HASSELL AND HEALTH

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	**File Ref: 94045** **Decision Ref: D02194**

Participants:

William Ralph Boucher Hassell
Applicant

- and -

Health Department of Western Australia
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - reports relating to evaluations of the "Quit" campaign - clause 11(1)(b) - matter relating to tests, examinations or audits conducted by the agency - meaning of "audit" - clause 10(1) - whether documents concern the financial affairs of the State - whether disclosure would have a substantial adverse effect on financial affairs of the State - meaning of "substantial adverse effect" - clause 10(3) - meaning of "commercial value" - requirements to establish "commercial value" of information - clause 10(4) - meaning of "commercial affairs" - requirements to establish whether agency engaged in commercial affairs.

Freedom of Information Act 1992 (WA) ss. 13(1)(b); 30; 68(1); 72(1)(b); 75(1); 102(1); Schedule 1 clauses 10(1), 10(3), 10(4), 11(1)(b).
Freedom of Information Act 1982 (Commonwealth) ss. 40(b); 43(1)(b).
Freedom of Information Act 1992 (Queensland) s. 45.
Fair Trading Act 1987 (NSW) s. 42.
Trade Practices Act 1974 (Commonwealth) ss. 47, 52.

Harris v Australian Broadcasting Corporation (1983) 78 FLR 236.
Re Jones and Shire of Swan (Information Commissioner WA, 9 May 1994, unreported).
Re Healy and Australian National University (Administrative Appeals Tribunal, Commonwealth, 23 May 1985, unreported).
Re James and Australian National University (1984) 2 AAR 327.
Re Actors Equity Association of Australia and Australian Broadcasting Tribunal (1985) 7 ALD 584.
Re Thies and Department of Aviation (1986) 9 ALD 454.

Re Cannon and Australian Quality Egg Farms Limited (Information Commissioner QLD, 30 May 1994, unreported).
Re Hopper and Australian Meat and Livestock Research and Development Corporation (1989) 16 ALD 658.
Re Ku-Ring-Gai Co-operative Building Society (No. 12) Ltd 1978 36 FLR 134.
Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisation Inc. (1992) 38 FCR 1.
Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd (1991) 27 FCR 149.
Concrete Constructions (NSW) Pty Ltd v Nelson (1990) 169 CLR 594.
Tobacco Institute of Australia v Woodward (1994) ATPR 41-285.

DECISION

The decision of the agency of 25 February 1994 is set aside. In substitution it is decided that the matter deleted from the disputed documents is not exempt.

B.KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

13th December 1994

REASONS FOR DECISION

BACKGROUND

1. This is an application for review by the Information Commissioner arising out of a decision of the Health Department of Western Australia ('the agency') to refuse access to certain parts of four research reports requested by Mr W Hassell ('the applicant') under the *Freedom of Information Act 1992* ('the FOI Act').

2. On 13 December 1993, the applicant endeavoured to exercise his rights of access under the FOI Act and applied to the agency for access to documents consisting of *"...Reark Research Reports and all related reports and material on the 1993 evaluation of the of the Quit Campaign and any research, evaluation or assessment reports in relation to the Quit campaign in relation to each of the years 1991 and 1992, including associated reports and material."*

3. On 25 January 1994, the applicant was advised that Mr M Swanson, Director, Health Promotion Services Branch of the agency had decided that the documents requested contained exempt matter and the applicant was provided with access to four documents with certain matter deleted. The agency initially claimed that the material edited from the four documents was exempt under clause 11 of Schedule 1 to the FOI Act.

4. On 17 February 1994 the applicant sought internal review by the agency of this decision. On 4 March 1994 he was advised that the internal review had been completed and that Mr B Wall, Acting General Manager, Public Health Services ('the review decision-maker') had decided, on 25 February 1994, to vary the initial decision and to release additional documents. Although it is not clear from the notice of decision, exemption was still claimed for the deleted material in the four edited documents already released. Subsequently, the applicant applied to the Information Commissioner on 24 April 1994 for external review of the decision of Mr Wall to refuse him access to the edited matter.

REVIEW BY THE INFORMATION COMMISSIONER

5. On 2 May 1994, in accordance with my statutory obligation under s.68(1) of the FOI Act, I notified the agency that I had formally accepted this complaint for review and, pursuant to my powers under ss.75(1) and 72(1)(b) of the FOI Act, I sought the production to me of the original documents in dispute and the agency's FOI file maintained in this matter. In my view, neither the original notice of decision to the applicant nor the notice of decision on internal review, which purported to be the notices of decision required under s.13(1)(b) of the FOI Act, complied with the requirements of s.30 of the FOI Act. Accordingly, I also sought from the agency detailed reasons to justify the exemptions claimed, including the material findings of fact on which the claims for exemption were based.

6. During the review process the agency provided three submissions to me in support of its claims for exemption, two from the agency and the final submission from solicitors on its behalf. On 10 May 1994, when the disputed documents were delivered to my office, the agency provided a submission containing the agency's arguments for exemption for the deleted matter under clause 11(1)(a), clause 10 and clause 6(1) of Schedule 1 to the FOI Act. On 7 June 1994, two of my officers attended at the agency to clarify certain matters set out in the agency's submission. Subsequently, the agency sought additional time to provide a more detailed submission and this was provided to my office on 20 June 1994. In that submission, the agency abandoned its earlier claims for exemption under clause 11(1) and clause 6(1) and argued that the edited matter was exempt under clauses 10(1), (3) or (4) of Schedule 1 to the FOI Act.

7. On 1 July 1994 the applicant was provided with a copy of the agency's submission and invited to provide comment. The applicant subsequently provided me with a written submission, in which he argued, through his solicitors, that the agency had failed to discharge the onus of establishing that its decision was justified pursuant to s.102(1) of the FOI Act. Finally, on 17 August 1994, the agency's solicitors provided me with a further submission on behalf of the agency. That submission contained further material expanding upon the claims made by the agency in its submission of 20 June 1994 that the documents were exempt under sub-clauses (1), (3) or (4) of clause 10 of Schedule 1 to the FOI Act. In addition, the agency again claimed that the material was exempt under clause 11(1)(b) of Schedule 1 to the FOI Act.

THE DISPUTED DOCUMENTS

8. There are four documents in dispute in this instance which are described as follows:

   (i) Summary of research conducted into the effectiveness of the 1991 Quit Smoking Campaign by The Marketing Centre Pty Ltd, dated July 1991.
   (ii) An Evaluation of the 1992 Quit Campaign by Reark Research Pty Ltd, dated August 1992.
   (iii) A process Evaluation of the 1993 Quit Campaign by Reark Research Pty Ltd, dated July 1993.
   (iv) Impact Evaluation of the 1993 Quit Campaign by Reark Research Pty Ltd, dated July 1993.

9. The applicant has been provided with access to edited copies of each of these documents. Both the matter already disclosed in the edited documents and the matter deleted from the edited documents consists of statistical data obtained from conducting public surveys of various anti-smoking strategies employed by the agency as part of its health education campaigns. The agency claims that the results disclosed by the deleted material, when analysed in conjunction with other parts of the documents to which access has been provided, are used to develop

marketing strategies to implement its on-going public education health programs aimed at reducing smoking in the community.

The Claims of the Agency

10. The agency claims exemption for the matter edited from the four documents in dispute because, it contends, it is in *"commercial competition"* with the tobacco industry and disclosure of these documents to the applicant would mean disclosure to the public and hence to the tobacco industry, whose interests it is claimed are diametrically opposed to the public interest, the objectives of the "Quit" campaign and the agency's smoking and public health education program. The agency also claims that disclosure of the information to the tobacco industry would enable the tobacco industry to devise marketing and advertising strategies that would counter the marketing and advertising strategies of the agency and thus, it is argued, diminish the effectiveness of the agency's program.

11. In order to place these arguments in context, it is necessary to understand the manner in which the agency delivers its services, including health promotion services, to the community in Western Australia. In its 1992-93 Annual Report the agency describes its mission thus: *"...as the principal health authority... to promote, protect, maintain and restore the health of the people of Western Australia."* The part entitled "Report on Operations" in the agency's 1992-93 Annual Report states that the agency delivers its services in program format. In 1992-93 agency programs focused on prevention of disease and promotion of health, detection and treatment of illness, provision of obstetric care, rehabilitation of the disabled and restoration of health and providing continuing care. These programs were divided into sub-programs to enable managers to set objectives, develop a budget and manage resources, deliver and evaluate the services and report on the success of the program.

12. The agency's total expenditure for the 1992-93 financial year was $1.442 billion of which 55% came from the State Government and the balance from the Commonwealth. The "Disease Prevention and Health Promotion Program" comprises two sub-programs, Health Protection and Health Promotion. The Health Promotion sub-program has a budget of $1.1 million or 0.076% of the total agency budget. The Health Promotion sub-program encourages people to adopt attitudes and behaviours which will reduce the incidence of major preventable diseases and injuries. This is achieved by:

- informing the public about the causes of disease and injury, especially those associated with an unhealthy lifestyle;
- promoting the means of avoiding premature illness, disability and death through changes in behaviour; and
- educating people to develop and maintain environments which will support health-enhancing behaviours and reduce health compromising behaviours.

13. Smoking is identified as the single largest preventable cause of disease and premature death in Australia. According to the agency's 1992-93 Annual Report the Health Promotion sub-program planned certain strategies to reduce the prevalence of smoking among adolescents, young women and Aboriginal adults, in particular, in 1993-94 including:

    (i) an expansion of the smoking prevention program for adolescents;
    (ii) the widespread delivery of smoking and health information to young women;
    (iii) the development of smoking cessation information and an ante natal smoking education program for Aboriginal smokers; and
    (iv) the development of a smoking education manual for use by Aboriginal health workers.

14. Against this background, the agency made a number of claims for exemption for the disputed documents under various clauses of Schedule 1 to the FOI Act. The reasons given by the agency for refusing access may be summarised as follows:

    (i) The primary objective of the agency is to promote health. The specific aim of the agency's smoking and health education program is to encourage and assist those who smoke to give up and to prevent children from starting to smoke. The objectives of the tobacco industry are to recruit new consumers to the smoking habit and to maintain existing consumers of tobacco. Therefore, the aims of the Health Department's smoking and health program and those of the tobacco industry appear to be diametrically opposed.

    (ii) It would not be in the public interest for this sensitive and confidential information to be made available because of the likelihood that such information could be used by the tobacco industry in its advertising and promotional activities and, as a consequence, lessen the impact of the agency's smoking and public health education and, in particular, the "Quit" campaign information programs.

THE EXEMPTIONS

15. In the submission dated 17 August 1994, lodged by solicitors for the agency, reliance was placed on sub-clauses (1),(3) and (4) of clause 10 as well as clause 11(1)(b) of Schedule 1 to the FOI Act as grounds for exemption for all the deleted matter. I propose firstly, to deal with the agency's claims that the edited matter is exempt from disclosure under clause 11(1)(b).

(a) Clause 11

16. Clause 11 relevantly provides:

> ***"11. Effective operations of agencies***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to -*
>
> *(a)...*
>
> *(b) prevent the objects of any test, examination or audit conducted by an agency from being attained;*
>
> *(c)...*
>
> *(d)...*
>
> ***Limit on exemptions***
>
> *(2) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

17. The agency said that the expression "test, examination or audit" in part (1)(b) of clause 11 of Schedule 1 to the FOI Act is one of wide scope. In particular, the agency claimed that the term "audit" is not confined to financial accounting and is apt to include an examination of the processes and impact of a particular program in order to evaluate its effectiveness. In this instance, it was argued, the object of an audit cannot be confined simply to the compilation of information, but must include the use of the information. The agency said that, to the extent that releasing the information publicly would allow the tobacco industry to allocate its resources and efforts in answer to the established effective and ineffective points in the agency's campaign, the agency would be prevented from attaining the object of the evaluation.

18. The alleged "facts" which are relied upon by the agency in reaching the conclusion that the exemption provided by clause 11(1)(b) applies to these documents are as follows:

(i) audit includes program evaluation;
(ii) the object or purpose of an evaluation includes considering the use to which information will be put;
(iii) this information will be used by the tobacco industry to devise strategies to counter those of the agency; and
(iv) if this occurs, the agency will be prevented from attaining the object of the evaluation.

19. The term "audit" is defined in the Concise Oxford Dictionary as *"an official examination of accounts"*. I accept that this is the ordinary meaning of the word. In my view, the agency's assertion that it means more than this is not supported by any evidence before me. Nonetheless, I accept that, at least within the Public Service, the term is commonly understood to embrace examinations of matters other than accounts. For example, public sector agencies' performance indicators are "audited" by the Auditor General, and the term is also used in respect of examinations of, for example, information technology systems. None of the disputed documents contains information about the finances of the agency nor do they relate to an "audit" of the agency's accounts, in the ordinary sense of the word. They are evaluations of successive advertising campaigns. This much is apparent from the documents themselves in which the purpose is expressly stated to be such.

20. However, even if I accept the proposition that an "audit" of a program includes an evaluation of its effectiveness, and the object of an evaluation includes considering the use to be made of the information, the agency must establish that disclosure could reasonably be expected to prevent this object from being attained. On this point, the agency has not produced any persuasive evidence to establish a factual basis for the statements outlined in paragraph 18. The existence of the reports means that the so-called "audit" has already been completed. All of the documents are more than 12 months old and some evaluation of the data has already taken place. There is no evidence before me that consideration of the use to which the information may be put could reasonably be expected to be prevented by its disclosure. In my opinion, if I were to accept the agency's argument, that would mean that the exemption is capable of protecting information of a type vastly different from the type of information contemplated by the clear words of the exemption. Such a result, in my view, cannot objectively be considered to be reasonable. Therefore, I am of the view that the agency has not presented any evidence that would discharge the onus that rests upon the agency under s.102(1) and I find that none of the material deleted from the documents by the agency is exempt under clause 11(1)(b).

(b) Clause 10

21. In its submissions of 20 June 1994 and 17 August 1994, the agency also claimed that the matter deleted from the documents was exempt under various parts of clause 10 of Schedule 1 to the FOI Act. Clause 10, so far as is relevant to this matter, provides:

> ***"10. The State's financial or property affairs***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure could reasonably be expected to have a substantial adverse effect on the financial or property affairs of the State or an agency.*
>
> *(2).....*

> *(3) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information (other than trade secrets) that has a commercial value to an agency; and*
>
> *(b) could reasonably be expected to destroy or diminish that commercial value.*
>
> *(4) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal information (other than trade secrets or information referred to in subclause (3)) concerning the commercial affairs of an agency; and*
>
> *(b) could reasonably be expected to have an adverse effect on those affairs.*
>
> ***Limit on exemptions***
>
> *(6) Matter is not exempt matter under subclause (1), (2), (3), (4) or (5) if its disclosure would, on balance, be in the public interest.*

22. It is clear from the specific words of the clause that the exemptions in sub-clauses (1), (3) and (4) of clause 10 are directed at protecting three different types of information from disclosure under the FOI Act. Whilst it is open to an agency to claim exemption for documents or parts of documents under more than one clause or sub-clause, as a matter of construction, the same information, in my view, cannot be exempt under more than one of the sub-clauses of clause 10. An agency may argue on external review that information is exempt under one of these provisions, and put arguments in the alternative as to which is applicable. However, that was not the position taken by the agency in this instance. Nevertheless, the agency was invited to identify the parts of the deleted matter which it said were exempt under each of the relevant exemptions cited under clause 10. However, it chose not to do so and claimed that all the deleted matter was exempt under all clauses cited. It is on this basis that I have determined this matter.

Do any of the documents contain matter exempt under clause 10(1)?

23. The type of matter which is potentially exempt under clause 10(1) is matter which relates to the financial or property affairs of the State or an agency. To establish an exemption under this sub-clause the agency must demonstrate that disclosure of the disputed matter could result in an effect that is *"substantially adverse"* to those affairs and also that such an effect could reasonably be expected.

24. The Federal Court in *Harris v Australian Broadcasting Corporation* (1983) 78 FLR 236 considered the meaning of the words "substantial adverse effect" in s. 40(b) of the Commonwealth FOI Act. Beaumont J. said, at p. 249:

"...In my view, the insertion of a requirement that the adverse effect be "substantial" is an indication of the degree of gravity that must exist before this exemption can be made out."

25. I also accept that this requirement applies to the words "substantial adverse effect" wherever they appear in the exemptions in the Western Australian FOI Act (See my decision in *Re Jones and Shire of Swan* (9 May 1994, unreported); see also *Re Healy and Australian National University* (Commonwealth Administrative Appeals Tribunal, 23 May 1985, unreported) and *Re James and Australian National University* (1984) 2 AAR 327 at 341).

26. The agency said that the effects of disclosure would be on the medium and long term financial affairs of the State and claimed that these would be substantial because of the substantial annual costs to the State's health system and the wider costs to the State caused by illness and death resulting from smoking. The agency reasoned that disclosure of this disputed matter to the applicant would mean disclosure of the disputed matter to the tobacco industry and that that industry would use the disputed matter to develop its own campaigns and marketing strategies to counter the Quit campaigns and marketing strategies of the agency. The result, according to the agency, would be a slowing of the rate of reduction of smoking in Western Australia (because more people would be persuaded by the pro-smoking campaigns) and this would cause a cumulative loss of substantial cost savings in health care and, in turn, this would cause a substantial adverse effect on the State's financial affairs.

27. The "facts" and matters which the agency relied upon to make the findings which I have summarised in paragraph 26 are as follows:

    (i) the information will be used by the agency to develop future marketing and advertising strategies for its smoking and public health education program (including the Quit Campaign) conducted to reduce the prevalence of smoking in Western Australia;
    (ii) since the Quit Campaign commenced the number of regular smokers in this State fell 6% between 1984 and 1991, and therefore, there have been substantial cost savings to the health system and the economy;
    (iii) public disclosure to the applicant would mean disclosure to the tobacco industry whose business interests and objectives are diametrically opposed to the public interest and the objectives of the Quit Campaign;
    (iv) the agency and the tobacco industry are direct competitors who seek to influence existing and potential tobacco consumers by commercial advertising and marketing strategies;
    (v) the tobacco industry uses market research to develop advertising strategies particularly to identify new target groups;
    (vi) the information would be of significant use to the tobacco industry in its strategies especially those that could counter the public health education campaign;
    (vii) despite restrictions on advertising, the industry can still promote its product through point-of-sale advertising and advertising in imported

magazines and through advertising at exempted national and international sporting events;

(viii) the information would be of cumulative use and value to the tobacco industry when added to its own market research: *Re Actor's Equity Association of Australia and Australian Broadcasting Tribunal* (1985) 7 ALD 584;

(ix) Associate Professor Donovan, Graduate School of Management, UWA, confirmed that the information would be used by the tobacco industry in ways that would be detrimental to the agency's interests and objectives;

(x) the use of the information by the tobacco industry would cause at least a slowing of the rate of decrease of prevalence of smoking in Western Australia; and

(xi) a slowing of the rate of reduction of smoking would result in a cumulative loss of substantial cost savings that would be sufficiently significant to cause concern to a reasonable person: *Re Thies and Department of Aviation* (1986) 9 ALD 454.

28. The agency provided me with information relating to the incidence of smoking in the State and the costs of health care. I was also provided with two written opinions from Professor R J Donovan, Associate Professor of Marketing, Graduate School of Management, University of Western Australia and Chairman of Donovan Research, testifying to the commercial value of these reports to the tobacco industry. In addition, I received a statement from Hon Peter Foss MLC, Minister for Health on the importance of the Quit campaign as a health promotion program.

29 I accept, as factual, the evidence provided to me which establishes the policy and priorities of the agency in relation to reducing the prevalence of smoking. I also accept as factual the statements (i), (ii), (v) and (vii) in paragraph 27. However, the remaining matters in that paragraph are not statements of fact but conclusions or opinions. The agency did not provide me with any material to support its claims about the alleged effect on the State's financial affairs, other than the claims made in (iii), (iv), (vi) and (viii)-(xi) in paragraph 27 above.

30. Even if I accepted the claim at (xi) in paragraph 27 that a slowing of the reduction in smoking would cause a cumulative loss of savings to the State, I do not accept that this would be a *"substantial adverse effect"* in the context of the financial affairs of the State as a whole, nor do I accept that this effect, if it occurred, would result from the disclosure of the deleted matter. There is simply no evidence that establishes a causal relationship between the effect that the agency claims will occur, and the act of disclosure. Even if I were to accept that, if the deleted matter is disclosed, the tobacco industry could reasonably be expected to use the matter in formulating its advertising campaigns, there is no material or evidence before me to establish either that advertising by the tobacco industry is, or could be, effective in encouraging people to take up or continue smoking or that use of the deleted matter could enhance the effectiveness of that advertising, or render less effective the agency's advertising strategies. I also note that the State estimates, in the 1994-95 Consolidated Fund Estimates at page 8, that it will derive $239 million from taxes and licences relating to tobacco. This suggests to

me that the State's financial affairs could well benefit if the expected effect were to occur. Such a result could hardly be described as substantially adverse.

31. Although the arguments of the agency may seem plausible, they are not directed at the requirements under the FOI Act to establish an exemption under clause 10(1). The applicant also sought to persuade me that the agency's arguments based on this exemption were flawed. It was his view that the agency had failed to place any information before me to support its claim that disclosure of these documents could reasonably be expected to have a substantial adverse effect on the agency's financial affairs. I agree with the applicant on this point. In my view, the agency has indeed failed to establish that disclosure of the matter deleted from these documents under the FOI Act could reasonably be expected to have a substantial adverse effect on the State's financial affairs. Therefore, on the evidence and the material before me, I am not satisfied that the requirements of clause 10(1) have been established and, accordingly, I find that none of the matter deleted from the documents is exempt under this sub-clause.

Do any of the documents contain matter exempt under clause 10(3)?

32. Sub-clause 10(3) is concerned with protecting information that has a *commercial value"* to the agency, (part (a) of clause 10(3)).

33. The Concise Oxford Dictionary of Current English, 8th Edition, defines "commercial" as meaning "*of, engaged in, or concerned with, commerce"* and "commerce" as meaning "*financial transactions, esp. the buying and selling of merchandise, on a large scale*". Similarly, the Collins English Dictionary (Aust. Ed) defines "commercial" as meaning "*of, connected with or engaged in commerce; mercantile*", and "commerce" as meaning "*the activity embracing all forms of the purchase and sale of goods and services*".

34. There are few reported decisions in which a precise meaning of the phrase *"commercial value"* has been considered. In a recent decision, the Queensland Information Commissioner ('the Commissioner') analysed the meaning of the phrase *"commercial value"* in *Re Peter Gerard Cannon and Australian Quality Egg Farms Limited*, (30 May 1994, unreported). In that matter, the Commissioner dealt with a claim that certain information was exempt from disclosure under the provisions of section 45 of the *Freedom of Information Act 1992* (Queensland), the equivalent of clause 10 of the Western Australian FOI Act.

35. The Commissioner said, at pages 16-17:

> "[*i*]*t 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 to another person if it is valuable for the purposes of carrying on the commercial activity in which that agency or other person is engaged. That information may be*

> *valuable because it is important or essential to the profitability or the viability of a continuing business operation...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. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act. The fact that there is a genuine market for information used by an agency or another person in carrying on commercial activity could also be regarded as a strong indication that the information is valuable for the purpose of carrying on that commercial activity, i.e. that the primary meaning referred to above is satisfied. I do consider, however, that information can be capable of having commercial value to an agency even though it could not be demonstrated that an arms-length buyer would be prepared to obtain that information. 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.*".

36 The matter for which exemption was claimed in *Re Cannon* consisted of material which identified a customer and the business relationship between the customer and the Egg Marketing Board and a reference to an on-going business arrangement between the Board and another body engaged in the marketing of eggs. The Commissioner was satisfied that some of the edited matter, if disclosed, could reasonably be expected to have an adverse effect on the business or commercial affairs of the respondent and found that the information was exempt from disclosure.

37. The exemption in 10(3) is concerned with a particular type of information. That is, it must be information that has some value in the commercial world, whatever that value might be. I prefer the first view identified by the Information Commissioner in Queensland that the phrase "commercial value" refers to information that is valuable for the purposes of carrying on the commercial activity of an agency. Further, it is only by reference to the context in which the information is used, or exists, that the question of whether it has a commercial value to an agency may be determined. It is only when that question is determined in the positive that consideration must be given to the requirements of part (b) of sub-clause 10(3).

The agency's submission relating to information of a "commercial value"

38. The agency claimed that the deleted matter was information that had a commercial value because the agency had spent time and money obtaining the information. In addition to its own internal costs, private market research organisations were paid approximately $40,000 for the information and the market research reports were owned by the agency.

39. In *Re Cannon*, the Commissioner also considered the question of whether the investment of time and money in obtaining information is an indicator of the fact that the information has a commercial value. The Commissioner said, at page 16:

> *"...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 surely is too broad a proposition. Information can be costly to produce without necessarily being worth anything. At best, the fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value for the purposes of s.45(1)(b) of the Queensland FOI Act."*.

40. In my opinion, the Commissioner's views are equally applicable to the consideration of the agency's claims that this information has a commercial value because it had spent time and money obtaining the information and I reject this argument for similar reasons given by the Commissioner in paragraph 39 above.

41. The agency also referred me to the decisions of the Commonwealth Administrative Appeals ('the Tribunal') in *Re Hopper and Australian Meat and Livestock Research and Development Corporation* (1989) 16 ALD 658 and *Re Actors' Equity (supra)* as authority for the proposition that information that could be used by a competitor to develop a marketing strategy is information that has a *"commercial value"* that would diminish if it were used by a competitor.

42. In *Re Hopper*, the applicant sought access under the Commonwealth *Freedom of Information Act 1982* to a report prepared by a private consultant for the National Breed Recording Scheme Board of Management (the Board), which was established by the Australian Meat and Livestock Research and Development Corporation (AMLRDC). The report was in the nature of a market research study of the beef cattle breeding industry with particular reference to the marketing of a commercial program related to beef cattle breeding. Mr Hopper was denied access to the report on the basis that the report was exempt from production under section 43(1)(b) of the Commonwealth FOI Act (that is, the information had a *"commercial value"* that could be destroyed or diminished by disclosure). Section 43(1)(b) of the Commonwealth FOI Act is the equivalent of clause 10(3) of Schedule 1 to the Western Australian FOI Act.

43. The report in question was prepared to provide the Board with a detailed market research study into the beef breeding industry, to enable the Board to develop a comprehensive marketing plan for a breed plan service, a product offered by the Board. Uncontradicted evidence was given before the Tribunal that the information was of great commercial significance to the Board and that the disclosure of the report would undermine the commercial advantage which the Board had achieved through use of that information.

44. The Tribunal was satisfied on the evidence, that the Board, and its associated bodies, were operating in a commercial environment and facing real commercial competition. The Tribunal was also satisfied that disclosure of the report concerned would disclose material which was properly described as information having "commercial value" to the Board and which could reasonably be expected to be destroyed or diminished if the information were disclosed.

45. In *Re Actors' Equity* the applicant sought access to statements of financial information (ABT-12's) required to be provided to the Australian Broadcasting Tribunal (the ABT) by 14 commercial television licensees. The applicant sought access to ABT-12's for the latest available financial year and the preceding 4 financial years. The Tribunal found that disclosure of the ABT-12's would disclose information concerning the lawful business, commercial or financial affairs of the licensees which would be valuable to other television licensees and to other organisations who are either directly competing with the television licensees or are already otherwise involved in the field of business in question or with an interest in it.

46. The Tribunal found on the evidence before it that the information contained in the ABT-12's could, if it were disclosed, be used for the development of market strategies which would enable a competitor to arrive at some very satisfactory conclusions about the overall strategy of the individual television station and how it went about selling itself. This information would be likely to advantage a licensee in selling advertising time and in other activities to the detriment of its competitors, including other television licensees and other components of the media industry seeking the funds available for advertising.

47. In the matter before me there is no evidence that the agency is operating in a commercial environment or facing commercial competition from the tobacco industry and, in my view, *Re Hopper* is distinguishable for that reason. Similarly, in *Re Actors' Equity* there was considerable evidence about the nature and extent of the commercial environment in which the licensees operated and of the commercial competition within the media industry, and the documents in dispute contained information that had a commercial value to parties other than the agency. No such evidence has been provided to me by the agency in this instance. In my view, both cases are distinguishable on their facts and neither assists the agency in the matter before me.

48. The agency also referred me to the opinion of Associate Professor Donovan which it said provided the relevant evidence that the information had a commercial value. The professor said that the agency and *"...other health authorities worldwide, are in a commercially competitive situation with the tobacco industry. This is not unique to the tobacco industry. In a wider sense, health authorities are also competing with the alcohol, food and entertainment/ leisure industries in their public education campaigns that target excess alcohol consumption, excess consumption of high fat, high sugar and other 'risk' foods, and lack of exercise, respectively."*

49. I accept that the professor holds this opinion but, without more tangible evidence to justify the conclusion or any explanation of how he has reached this opinion, his belief is not material that would persuade me that the information has a "commercial value" as is contemplated in clause 10(3) of the FOI Act. I do not accept that his experience in the area of market research is of sufficient weight to persuade me of the validity of the conclusion that the agency and other health authorities are in a "*commercially competitive situation*" with the tobacco industry, particularly as the Annual Report of the agency's activities and programs do not suggest a commercial flavour to any of its activities in this area.

50. Further, it is not clear from the written opinion of the professor whether he has had access to the edited material in the disputed documents, although I accept that his experience in conducting campaign evaluations of this nature may give him some knowledge of the nature of their contents. Nevertheless, although I acknowledge Professor Donovan's experience in his field, I am not persuaded by the opinion of an experienced market researcher that the agency's objectives of reducing health care costs associated with smoking related diseases, the costs to industry of absenteeism due to smoking related causes and the costs to the community overall of premature deaths due to smoking related diseases are commercial objectives, and his statements to this effect are insufficient to satisfy me that the information in question has a commercial value to the agency.

51. The agency submitted, in the alternative, that, if involvement in trade or commerce is a requirement of the exemption in sub-clause (3) of clause 10, then it is involved in trade or commerce in a limited but sufficient sense to satisfy this requirement. The agency stated that its advertising and promotional activities associated with the 'Quit campaign" can be regarded as activities in trade and commerce and accordingly of sufficient commercial character for the information to have a commercial value.

52. In support of that contention, the agency referred me to a dictum of Deane J in *Re Ku-Ring Gai Co-operative Building Society (No.12) Ltd* (1978) 36 FLR 134, which indicated a broad interpretation of the terms 'trade' and 'commerce'. In *Re Ku-Ring Gai,* two Building Societies stated a special case to the full Federal Court, seeking declarations as to the operation and effect of Commonwealth *Trade Practices Act 1974* (the TP Act) in relation to the operations of the Building Societies concerned. The Federal Court considered a number of different questions. However, the finding relevant to the claims of the agency in the matter before me was whether the Building Societies were engaged in "trade or commerce" within the meaning of section 47 of the TP Act. It was the submission of the Building Societies that because they did not lend in the market place and their lending practices were not for the purposes of profit, the Building Societies were not engaged in an activity in "trade and commerce".

53. In holding that the Building Societies were engaged in "trade or commerce", His Honour, Deane J, said, at page 167:

> "*...the terms 'trade' and 'commerce' are not terms of art. They are expressions of fact and terms of common knowledge. While the particular instances that may fall within them will depend upon the varying phases of development of trade, commerce and commercial communication the terms are clearly of the widest import...they are not restricted to dealings or communications which can properly be described as being at arms length in the sense that they are within the open markets or between strangers or have a dominant objective of profit making. They are apt to include commercial or business dealings in finance between a company and its members which are not within the mainstream of ordinary commercial activities and which, while being commercial in character, are marked by a degree of altruism which is not compatible with a dominant objective of profit making.".*

54. His Honour determined that the lending practices of the Building Societies were commercial or business dealings in finance and were, therefore, activities "in trade and commerce" within the meaning of section 47 of the TP Act. In my view, that case is clearly distinguishable. Although the dealings of the Building Societies did not have profit making as their primary objective, they were, nonetheless, dealings in finance and clearly, in my respectful view, of a commercial character.

55. The agency then stated that "*advertising is an activity in trade or commerce*" and referred me to "*Miller, The Trade Practices Act, 14th Ed 1993, para 815.95 and 825.35*" and submitted that "*[t]he question is whether The Department's 'Quit' advertising and promotional activities can, because of some particular feature, be regarded as activities in trade and commerce and accordingly of sufficient commercial character for the information to have a commercial value to the Department"*. The agency asserted that as a matter of fact, its "Quit" advertising and promotional activities have such a particular feature.

56. The agency submitted that its "Quit" advertising and promotional activities are different from the public education advertising of other agencies because they are aimed at reducing sales in a commercial market of a commercial product, and, notwithstanding that these activities are conducted for the purpose of public health education, they also have a "*commercial character*" in that they are intended to reduce the sales in a commercial market of tobacco products sold by a "competitor".

57. In support of that contention, I was also referred to the decision of the Full Federal Court in *Tobacco Institute of Australia Ltd v Australian Federation of Consumer Organisations Inc* (1992) 38 FCR 1 (the Tobacco case) as authority for the view that promotional activities are activities in trade and commerce where the intention of the advertising is to promote the consumption of tobacco products. The agency submitted that if advertising by a lobby group on behalf of the tobacco industry is an activity in trade and commerce, it logically follows that counter advertising by the agency was likewise an activity in trade and commerce.

58. The Tobacco case is not, in my view, authority for the proposition that *"advertising is an activity in trade and commerce"*. That case was an appeal by the Institute to the Full Federal Court from a decision of Morling J. in *Australian Federation of Consumer Organisations Inc v Tobacco Institute of Australia Ltd* (1991) 27 FCR 149. Before Morling J., the Australian Federation of Consumer Organisations, (AFCO), obtained judgement against the Institute - a corporation, the members of which were the three manufacturers of cigarette and tobacco products in Australia - for misleading and deceptive advertising in breach of s.52 of the TP Act. The Institute argued that its advertisement about the effects of passive smoking was not conduct "in trade and commerce".

59. Morling J found there was sufficient material before him to support a finding that the publication of the Institute's advertisement was conduct "in trade or commerce" within the meaning of s.52 of the TP Act. He said, at page 157:

> "*...The advertisement had the potential, and no doubt was intended, to protect the commercial interests of cigarette manufacturers and distributors. Accepting that conduct in 'trade and commerce' is confined to conduct which is of itself an aspect of activities which, of their nature, bear a commercial character I think the proper conclusion is that the publication of the advertisement was conduct 'in trade or commerce'. Advertising products for sale is an aspect or element of the selling of those products. The selling of the products is indisputably a trading or commercial activity".*

60. On appeal, the Full Federal Court in the Tobacco case upheld the decision of Morling J. Sheppard J, at page 16, stated that "*...the most likely reason for the publication of the advertisement was to promote or maintain the sales of cigarettes for commercial reasons, i.e. gain".* Foster J., relying upon the authority of the High Court of Australia in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594, said that the Tobacco Institute could perform activities in trade and commerce without itself being a trading corporation and concluded, at page 25, that:

> "*...the appellant had a commercial interest in assuaging community concerns about the harmful effects of inhaling environmental tobacco smoke. The general tenor of the advertisement, its wide exposure, and the name of the appellant combine to create an irresistible impression that it was promotional material designed to advance the cause of cigarette smoking and to assist in the sale of cigarettes*".

61. The question of when conduct can be said to be "in trade or commerce" and when conduct can be regarded as conduct "in respect of trade and commerce" was discussed, and settled, by the majority of the High Court of Australia in *Concrete Constructions.*

62. The High Court concluded that the expression "in trade and commerce" limited the operation of section 52 of the TP Act and said, at page 603 that:

> *"...the reference to conduct 'in trade and commerce' in section 52 can be construed as referring to conduct which is itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. So construed, to borrow and adapt the words used by Dixon J in a different context in Bank of New South Wales v Commonwealth (1948) 76 CLR 1 at p.381, the words 'in trade and commerce' refer to 'the central conception' of trade or commerce and not to the 'immense field of activities' in which corporations may engage in the course of, or for the purposes of, carrying on some overall trading or commercial business...*and, further, at page 604, [*w*]*hat the section is concerned with is the conduct of a corporation towards persons, be they consumers or not, with whom it (or those whose interests it represents or is seeking to promote) has or may have dealings in the course of those activities or transactions which, of their nature bear a trading or commercial character. Such conduct includes, of course, promotional activities in relation to, or for the purposes of, the supply of goods or services to actual or potential consumers, be they identified persons or merely an unidentifiable section of the public.".*

63. In my view, the decision of the Federal Court in the Tobacco case and the decision of the High Court in *Concrete Constructions* are clear authority for the proposition that advertising and other promotional activities will be conduct "in trade and commerce" only where that advertising or promotional activity is related to, or for the purposes of, the supply of goods and services, thus being an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character. It is also my view, that neither decision is an authority for the proposition that advertising *per se* is an activity "in trade or commerce", nor a commercial activity, which was the essence of the argument advanced by the agency in its submissions to me.

64. Further, I reject the argument that, because advertising on behalf of the tobacco industry has been held to be an activity in trade or commerce, it follows that counter-advertising by the agency should be characterised as being an activity in trade or commerce. The Tobacco Institute recently relied upon similar submissions to those of the agency in this instance, in a matter before the Supreme Court of New South Wales-Equity Division. In that matter, *Tobacco Institute of Australia v Woodward* (1994) ATPR 41-285 (Woodward's case), the Institute brought an action against Mr Woodward, alleging that he had engaged in conduct that was misleading and deceptive conduct in trade and commerce, within the meaning of s.42 of the *Fair Trading Act 1987* (NSW).

65. Mr Woodward was the Executive Director of Action on Smoking and Health ("ASH"). The Institute made submissions to Morling J., that Mr Woodward was conducting himself in trade and commerce in tobacco products by denigrating those products and attempting to reduce their sale. Mr Woodward freely admitted in cross examination that he had deliberately designed campaigns, in which he had taken part, relating to tobacco use and tobacco advertising so as to serve a strategy of reducing the sale of cigarettes and to reduce the consumption of tobacco.

66. It was contended by the Institute that when the relationship between Mr Woodward's conduct and the transactions of buying and selling which are at the central core of trade or commerce were examined, there was an overwhelming persuasive symmetry about conduct designed to boost and conduct designed to reduce sales, as both bore the same kind of relation to the core concept. It was further submitted by the Institute that Mr Woodward's conduct bore the same relation to hypothetical transactions of buying and selling as does the conduct of an advertising agency.

67. Finally, it was contended by the Institute that it would be an astonishing policy and a curious gap in the relevant legislation if advertisements against goods designed to reduce their attractiveness to consumers were held not to be in trade and commerce, and this was so irrespective of the motive, whether profit motive of a rival trader, malevolence or a concept of the public interest.

68. Morling J. noted that some people in competition with other traders use words to reduce the sales of others and in doing so are clearly conducting themselves in trade or commerce. His Honour also said, at 41,841, that:

> "*[M]uch advertising explicitly or implicitly denigrates competing traders, on the calculation that by depressing the sales of others, the likelihood of ones own product will be increased.... It would be an unjustified gloss on s.42 to require that the person whose conduct is complained of should act under the profit motive so that some rational hope or expectation of gain as the intended outcome of the conduct should be an element of s.42. Section 42 is not limited by reference to conduct directly engaged in the core concept of buying and selling, and extends the conduct of ministerial agents with such a close connection to the transaction of buying and selling as to be fairly described as in trade and commerce, as opposed to merely being in some remote relation to trade and commerce".*

69. However, Morling J. rejected the Institute's submissions, stating at 41,842 that:

> "*...Denigratory material from a rival trader and denigratory material from a person wholly outside the relevant industry appear to me to stand in entirely different situations for the relation between such conduct and trade or commerce. In my view of the facts, the second submission does not accord with the facts. It is simply incorrect, as a matter of fact, to contend that the defendant's statements were conduct in trade or commerce in tobacco products. That is the very opposite of what they were.".*

70. For similar reasons, I reject the submissions of the agency. In my view, the agency stands wholly outside the tobacco industry (the relevant industry) and there is no evidence that the agency is promoting a product in substitution of the tobacco industry's products. The agency's "Quit" advertising and promotional activities are, on the agency's own evidence, intended to reduce (and, it is claimed, have been effective in reducing) the sales of cigarettes and other tobacco products to particular target groups. The agency clearly is not a rival trader. It

conducts its "Quit" and health promotional activities for the general public good and is not publishing denigratory material about the commercial products of a rival trader in the hope of reducing sales of cigarettes and tobacco products with a consequent benefit to the agency's own commercial activities.

71. The claim that, in conducting the "Quit" campaign, the Health Department of Western Australia (an agency of government providing general health services) is engaged in commercial activities or that it is in commercial competition is not supported by any material before me. I accept that in the performance of its functions the agency is required to be efficient, especially where the private sector provides an alternative service. That is no more nor less than is required of other government agencies. However, that does not mean that its various programs and sub-programs are in a commercially competitive environment with regard to other activities.

72. In particular, the "Quit" advertising and promotional activities of the agency, in my view, on the evidence before me, do not amount to conduct "in trade or commerce", nor to a commercial activity sufficient to endow the information in the documents with a commercial value to the agency. Widespread advertising of the health disadvantages of smoking which seeks to reduce the incidence of smoking for the public good is conduct, in my view, of an altogether different character to advertising which seeks to persuade the public to buy a particular product or brand of product. Accordingly, I find that the agency has failed to establish that the matter deleted from the disputed documents has a *"commercial value"* to the agency within the meaning of subclause 10(3)(a) of Schedule 1 to the FOI Act. Accordingly, I find that the disputed parts of the documents in question are not exempt under clause 10(3).

73. Because the agency has not satisfied the provisions of subclause 10(3)(a), it is unnecessary to consider the arguments of the agency with respect to the diminishing of that commercial value and whether, on balance, it is in the public interest, to disclose the information.

Do any of the documents contain matter exempt under clause 10(4)?

74. The exemption provided by clause 10(4) is more general in its terms than that provided by clause 10(3). It is directed at protecting from adverse effects certain of the activities of the agency itself so that the competitive position of state agencies and instrumentalities will not be undermined. However, unlike FOI legislation in other jurisdictions, in which the term "business, professional, commercial or financial affairs" is used, the exemption in sub-clause 10(4) is concerned only with information relating to the commercial affairs of the agency. Nevertheless, it is my view that the commercial affairs of an agency may also include its business and financial affairs.

The agency's submission relating to its "commercial affairs"

75. The agency sought to persuade me that the information related to its *"commercial affairs"* and referred me once again to the passage in the judgement of Deane J in *Re Ku-Ring Gai* (cited at paragraph 51 above) which it claimed supported a broad interpretation of the words "trade and commerce".

76. In its submission of 20 June 1994, the agency claimed the deleted information concerned the commercial affairs of the agency because:

    (i) the smoking and public health education campaign, including the Quit campaign, involve the agency engaging in commercial transactions with advertising agencies and commercial media outlets;

    (ii) the agency is involved in making commercial decisions in relation to the program and campaign and that the advertising industry view that agency's account is as being a commercially desirable account to obtain;

    (iii) the agency spends approximately $1.1 million dollars on its smoking and public health education program, of which approximately $400,000 is spent annually on the Quit campaign; and

    (iv) the agency uses the information in the documents to assess the performance and cost effectiveness of the advertising strategies used, the mix of media outlets used and the performance the advertising agencies used.

77. I have examined the disputed parts of the documents and, in my view, the information contained in those parts does not have the essential quality or character of information which concerns the commercial affairs of the agency. For the reasons given in respect of the claims under clause 10(3), I have already determined that the agency has not provided sufficient evidence to satisfy me that, in running the "Quit" campaign, the agency is engaged in a commercial activity.

78. Further, the disputed parts of the documents, in my view, do not reveal any information that may be argued on any other basis, to concern the agency's commercial affairs as that term is commonly understood. The documents are evaluations of the effectiveness of successive "Quit" campaigns. The material contained in the reports comprises a description of the research methodology used. The documents can be described as reports to the agency as to how well past "Quit" advertising campaigns were received. The fact that the agency makes decisions about where to spend its money and that the agency claims that the advertising industry regards the agency's advertising account as an account worth obtaining is not, in my view, any evidence that the information within these documents is information about the commercial affairs of the agency. The reports do not contain any cost effectiveness assessments. They do not reveal information about the letting or negotiation of the advertising contracts, which may perhaps, although I draw no conclusion, be argued to concern the commercial affairs of the agency.

79. In my opinion, for the reasons I have given, the agency has failed to establish that the information contained in the disputed parts of the documents concerns the commercial affairs of the agency as required by subclause (4)(a) of clause 10. It is, therefore, unnecessary that I consider the arguments of the agency with respect to subclause 4(b) and where the balance of the public interest lies. I find that the disputed parts of the documents are not exempt under clause 10(4).

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