries and Allowances Act 1967-1975, and for incidental and other purposes".*

49. By reference to the current long title and that in the original enactment, it appears that the agency's role, whilst currently cast in very similar terms, has grown at least to the extent that it now also includes the determination of "… *certain matters relating to the superannuation of members of Parliament* …" and "… *authorise*[s] *the making of arrangements for the payment of certain travelling expenses, and for incidental and other purposes*…".

50. The Second Reading speech in the Legislative Council by the then Minister of Justice, the Hon. N McNeill MLC (Lower West), on the introduction of the SAT Act, identified the object of the legislation in the following way (*Western Australia Parliamentary Debates* 1975 No. 4 Volume 210 at page 4365):

> "*The purpose of the measure is to facilitate the periodic adjustment of judges' salaries by eliminating the need for legislation at regular intervals in order to give effect to recommendations made by the Salaries and Allowances Tribunal. As Members know the tribunal is required to inquire into and to report from time to time on the remuneration of judges of the Supreme Court and of the District Court, but it can only recommend the nature and extent of the alterations that should be made."*

51. The emphasis on the objective of giving effect to the recommendations of the agency without the need for annual legislation is also evident in the Second Reading speech in the Legislative Assembly by then Premier the Hon. Sir Charles Court MLA (Nedlands) (*Western Australia Parliamentary Debates* 1975 No. 4 Volume 210 at page 4251).

52. At its inception, rather than having a judicial function, the agency was constituted in its then legislative form for the purpose of obviating the need for annual legislation to set salaries primarily for judges. Such an object appears to be more in the nature of an administrative arrangement by executive government that a judicial or quasi-judicial function.

53. I have been unable to locate any extrinsic material suggesting that the primary role of the agency has changed. However, having made those observations it is clear that the agency has a role largely independent from the executive arm of government (although not entirely so – discussed below at paragraphs 64, 65 and 70 - 76]). Equally, it might be observed that Royal Commissions require the conferral of executive rather than judicial power, albeit such a commission may be a "*court*" for the purposes of the FOI Act if its role brings it within the meaning of "*court*" therein.

5.3.5 A "court" under the FOI Act

54. "*Court*" is defined at clause 1 of the Glossary of the FOI Act to include "*a tribunal*". The expression 'tribunal' is not defined under the FOI Act or indeed the Interpretation Act. Merely because the Parliament has described a body constituted by an enactment as a 'tribunal' does not mean that the body so created is a "*court*" for the purposes of the FOI Act. Such a conclusion requires the application of the FOI Act and, in this case, a consideration of the SAT Act.

55. As Anderson J points out in *Re Monger; Ex parte WMC* – subject to the terms of the relevant legislation - in this instance the SAT Act - when one seeks to ascertain whether a body is a 'tribunal', a relevant consideration is whether the body is "*a person or body exercising judicial or quasi-judicial functions outside the regular judicial system*". Clearly the agency is outside the regular judicial system, but does it exercise judicial or quasi-judicial functions?

56. The Marshall Letter suggests the approach taken by Information Commissioners in this State has been to adopt a narrow interpretation of the meaning of "*court*" for the purposes of the FOI Act. I note Ms Marshall's reference to the previous decisions of Western Australia Information Commissioners in *Re Rakich and the Guardianship and Administration Board* [2000] WAICmr 3 at [13]; *Bartucciotto No.1* at [40], and *Bartucciotto No.2* at [90].

57. The former A/Commissioner in *Bartucciotto* No.1 relies on the earlier decision of *Re Rakich* in which the then Information Commissioner stated at [13] (emphasis added):

> *"**[13]** The NSW Ombudsman has set out a number of tests that are relevant to determining whether a body is a "*tribunal*" for the purposes of clause 10 of the NSW FOI Act. I consider that those tests are a useful guide as to whether the agency in this case is a tribunal. Those tests are as follows:*
>
> *(a)* "that the body has formal and procedural attributes that are similar to that of a court*", including initiation of proceedings by parties, public proceedings, the power to compel attendance or witnesses who may be examined on oath or affirmation, a requirement to follow the rules of evidence (although it should be noted many tribunals are not bound by the rules of evidence) and the power to enforce compliance with orders given;*
>
> *(b) that the body "*makes a conclusive determination ... resolving disputed questions of fact or law*"; and*
>
> *(c) that the orders of the body "*have the force of law without the need for confirmation or adoption by a court or any other body*" (NSW Ombudsman,* FOI Policies and Guidelines *(1994) at p.65).*"

58. There are, however, some significant differences between the NSW and WA legislative schemes for access under Freedom of Information legislation. This was subsequently acknowledged by the former A/Commissioner when considering whether the then new State Administrative Tribunal was a "*court*" for the purposes of the FOI Act in *Bartucciotto No.2* at [90] (emphasis added):

> "[90] *In his FOI Guidelines (2nd Edition), published online at www.ombo.nsw.gov.au, the New South Wales Ombudsman suggests that "tribunal" in the New South Wales* Freedom of Information Act 1989 *('the NSW FOI Act') should be interpreted narrowly, as "*applying to bodies analogous to, or which are in effect substitutes for, courts*", and has set out a number of tests that would be relevant to determining whether a body is a "tribunal" for the purposes of clause 10 of the NSW FOI Act. I consider that those tests suggested by the NSW Ombudsman are a useful guide as to whether a particular body is a tribunal for the purposes of the FOI Act.*

> [91] *The wording of the relevant provisions of the NSW FOI Act is significantly different from that of the relevant provisions of the Western Australian legislation, so the NSW Ombudsman's arguments for a narrow interpretation of "tribunal" in the NSW FOI Act do not apply directly to the FOI Act in this State. However, given that the term "court" is defined in the FOI Act to include a tribunal, and given the wording of clause 3 of the Glossary (quoted in paragraph 16 above), I am inclined to the view that a similarly narrow interpretation is to be preferred, although I need not decide that on this occasion as it seems to me that the agency is a body that is analogous to a court and therefore satisfies that narrower interpretation.*
>
> [92] *Those tests are as follows:*
>
> *(a)* *"*that the body has formal and procedural attributes that are similar to that of a court*", including initiation of proceedings by parties, public proceedings, the power to compel attendance or witnesses who may be examined on oath or affirmation, a requirement to follow the rules of evidence (although not conclusive as it should be noted many tribunals are not bound by the rules of evidence) and the power to enforce compliance with orders given;*
> *(b)* *that the body "*makes a conclusive determination ... resolving disputed questions of fact or law*"; and*
> *(c)* *that the orders of the body have the force of law without the need for confirmation or adoption by a court or any other body (NSW Ombudsman,* FOI Policies and Guidelines *(1994) at p.65)."*

59. In this passage the former A/Commissioner seems to accept that because the word "*tribunal*" appears within the definition of a "*court*", '*tribunal'* used in this context necessarily means something similar to or analogous to a '*court'*. In my opinion this does not necessarily follow. The Legislature by employing the word '*tribunal'* can be construed as doing no more than including in references to '*courts'* bodies that come within the description of '*tribunal'* used in its ordinary and natural sense. This understanding explains why the use of the word "*tribunal*" in the definition of "*court*" in the FOI Act means that references to "court" within he FOI Act includes those bodies that fall within the meaning of the word "*tribunal*" used in its ordinary and natural sense.

60. I note that the former A/Commissioner's decision in *Bartucciotto* No.2 - that the State Administrative Tribunal was a "*court*" for the purposes of the FOI Act - reflects the Court of Appeal's observations in *Re Carey:* see the judgment of the Chief Justice at page 523 and following. In His Honour the Chief Justice's judgement emphasis is placed on the function being performed rather then the body performing it, for the purposes of characterising the body as an "*administrative tribunal*" or an "*anomalous tribunal analogous to a court*". Whilst the task here is to identify what constitutes a "*tribunal*" within the meaning of "*court*" in the FOI Act such a characterisation also requires a focus on function and not nomenclature.

61. In my view, it is significant that the agency does not make findings of fact on the basis of admitted evidence in the manner in which a court or administrative tribunal does. In making this observation I note that the agency makes "*determinations*" and "*recommendations*" under the SAT Act and any assessment of the material gathered by the agency is made for the limited purpose of assessing whether the material is capable of supporting such a "*determination*" or "*recommendation*".

62. Whilst an assessment by the agency may be made on the basis that the material gathered by it is more likely than not (upon the civil standard of proof) to support a "*determination*" or "*recommendation*", the assessment is made for that very limited purpose. In this sense, the agency does not resolve disputed questions of fact. This sets the agency apart from administrative tribunals such as the State Administrative Tribunal (refer to the agency's submissions at paragraph 25(2)(iii) supra).

63. Similarly, the Corruption and Crime Commission, *inter alia*, makes "*assessments*" and "*opinions*" under the *Corruption and Crime Commission Act 2003, "assessments and "opinions"* that do not require it to make "*findings of fact*": see Hall, P M, *Investigating Corruption and Misconduct In Public Office* (Law Book, 2004, at page 344).

64. The agency appears to have been constituted to achieve the object of facilitating administrative arrangements that would otherwise be the province of the executive arm of government.

65. There may be circumstances in which the conferral of executive power by enactment on a body for the purpose of making an inquiry will bring the meaning of "*tribunal"* in the definition of "*court"* in the FOI Act. In this instance, however, I need only consider the status of the agency under the FOI Act, a body that that makes "*determinations*" and "*recommendations*" under the SAT Act without the need to resolve factual disputes and does not make findings of fact in a judicial or quasi-judicial manner.

66. The task remains to identify with more particularity the characteristics that typify a body being a "*tribunal*" within the definition of "*court*" in the FOI Act.

67. The objects of the FOI Act at s.3(1) of the FOI Act are as follows:

> ***"3. Objects and intent***
>
> *(1) The objects of this Act are to:*
>
> *(a) enable the public to participate more effectively in governing the State; and*
>
> *(b) make the persons and bodies that are responsible for State and local government more accountable to the public.*

> *(2) The objects of this Act are to be achieved by:*
>
> *(a) creating a general right of access to State and local government documents;*
>
> *(b) providing means to ensure that personal information held by State and local governments is accurate, complete, up to date and not misleading; and*
>
> *(c) requiring that certain documents concerning State and local government operations be made available to the public.*
>
> *(3) Nothing in this Act is intended to prevent or discourage the publication of information, or the giving of access to documents (including documents containing exempt matter), or the amendment of personal information, otherwise than under this Act if that can properly be done or is permitted or required by law to be done."*

68. Where there are competing available interpretations of the meaning of "*tribunal*" and hence "*court*" under the FOI Act, the objects of the FOI Act and the approach demanded by s.18 of the Interpretation Act demand an interpretation in aid of its objects.

69. In this regard I accept the analysis of Hasluck J in the *Channel 31* case. The interpretation favoured by the High Court, noted by Wheeler J in *Information Commissioner for Western Australia* would, were it accepted in this State, be a further reason for adopting the construction which supports my view set out here.

5.3.6 The agency is not a "court" under the FOI Act

70. In my opinion, taking into the account the matters referred to above and for the reasons set out below, the agency is neither a "*tribunal*" nor a "*court*" within the meaning of the FOI Act.

71. The designation and title of the agency suggests that it may satisfy the meaning of "*tribunal*" in the definition of "*court*" in the FOI Act, but the use of the word "tribunal" in the agency's name is not determinative (refer to the agency's submissions at paragraph 25(1) above). The powers conferred on the agency by s.10(2) of the SAT Act give the agency some characteristics similar to a court. This is particularly so when one considers the powers conferred on the agency pursuant to s.10(2) of the Act in respect of the RC Act. These reach their high water mark in the power to examine witnesses under oath.

72. The agency is also generally required to act impartially and in a manner separated from the central functions of executive government.

73. Whilst the agency's "*determinations*" generally have effect without the need that they be confirmed or adopted by another body (see ss.6(2)(c) and 6(3) of the SAT Act), some - such as determinations as to the Governor's remuneration - are subject to the Premier's review (s.5A(5) of the SAT Act).

74. Equally, "*recommendations*" of the agency are not conclusive and I note the power of either House of Parliament to disallow a recommendation of the agency relating to judicial salaries (s.7(5) of the SAT Act). To this extent the power and function of the agency are subject to the oversight of executive government and the Legislature and are clearly different from the binding decisions of administrative tribunals such as the State Administrative Tribunal.

75. The oversight of the agency in this regard is different from other methods of oversighting agencies, such as oversight by a Parliamentary Inspector or a standing committee of the Parliament. Thus neither "*determinations*" by the agency nor its "*recommendations*" are wholly independent of the executive.

76. The question whether the agency is a "*tribunal*" within the meaning of "*court*" in the FOI Act has to be answered by reference to the agency as a whole; it cannot be divided between various functions of the agency under the SAT Act. It would be artificial, and in my view a misapprehension of the effect of the definition of "*court*" in clause 1 of the Glossary to the FOI Act, to conclude that the same body may be a "*tribunal*" for one purpose under the FOI Act and not a "*tribunal*" for another. The language of the FOI Act is not cast in terms of a body when acting as a court or tribunal. This observations must be kept firmly in mind when one considers the agency's views regarding its functions (refer to paragraph 25(2)(i) above).

77. I note that the Hollier Letter sets out, at pages 6-7, the reasons why the agency considers the decision in *Re Monger; Ex parte WMC* "*is* not *relevant to the meaning of 'tribunal' in the FOI Act*". In my opinion, the decision in *Re Monger* is relevant to the meaning of "*tribunal*" under the FOI Act.

78. To have regard to the approach by the Full Court of the Supreme Court of Western Australia in *Re Monger; Ex parte WMC* as to the nature of the construction exercise - albeit in the context of a different provision - and the Court's general observations as to the nature of a "*tribunal*" is simply to examine an appropriate approach to statutory interpretation of a similar expression, in the context of a different instrument, by Western Australia's superior court.

79. I consider that the approach by the Full Court in *Re Monger; Ex parte WMC*, whilst noting that it was couched in the context of an application in respect of Order 56 rule 11(1) of the Rules, is a relevant matter for the purpose of determining the ambit of the meaning of the term "*tribunal*" used in the definition of the word "*court*" in the FOI Act, although it is not determinative.

80. Further, in seeking to answer the question posed in *Re Monger: Ex parte WMC* as to whether in making his "*determinations*" the Director was acting as "*a person or body exercising judicial or quasi-judicial functions outside the regular judicial system*" aids in determining whether the agency is a "*tribunal*" within the meaning of the FOI Act. I note the emphasis on this question in the Hollier Letter as a basis for resolving the interpretation issue.

5.3.7 Judicial or Quasi-Judicial Function

81. For the purpose of determining whether the agency is exercising judicial or quasi-judicial functions I consider it relevant, albeit primarily indicative, that the agency does not receive claims or applications initiated by parties and does not determine claims following a process which involves examining submissions, receiving evidence and assessing evidence by reference to standards of proof (refer to my discussion of the comments by Hall above at paragraph 63). This indicates that the agency's functions are primarily inquisitorial rather than adversarial. It distinguishes the Agency from administrative bodies such as the State Administrative Tribunal.

82. In this case the agency's "*determination*" was pursuant to its obligations and functions under s.6 of the SAT Act. The "*determinations*" made by the agency are made following a process of inquiry. That process must be conducted on an annual basis (s,8 of the SAT Act.).

83. The powers conferred on the agency by s.10(2) of the SAT Act are not, in my opinion, enough on their own to make the agency a "*body exercising judicial or quasi-judicial functions"* nor as the Hollier Letter puts it at p.5 (emphasis added), "*a place or seat of judgment*" or "*an adjudicative body set up by Government to investigate particular matters*".

84. One must have regard to the functions and role of the agency, and to Parliament's objects in creating the agency in order to appreciate its essential nature. It is perhaps in Mr Hollier's formulation of the description of the agency as "*an adjudicative body set up by Government to investigate particular matters*" that he comes closest to capturing a judicial or quasi-judicial function attributable to the agency. As demonstrated above, however, the Agency is not an adjudicative body in the sense that a court or administrative tribunal adjudicate between litigants.

85. Members of the agency are not judicial officers. In my view, they perform no judicial or quasi-judicial function. Whilst the agency is required to "*determine*" appropriate levels of remuneration this is not a process in which the agency adjudicates between competing positions advanced by different parties. The agency does not conduct hearings in a manner analogous to a judicial or quasi-judicial body.

86. I consider that the agency's annual "*determination*" of the remuneration to be paid or provided to the public servants - enumerated at, and under, s.6 of the SAT Act - is essentially an administrative function conferred by the Legislature to obviate the need for annual legislation. Such a function is not properly understood as "*adjudicative*" in the sense used by Mr Hollier. Further, the term *"tribunal"*, as used in the FOI Act, does not encompass tasks of an administrative kind as required of the agency by the SAT Act. I would, therefore, answer the question, "Is the agency a "*court*" within the meaning of the FOI Act?", "No".

87. This view makes the question, whether the document sought by the complainants is a "document *relating to matters of an administrative nature*", redundant. I now turn to the question of whether there is any other basis for denying access to the document sought.

SECTION 6 CLAUSE 4

88. In its letter to me of 31 May 2007, the agency claimed that the following parts of the Report are exempt under clauses 4(1), 4(2) and 4(3) of Schedule 1 to the FOI Act:

- pages 13-15;
- page 25, the table on page 26, pages 28, 30, 34-36, 55 and 56, and
- Appendix C (pages 51-53).

89. On 15 November 2007, in response to my letter of 23 October 2007, the agency advised me that it did not wish to make further submissions in respect of its claim that the information listed in the dot points at paragraph 88 is exempt under clause 4. However, the agency did not withdraw those claims.

90. On 19 November 2007, Mercer provided me with its response to my letter of 23 October 2007. Mercer advised that, in light of my letter, it had now withdrawn its claim under clause 4 for some information in the Report for which it had previously claimed exemption. Mercer now claims that the following information in the Report is exempt under clause 4(2):

- the tables on pages 13-15, inclusive;
- the charts on pages 28-31;
- the co-ordinates on pages 51-53; and
- pages 62-65 and 67-71, inclusive.

91. Clause 4 of Schedule 1, insofar as it is relevant, provides:

> ***4. Commercial or business information***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure would reveal trade secrets of a person.*
>
> *(2) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*
>
> *(b) could reasonably be expected to destroy or diminish that commercial value.*

> *(3) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and*
>
> *(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.*
>
> ***Limits on exemptions***
>
> *(4) Matter is not exempt matter under subclause (1), (2) or (3) merely because its disclosure would reveal information about the business, professional, commercial or financial affairs of an agency.*
>
> *(5) ...*
>
> *(6) ...*
>
> *(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest.*

92. The first point to make about clause 4 of Schedule 1 is that it describes three distinct kinds of information at each clause, each of which identifies a discrete type of "*exempt matter*".

6.1 Clause 4(1)

93. The agency claims that the pages 13-15; 25, 28, 30, 34-36, 51-53, 55, 56 and the table on page 26 of the Report contain information that is trade secrets belonging to Mercer, that is exempt matter under clause 4(1).

6.1.1 The Agency's submission

94. In its letter to me of 31 May 2007, the agency submits that the correct approach to clause 4(1) is set out in paragraphs [12] – [16] of the decision by the Information Commissioner in *Re Greg Rowe & Associates and Minister for Planning* [2001] WAICmr 4, as follows:

> "14. *After considering the relevant authorities in* Re Cannon, *the Queensland Information Commissioner concluded that the phrase 'trade secrets' should be given its usual meaning in Australian law, as defined by Gowans J in* Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd *[1967] VR 37. In the* Ansell Rubber *case, Gowans J noted that a "*trade secret*" may consist of "...* any formula, pattern or device or compilation of information which is used in ones' business and which gives him (sic) an opportunity to gain an advantage over competitors who do not know it or use it."
>
> 15. *In* Re Cannon, *the Queensland Information Commissioner summarised, at paragraph 49 of his decision, the matters that may be relevant in determining the existence or otherwise of a trade secret. Those matters include:*
>
> - *the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality;*
> - *that information, originally secret, may lose its secret character with the passage of time;*
> - *that the relevant information be used in, or useable in, a trade or business;*
> - *that the relevant information would be to the advantage of trade rivals to obtain; and*
> - *that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.*
>
> 16. *I accept that the factors identified by the Queensland Information Commissioner in* Re Cannon *are relevant to my determination of whether the disclosure of a copy of Document 1, edited in the manner proposed by the Minister, would reveal trade secrets of the complainant.*"

6.1.2 Determination

95. The first observation to make in respect of the agency's claims is the basis for those claims. Mr Hollier, for the agency, notes:

> "*In making the following submissions, I have drawn on information provided to the Tribunal by Mercer … It is respectfully submitted that if you require further information in order to be satisfied that the Mercer Report contains matter which is exempt under clauses 4(1), 4(2) or 4(3), you should invite Mercer to make a submission to you, or alternatively, should join Mercer to the external review so that it will have the status of a party to the external review*".

96. Since then, Mercer has been joined as a party and has made submissions as what parts of the Report may be "*exempt matter*" under the FOI Act - submissions that are far narrower than those advanced by the agency.

97. With regard to the agency's submission, I accept that paragraphs [14] - [16] of *Re Rowe* set out the approach to the exemption at clause 4(1) in this State.

98. This type of exemption is drawn from the exemptions originally contained in the CFOI Act at s. 43. Cases which discuss the federal equivalent at s. 43(1) of the CFOI Act include: *Searle Australia* v. *Public Interest Advocacy Centre* (1992) 36 FCR 111 at 122; *Re Organon (Aust) Pty Ltd* v. *Department of Community Services and Health* (1987) 13 ALD 588; *Re Public Interest Advocacy Centre* v. *Schering Pty Ltd* (1991) 23 ALD 714, see also *Gill* v. *Department Industry Technology and Resources* (1987) VR 681 and *Lansing Linde Ltd* v. *Kerr* (1990) 21 IPR 529.

99. The first step is to identify the particular information that is said to be a "*trade secret of a person*". The agency has provided me with no information to establish the existence or otherwise of a trade secret, as outlined in *Re Cannon* and I note that Mercer has made no such claim.

100. Section 102(1) of the FOI Act provides that the onus is on the agency to establish "that its decision is justified or that a decision adverse to another party should be made". Similarly under section 102(2) when a third party, such as Mercer, intervenes "the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made":

> **102. Burden of proof**
>
> (1) Except where subsection (2) or (3) applies, in any proceedings concerning a decision made under this Act by an agency, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made.
>
> (2) If a third party initiates or brings proceedings opposing the giving of access to a document, the onus is on the third party to establish that access should not be given or that a decision adverse to the access applicant should be made.
>
> (3) If, under a provision of Schedule 1, matter is not exempt matter if its disclosure would, on balance, be in the public interest, the onus is on the access applicant to establish that disclosure would, on balance, be in the public interest.

101. The relevant standard of proof was discussed by Owen J in *Manly* v. *Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573 (emphasis added) when considering whether material was exempt under the exemption at clause 4(3) and in particular, in the context of the phrase "*could reasonably be expected*" at 4(3)(b). That phrase qualifies the exemptions at clauses 4(2) and 4(3) when the requirements of 4(2)(a) or 4(3)(a) are satisfied – it does not appear at clause 4(1):

> "*How can the* [Information] *Commissioner, charged with the statutory responsibility to decide on the correctness or otherwise of a claim to exemption, decide the matter in the absence of some probative material against which to assess the conclusion of the original decision maker that he or she had "real and substantial grounds for thinking that the production of the document could prejudice that supply" or that disclosure could have an adverse effect on business or financial affairs? In my opinion it is not sufficient for the original decision-maker to proffer the view. It must be supported in some way. The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must 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*".

102. In *Police Force of Western Australia v. Winterton,* unreported; SCt of WA (Scott J) Library Number 970646; 27 November 1997, Scott J considered the terms of section 102 of the FOI Act and the relevant standard of proof. In that case the Court noted a controversy regarding the standard of proof:

> "*There is some controversy between the parties as to the standard of proof. Counsel for the appellant, in that respect, relies upon Attorney General's Department v Cockcroft (1986) 10 FCR 180 per Bowen CJ and Beaumont J where their Honours, in relation to the equivalent Commonwealth legislation, said at 19*0:
>
> > 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. ... In our opinion, in departing from the terms of s 43(1)(c)(ii) and requiring the applicants to establish a case on the balance of probabilities, the majority of the Tribunal fell into error in their construction of the provision."
>
> *As can be seen from cl 5(1)(b) of the First Schedule to the FOI Act, the words "could reasonably be expected to" are also contained within the FOI Act of Western Australia. 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 Cockcroft 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.*

103. In this instance I am concerned with the exemption at clause 4(1) which does not contain the phrase dealt with by Owen J or Scott J. It appears clear that in the absence of such expressions the standard of proof to be applied must be the balance of probabilities. I note that the same observation does not apply in respect of clauses 4(2)(b) and 4(3)(b) which both contain references to the phrase "could reasonably be expected to", and I return to this issue below.

104. On the information before me, I am not satisfied on the balance of probabilities that the information on pages 13-15, 25, 28, 30, 34, 35, 36, 51-53, 55, 56 and the table on page 26 of the Report is a "*trade secret*" within the meaning of the FOI Act because the agency has provided me with no information to establish the existence or otherwise of a trade secret, as outlined in *Re Cannon* and I note that Mercer has made no such claim.

6.2 Clause 4(2)

105. The agency claims that pages 13-15; 25, the table on page 26; pages 28, 30, 34-36, 51-53, 55 and 56 of the Report are exempt under clause 4(2).

106. Mercer claims that the tables on pages 13-15; the charts on pages 28-31; the co-ordinates on pages 51-53; pages 62-65 and 67-71 of the Report are exempt under that provision.

107. Clause 4(2) makes it clear that it does not apply to "*trade secrets*". At the heart of the "*exempt matter*" described in clause 4(2) is the concept of "*commercial value*", and the clause is designed only to protect "*commercial value*" in the information to which access is sought which is of "*commercial value*" to the relevant third party, in this instance Mercer.

108. The use of the conjunctive "*and*" in clause 4(2) indicates that paragraphs (a) and (b) are cumulative requirements, and that the application of clause 4(2) requires satisfaction of both limbs.

109. The application of clause 4(2)(a) requires the identification of some "*commercial value*" to a third party in the information that would be revealed were access granted in accordance with the application under the FOI Act. If the inquiry required by clause 4(2)(a) identifies no such commercially valuable information then clause 4(2)(b) can have no operation and no information in the document(s) to which access is sought under the FOI Act would be "*exempt matter*" under clause 4(2).

110. The standard of proof to which an agency or third party must establish those matters legislated for at clause 4(2)(a) is the balance of probabilities (refer to the discussion at paragraphs 100 –104).

111. Assuming that the exercise required at clause 4(2)(a) identifies relevant commercially valuable information, then the application of clause 4(2)(b) then requires consideration of the effect of granting access to the commercially valuable information and whether (emphasis added) "*disclosure … could reasonably be expected to destroy or diminish that commercial value*". In determining such a question one would be required to satisfy the requisite standard of proof which raises the issues such as those discussed by Owen J and Scott J noted above. If is not necessary for me to consider the operation of 4(2)(b) or 4(3)(b) then these issues do not arise.

112. In *Re Ryan and the City of Belmont* [2000] WAICmr 55 (27 October 2000) at paragraphs [20] – [22] the then Information Commissioner described the purpose of clause 4(2) in the following terms:

> *"20. Clause 4(2) is concerned with protecting from disclosure matter which is not a trade secret, but which has "commercial value" to a person. The word "person" includes a public body, company, or association or body of persons, corporate or unincorporate: see s.5, Interpretation Act 1984.*
>
> *21. Clause 10 deals with certain commercial or business information of the State and its agencies. Subclause (3) of clause 10 is drafted in substantially similar terms to subclause (2) of clause 4, except that the former refers to agencies, whereas the latter refer to "persons". In my view, as a matter of statutory construction, the inclusion in Schedule 1 to the FOI Act of an exemption clause specifically directed at protecting the commercial or business information of State government agencies means that the appropriate exemption to be used by those agencies seeking to protect their commercial or business information is clause 10 rather than clause 4.*
>
> *22. I consider that clause 4 …* [generally] *… applies to documents containing information about the commercial or business information of any natural person, or any body or organisation, whether corporate or unincorporate, other than government agencies. In my view, it is primarily intended to protect certain of the commercial or business affairs of private individuals and organisations having business dealing with Government.*"

113. In my opinion, generally put, the purpose of clause 4(2) is to balance the general right of access to documents in the possession or control of "*agencies*" against the commercial interests of affected third parties, such as Mercer. By this balance the FOI Act seeks to preserve, *inter alia*, the capacity of government agencies to acquire and generate commercially sensitive information – a capacity that may be limited, damaged or destroyed if such information was susceptible to public disclosure.

114. Clause 4(2) creates a mechanism for balancing such interests by limiting access under the FOI Act to information other than the "*exempt matter*" identified by its terms. Its aim appears to be to provide access to documents in an agency's possession but only where there is no unwarranted commercial disadvantage to third parties who have a commercial interest in the commercially valuable information recorded in documents that have been the subject of an application for access under the FOI Act.

6.2.1 Commercially valuable

115. There have been a series of decisions in this State and other Australian jurisdictions by Information Commissioners and other decision-makers under freedom of information legislation regarding information that may be described as commercially valuable.

116. In *Re Ryan* the WA Information Commissioner described "commercial value" in the context of clause 4(2), (emphasis added):

> *"23. In a number of my previous decisions, I have expressed the view that information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person: see, for example,* Re Precious Metals Australia Limited and Department of Minerals and Energy [1997] WAICmr 12. *I do not consider that the commercial value of the matter under consideration needs to be quantified or assessed in order to satisfy the requirements of clause 4(2)(a). However, the exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish the exemption…".*

117. In *Re Cannon and Australian Quality Egg Farms Ltd* (1994) QAR 491, the then Queensland Information Commissioner considered a substantially similar exemption to clause 4(2) at s. 45(1)(b) of the *Freedom of Information Act 1992* (Qld) ("QFOI Act"). Section 45(1) provided:

> *"45. (1) Matter is exempt matter if -*
>
> *(a) its disclosure would disclose trade secrets of an agency or another person; or*

> *(b) its disclosure -*
>
> *(i) would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and*
>
> *(ii) could reasonably be expected to destroy or diminish the commercial value of the information; or*
>
> *(c) its disclosure -*
>
> *(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
>
> *(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*
>
> *unless its disclosure would, on balance, be in the public interest*".

118. The Queensland Information Commissioner offers a good summary of the decisions made regarding "commercial value" prior to *Re Cannon*, from [51] *et seq*, (emphasis added):

> *"51. … The meaning of "commercial value" has received surprisingly little attention in cases reported under the Commonwealth FOI Act, where the same term appears in s.43(1)(b).* In Re Rogers Matheson Clark and Australian National Parks and Wildlife Service *(1991) 22 ALD 706 at p.714, the Commonwealth AAT held that the names and addresses of overseas customers of the applicant (an exporter of kangaroo products) comprised information having a commercial value, without any attempt at explaining the nature of that commercial value. The Tribunal seemed to regard this, and the fact that the value of the information to the applicant would be diminished by disclosure, as self-evident. It seems that information concerning the customers of a business and requirements, will often have a special commercial sensitivity and value … Similarly, in* Re Organon*, the Tribunal merely observed (at 13 ALD p.595, paragraph 31) that it had evidence before it that the information in documents 1 and 2 (described as containing information as to the composition and properties of the plastic component of the IUD) had a commercial value, which evidence the Tribunal accepted, again without any explanation as to the nature of that commercial value. It is understandable that Tribunals have been reluctant to go into any detail in respect of information which they are prepared to find exempt on the basis that disclosure of it would diminish or destroy its value. <u>What is surprising is the lack of any attempt to expound a precise meaning for the term "commercial value</u>".*

52. *In* Re Organon, *the Tribunal also held that document 3 (described as containing information of a statistical nature supplied in response to a request from the relevant Department) was exempt under s.43(1)(b) of the Commonwealth FOI Act. The brief explanation offered (at p.595) for that finding was as follows:*

> The compilation of the information in document 3 must have accounted for considerable time and money. To the extent that the statistical information contained in the document is dispersed to the world generally, the value of that investment must be substantially diminished.

I am not prepared to accept that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition. This is surely too broad a proposition. Information can be costly to produce without necessarily being worth anything. …

53. *I note in this regard that in* Wittingslow Amusements Group and Another v Director-General of the Environment Protection Authority of New South Wales *(Supreme Court of New South Wales, Equity Division, No. 1963 of 1993, Powell J, 23 April 1993, unreported) Powell J had to consider whether a document (described as the Knowland report) contained "information (other than trade secrets) that has a commercial value to any person" under s.32(1)(b) of the* Freedom of Information Act 1989 NSW. *The applicant had submitted a tender in response to requests for proposals to lease, develop and operate an amusement area at the old Luna Park site in Sydney. For that purpose, the applicant had retained Mr Knowland's firm as consultants in acoustics, to provide a detailed noise impact assessment and appropriate noise control suggestions. By the time the case came before the court, Mr Knowland's firm had already been paid for preparing the report. Powell J held that he was unable to see how the information contained in the Knowland report had a commercial value to any person (notwithstanding that the applicant had expended funds to obtain the preparation of the report). In a similar vein, the Commonwealth AAT in* Re Caruth and Department of Health, Housing, Local Government & Community Services *(Commonwealth AAT, No. W90/215, Mr P W Johnston (Deputy President), Major General K J Taylor, Mr S D Hotop, 18 June 1993, unreported), after noting that certain information in relation to a drug marketed by the Roche pharmaceutical company was already in the public domain, observed (at p.26):*

> Even if money has been expended in relation to it, the information cannot be said to be secret, nor does it have any commercial value to anyone insofar as labelling and other information is now capable of reproduction.

54. *It seems to me that there are two possible interpretations of the phrase "commercial value" which are not only supportable on the plain meaning of those words, but also apposite in the context of s.45(1)(b) of the FOI Act. The first (and what I think is the meaning that was primarily intended) is that information has commercial value to an agency or another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. The information may be valuable because it is important or essential to the profitability or viability of a continuing business operation, or a pending, "*one-off*" commercial transaction. According to the Collins English Dictionary (Aust. Ed.) the word "*commercial*" means "*of, connected with or engaged in commerce; mercantile*", and the word "*commerce*" means "*the activity embracing all forms of the purchase and sale of goods and services".*

55. *The second interpretation of "commercial value" which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. … The difficulties of proof of the material facts which would bring information within the ambit of the second meaning of "commercial value" to which I have referred will probably mean that it is not relied upon on many occasions.*

56. *The information in issue must have commercial value to an agency or another person at the time that an FOI decision-maker comes to apply s.45(1)(b) to the information in issue. This proposition is illustrated by observations in reported cases of the Commonwealth AAT to the effect that:*

- *information which is aged or out-of-date has no remaining commercial value (see for example Re* Brown and Minister for Administrative Services *(1990) 21 ALD 526 at p.533, paragraph 22; and it may be that the value of information relating to a major, "one-off" commercial transaction, such as the sale of a government property, is spent once the transaction is consummated: for the American approach in these circumstances see* Tennessean Newspaper Inc v Federal Housing Administration, *464 F.2d 657 (6th Cir 1972);* Benson v General Service Administration, *289 F.Supp 590 (DC Wa 1968)); and*

- *information which is publicly available has no commercial value which can be destroyed or diminished by disclosure under freedom of information legislation (see* Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd *(1991) 23 ALD 714 at p.724, paragraphs 44 and 46).*

> *57. In the last mentioned case and a related case,* Re Public Interest Advocacy Centre and Department of Community Services & Health and Searle Australia Pty Ltd *(cited above at paragraph 46), the Commonwealth AAT dealt with similar arguments by the respondent pharmaceutical companies to the effect that some documents in issue were wholly exempt under s.43(1)(b) of the Commonwealth FOI Act, even though parts of the documents were comprised of published articles. It was submitted that commercial value attached to the compilation of material otherwise publicly available, and that the process of selection, involving commercial expenditure and the application of expertise, is the "value" which attaches to such information. The Tribunal rejected the argument that the selection and arrangement of publicly available research material has commercial value. Its reasons in the* Schering *case appear at 23 ALD p.724, and its reasons in the* Searle *case are reproduced in the judgement on appeal to the Full Court of the Federal Court (108 ALR at p.177). Basically the Tribunal was of the view that to interpret s.43(1)(b) of the Commonwealth FOI Act as applying to the compilation of material otherwise publicly available would not be in accord with the object of the legislation and would circumvent the intended ameliorating effect of s.22 of the Commonwealth FOI Act (which corresponds to s.32 of the Queensland FOI Act, and which in effect allows for exempt matter in a document to be deleted and the balance of the document disclosed). The Full Court of the Federal Court did not comment adversely on that proposition in dealing with the appeal from the decision of the Commonwealth AAT in the* Searle *case…".*

119. Since *Re Cannon*, the question of what constitutes "*commercial value*" has arisen on a number of occasions. These cases demonstrate how the principles discussed in *Re Cannon* have been applied in Western Australia.

120. In *Re Hassell and Health Department of Western Australia* [1994] WAICmr 25 the Information Commissioner cited *Re Cannon* with approval and specifically adopted passages from paragraphs [52] and [54] of *Re Cannon* set out above.

121. In *Re E and L Metcalfe Pty Ltd and Western Power Corporation* [1996] WAICmr 23, information about the relationship between certain companies and details of products was found not to have "*commercial value*". The information was common knowledge in the private sector industry, the documents were 18 months old and the information was out of date.

122. In *Re Yerilla Gems Pty Ltd Gembank Limited WA Gem Explorers Pty Ltd and Department of Minerals and Energy* [1996] WAICmr 58 (1 November 1996), the WA information Commissioner stated:

> *"16. In my view, it is clear from the specific words of clause 4 that the exemptions in each of the sub-clauses (1), (2) and (3) are directed at protecting different types of information from disclosure under the FOI Act. As I have said before, whilst it is open to a complainant or an agency to make alternative claims for exemption for documents, or parts of documents, under more than one of those sub-clauses, the same information cannot be exempt under more than one of those sub-clauses. However, different matter within a document may be exempt under different sub-clauses of clause 4. …*
> …
> *19. In my decision in* Re Slater and State Housing Commission of Western Australia *(22 February 1996, unreported, D01396), I considered the meaning of the words "commercial value" in the context of a claim for exemption under clause 10(3) of Schedule 1 to the FOI Act. As clause 10(3) is in similar terms to clause 4(2), except that it applies to the commercial activities of agencies, I consider the discussion in* Re Slater*, at paragraphs 10-13, to be equally applicable in this instance. Accordingly, I consider that matter has a commercial value if it is valuable for the purpose of carrying on the commercial or business activities of a person. Further, it is by reference to the context in which the matter is used, or exists, that the question of whether it has a commercial value can be determined…".*

123. This statement of principle in *Re Yerilla* was applied by the Information Commissioner in *Re Precious Metals Australia Limited and Department of Minerals and Energy* [1997] WAICmr 12 (17 April 1997) at [18].

124. In more recent times a series of decisions have cited the treatment in *Precious Metals*, see: *Re Cockburn Cement Ltd and Department of Environment, Water and Catchment Protection and Kwinana Progress Association* [2003] WAICmr 23 (21 August 2003) at [13]; *Re Prosser Management Pty Ltd and City of Bunbury* [2003] WAICmr 30 (22 October 2003) at [15], and *Re Rogers and Water Corporation and Guppy and KG & GS Nominees Pty Ltd* [2004] WAICmr 8 (5 March 2004) at [49].

125. I accept the applicable legal principles in respect of clause 4(2) are, making allowances for the differences in the legislative schemes in WA and Queensland, those principles set out in the passages from *Re Cannon* set out above and applied in this State.

6.2.2 The Agency's submissions – Clause 4(2)

126. In its letter to me of 31 May 2007, the agency submits that the Report contains sensitive market pay data that is highly confidential, has considerable value to Mercer and has been acquired by Mercer at considerable effort and cost. The agency also submits that the Report, if disclosed, would reveal the Methodology, which is Mercer's intellectual property, and that disclosure would potentially significantly devalue the commercial value of that intellectual property.

6.2.3 Mercer's submissions – Clause 4(2)

127. By letter of 19 November 2007, Mercer provided me with detailed submissions in relation to my preliminary view that the information in the Report that it had identified as exempt under clause 4(2) of Schedule 1 of the FOI Act was not exempt on the basis that:

- the information lacked a sufficient degree of "*commercial value*" to be regarded as "*exempt matter"*; and/or

- the information lacked the relevant degree of currency as required by the case law in order to be regarded as having *commercial value* and therefore to be regarded as *"exempt matter"; and/or*
- the information was publicly available and as such could not be regarded as having *commercial value* .and consequently could not be regarded as *exempt matter*.

128. Mercer withdrew its claim for exemption for some information but maintains that the following information in the Report is exempt under clause 4(2):

- the tables on pages 13-15, inclusive;
- the charts on pages 28-31;
- the co-ordinates on pages 51-53;
- pages 62-65 and 67-71, inclusive.

For the sake of convenience, I refer to that information as "*Mercer's disputed information*".

129. As part of its submission, Mercer clarified how its work is conducted and provided me with the following information and submissions:

- **Mercer's Submissions - Methodology and its Outputs**

130. Mercer advises me that the Mercer CED Job Evaluation Methodology ('the Methodology') is a methodology that when applied to a particular job or a generic group of jobs will give that job a "work value score". That score allows a remuneration expert to assess the remuneration for jobs that may be different. The Methodology was designed to avoid remuneration discrepancies arising within organisations where the holders of different jobs have similar levels of expertise, decision making obligations and accountability. The Methodology allows an organisation to ensure that pay rates across different job types and classes are comparable.

131. Mercer submits that the information which it claims is exempt under clause 4(2) is the output of the application of the Methodology to the Special Division positions within the Western Australian public service.

132. To assess the remuneration level for a particular work value score, Mercer surveys its clients across different industries, sectors and jurisdictions to collect remuneration data. Mercer provides that data, once collected, collated and aggregated, to organisations for a fee, so that organisations can remunerate their staff at market appropriate levels. Mercer says that it is generally accepted in Australia that it has the largest and most comprehensive data base of remuneration rates.

133. Mercer informs me that it is easier to apply the Methodology once work value scores are known for particular senior positions within an organisation, since once that it is done the Methodology enables the work values for jobs below those levels to be ascertained. The work value scores determined for those key roles effectively become the bench marks against which all other jobs within that organisation can be valued. Once those key work value scores are known, pay data can be used by Mercer or an organisation to assign a salary to a particular job.

134. Mercer notes that the Methodology on its own is significantly more difficult to apply without knowing the work value scores for the band of senior jobs in a particular organisation. In this case, the work value scores for the Special Division Office holders in the Western Australian public service are reflected in the tables in the Report which Mercer claims are exempt.

135. Mercer says that in ascertaining the relevant work value scores in the Report , required the participation of three senior principals from its organisation.

136. Mercer submits that its Methodology is a unique method of assessing the "work value" of a particular job by means of which Mercer can give any specific job or generic job group a points score. Using the points scored for a particular job, a salary can be assigned to that job using pay data. The points for a particular job are calculated by assessing a job against three primary factors and eight sub-factors spread across the primary factors. The three primary factors are:

- the expertise, skills knowledge and experience required in the job;
- the complexity of tasks and the problem solving requirements;
- the outputs or accountabilities required by for the position.

137. Within each of the eight sub-factors there are further levels with definitions for each level determining how a position is rated on each sub-factor. When a job is being evaluated the position's requirements are compared with detailed and standard definitions to find the level within each sub-factor that most accurately and closely describes the characteristics of that particular job. Following evaluation, each job is assigned a number of work value points with the total points assigned over all factors creating that job's work value score.

138. There are a number of ways that an evaluation of a job may be undertaken for the purposes of evaluating bench mark positions. In the present case, the agency provided Mercer with organisational charts and position descriptions for each position and then interviewed each office holder. Of the 77 jobs evaluated, four were vacant at the time of undertaking the evaluation.

139. Following those interviews, the three Mercer principals reviewed the materials provided and their interview notes and undertook an evaluation of the relevant positions for the purpose of assigning a number of work value points. Once that was done, the principals undertook an internal relativity check amongst the evaluated positions, followed by a relativity check undertaken against similar roles in other jurisdictions. The information used to undertake the relativity checks is not publicly available information.

140. The relativity checks were made to ensure that the evaluations for the agency were in line with evaluations for similar roles in external organisations. If there were significant discrepancies, the evaluation was reassessed.

141. The Report was constructed based upon the conclusions drawn from the application of the Methodology.

• **Mercer's Submissions - Pay Line Data**

142. Once the work value scores for each job are known, the remuneration data is applied to the work value scores. This results in the creation of the pay line graphs that are set out on pages 28-30 of the Report.

143. Mercer surveys its clients regularly and obtains substantial remuneration information across a wide range of industries and the public and private sector. A regression analysis is then applied to the remuneration data and the work value scores and pay lines can be provided across jurisdictions, sectors and industries.

144. The bringing together of the remuneration data and the work value scores and the creation of the pay line graphs allows third parties who may gain access to the information to use the graphs and apply the details to other jobs and evaluate jobs in circumstances where they would not have previously been able to do.

145. The pay line data is derived from information that has cost Mercer considerable time and expense to accumulate. Other providers offer pay line information and undertake their own surveys, however, Mercer considers its remuneration data to be the most comprehensive and as such the most valuable.

- **Mercer's Submissions - Currency of the Information**

146. Mercer accepts that where the information a party seeks to classify as exempt matter does not have a requisite level of currency then it cannot have the requisite level of commercial value.

147. Mercer says that although the fundamentals of the Methodology and its application have remained unchanged since it was first developed, the Methodology is not lacking currency. Mercer advises that it updates its "position descriptors" to reflect changes in job types or descriptions and to reflect current market terminology. For example, the reference to a "typist" is no longer included since that job no longer exists.

148. Mercer submits that it is not correct to say that, because the Report is some 20 months old, it lacks currency. Mercer submits that the output of the application of the Methodology - being the work value scores as set out in the information for which it claims exemption - are still current and are typically current for between 5 and 8 years. Work value points collated for bench mark jobs such as those within the Special Division do not loose currency within that period unless there is a significant restructure of a job or series of jobs. Should there be a major structural reorganisation prior to that time, Mercer would revalue the benchmark positions. The client's trained staff would then use those work value scores for the benchmarked positions to enable them to conduct their own internal evaluations of jobs below the benchmarked positions until the expiration of 5-8 years or the next major restructure.

149. Mercer submits that, in the absence of a major restructure, Mercer's disputed information will be current for at least the next 3.5 years and possibly the next 5 years.

- **Mercer's Submissions - Public Availability**

150. Mercer accepts that information that is publicly available will lack commercial value and, consequently, will not be exempt under clause 4(2). Mercer says that it is not seeking to limit the release of general information regarding the Methodology.

151. Mercer informs me that the Methodology is a well understood and regarded job evaluation tool within the human resources industry. Mercer trains and licenses staff from its client organisations to use the Methodology. The staff so trained and licensed, however, cannot use the Methodology without access to the work value scores for a group of jobs that are used as a benchmark for that organisation. It is Mercer that undertakes the benchmarking and provides the work value scores from which trained staff then value jobs that sit below those group of benchmarked jobs.

152. Mercer acknowledges that a number of its reports refer to the Methodology and certain pay lines and are publicly available. Mercer accepts that the information in those reports is not of commercial value as it is publicly available. However, Mercer submits that Mercer's disputed information is not set out in any of those reports or any other report published on the internet or otherwise. Evaluation of the Special Division Office holders has not been previously undertaken and the work value scores contained in Mercer's disputed information have not been previously published.

- **Mercer's Submissions - Commercial Value**

153. Mercer submits that Mercer's disputed information has a commercial value to Mercer. Mercer has spent a considerable amount of time and expertise in applying the Methodology to the jobs within the Special Division to arrive at the work value scores. Mercer says that it will use those work value scores, together with its pay line data to evaluate jobs of similar levels or below or to provide general remuneration advice to its clients.

154. In Mercer's view, none of its competitors would have information of the type contained in Mercer's disputed information. Mercer will use that information as part of its corporate knowledge and expertise for some time to come as a comparison for other jobs in both the public and private sector and in other jurisdictions. Mercer will also use the information gained from the evaluation of the Special Division jobs to ensure consistency of the Methodology from one organisation to another or across organisations when it undertakes similar assignments for other clients.

155. Mercer submits that if a competitor obtained access to Mercer's disputed information and have training in the Methodology, then it could use that information and hold itself out as having the capacity to evaluate similar senior roles (and many more roles below those assessed) based upon the significant number of substantial senior roles that Mercer evaluated. All of the jobs evaluated by Mercer in the Report have work value scores range well in excess of 700 points - at which point a role is classified as being a senior role. The range of work value scores in the Report would give a competitor significant scope to evaluate a large number of senior roles and the disclosure of Mercer's disputed information is likely to result in a loss of business by Mercer.

- **Table on pages 13-15 inclusive**

156. Mercer submits that Mercer's disputed information is not publicly known and does not appear in any other Mercer report available on the internet or any other report. The Methodology that allowed those point scores to be calculated is widely known but the points scored for the jobs within the Special Division cannot be obtained without undertaking the evaluation process that was undertaken by the Mercer principals and without their level of skill and expertise.

157. Some knowledge of the Methodology is not sufficient to readily score jobs of this level. The release of work value scores for this level of jobs gives a person with some knowledge of the Methodology the ability to scores jobs that they could not otherwise score.

158. Accordingly, Mercer submits that this information has considerable commercial value and its disclosure would potentially diminish the assignments that Mercer could win based upon the possibility of other organisations holding themselves out as having the required skills and information to evaluate senior positions.

159. Mercer advises me that it would concede to the tables on pages 13-15 being disclosed provided that the 4 columns of points listed were deleted from those pages.

- **Co-ordinates on pages 51-53 inclusive**

160. Mercer submits that this information is a detailed version of the information on pages 13-15 and provides in greater detail how the scores in the three primary factors were calculated. The provision of the co-ordinates gives any person with experience of Methodology a great deal more insight into the experience and skills applied to come up with the scores within each of the sub-factors. The information drills down into the detail behind the three primary factors.

161. Mercer informs me that the coordinates are the letters, numbers and the addition and subtraction signs in the columns entitled "Coord" under each of the headings "Expertise", "Judgement" and "Accountability" and says that they have little relevance to a person who does not have an understanding of the Methodology. Mercer submits that the inclusion of the coordinates in the tables on pages 51-53 would give a person significantly more detail of the application of the Methodology to the jobs evaluated.

162. Mercer also submits that this information is not publicly known and would, if disclosed, provide a great deal of insight into how the scores in the three primary factors were calculated. Mercer says that providing the further detail of how the work value scores were calculated within the 8 sub-categories gives a level of insight that could not be obtained without direct access to the Mercer principals who undertook the evaluation of the jobs. Mercer notes that the ultimate point scores on pages 13-15 are the same but the detail is significant to the user of such information.

163. Mercer advises me it would concede its claim in respect of the tables in Appendix C if the information under each of the "*Points*" and "*Coord*" columns was removed.

- **The charts on pages 28-31**

164. Mercer says that the pay line data graphs on pages 28 and 30 are derived from Mercer survey results. Mercer surveys all of its human resource clients and requests remuneration information for various senior positions from those clients. That information is provided to Mercer on a confidential basis and is collected and collated at considerable cost to Mercer.

165. Mercer advises that, once collected, the information is applied to the work value scores and a regression analysis is applied to those results and the pay lines are the result. The application of the work value scores to the remuneration data makes possible the creation of the pay line graphs.

167. Mercer submits that the pay line data graphs on these pages are of commercial value to Mercer. They will be included in Mercer's internal data base for application by Mercer staff when providing evaluation services to other clients. Such information becomes part of the Mercer intellectual capital available to Mercer staff.

168. If that pay line data is disclosed, it will enable Mercer's competitors or any organisation needing up to date pay line data for jobs of those levels to obtain information at no cost that Mercer routinely sells to its clients.

169. Mercer submits that pay lines lose currency more rapidly than work value scores. In particular, pay lines will loose currency rapidly during periods of great volatility in salaries, such as when there is significant inflation or where salaries are falling. Mercer takes the view that currently pay rates are very stable across Australia and as such the pay lines set out on pages 28 and 30 will have currency for at least 3 years. Hence a claim that these pay lines lack currency is not correct at this point of time.

- **Pages 62-65 and 67-71**

170. The graphs and tables referred to on these pages reveal the work value scores for all of the jobs according to the group into which the job falls within after the application of the Methodology. The work value points for those jobs are compared to pay data held by Mercer across a number of jurisdictions.

171. Mercer submits that those work value scores have considerable commercial value to Mercer and are a reflection of the application of considerable expertise by senior Mercer principals in evaluating the jobs in the Special Division. The work value scores reflected here are not publicly available.

172. Mercer submits that if this information was disclosed, persons who have knowledge of the Methodology will be able to evaluate jobs for roles, which they would not otherwise be able to evaluate. The provision of the pay line data on the associated graphs would assist such persons to undertake that task across a number of jurisdictions for the reasons previously explained.

173. Mercer consents to the disclosure of pages 62-65 and 67-71, if all work value scores are deleted.

• **Mercer's General Submissions - Summary**

174. Mercer submits that Mercer's disputed information is exempt because it satisfies the requirements of clause 4(2)(a) of Schedule 1 of the FOI Act, as that information has the requisite level of "*commercial value*" as required by the FOI Act.

175. Mercer submits that Mercer's disputed information:

- does not fail the test of "*commercial value"* for want of currency, as the information is still current for the reasons explained by Mercer.

- does not fail the test of "*commercial value*" on the basis that the information is publicly available, since none of Mercer's disputed information is available elsewhere.

- is exempt because it satisfies the requirements of clause 4(2)(b) of Schedule 1 of the FOI Act , as its release would diminish the "*commercial value"* of that information to Mercer for the reasons explained by Mercer.

- can be classified as "*exempt matter"* under clause 4(2) and, consequently, the agency has properly refused to give the complainants access to the Report.

176. Mercer agrees to release Mercer's disputed information provided that all work value scores on all graphs and tables are deleted.

177. Mercer is strongly of the view that a person who had experience of the application of the Methodology could use the work value scores and the pay data disclosed in the Mercer to evaluate jobs that they would not have otherwise had the capacity or experience to score.

178. Mercer notes that a score for substantial senior roles commences at 700 points and says, for example, a Chief Financial Officer of a corporation would typically have a work value score in excess of 700 points. The work value scores compiled by Mercer in the Report commence at 883 points up to 3,458 points. The disclosure of that information would allow competitors and organisations to size jobs at levels below 3,458 points. Generally such jobs would be evaluated by senior Mercer principals. All firms and corporations guard such information very closely as the skills, experience and cost of obtaining that information is considerable.

179. Mercer submits that the disclosure of Mercer's disputed information gives its competitors a greater opportunity to undertake work that they would not previously have had the skills or information to undertake. Such disclosure has the potential to lead to a loss of work to Mercer in this field - especially within the state public service sectors for very senior jobs. Mercer submits that the capacity of third parties to take work away from Mercer in these areas clearly diminishes the value of Mercer's disputed information.

6.2.4 Determination – Mercer's Claims Clause 4(2)

180. The ambit of Mercer's claims that parts of the Report are exempt under clause 4(2) has narrowed as a consequence of the provision to Mercer of my preliminary view. I have identified the parts to which such a claim is maintained as "Mercer's disputed information" in paragraph 128 herein, that includes the following parts of the Report:

- The tables on pages 13-15, inclusive;
- The charts on pages 28-31;
- The co-ordinates on pages 51-53; and
- Pages 62-65 and 67-71, inclusive.

181. I am informed by Mercer- in its submissions to me of 20 July 2007 - that the two primary aspects that underpin the commercial value of the identified portions of the Report are "*the CED Methodology and its payline data"*.

182. The CED Methodology is described by Mercer as follows:

> *"The Mercer CED Methodology is a unique method for assessing the "work value" of a particular job. The CED Methodology measures and evaluates a particular position or generic position description in terms of actual requirements of the job rather than just looking at the skills and experience of the incumbent. The CED Methodology expresses a job's value in "work value points". The points for a particular job are calculated by assessing up to eight individual sub-factors. The CED Methodology considers all jobs in terms of, the inputs required for the position, the processes involved in carrying out the job and the outputs required for the position. The eight sub-factors fall within 3 primary factors: the expertise, skills knowledge and experience required; the complexity of tasks and the problem solving requirements; and the outputs or accountabilities required by the position. When scoring or evaluating a job, assessments are made for each of the eight sub-factors. Each sub-factor has approximately eight levels with the definitions for each level determining how a position is rated on each sub-factor.*

> *For any job being evaluated the position's requirements are compared with detailed and standard definitions to find the level within each sub-factor that most accurately describes the characteristics of the job. The sub-factors and the standard definitions within each sub-factor have been developed by Mercer over approximately 30 years. The work value descriptors are regularly reviewed and updated. Upon evaluation of each of the sub-factors the job is assigned a number of work value points. Mathematically derived points charts are used to assign points to each factor. The total of all points assigned over all factors creates that job's work value score".*

183. The CED Methodology is essentially a job evaluation system that allows the remuneration value of different positions to be compared by ascribing a points value to each position. Payline data is then used to ascribe each position a comparative salary.

184. I am informed by Mercer that the points for a particular position are calculated by reference to three primary factors: (1) the expertise skills and knowledge and experience required to do the job; (2) the complexity of the tasks and the problem solving requirements and (3) the outputs or accountabilities required of the position. There are eight sub-factors and each of these is assessed by reference to eight different levels.

185. Mercer describes the development of the CED Methodology in the following terms, (emphasis added):

> "*For any job being evaluated the position's requirements are compared with detailed and standard definitions to find the level within each sub-factor that most accurately describes the job. The sub-factors and standard definitions within each sub-factor have been developed by Mercer over approximately 30 years. The work value descriptors are regularly reviewed and up-dated*".

186. This description of the CED Methodology depicts a technique or methodology that is constantly being developed. In this sense access to any application of the CED Methodology by reference to a particular report may well lack currency. Where such a report lacks currency it will not be an application of the current CED Methodology used by Mercer. In this instance, for example, the Report is now eighteen months old.

187. I note the decision in *Re Metcalfe* **(**see paragraph 121 above**)** that information of the same age was out-of-date. The currency and "*commercial value*", if any, of information requires careful consideration of the particular circumstances. In this case the information appears somewhat dated given the changing nature of administrative structures and salaries. Here I note what appears to be the annual provision of such information in respect of the Western Australian public sector.

188. I am also informed by Mercer that (emphasis added):

> "*The job evaluation system part of the CED Methodology is known of outside Mercer, and clients can be trained to evaluate positions within their own organisation. The complete methodology linking the evaluation(s) to the payline data, however is not able to be used by non Mercer parties as the skills and expertise required to be applied to the provision of remuneration data reside only in Mercer*".

189. This submission indicates that the CED Methodology - to the extent that it involves the application of primary factors, sub-factors and standard definitions - is understood and applied outside Mercer. Mercer is, however, seeking to maintain a claim that the application of the CED Methodology in concert with its payline data to produce recommended rates of remuneration for specific positions is unique and confidential to Mercer.

190. Even if one were to accept that the combination of the CED Methodology and the Mercer payline data is unique to Mercer, it is clear on the balance of probabilities that the CED Methodology is known and applied outside of Mercer.

191. The CED Methodology appears to fall outside of the ambit of clause 4(2) because it is information that is either widely known, or in the public domain.

192 Mercer confirms that:

> "*… Currently, there is some Mercer CED Methodology available on the internet. There is a report by Mercer dated 31 May 2005 entitled "2004 Broader Market Comparison - SES & Non SES Remuneration". The information that this report reveals is nothing more than the information that Mercer routinely provides to clients to describe in the broadest of terms the CED Methodology. This very same information is set out in the Report on pages 42-44 inclusive and Mercer is not seeking to restrict the release of this information".*

193. This suggests, and I understand, that Mercer accepts the principle that what is published on the internet by Mercer is not "*exempt matter*" within clause 4(2) of Schedule 1 to the FOI Act. Ultimately what is "exempt matter" falls to be determined under the provisions of the FOI Act on the basis of the material before the decision-maker but information that is publicly available is unlikely to have "commercial value" within the meaning of clause 4(2).

194. The conclusion that Mercer is seeking to protect the use of the CED Methodology in concert with its payline data - rather than each separately - would explain why Mercer puts its claim under clause 4(2) in respect of the "*CED Methodology and the payline data*". Mercer advises me that:

> "*The CED Methodology and the payline data is not a single concept or formula but a complex and extensive methodology that is made up of an number of distinct yet interwoven parts all* [sic] *which go to make this methodology as having* [sic] *significant commercial value*".[1]

195. It is somewhat incongruous to describe "*payline data*" as a "*methodology*". Further to assert that a methodology and a data base is "*not a single concept or formula but a complex and extensive methodology that is made up of a number of distinct yet interwoven parts"* in my opinion confuses the different qualities of data (facts) and method (technique).

196 This point is emphasised when one considers Mercer's own description of the link between the CED Methodology and the payline data, as follows:

> "*The CED Methodology provides consistent work value results across specific industries, job families or the general market hence it has great value. Mercer uses the CED Methodology to link the points scored to an appropriate payline and hence arrive at an appropriate pay range for a position*".[2]

197. To tie the CED Methodology to the payline data and describe them as a single methodology is illogical. As I understand the passage at paragraph 194 it reiterates the proposition that the CED Methodology used in concert with Mercer's own payline data is "exempt matter" under clause 4(2) of Schedule 1.

198. In its submissions to me of 20 July 2007, Mercer anticipates that other consultants may seek to apply the CED Methodology to their own payline data, albeit that Mercer is of the opinion that such an application "*devalues the overall results provided by Mercer in the eyes of the relevant client and devalues the CED Methodology in the industry*".

199. Ultimately, of course, clients will choose the consultant they wish to use. A factor in such a choice may be the payline data available to the consultant. This proposition does not invest the CED Methodology with any quality of confidence particular, or special, to Mercer.

200. In this context it is interesting to note that the Mercer refers to "*Mercer's CED Methodology*" in some places and "*CED Methodology*" in others. As I understand it there is only a single methodology here known as the "*CED Methodology*".

[1] Mercer's Submissions dated 20 July 2007 at page 3
[2] Ibid, page 2

201. The payline data to which this claim relates is not clearly identified. I am informed that:

> "*The payline data owned by Mercer is not publicly available data but information that is provided to Mercer by a wide range of Mercer clients (in the strictest confidence) across many industries and is sorted and arranged in a manner that makes it useful to Mercer depending upon the industry and type of job being evaluated. Paylines are derived by application of a regression analysis of work value scores for a job in the Mercer database and actual pay for incumbents*.[3]

202. Regression analysis examines the relation of a dependent variable (response variable) to specified independent variables (explanatory variables). The mathematical model of their relationship is the regression equation. The dependent variable is modelled as a random variable because of uncertainty as to its value, given only the value of each independent variable.[4]

203. I understand the reference to regression analysis by Mercer to suggest that the dependent variable is the salary range of the position being evaluated and the explanatory variables to be the salaries of similar positions (as values by points assigned using the CED Methodology and generated from payline data).

204. I am informed by Mercer that some of its payline data has "*been specifically collated … to compliment the CED Methodology*" but that "*Mercer has found that the use of Mercer payline data developed by it for other projects cannot be used in conjunction with the CED Methodology as the results are inferior*" ("incompatible payline data"). Given that Mercer's claims are based on a synergy of the CED Methodology and its payline data this submission establishes that Mercer's claim does not relate to such incompatible payline data.

205. This observation makes the expression "*payline data base*" a difficult one to understand. Is this a data base of all Mercer's payline data or merely a portion of it? If it is merely a portion of such data how does one determine what payline data is in the "*payline data base*" and what is not?

206. Mercer submits that the "*payline data used by Mercer is exclusive to Mercer and has not been replicated by any other consultant*". Simply gathering publicly available information and adding it to a data base that contains payline data which cannot be obtained publicly does not invest such publicly available data with a quality of confidence.

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[3] Ibid

[4] Sykes, A O, An Introduction To Regression Analysis, The Inaugural Coase Lecture, available at www.law.uchicago.edu/Lawecon/WkngPprs_01-25/20.Sykes.Regression.pdf

207. Of course, if the publicly available data and confidential data become so mixed that it is impossible to reveal one without the other then one would have to consider the relevant circumstances when making a judgement (to the relevant standard) as to whether such data was confidential to a third party.

208. Commercial value may be found both in confidential data and the way in which data is compiled, organised, stored and accessed. It is vital therefore to identify exactly what data is the subject of an application for access under the FOI Act and the basis upon which it is said to be "*exempt matter*".

209. In this instance much of the payline data, if not all, described by Mercer as relating to the "*Tables and Charts*" is publicly available. The claim in respect of this data is put in the following terms: "*This information as represented in these tables and charts has significant commercial value to Mercer as no other consultancy has access to this combined set of data. Mercer relies upon the confidentiality of that data and any representation of it to maintain its commercial advantage over its competitors*".

210. This submission based on "*confidentiality*" is hard to understand given the public availability of the data. It would be easier to understand a submission based on the manner in which such data is compiled, collated, organised, stored or accessed. Such a claim does not emerge from Mercer's submissions.

211. Returning to the issue as to what portion of the "*CED Methodology and the payline data*" is in the public domain, a search of the internet reveals that in addition to the report referred to in the Mercer Submission there is an earlier published report titled, "*2003 Broader Market Comparison – SES & Non-SES Remuneration Department of Employment & Workplace Relations Data as at December 2003. Revised version released October 2004*" produced by Mercer ("2003 Report").

212. In the 2003 Report at Appendix A, Mercer states (emphasis added) at page 69 *et seq* that,

> "**Mercer CED Job Evaluation System**
>
> *The following section outlines the use of the Mercer CED Job Evaluation System throughout Australian State and Territory public service.*
>
> **ACT**
>
> *The chief executive and executive classification and remuneration management systems were reviewed and redesigned in 1995 with the introduction of the then Cullen Egan Dell job evaluation methodology. Since that time Mercer has provided work value assessment support to agencies and the Chief Minister's Department, for positions at these levels as well as Statutory offices. From time to time provides work value based market data. Government owned enterprises in the energy and services sectors also apply the methodology to underpin executive and non-executive classification and remuneration management.*

New South Wales

A major review to establish the Senior Executive Service was undertaken in 1990 and its scope included the application of the then Cullen Egan Dell job evaluation methodology, and the creation of a new classification structure and market leading employment and remuneration management practices (including employment contracts, performance pay, performance agreements and salary packaging). Since that time Mercer has continued to provide work value assessments for senior executive, chief executive and statutory office holder positions, as well as work value based market data. Mercer undertakes all chief executive work value assessments. Other senior executive evaluations may be outsourced, or undertaken by agency-based evaluators trained by Mercer. Senior executive classification determination is within agency delegation. In 1992-93 the NSW Government implemented points factor job evaluation methodology at the non-executive levels providing for 3 approved systems. The Mercer CED job evaluation methodology is one of the three approved methodologies and has been implemented in a range of agencies in the NSW public sector. In some instances trained evaluators within agencies apply the methodology, and in other instances evaluation is fully outsourced to Mercer. At the executive and non-executive levels, classification is tied to work value outcomes. At the chief executive and statutory office holder levels other factors may also be taken into consideration. A wide variety of Government owned enterprises and authorities have implemented the methodology to underpin executive and non-executive classification and remuneration management. This includes organisations in sectors such as transport, energy, water, insurance, superannuation, and education.

Northern Territory

A major study was undertaken in 1989/90 to establish a new classification and remuneration management framework for executive and non-executive officers using the then Cullen Egan Dell job evaluation methodology. Subsequently chief executive and statutory positions were reviewed and included in the framework. A major focus of the original study, and subsequent assignments, was to enable the NT to be relatively self-sufficient in using the methodology. However, ad hoc evaluations are undertaken by Mercer from time to time, and a comprehensive annual audit program exists to ensure high quality standards in the application of the methodology. A tailored job evaluation manual was developed as part of the original study, and was extensively revised in 1998. In 1997/98 the Government undertook a full program evaluation of the Job Evaluation System. Work value based market data for executive and non-executive levels are provided on an annual basis. At the executive and non-executive levels classification is determined by work value assessment. Chief executive and statutory position classification is primarily determined by work value assessment, although other factors may be taken into consideration.

Queensland

An initial study of executive and non-executive classification and remuneration was undertaken in 1988, with chief executives and statutory positions being included in 1989. Extensive training of agency personnel has occurred and most non-executive evaluations are undertaken by agencies using a tailored job evaluation manual originally developed in the early 1990s. The Government requires all executive work value assessments to be undertaken by Mercer, and such assessments form part of classification review submissions submitted by agencies to the Department of Premier and Cabinet for determination. Mercer provides work value based market remuneration analyses on a regular basis, for both executive and non-executive levels. Executive and non-executive classification is directly related to work value, but at chief executive levels other factors may be taken into consideration and no formal classification grading is applied. Remuneration levels are negotiated with the Premier. In 2001, Mercer revised the tailored manual, and developed a web-based variant to provide evaluators with access to a more comprehensive suite of support and learning tools. A wide variety of Government owned enterprises and authorities apply the methodology to underpin executive and non-executive classification and remuneration management in the transport, ports, energy, finance, police and emergency services, and education sectors.

South Australia

An initial study was undertaken in 1995 to review and redesign the chief executive and senior executive classification and remuneration management system. Work level standards, underpinned by work value analysis using the Mercer CED methodology, were developed to support the classification process. Classifications are determined on a day to day basis by using both work value assessment and reference to the work level standards. Mercer provides such assessments for senior executive, chief executive and statutory and prescribed officer positions on a regular basis. A wide range of Government owned enterprises and authorities also use the methodology for executive and non-executive classification and remuneration management. This includes agencies in sectors such as transport, water, tourism and entertainment, ports, insurance and health.

Tasmania

In 1993 Mercer (then as Cullen Egan Dell) undertook a review of the classification and remuneration management arrangements of chief executives. Since that time ad hoc re-evaluations of chief executive and statutory positions have been undertaken, and work value based market updates have also been provided.

In 2001, Mercer worked collaboratively with the Office of the State Service Commissioner to review all executive roles within the State Service. The outcome of the review was a new classification framework for executives, which is underpinned by the Mercer CED job evaluation system. A range of Government owned enterprises and authorities in Tasmania, in the electricity, water, ports, forestry, and superannuation sectors also use the methodology.

Victoria

An initial major study was undertaken in 1980–83 to provide the framework for the use of the methodology in the VPS at both the executive and non-executive levels. The study also embraced the establishment of new remuneration management arrangements. A tailored job evaluation manual was developed and extensive training undertaken to transfer skills to the VPS. In the mid 1980s considerable work was undertaken to extend the use of the methodology to outer sector agencies (e.g. TAFE). In 1993 a further major study of non-executive classification and remuneration management was undertaken that led to the implementation of a 5 level structure, and associated remuneration policies across the service. Most agencies are self-sufficient in determining non-executive classification, and may use work value measurement or other techniques (e.g. work level standards). From time to time Mercer provides work value assessments for agencies for positions where classification is in dispute or where an independent view is required. Senior executive classification for Band 3 (lower executive band) is based on the same approach as non-

executive classification with delegations remaining with the relevant agency. Senior executive and chief executive classification (Bands 1 and 2) is determined centrally taking into consideration work value and other factors. Mercer provides work value assessments on an ad hoc basis to support this classification process. Chief executive remuneration is negotiated, within prescribed bands, between the CEO and the Premier as employer. On an ad hoc basis, Mercer also provides work value assessments for statutory and prescribed office holder positions, although such assessments can also be undertaken by trained evaluators in the relevant central agencies. Work value based market remuneration data and associated analyses are provided usually on an annual basis for both executive and non-executive levels. A wide variety of Government owned enterprises and authorities apply the methodology for executive and non-executive classification and remuneration management. This includes agencies in the finance, insurance, superannuation, health, fire and emergency, audit, ports, police and road construction sectors and, prior to privatisation, organizations in the water, transport and energy sectors.

Western Australia

In 1989 a major study was undertaken of the classification and remuneration framework for positions falling under the jurisdiction of the Salaries and Allowances Tribunal including chief executives, statutory and prescribed office holder positions, and judicial and parliamentary positions. As required, Mercer provides work value assessments and work value based market remuneration data for the Tribunal, although the Tribunal can also source work value assessments from trained evaluators in the Ministry of the Premier and Cabinet. The Tribunal's classification decisions are primarily influenced by work value, although other factors may be taken into consideration. The Mercer CED methodology has also been accepted as a tool for classifying senior executive positions, and on an ad hoc basis Mercer undertakes evaluations for individual agencies prior to submission to Premier and Cabinet for approval/determination of classification. A major study to review and redesign senior executive service classification and remuneration management was undertaken in 1997. The methodology has also been extensively applied to underpin executive and nonexecutive classification and remuneration management in Government owned enterprises and authorities in the energy, water, ports, superannuation, gambling, health and police sectors".

213. Further extensive detail concerning the CED Methodology and its application also appears in the following reports produced by Mercer that are available on the internet:

    (1) *"2004 Broader Market Comparison – SES & Non SES Remuneration Department of Employment and Workplace Relations"* ("2004 Report"), *and*

    (2) *"2005 APS SES Remuneration Survey Department of Employment and Workplace Relations"* ("2005 Report").

214. The 2004 and 2005 Reports provide extensive and detailed examples of the application of the CED Methodology to both SES and non-SES positions in the Western Australian public service. They reinforce the comments and observations made by Mercer in the 2003 Report set out above.

215. The 2004 Report (at p.2) describes how the methodology employed "… *to determine the Combined Public Service analysis utilises a remuneration range spanning from the minimum to the maximum of the reported range across all State and Territory Governments (excluding Tasmania)*". At page 57 in Appendix B Mercer states:

> "*The methodology used to determine comparative Combined Public Service data has been altered for the 2004 Report. Both the 2003 and 2004 Reports used a regression analysis to establish minimum and maximum pay ranges for positions of equal work value at each of the APS classifications within each individual State and Territory jurisdiction.*

216. This account suggests an approach to payline data entirely consistent with that in the Report and traversing the same public sector positions and salary structures. This conclusion is antithetical to the Mercer claim regarding the confidentiality of payline data. The generality in the manner in which Mercer refers to payline data makes it difficult to assess the congruity of payline data in the 2004 Report and the Report but in my opinion, based on what has been provided to me to-date, they are equivalent.

217. The 2005 Report dealt with a narrower range of salaries being the Australian Public Service Senior Executive Service.

218. In my opinion the 2003, 2004 and 2005 Reports establish the following propositions as more likely than not:

(1) The CED Methodology employed by Mercer is now employed throughout Australia, and was employed in NSW from at least in or around 1992-1993;

(2) The CED Methodology is employed by a wide range of Australian government and Government owned enterprises and authorities, entities that have implemented the methodology to underpin executive and non-executive classification and remuneration management;

(3) The range of entities employing this methodology in their own right includes, *inter alia*, organisations in sectors such as transport, energy, water, insurance, superannuation, and education;

(4) In Western Australia, "*Mercer provides work value assessments and work value based market remuneration data for the Tribunal, although the Tribunal can also source work value assessments from trained evaluators in the Ministry of the Premier and Cabinet*", which indicates that "*trained evaluators in the Ministry of the Premier and Cabinet*" also employ the CED Methodology (see that section of Appendix A in the 2003 Report dealing with Western Australia, set out at paragraph 212 above); and

(5) Many entities are self-sufficient as to the application of various aspects of the CED Methodology, for example:

- In NSW, "*A wide variety of Government owned enterprises and authorities have implemented the methodology to underpin executive and non-executive classification and remuneration management. This includes organisations in sectors such as transport, energy, water, insurance, superannuation, and education", and*

- In Victoria, "*Most agencies are self-sufficient in determining non-executive classification, and may use work value measurement or other techniques (e.g. work level standards)".*

219. On Mercer's own account the CED Methodology is widely known and applied by others throughout Australia. Activity that appears to have been promoted by Mercer, certainly to the extent that Mercer has recorded and circulated material on the internet, records and documents this use.

220. In such circumstances there can be no basis for finding that the CED Methodology on its own has the requisite "*commercial value*" required by clause 4(2) because it is widely known and applied throughout Australia by entities other than Mercer, and information describing that methodology in a number of different applications analogous to that in the Mercer Report can be downloaded from the internet.

221. The gravamen of Mercer's claim is set out in paragraph 188 above, that is:

> *"… The complete methodology <u>linking the evaluation(s) to the payline data, however is not able to be used by non Mercer parties as the skills and expertise required to be applied to the provision of remuneration data reside only in Mercer</u>…"*

222. However, there is some indication at Appendix A of the 2003 Report that entities are largely self-sufficient in their application of the CED Methodology and that they produce their own "*executive and non-executive classification and remuneration management"*, certainly in respect of NSW where we are told that: "*A wide variety of Government owned enterprises and authorities have implemented the methodology to underpin executive and non-executive classification and remuneration management. This includes organisations in sectors such as transport, energy, water, insurance, superannuation, and education*".

223. I now turn to the information identified by Mercer, in the Report, which it claims is exempt matter under clause 4(2) of Schedule 1 of the FOI Act.

- **<u>Table on pages 13-15 inclusive</u>**

224. The Table at pages 13 – 15 is entitled, "*Review of Grading and Remuneration Rates*" ("the Table"): a table that lists the identity of each position holder and ascribes points value to their position under three headings, it also records a total number of points for each position.

225. The Table also records bands in the left hand margin that indicate a hierarchy of "*Grading and Remuneration Rates*".

226. Absent personal information, that identifies then current incumbents in each position listed in the Table, the process of allocating points to each position is part of the process of applying the CED Methodology, as described above (I deal with personal information below at **Section 7**).

227. There appears to be no reference to Mercer "*payline data*" in the Table.

228. Proceeding on the basis, set out above, that CED Methodology is widely understood and applied throughout Australia, I need to consider what information that is set out in the Table would, were access granted under the FOI Act, "*reveal information (other than trade secrets) that has a commercial value to a person*".

229. To the extent that the Table reveals the CED Methodology I am not satisfied – for the reasons set out in paragraph 218 *supra* - on the balance of probabilities that the information has "*commercial value*" within the meaning of the FOI Act. I then turn to the issue what information in the Table, absent the personal information as to the identity of then current incumbents, reveals (or evidences) more than the CED Methodology or its application?

230. The Table does no more than proffer examples of the application of the CED Methodology to the positions listed in the Table. On that basis, none of the information in the Table satisfies the terms of clause 4(2)(a) of Schedule 1 of the FOI Act, and therefore the application of clause 4(2)(b) does not arise in this regard.

- **Co-ordinates on pages 51-53 inclusive**

231. The reference to "*coordinates on pages 51 – 53*" is ambiguous as the word "*coordinates*" does not appear on any of these pages. The reference to pages 51 – 53 inclusive is a reference to Appendix C of the Mercer Report ("Appendix C").

232. Given the ambiguity identified at paragraph 231 I have treated this aspect of Mercer's First Claim as a claim in respect of the whole of Appendix C.

233. The information in Appendix C mirrors the information in the Table with the exception of the column on the extreme right ("Additional Information").

234. Were there no difference in the information at Appendix C and the Table then, clearly, my decision in respect of Appendix C would be the same as that for the Table.

235. The Additional information appears to be an attempt to characterise the overall nature of the obligations and responsibilities of each of the positions listed.

236. The Additional Information simply records one aspect of the responsibilities of each of the positions Mercer was asked to evaluate. It appears to be publicly available information, I am not satisfied on the balance of probabilities that the information has "*commercial value*" to Mercer within the meaning of the FOI Act.

- **The charts on page 28, 29, 30 and 31**

237. The charts at pages 28 and 30 may contain Mercer payline data to the extent to which they refer to "*General Market*". This reference is unclear and I invited Mercer to provide further information in this regard as to how this information is "*commercially valuable*". However based on what I have been provided with I am unable to identify with any specificity information that has "*commercial value*" within the meaning of the FOI Act and I am not satisfied on the balance of probabilities that the information has "*commercial value*" to Mercer within the meaning of the FOI Act.

- **Pages 62-65 and 69-71**

238. Pages 62-65 are a reference to Appendix F of the Mercer Report. Pages 69-71 refer to a chart setting out "*each of the roles assigned to the proposed classification structure on the outcomes of the job evaluation process*" ("69-71 Chart").

239. Appendix F appears to be a compilation of publicly available information and, as such, it can have no "*commercial value*" within the meaning of that term in the FOI Act in the context of a claim based on confidentiality (as compared to a claim based on the manner in which information was compiled, collated, organised, stored or accessed). No claim is made that the data is compiled stored or accessible in a particular manner that impresses that information with "*commercial value*". No basis for any such a claim appears on the face of Appendix F and I am not satisfied on the balance of probabilities that the information has "*commercial value*" within the meaning of the FOI Act.

240. The information in the 69-71 Chart is simply a compilation of the points' values at pages 13 – 15 of the Mercer Report. I have already found that this information does not have a "commercial value" within the meaning of the FOI Act, see paragraphs 224-230 above**.**

6.2.5 Determination – Agency's Claims Clause 4(2)

241**.** In addition, there remains the agency's claim that pages 13-15; 25, 28, 30, 34-36, 51-53, 55, 56 and the table on page 26 of the Report are exempt under clause 4(2).

242. The Agency's claim under clause 4(2) adds nothing new to the claims made by Mercer.

243. The agency has provided me with no information beyond that provided by Mercer, and no material that sheds any further light on matters relevant to the requirements of clause 4(2). In relation to the specific material identified by the agency I am not satisfied on the balance of probabilities that the information on pages 25, 34-36, 55, 56 and the table on page 26 of the Report are exempt under clause 4(2) of Schedule 1 to the FOI Act

6.3 Clause 4(3)

244. The agency claims that pages 13-15; 25, 28, 30, 34-36, 51-53, 55, 56 and the table on page 26 of the Report are exempt under clause 4(3) of Schedule 1 to the FOI Act.

6.3.1 The Agency's submissions - Clause 4(3)

245. In essence, I understand the agency's submissions to be the same as those made in respect of the agency's claim under clause 4(2).

6.3.2 Determination - Agency's Claims Clause 4(3)

246. Clause 4(3) is a separate head of "*exempt matter*". In *Re Kobelke and Department of Productivity and Labour Relations* [1998] WAICmr 17 the Information Commissioner expressed the view that clauses 4(1), 4(2) and 4(3) of Schedule 1 of the FOI Act are directed at protecting different types of information from disclosure under the FOI Act.

247. Clause 4(3)(a) states:

> *(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…*
>
> *(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.*

248. If the terms of clauses 4(3)(a) and 4(3)(b) are met then the restrictions at clauses 4(4) – 4(7) must then be considered..

249. Clause 4(3) recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies nor the business of government should be adversely affected by the operation of the FOI Act, *Re Kimberley Diamond Company NL and Department of Resources Development and Argyle Diamond Mines Pty Ltd* [2000] WAICmr 63 at paragraph [93].

249. In *Re Cannon*, the Queensland Information Commissioner when considering the Queensland equivalent of clause 4(3) (s. 45(1)(c) of the Queensland legislation) stated at paragraphs [67] – [72] that: -

> 67. *The first requirement of s.45(1)(c) is that the matter in issue must comprise information (other than trade secrets or information mentioned in s.45(1)(b)) concerning the business, professional, commercial or financial affairs of an agency or another person. The meaning of the word "concerning" (according to both the Collins English Dictionary (Aust. Ed) and the Australian Concise Oxford Dictionary) is "*about, regarding*", and that meaning is appropriate in this context. The application of s.45(1)(c)(i) essentially requires a proper characterisation of the information in issue to determine whether it falls within the words of s.45(1)(c)(i).*
>
> 68. *The application of s.34(1)(a) of the* Freedom of Information Act 1982 *Vic (the Victorian FOI Act) calls for a very similar exercise in characterisation namely, whether information "relates to ... matters of a business, commercial or financial nature", and the Victorian case law on this issue is particularly helpful. (Generally, however, s.34 of the Victorian FOI Act has so many substantial differences from the structure and wording of s.45 of the Queensland FOI Act that the Victorian case law cannot often be of great assistance.)*
>
> 69. *In* Re Croom and Accident Compensation Commission *(1989) 3 VAR 441, the respondent submitted that information created for the purpose of dealing with a claim for compensation for industrial injury, namely statements of witnesses obtained by a firm of accident investigators plus a medical report on the claimant, was information which related to "matters of a business, commercial or financial nature" for the purposes of s.34(1)(a) of the Victorian FOI Act, and "information of a business, commercial or financial nature" for the purposes of s.34(4)(a)(ii) of the Victorian FOI Act. Jones J (President) of the Victorian AAT said (at p.464):*
>
> > For the exemption to apply, the information must relate to matters of a business, commercial or financial nature not merely be derived from a business or concerning it or have some connection with it. ... Is the essential quality or character of the matter business, commercial or financial? I am not persuaded that the information in issue here can be so categorised. ...
>
> 70. *The Accident Compensation Commission appealed to a Full Court of the Supreme Court of Victoria (see Accident Compensation Commission v Croom [1991] 2 VR 322) which affirmed the Tribunal's approach to the issue and its findings. Young CJ said (at p.324-5):*

> Under s.34(1)(a) it was said that disclosure of the witnesses' statements would disclose information acquired by the appellant from a business undertaking and that the information relates to "other matters of a business nature". I am clearly of the opinion, however, that the information in the investigator's report does not relate to matters of a business nature. The information is rather of a nature that concerns the investigation of an industrial injury and that is not covered by the exemption. Nor does the information in the medical report relate to matters of a business nature. It plainly relates to matters of a medical nature. ...the information in a particular document must relate to matters of a business nature before exemption can be claimed and that requirement is not satisfied by the contention in this case that the information is required for the purposes of the appellant's business. The requirement can only be satisfied by the proper characterisation of the nature of the information itself. Here the information is of a medical and not of a business nature. The same reasoning answers the submissions made for exemption under s.34(4)(a)(ii) and I find it unnecessary to go further for the purposes of deciding the case'.

71. *O'Bryan J (with whom Vincent J agreed) approached the question in a similar fashion (at pages 330-331):*

> Although each of the words [in s.34(1)(a) of the Victorian FOI Act] employed by the legislature must be accorded its ordinary meaning that meaning must, of course, be determined by reference to the context in which it is used. It is clear, I consider that Parliament did not intend to exempt from the operation of the Act every piece of written information which is obtained by an agency merely on the basis that it had been acquired and provided by a business undertaking in the course of its ordinary activities. ... I accept that the appellant is engaged in the business of insurance when it performs functions under Part III of the Accident Compensation Act ... but the information in the investigator's report is unrelated to matters of a business nature.
>
> The report contains information of the circumstances of the employment of the respondent, the nature of her work, the relationship between her occupation and illness and the opinions of Mr Hartfield as to the liability of Duncan Rubber at common law. The report does not contain information of a business, commercial or financial nature but is of an industrial injury investigative nature. The circumstances that the information will be used by the appellant in the course of its activity or undertaking of insurance does not mean that the information relates to the business of insurance. Such a connection is too tenuous to fall within the protection of s.34.

> Likewise the information in the medical report does not relate to insurance business. For an exemption to be granted the information must relate to matters of a business, commercial, or financial nature and it is not sufficient that the information will be used by an agency in the course of a business undertaking.
> ...
> Further, the use to which the information can be put by an agency does not change or extend the nature of the information.

72. *Powell J of the NSW Supreme Court performed a similar exercise in his decision in* Wittingslow Amusements Group Pty Limited and Another v the Director-General of the Environment Protection Authority of NSW *(cited above at paragraph 53). The applicant in that case contended that the acoustic impact assessment (the Knowland report) fell within s.32(1)(c) of the Freedom of Information Act 1989 NSW. Powell J said (at pages 30-31):*

> Can it, however, be said that the report contains information concerning the business, professional, commercial or financial affairs of any person? Since, as I have already noted, the redeveloped site is far from operational, and since the material contained in the report is limited to that which I have set out above, there being nothing in the report dealing with such matters as, the cost of acquiring, and installing, and modifying the proposed "rides" and other amusements or the cost of operating the proposed "rides" and other amusements, and the profits likely to arise therefrom, it is, in my view, impossible to characterise the information in the report as information relating to the business - whether present or projected - or relating to the professional, commercial or financial affairs of any person - on the contrary, the information is information as to the likely acoustic impact on the neighbourhood of an amusement park of the type presently proposed, operating on the site (see, for example, Accident Compensation Commission v Croom (supra))'.

251. As I have said previously in these reasons, the agency bears the onus under section 102(1) of the FOI Act of establishing that a decision to refuse the complainant access to the Report, on the ground that it is exempt under clause 4(3), was justified (see: observations of Owen J in *Manly's* case, at paragraph 101, page 37). In this instance, the agency has not provided me with any "probative material" against which I can assess the agency's claim for exemption under clause 4(3). It is not sufficient to discharge the onus the agency bears under the section 102(1) of the FOI Act to simply claim, as the agency has done in this instance, that a document is exempt under clause 4(3).

Section 30(f) of the FOI Act states that if the decision is to refuse access to a document, the notice which the agency gives to the applicant is to give details, in relation to each decision, of the reasons for the refusal and the findings on any material questions of fact underlying those reasons, referring to the material on which those findings were based. In this instance, the agency has failed to provide me with any information of the kind described in section 30(f) in relation to the specific material which the agency claims is exempt matter under clause 4(3). The agency is, in effect, claiming exemption under clause 4(3) for that information where the second complainant, Mercer, has not claimed exemption under that exemption clause. In the absence of any relevant information or submissions from the agency, I am not satisfied on the balance of probabilities that the agency has established that the information on pages 25, 34-36, 55, 56 and the table on page 26 of the Report satisfy the terms of clause 4(3)a) and, therefore, it is unnecessary to consider the application of clause 4(3)(b).

SECTION 7 CLAUSE 3

252. Since my preliminary views of the claims for exemption made by the agency and Mercer were that the Report is not exempt, I asked the OIC to contact the Special Division Office Holders referred to in the Report, to consult them as to whether the Report contains matter that is exempt under clause 3(1), pursuant to my obligation under s.32 of the FOI Act.

253. Clause 3 provides, insofar as it is relevant:

> "(*1*) *Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> ***Limits on exemption***
>
> *(2) ...*
>
> *(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
>
> *(a) the person;*
>
> *(b) the person's position or functions as an officer; or*
>
> *(c) things done by the person in the course of performing functions as an officer.*
>
> *(4) ...*
>
> *(5) Matter is not exempt matter under subclause (1) if the applicant provides evidence establishing that the individual concerned consents to the disclosure of the matter to the applicant.*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

254. The term '*personal information*' is defined in the Glossary in Schedule 2 to the FOI Act to mean:

> *"... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*
>
> *(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*

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

255. It is evident that the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

256. The definition of "*personal information*" in the Glossary makes it clear that any information or opinion about a person from which that person can be identified is personal information for the purposes of the FOI Act. Such information is, *prima facie*, exempt information under clause 3(1). Thus, "*personal information*" is information about an identifiable person.

257. With regard to officers or former officers of government agencies, the FOI Act makes a distinction between purely private personal information - such as an officer's home address or health details - and certain information (called "*prescribed details*") that relates solely to an officer's employment. Clause 3(3) of Schedule 1 to the FOI Act and regulation 9(1) of the *Freedom of Information Regulations 1993* ('the Regulations') effectively provide that certain kinds of work-related information is not "*personal information*" about an officer that will be exempt under clause 3(1).

7.1 Determination

258. At my request, the OIC took steps to contact all of the approximately 70 senior officers whose remuneration was the subject of the Report. Of those who responded, all but three consented to the release of the "*personal information"* about them contained in the Report. Consequently, pursuant to clause 3(5), that information is not exempt under clause 3(1).

259. Of the three officers who did not consent, none made submissions to me in relation to the issues and none sought to be joined as a party to this complaint.

260. The information concerning officers and former officers contained in the Report consists of their names, their position titles, the functions and duties of the respective positions and information from which the salaries for those posts could be deduced. Clause 3(3) and regulation 9(1) of the Regulations provide that, with the exception of the latter, that information is prescribed details, which are not exempt. Regulation 9(1) provides:

> "*In relation to a person who is or has been an officer of an agency, details of -*
>
> *(a) the person's name;*
>
> *(b) any qualifications held by the person relevant to the person's position in the agency;*
>
> *(c) the position held by the person in the agency;*

(d) the functions and duties of the person, as described in any job description document for the position held by the person; or

(e) anything done by the person in the course of performing or purporting to perform the person's functions or duties as an officer as described in any job description document for the position held by the person,

are prescribed details for the purposes of Schedule 1, clause 3(3) of the Act."

261. Consequently, I consider that that kind of information about the three officers who did not consent to the disclosure of "*personal information"* concerning them contained in the Report is not exempt under clause 3(1).

262. In my view, the information about the remuneration of the three officers is "*personal information*" about those persons - because each can be identified from that information - but is not prescribed details, as set out in clause 3(3). Accordingly, I have considered the limit on the exemption in clause 3(6) with regard to that information.

7.2 Clause 3(6)

263. Clause 3(6) provides that information will not be exempt if its disclosure would, on balance, be in the public interest. Determining whether or not disclosure would, on balance, be in the public interest involves identifying those public interests that favour disclosure and those that weigh against it and making a determination as to where the balance lies.

264. In this case, broadly speaking, the competing public interests are essentially the accountability of the Government and the personal privacy of the individuals concerned.

265. I recognise that there is a very strong public interest in maintaining the personal privacy of individuals. In my view, that interest may only be displaced by a very strong countervailing public interest that requires the disclosure of personal information. However, I note that the relevant information is information that is in the public domain. Among other things, the agency publishes details of the remuneration for the Special Division Office Holders once its determination is made. Accordingly, in my view, the disclosure of information about the remuneration of the three officers contained in the Report is not information that requires protection in the interests of the personal privacy of those individuals.

266. I also recognise that there is a public interest in the Government being accountable for the expenditure of public money in the form of salaries paid to senior officers. In *Re National Tertiary Education Industry Union (Murdoch Branch) and Murdoch University and Others* [2001] WAICmr 1 at [68], the former Information Commissioner accepted that there is a public interest in the public receiving value for the expenditure of public monies and that the public is entitled to know how much of its money is received in salary and entitlements by senior public officers for performing functions on behalf of the public. I agree with that view.

267. Therefore, in weighing those competing public interests, I consider that the public interest in disclosing the remuneration of the three non-consenting officers outweighs the public interest favouring privacy and confidentiality in this case.

268. In my view, none of the information about the office holders contained in the Report is exempt under clause 3(1) of Schedule 1 to the FOI Act.

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