COASTAL WATERS AND DEP

OFFICE OF THE INFORMATION COMMISSIONER (W.A.)	File Ref: 95020 Decision Ref: D03795

Participants:

Coastal Waters Alliance of Western Australia Incorporated
Complainant

- and -

Department of Environmental Protection
Respondent

- and -

Cockburn Cement Limited
Third Party

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - draft public bulletin - draft briefing notes - internal memoranda and working documents - clause 6 - deliberative processes - advice and opinion obtained and recorded for the purpose of the deliberative processes of the agency - whether contrary to the public interest to reveal deliberations of the agency.

FREEDOM OF INFORMATION - proposal for consideration by an agency - clause 7 - legal professional privilege - whether document is confidential communication between a firm of solicitors and its client for the sole purpose of giving legal advice - whether legal professional privilege is expressly or impliedly waived by client - limited waiver - whether privilege maintained for some purposes although document disclosed to third party - imputed waiver - whether disclosure on "without prejudice" basis preserves legal professional privilege - clause 8(2) - confidential communications - prejudice future supply - reasonable expectation.

Freedom of Information Act 1992 (WA) ss. 68(1), 72(1)(b), 75(1), 102(1); Schedule 1 clauses 1(1)(d), 4(3), 5(1)(d), 6(1), 7, 8(2); Schedule 2 clause 2(4).
Freedom of Information Regulations 1993 (WA) regulation 10; Schedule 2.
Freedom of Information Amendment Regulations 1994 (WA) regulation 7.
Freedom of Information Act 1982 (C'wlth) s. 36(1)(a).

Environmental Protection Act 1986 (WA)
Cement Works (Cockburn Cement Limited) Agreement Act 1972 (WA)
Cement Works (Cockburn Cement Limited) Agreement Amendment Act 1986)(WA)

Re Read and Public Service Commission (Information Commissioner, WA, 16 February 1994, unreported).
Re Rehman and Medical Board of Western Australia (Information Commissioner, WA, 1 August 1995, unreported).
Re "E" and Department for Family and Children's Services (Information Commissioner, WA, 29 August 1995, unreported).
Re Waterford and Department of the Treasury (No 2) (1984) 5 ALD 588.
Re Veale and Town of Bassendean (Information Commissioner, WA, 25 March 1994, unreported).
Manly v Ministry of Premier and Cabinet (Supreme Court of Western Australia, 15 June 1995, unreported).
Re Guyt and Health Department of Western Australia (Information Commissioner, WA, 16 March 1994, unreported).
Re Weeks and the Shire of Swan (Information Commissioner, WA, 24 February 1995, unreported).
Re Nazaroff and Department of Conservation and Land Management (Information Commissioner, WA, 24 March 1995, unreported).
Grant v Downs (1976) 135 CLR 674.
Baker v Campbell (1983) 153 CLR 52.
Wheeler v Le Marchant (1881) 17 Ch D 675.
Trade Practices Commission v Sterling (1979) 36 FLR 244.
Goldberg v Ng (1994) 33 NSWLR 639.
Woollahra Municipal Council v Westpac Banking Corporation (1992) 33 NSWLR 529.
State Bank of South Australia v Smoothdale No. 2 Limited (Supreme Court of South Australia, 2 June 1995, unreported).
Giannarelli and Others v Wraith (1991) 171 CLR 592.
Network Ten Limited v Television Holdings Limited and Another (1995) 16 ACSR 138.
Field v The Commissioner for Railways for New South Wales (1957) 99 CLR 285.
Diversified Mineral Resources v CRA Exploration Pty Ltd (Federal Court of Australia, 31 March 1993, unreported).
Attorney General for the Northern Territory v Maurice (1986) 161 CLR 475.
News Corporation Limited v National Companies and Securities Commission (1984) 57 ALR 550.
Ryder v Booth [1985] VR 869.

DECISION

The decision of the agency is set aside. In substitution it is decided that:

- that part of Document 6 comprising a copy of a letter containing legal advice to the complainant is exempt under clause 8(2) of Schedule 1 to the *Freedom of Information Act 1992*;
- those parts of Document 6 comprising a facsimile cover sheet and a memorandum from the third party to the agency are not exempt; and
- none of the other documents are exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

28th September 1995

REASONS FOR DECISION

1. This is an application for external review by the Information Commissioner arising out of a decision of the Department of Environmental Protection ('the agency') to refuse the Coastal Waters Alliance of Western Australia Incorporated ('the complainant') access to certain documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act').

BACKGROUND

2. The documents the subject of this complaint relate to a recommendation of the Environmental Protection Authority ('the EPA'), made in May 1994, to approve a proposal by Cockburn Cement Limited ('the third party') for the continuation of dredging of shell sand on Success Bank. Success Bank is an area of the sea-bed located a short distance from the coast a few kilometres south of Fremantle.

3. I am informed by the information and documents provided by the agency that the EPA consists of a group of individual members, most of whom are part-time members, who currently meet once a month. I am also informed that the EPA is independent of the agency and of Ministerial direction. The agency provides the professional and administrative expertise to assist the EPA to discharge its decision-making functions under the *Environmental Protection Act 1986* ('the EP Act'). A booklet prepared and published by the EPA for public distribution states "*...the EPA in Western Australia is an independent environmental adviser that recommends to the Government whether projects are environmentally acceptable. It does not decide whether projects should proceed. That task is properly left with the Government.*"

4. Since 1972, the third party has dredged shell sand to produce cement and lime products from Parmelia and Success Banks in accordance with the *Cement Works (Cockburn Cement Limited) Agreement Act 1972* ('the State Agreement Act') and now in accordance with the *Cement Works (Cockburn Cement Limited) Agreement Amendment Act 1986* ('the amended State Agreement Act'). One of the major changes introduced by the latter Act was the inclusion of certain environmental conditions placed upon the third party for the remainder of the term of that agreement. In short, the amended State Agreement Act requires the third party to submit a Dredging Management Programme ('DMP') every two years containing, *inter alia,* proposals for its on-going dredging operations including the monitoring, protection and management of the environment in connection therewith.

5. I am informed by the submissions of the agency and documents provided by the agency that, in 1992, the third party submitted a 10 year DMP to the Government that was only partially approved because of the perceived loss of substantial areas of seagrass from Success Bank. Accordingly, the third party undertook to develop its proposal further to address the environmental issues of concern. In

December 1993, the third party submitted further proposals to the EPA relating to the continuation of dredging, both in the short and long term.

6. Following its review process, in May 1994, the EPA released its Bulletin 739 for public consideration. That bulletin contains the EPA's report and recommendations on proposed short-term continuation of dredging of shell sand on Success Bank, Owen Anchorage, and a proposed strategy to address the long-term environmental issues of shell sand dredging by the third party. The EPA recommended that the third party be allowed to continue dredging for the next two year period of the agreement. The EPA also made a number of other recommendations in relation to conditions and requirements under which the third party was to operate during that period.

7. After the release of Bulletin 739, there were unsuccessful appeals by the complainant and other parties to the Minister for the Environment against the recommendations of the EPA. Subsequently, the complainant lodged a total of three access applications under the FOI Act, dated respectively 22 July, 6 September and 18 October 1994, seeking access to various documents leading up to the report and recommendations contained in Bulletin 739.

8. Following lodgement of the three access applications under the FOI Act, it appears that the complainant was granted access to copies of some documents, and, after receipt of the access application dated 18 October 1994, a representative of the complainant was allowed to inspect other documents. However, during that inspection access to certain other documents was refused.

9. In its access application of 18 October 1994, the complainant requested access, in the form of copies, to the following documents:

   "1. All advice from the Department of Environmental Protection to the Environmental Protection Authority (regarding both the long term and short term dredging proposals) which led to the decision to remove the requirement for an ERMP on the long term (15 year) shellsand dredging proposal Cockburn Sound.

   2. Cockburn Cements proposal of December 1993 for short term (2 year) shellsand dredging, Cockburn Sound, which was subsequently assessed as a CER.

   3. Any referral/s regarding shellsand dredging from the Minister for State Development to the Department of Environmental Protection or the EPA."

10. For the purposes of the FOI Act, the agency is responsible for making decisions about access to documents of the EPA requested under the FOI Act. That situation arises because the EPA is listed in Schedule 2 to the *Freedom of Information Regulations 1993*,(inserted by regulation 7 of the *Freedom of Information Regulations 1994)* published in the Government Gazette on 30 September 1994. The effect of that is that, pursuant to clause 2(4) of Schedule 2

to the FOI Act and regulation 10, for the purposes of the FOI Act, the EPA is not to be regarded as a separate agency, but is to be regarded as part of the agency.

11. On 28 November 1994, Mr Peter Kent, Director, Corporate Services of the agency provided the complainant with a notice of decision relating to those documents which fell within the ambit of the access application of 18 October 1994 and to which access was refused. On that occasion, Mr Kent identified the documents in dispute, claimed exemption under various clauses of Schedule 1 to the FOI Act and provided some reasons for refusing access.

12. On 22 December 1994, solicitors for the complainant sought internal review of the agency's decision to deny access to those documents that had been identified as exempt documents. On 12 January 1995, Dr Bryan Jenkins, Chief Executive Officer and principal officer of the agency, confirmed the original decision and provided reasons for his decision. On 1 February 1995, solicitors for the complainant applied to the Information Commissioner for external review of that decision.

REVIEW BY THE INFORMATION COMMISSIONER

13. On 8 February 1995, in accordance with my obligation under s.68(1) of the FOI Act, I notified the agency that I had accepted this complaint for review. Pursuant to my authority under s.75(1) and s.72(1)(b) of the FOI Act, I sought the production to me of the documents in dispute, together with the file maintained by the agency with respect to the access application. I also required the agency to provide me with a schedule listing and describing the documents in dispute and the exemptions claimed to be applicable to each document, or part of a document, listed on that schedule. The disputed documents and the schedule were produced to me on 15 February 1995. On 15 March 1995, following some adjustments to the description of documents on that schedule, a copy of the schedule was provided to the complainant by my office.

14. On 17 March 1995, a preliminary conference between one of my officers and representatives of the parties was held at my offices. The parties were informed of the procedures to be adopted by me in dealing with this complaint. Each party was invited to lodge any further written submissions and informed that a copy of any submissions provided to me, excluding exempt matter, would be provided by my office to the other party, in accordance with my normal practices. The agency provided a written submission on 3 April 1995 containing further reasons to support its claims that the disputed documents are exempt. On 18 May 1995, solicitors for the complainant provided a written submission, including comments on the agency's reasons for denying access. Those submissions were exchanged between the parties.

15. On 26 May 1995, the agency agreed to release one of the disputed documents and parts of another to the complainant. On 17 July 1995, after examining the documents and considering the various submissions, I met with representatives of

the agency and informed them of my preliminary view of its claims in relation to the remaining documents. On the information then before me, it was my preliminary view that the agency had not discharged its onus under s.102(1) of establishing that its decision that the disputed documents are exempt under clauses 1(1)(d), 4(3), 6(1), 7 and 8(2) of Schedule 1 to the FOI Act was justified. In light of my preliminary view, the agency was invited to reconsider its claims for exemption..

16. On 10 August 1995, the agency released a further document in full and parts of 15 other documents were disclosed to the complainant. However, in relation to the remainder, I was informed by the agency that it intended to seek the views of the EPA, the Minister for the Environment and the third party before deciding to release any further documents. By that date, I considered that the agency had already had ample time and opportunity to consult with relevant parties and to establish a case, if there was one, for exemption for those documents.

17. However, a representative of the complainant advised me that it no longer wished to proceed in relation to a number of the disputed documents comprising copies of other documents listed on the schedule.

18. Whilst I was proceeding to finalise this decision and reasons for decision, solicitors on behalf of the third party made a written submission to me in respect of Document 6. The third party indicated that it had no objection to disclosure of part of Document 6. however, the third party claimed exemption under clause 7(1) of Schedule 1 to the FOI Act for that part of Document 6 comprising a letter to the third party from its solicitors. The third party also sought to be joined as a party to the complaint and, being in my view a third party as defined in the FOI Act, the third party was so joined.

19. The complainant was invited to respond to those submissions and all parties were informed that, in light of the third party's submissions, my view was that that part of Document 6 comprising the letter of legal advice may be exempt under clause 8(2) of Schedule 1 to the FOI Act. On 20 September 1995, the complainant responded to the third party's submissions in respect of that part of Document 6.

THE DISPUTED DOCUMENTS

20. There are 18 documents remaining in dispute between the parties. Those documents, and the exemptions claimed by the agency for each of them, are described below. The documents are numbered according to the schedule prepared by my office, which has been provided to both parties. Some of the documents are earlier drafts of others; many of the documents contain hand-written notes and comments.

No	Date	Document description	Exemption
1(a)	26/11/93	Summary Sheet of briefing to Premier, with some minor annotations on pages 1, 3, 4 & 5, with attachment consisting of one page of handwritten notes.	6(1)
2	undated	Early draft of part of bulletin 739 (April 1994).	6(1)
2(a)	undated	Early draft of parts of bulletin 739.	6(1)
4	undated	Briefing note to EPA meeting 592.	6(1)
4A	31/3/94	Briefing note to EPA meeting 592.	6(1)
4B	5/4/94	Supplementary information to briefing note of 31/3/94.	6(1)
5	7/4/94	Draft meeting notes.	6(1)
5A	31/3/94	Draft meeting notes, with attached draft of document 4A with annotations.	6(1)
6	29/3/94	Facsimile from third party to EPA consisting of facsimile cover sheet, copy memorandum to Department for Resources Development and copy letter from solicitors to the third party.	7(1); 8(2)
7	14/3/94	Internal memorandum, copy of briefing note to EPA Meeting 591 and working notes.	6(1)
8	24/2/94	Summary sheet of the Environmental Assessments Report Committee Meeting of 24/2/94 and note for EPA Meeting 591, briefing note by assessing officer for EPA Meeting 591, dated 4/3/94 and signed.	6(1)
9	4/3/94	Draft of part of Document 8 being briefing note by assessing officer for EPA Meeting 591, with attachment of 3 pages of handwritten notes.	6(1)
11	18/2/94	Briefing notes headed "Committee Meeting No. 3" for Environmental Assessments Committee.	6(1)
11A	18/2/94	Earlier drafts of Document 11 with annotations.	6(1)
12	21/9/94	Briefing note to the EPA meeting 599.	6(1)
13	undated	Minutes of a meeting between agency, EPA and Appeals Convenor.	6(1)
16	9/9/94	Earlier draft of Document 12.	6(1)
17	23/9/94	EPA minutes action note.	6(1)

THE EXEMPTIONS

(a) Clause 6(1) - Deliberative processes

21. Each of the disputed documents except Document 6 is claimed to be exempt under clause 6 of Schedule 1 to the FOI Act. Clause 6(1) provides:

> ***"6. Deliberative processes***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure -*
>
> *(a) would reveal -*
>
> *(i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or*
>
> *(ii) any consultation or deliberation that has taken place,*
>
> *in the course of, or for the purpose of, the deliberative processes of the Government, a Minister or an agency;*
>
> *and*
>
> *(b) would, on balance, be contrary to the public interest."*

22. I have discussed the meaning and purpose of the exemption in clause 6(1) in a number of my formal decisions, initially in *Re Read and Public Service Commission* (16 February 1994, unreported), at paragraphs 12-26, and most recently in *Re Rehman and Medical Board of Western Australia* (1 August 1995, unreported), at paragraphs 49-53 and *Re "E" and Department for Family and Children's Services* (29 August 1995, unreported), at paragraphs 12-15. I repeat my comments and views on the application of this exemption.

23. To establish an exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of that exemption. If the disputed documents contain matter of a type described in paragraph (a), then it is necessary to consider the requirements of paragraph (b), that is, whether disclosure of the documents would, on balance, be contrary to the public interest.

24. As I have said before, the key words in clause 6(1)(a) are the "*deliberative processes...of an agency*". The meaning of the phrase "deliberative processes" has been considered in a number of cases based on the equivalent section in the Commonwealth *Freedom of Information Act 1982* (s.36(1)(a)). In my view, the following passage in *Re Waterford and Department of the Treasury* (No 2) (1984) 5 ALD 588 in relation to the equivalent Commonwealth provision applies to a consideration of clause 6(1) of the FOI Act in Western Australia and the

meaning of the words "deliberative processes". In that case, the Commonwealth Administrative Appeals Tribunal said, at paragraphs 58-60:

> *"58. As a matter of ordinary English the expression 'deliberative processes' appears to us to be wide enough to include any of the processes of deliberation or consideration involved in the functions of an agency. "Deliberation" means "the action of deliberating; careful consideration with a view to decision": see the Shorter Oxford English Dictionary. The action of deliberating, in common understanding, involves the weighing up or evaluation of the competing arguments or considerations that may have a bearing upon one's course of action. In short, the deliberative processes involved in the functions of an agency are its thinking processes - the processes of reflection, for example, upon the wisdom and expediency of a proposal, a particular decision or a course of action. Deliberations on policy matters undoubtedly come within this broad description. Only to the extent that a document may disclose matter in the nature of or relating to deliberative processes does s.36(1)(a) come into play...*
>
> *59. It by no means follows, therefore, that every document on a departmental file will fall into this category...Furthermore, however imprecise the dividing line may first appear in some cases, documents disclosing deliberative processes must, in our view, be distinguished from documents dealing with the purely procedural or administrative processes involved in the functions of the agency...*
>
> *60. It is documents containing opinion, advice, recommendations etc. relating to the internal processes of deliberation that are potentially shielded from disclosure...Out of that broad class of documents, exemption under s.36 only attaches to those documents the disclosure of which is 'contrary to the public interest'..."*

25. I accept that statement as a correct explanation of the meaning of the exemption in clause 6 in Western Australia. Further, I consider that the exemption in clause 6 is designed to protect the "thinking processes" of an agency so that the integrity of those processes, especially in circumstances where deliberations have not concluded, are not jeopardised by the disclosure of documents. However, once the deliberative process is complete, in my view, different considerations apply.

26. The agency claimed that the deliberative process of the EPA in assessing a particular proposal involve the EPA in a continual, interactive process. I am informed that an assessment officer from the agency is responsible for the management of a proposal from the determination of the level of assessment through to the final recommendations and report to the EPA. The EPA may become involved, and does become involved, in that process at an early stage because the process is an interactive one between the agency and the EPA with issues being identified and raised by the assessment officer, either by briefing the EPA or its Committee or discussing the issues face to face and receiving advice. I am advised that there may be a series of such meetings before a report is

finalised and the EPA makes its recommendation to the Minister. During that process the EPA may also receive advice, and often does, from other sources. However, I am informed by the agency that that advice would not appear in the files and documents of the agency.

27. I have examined each of the documents for which exemption under clause 6(1) is claimed. I am satisfied that each of those documents contains matter of type described in paragraph (a) of clause 6(1). That is, I am satisfied those documents contain, *inter alia,* advice, opinion or recommendations obtained, prepared or recorded in the course of, or for the purposes of, the deliberative processes described in paragraph 24 above, of either the agency or the EPA, or both. Some of the disputed documents consist of working copies of final briefing notes that were presented to the EPA for its consideration at its normal committee meetings; others are drafts of parts of Bulletin 739; others are internal memoranda and working documents; some are briefing notes and drafts of those briefing notes prepared for the Environmental Assessments Committee of the agency; one is a draft summary and background note for an EPA briefing to the Premier.

28. In seeking to persuade me that disclosure of the disputed documents was contrary to the public interest, the agency, in its submission dated 3 April 1995, identified a number of public interest factors which, in its view, are claimed to tilt the balance in favour of non-disclosure. I have summarised those factors as follows:

    (i) having regard to the litigation presently on foot between the complainant and the agency, the FOI Act should not be permitted to be used as a means of premature discovery of documents;
    (ii) there is little to be gained by allowing incomplete working documents into the public arena and there is a broad, but widely recognised, public interest against working documents being made available to the public, especially when the final version of a document is publicly available;
    (iii) to subject the EPA to such minute scrutiny is not in the public interest, but can only undermine the credibility of EPA decision-making;
    (iv) disclosure of the draft report would be contrary to the public interest as it will have the potential for mischief or undermining of confidence in the final report;
    (v) there is the potential for parts of the draft to be taken out of context and those parts could be released to the media or otherwise used to discredit the EPA;
    (vi) the disclosure of briefing material which does not of itself present the evaluation of the EPA as to its accuracy, relevance or appropriateness may inadvertently mislead the public as to the considerations of the EPA;
    (vii) it is contrary to the public interest to release details of meetings undertaken to canvas options at a departmental level as preliminary deliberations are likely to mislead public debate;
    (viii) it is not reasonable to allow the deliberative processes of the agency to be disrupted by allowing draft documents to be accessible;

(ix) minute inspection of the agency's processes is not likely to result in any public benefit when the final result is a public document, rather the public interest may be harmed by the damage which may be done to the public perception of the agency;

(x) the granting of access to documents which do not fully indicate the views of the EPA and which do not make clear the point at which the agency's views were before the EPA, is contrary to the public interest; and

(xi) it is contrary to the public interest to allow draft documents to be released because irreparable damage is likely to occur to the EPA decision-making processes from incomplete, unverified documents being in the public arena where any use may be made of them.

29. In my decision in *Re Veale and Town of Bassendean* (25 March 1994, unreported), at paragraphs 37-53, I considered and discussed in detail the issue of the relationship between access applications under the FOI Act and discovery procedures in litigation. I reiterate the comments I made in that decision and, in particular, that the FOI Act has created an additional means of gaining access to documents and has added to a person's rights in that respect. I accept that the fact of current litigation may be relevant to a consideration of the public interest in a particular case and I recognise that there is a public interest in not subverting the rules governing proceedings before a court. Those rules have been developed to ensure procedural fairness between the parties to litigation. I also recognise a public interest in ensuring that proceedings are not prejudiced. That latter public interest is, in my view, recognised to some extent in clause 5(1)(d) of Schedule 1 to the FOI Act. However, there is no material before me which suggests that either of those public interests would be damaged or infringed in any way by disclosure of the disputed documents.

30. I recognise that there is a public interest in an agency having access to the widest possible range of data and advice in order that it may carry out its functions and make informed decisions on matters that affect the community as a whole. That public interest is served by preserving the integrity of an agency's deliberative processes, but only to the extent that the disclosure of documents relied upon by an agency during its deliberations would adversely affect those processes such that it would, on balance, be contrary to the public interest to do so, or that disclosure would, for some other reason, be demonstrably contrary to the public interest.

31. I also recognise that there is a public interest in members of the community having access to information about the processes of government decision-making in order that they may participate in those processes in accordance with democratic ideals. That public interest is an object served by the enactment of FOI legislation. In my view, it may legitimately be argued that all government information is collected, maintained, distributed and used by agencies on behalf of, and for the benefit of, the public and that it should, therefore, be accessible by the public. Except in circumstances where essential public and private interests may be harmed by disclosure of documents, it is my view that the general right of

access in the FOI Act should be given more weight by decision-makers than they have been prepared to give to date.

32. In order to displace the statutory right of access, an agency must establish a case for exempting from disclosure the particular documents to which access is sought. That onus requires a decision-maker to make out a clear case for exemption under one or more of the clauses in Schedule 1 to the FOI Act. However, a case for exemption is not established by merely citing an exemption clause, nor by paraphrasing it, nor by merely claiming that certain effects will inevitably follow from disclosure. Whilst an agency is not required to establish a case for exemption on the balance of probabilities, there must be some material provided to me that is capable of supporting its claims. On this point I respectfully refer to the comments of Owen J. in *Manly v Ministry of Premier and Cabinet* (Supreme Court of Western Australia, Appeal No. SJA 1143 of 1994). His Honour said, at p.44:

> *"How can the 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."*

33. Those real and substantial grounds are not evident in the material before me in this instance, neither is it apparent to me, from my own examination and consideration of the disputed documents, the nature of the essential public interest which the agency seeks to protect by non-disclosure. The agency merely asserts that disclosure of the documents would be contrary to the public interest, but has provided no material to support that claim, nor is there any other material before me which supports it.

34. For that reason, I am not persuaded by the claim that disclosure of a series of drafts of documents used by the agency and by the EPA in preparing a final report for public release in the form of Bulletin 739, would, on balance, be contrary to the public interest. I consider paternalistic and simplistic the view that the public is unable to understand the difference between a draft document and a final report. I also reject as fanciful the claim that the public is likely to be misled by the disclosure of documents that reveal a process of editing, correcting and refinement of written material produced by an agency. I do not consider the disclosure of draft documents to necessarily involve a criticism of the officers concerned, the agency or the EPA. It simply reveals a facet of public sector administration that is sufficiently common to be an acceptable and unavoidable part of it.

35. Neither am I persuaded, by any material before me, that the credibility of either the agency or the EPA is likely to be affected by disclosure of those documents. There is simply nothing to support the claims that the disputed documents could be used to discredit the EPA or that public perception of the agency would be harmed. In any case, it is my view that the decision-making processes of government agencies, particularly once completed, should be able to withstand scrutiny and that there is a public interest in the disclosure of documents that will enable that to occur. Further, in my opinion, the disclosure of earlier draft documents of Bulletin 739 can only serve to place into perspective the recommendations and conclusions finally reached by the EPA, and hence to inform the public about the processes leading to that outcome.

36. With the enactment of the FOI Act, every person has a legal right to access, *inter alia,* documents that show how government decisions were reached, unless it can be shown that, for very good reason, one or more of the exemptions in the FOI Act applies and they should not be disclosed.

37. Therefore, except in relation to Document 6 which is claimed to be exempt for other reasons, I am not persuaded that disclosure of any of the disputed documents would, on balance, be contrary to the public interest. There is no material before me that supports that conclusion. I find those documents are not exempt under clause 6 of Schedule 1 to the FOI Act.

Document 6

38. The agency claims that Document 6 is exempt under clause 7 and clause 8(2). the third party also claims that Document 6 is exempt under clause 7. Clause 7 exempts matter that would be privileged from production in legal proceedings on the ground of legal professional privilege. Clause 7 in Schedule 1 to the FOI Act provides:

> *"7. **Legal professional privilege***
>
> ***Exemption***
>
> *(1) Matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege.*
>
> ***Limit on exemption***
>
> *(2) Matter that appears in an internal manual of an agency is not exempt matter under subclause (1)."*

39. The exemption in clause 7 is not limited by a "public interest test". In my view, that exemption recognises the public interest in the maintenance of the principle of legal professional privilege as outweighing any other competing public interest. In a number of my previous formal decisions, I have discussed the principle and

application of legal professional privilege: *Re Guyt and Health Department of Western Australia* (16 March 1994, unreported) at paragraphs 11-18; *Re Read* at paragraph 65; *Re Weeks and the Shire of Swan* (24 February 1995, unreported) at paragraphs 15-20; *Re Nazaroff and Department of Conservation and Land Management* (24 March 1995, unreported) at paragraphs 15-19.

40. The common law principle is that confidential communications between a solicitor and his or her client will be privileged from production in legal proceedings if made for the sole purpose of giving or receiving legal advice or for use in existing or anticipated legal proceedings: *Grant v Downs* (1976) 135 CLR 674*; Baker v Campbell* (1983) 153 CLR 52. Confidential communications between a solicitor or client and a third party will also be privileged if they are made for the purpose of actual or anticipated litigation: *Wheeler v Le Marchant* (1881) 17 CH D 675; *Trade Practices Commission v Sterling* (1979) 36 FLR 244.

41. Document 6 consists of 6 pages. The first page is a facsimile cover sheet recording a transmission from the third party to the EPA. The remaining parts of Document 6 consist of a one page memorandum from the third party to the Department of Resources Development and a four page letter to the third party from a firm of solicitors. From my examination of the facsimile cover sheet, I am of the view that that page would not be privileged from production in legal proceedings on the ground of legal professional privilege. Clearly, that document is not a communication between a solicitor and client, nor does it have any reference to existing or anticipated litigation and cannot, therefore, attract the privilege. Accordingly, I find that the first page of Document 6 is not exempt under clause 7.

42. I am not satisfied that the memorandum from the third party to the Department of Resources Development is exempt under clause 7 either. In my view, that part of the document also is not a communication between a solicitor and client nor is it a communication between a client or solicitor and a third party in contemplation of litigation. In my view it would not, therefore, be privileged from production in legal proceedings on the ground of legal professional privilege. From my examination of that part of Document 6, it appears the communication to the Department of Resources Development was for the purpose of putting forward a proposal for consideration by the EPA. The letter from the firm of solicitors appears to have been sent in support of that proposal. In my view, the memorandum would not be privileged from production in legal proceedings on the ground of legal professional privilege for the reason that it does not meet the test in *Grant v Downs.* Therefore, I find that part of Document 6 comprising the memorandum is not exempt under clause 7 of Schedule 1 to the FOI Act.

43. The letter to the third party from its solicitors is clearly, from my examination of the document itself, a copy of a confidential communication between a firm of solicitors and its client for the sole purpose of giving the client legal advice. In my opinion, it would, therefore, be, *prima facie,* privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege is a privilege of the client. The privilege attaching to the

letter sent to the third party from the firm of solicitors, belongs to the third party. That privilege may be expressly or impliedly waived by the client, the third party. In this instance, I consider that the provision of a copy of that document to the Department for Resources Development and the EPA amounted to a waiver by the third party of its right to claim privilege with respect to that document. Accordingly, I find that those parts of Document 6 are not exempt under clause 7 either.

44. It was the submission of the third party that privilege had not been waived because:

    (a) disclosure in the circumstances was for a limited and specific purpose which constituted only a limited waiver; and
    (b) in any event, there was no express waiver and the circumstances preclude and imputed waiver.

45. In support of the first proposition, the third party relied on the case of *Goldberg v Ng* (1994) 33 NSWLR 639, in which Kirby P at 651-654, discussed the line of authorities from the English Court of Appeal which held that, where communications the subject of legal professional privilege are disclosed to a third party by the holder of the privilege for a limited and specific purpose, legal professional privilege is waived only for that limited and specific purpose as against the third party, and not as against other parties. Kirby P also discussed, at 656-657, the concept of an implied or imputed waiver of legal professional privilege, based on the principle enunciated in *Attorney General for the Northern Territory v Maurice* (1986) 161 CLR 475. His Honour held that, in the circumstances, there had been no implied or imputed waiver of privilege.

46. However, the majority of the court in that case did not consider the concept of a limited waiver of privilege and held that, when a party to litigation deliberately discloses to a stranger to that litigation documents which are otherwise subject to legal professional privilege, albeit for a limited and specific purpose only, and on the express condition and belief that confidentiality and such privilege was to be maintained, considerations of fairness require such privilege to be deemed in law to have been waived where that party, by conscious disclosure, has used the privileged material to his advantage and to the disadvantage of the other party to the litigation.

47. The third party also relied on the decision of *Woollahra Municipal Council v Westpac Banking Corporation* (1992) 33 NSWRL 529. In that case, Giles J, at 536-541 discussed the principle of implied waiver of privilege. However, unlike to majority in *Goldberg,* Giles J, at 539, accepted that not every disclosure to a third party is a waiver of privilege and gave some examples where disclosure could occur without there being any waiver (ibid.). However, in my opinion, the examples referred to in that case are situations in which the court has not imputed a waiver, following disclosure, as opposed to the court accepting that there has been waiver of the privilege for a limited purpose.

48. Further, the case of *Goldberg* and the issue of limited waiver in general has recently been discussed by the Full Court of the Supreme Court of South Australia in *State Bank of South Australia v Smoothdale No. 2 Limited* (Supreme Court of South Australia, 2 June 1995, unreported). In that case, the court agreed that the general principle is that, once privilege is waived, it is waived for all purposes. However, the court accepted that there was very persuasive English authority for the proposition that there may be waiver which is partial or limited only. The court discussed the English authorities relevant to this point and did not consider that the decision of *Giannarelli and Others v Wraith* (1991) 171 CLR 592 precluded the acceptance in Australia of the doctrine of limited waiver. However, the court did not consider in any further detail what principle was to be applied in determining whether disclosure constitutes a limited waiver of privilege and, instead, considered whether, in the circumstances, waiver could be imputed from the disclosure so that the claim for privilege could no longer be maintained.

49. The decision of *Goldberg* was also discussed in *Network Ten Limited v Television Holdings Limited and Another* (1995) 16 ACSR 138. In that case, Giles J concluded, at 147, that the result is the same whether it can be said that the circumstances of disclosure are such that there has only been a limited waiver, or whether, in the circumstances, considerations of fairness do not require the imputation of a waiver. To that extent he considered the divergence of views between Kirby P and Clarke JA in *Goldberg* was one of semantics rather than substance (ibid.). His Honour considered that the decision in *Goldberg*, whichever view was taken, simply underlines that there can be a limited disclosure without necessarily resulting in the loss of legal professional privilege (ibid.). Whether it is because of the limited and specific purpose and context of the disclosure, or because there is no unfairness in maintaining the privilege following any disclosure, Giles J was of the view that, if the facts so warrant, legal professional privilege can be maintained despite disclosure (ibid.).

50. In my opinion, there is insufficient authority within Australia to accept that the concept of limited waiver has become part of the law in Australia. I note the comments of Giles J in *Network Ten Limited*, and consider that the ultimate result may not be any different by the application of a "limited waiver" test as opposed to considering whether waiver should be imputed in the circumstances. I consider this to be particularly so in light of the clear acceptance within the general law that there are some circumstances in which disclosure to a third party does not result in a waiver of privilege: for example, disclosure pursuant to an obligation to disclose; inadvertent disclosure during the course of discovery; or disclosure to an expert witness for the purpose of the proceedings.

51. Turning then to the third party's submission that there was no express waiver and waiver could not be imputed from the circumstances, I accept that there has been no express waiver and therefore the question of imputed waiver arises. The third party maintains that the use of the words "without prejudice" in the memorandum to which the legal opinion was attached and in relation to the provision of that legal opinion to the agency is sufficient to enable the confidentiality of the opinion to be maintained, and the disclosure of the agency is not, in the circumstances, a waiver of privilege.

52. The concept of "without prejudice" communications relates to a principle that the law excludes from evidence admissions by words or conduct made by parties in the course of negotiations to settle litigation: *Field v The Commissioner for Railways for New South Wales* (1957) 99 CLR 285. It is also clear from the authorities that it is not necessary for the words "without prejudice" to be used to enable a party to claim that the communication was conducted on a "without prejudice" basis and failure to describe the communication as being "without prejudice" will not prevent the privilege that attaches to such communications being maintained.

53. It appears to me, in the light of the relevant authorities, that the provision to the agency by the third party of a copy of the legal opinion was not done in the course of communications in which it would be appropriate to claim "without prejudice" privilege or, alternatively, in which such a claim of privilege was available. There was no litigation on foot between the parties; there were no settlement negotiations in existence; and there was no attempt to compromise a claim between the parties. Rather, a copy of a legal opinion provided to the third party in the course of the provision of general legal advice by its solicitors was provided to an external third party, the agency, for the purpose of supporting the arguments of the third party in its attempt to secure a particular course of conduct by the agency. The fact that the words "without prejudice" have been used when forwarding the advice to the agency is not sufficient to base a claim for "without prejudice" privilege. As, in my view, the elements of the law in this area have not been satisfied in this case, I am of the view that there was no basis on which a claim for the privilege for "without prejudice" communication could be properly applied to this document.

54. Neither, in my view, does the use of those words support the third party's claim that there has been no imputed waiver of the third party's legal professional privilege in respect of that document. The question of whether the use of the words "without prejudice" is sufficient to reject a claim for legal professional privilege arose in the case of "*Diversified Mineral Resources v CRA Exploration Pty Ltd* (Federal Court of Australia, 31 March 1993, unreported). In that decision, an issue arose as to whether a communication on a "without prejudice" basis was thereby subject to legal professional privilege. Cooper J discussed the reasoning behind "without prejudice" communications. On the facts before him, Cooper J noted that:

> *"The term "without prejudice" standing alone is equally open to the construction that delivery of the Report was without prejudice to the applicant's right to advance a claim on a basis other than revealed in the reason of the valuation report. That is, the applicants were to be free to advance whatever case they chose on whatever basis they determined if the settlement negotiations did not proceed to a satisfactory conclusion, and the fact that negotiations had occurred and material had been provided where not in themselves circumstances open to the respondent to produce in evidence to the detriment of the applicants."*

55. His Honour stated that mere delivery of the document to the other party for the purposes of the settlement negotiations did not clothe the document with legal professional privilege. However, Cooper J did not decide the issue or discuss further the connection between "without prejudice" communications and a claim of legal professional privilege. In the circumstances, Cooper J held that there was no practical need to consider the claim of privilege as that document was already in the possession of the respondent. However, it did appear to be clear from the reasoning of Cooper J that the simple fact that a communication was made on or without prejudice basis between the parties did not automatically result in the creation of legal professional privilege.

56. As it is not inherent in a "without prejudice" communication that legal professional privilege may arise and be maintained following disclosure, the question arises whether, in the circumstances, there has been an imputed waiver of any claimed privilege that otherwise may, *prima facie*, exist. The law in relation to the imputed waiver of privilege has been discussed in the decision of *Maurice*. Dean J stated the principle as follows:

> *"Waiver of legal professional privilege by imputation or implication of law is based on notions of fairness. It occurs in circumstances where a person has used privileged material in such a way that it would be unfair to him to assert that legal professional privilege rendered him immune from procedures pursuant to which he would otherwise be compellable to produce or allow access to the material which he has elected to use to his own advantage. Thus, ordinary notions of fairness require that an assertion of the effect of privileged material or disclosure of part of its contents in the course of proceedings before a court or quasi-judicial tribunal be treated as a waiver of any right to resist scrutiny of the propriety of the use he has made of the material by reliance upon legal professional privilege."*

57. Based on the law as stated in *Maurice*, a party wishing to maintain a claim for privilege following disclosure of a document may only do so if no unfairness would result. Where the party entitled to the privilege discloses the communication in circumstances which would make it unfair to the other party to withhold it from production, waiver of the privilege would be imputed. It is clear that, therefore, the primary question in determining whether there has been an imputed waiver revolves in considerations of fairness.

58. In this matter, the communication to the agency was not stated to have been on a confidential basis, but simply on a "without prejudice" basis. The agency was provided with the legal opinion in order that the third party could support its claim for amendment of a particular agreement.

59. I consider that it would be unfair not to impute a waiver of privilege in the circumstances. The circumstances in which a waiver has not been held to be implied have arisen where there has been an inadvertent disclosure of documents, or when a document has been disclosed pursuant to a court order or other such obligation. In the circumstances of this matter, there was no compulsion to

disclose the document. Further, the document was disclosed for a benefit for the third party. In my view, it would be unfair for the third party to now to be able to maintain a claim for privilege given that it has previously disclosed the document for its own benefit, and given that the third party may now be of the view that disclosure to the complainant may prejudice the third party. In my opinion, there has been an imputed waiver of any legal professional privilege attaching to the document and I do not accept the submission of the third party.

60. The agency also claims that Document 6 is exempt under clause 8(2) of Schedule 1 to the FOI Act. Clause 8, so far as it is relevant, provides:

"(2) Matter is exempt matter if its disclosure -

(a) would reveal information of a confidential nature obtained in confidence; and

(b) could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

Limits on exemption

(3)...

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

61. In order for matter to be exempt under clause 8(2), an agency must not only establish that, if the matter were disclosed, it would reveal information of a confidential nature obtained in confidence, but also that the disclosure of that information could reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency.

62. I have also considered the meaning of this clause in previous decisions. I reiterate my earlier comments and observations. The Concise Oxford Dictionary, Eighth Edition, defines "prejudice" as meaning, *inter alia, "harm or injury that results or may result from some action or judgement"*. The meaning of the phrase "could reasonably be expected to prejudice" was considered by all the judges of the full Federal Court in *News Corporation Limited v National Companies and Securities Commission* (1984) 57 ALR 550. In that case, Woodward J. said, at page 561:

"...I think that the words "would, or could reasonably be expected to...prejudice" mean more than "would or might prejudice". A reasonable expectation of an event requires more than a possibility, risk or chance of the event occurring...In my view it is reasonable to expect an event to occur if there is about an even chance of its happening and, without attempting to suggest words alternative to those chosen by the draughtsman, it is in that general sense that the phrase should be read."

63. It is my view that the exemption in clause 8(2) is directed at the ability of the agency to obtain that kind of information in the future, if the particular documents were to be disclosed: see, in respect of a similar provision in the Victorian FOI legislation, *Ryder v Booth* [1985] VR 869 at p.872. From my examination of the parts comprising Document 6 as described in paragraph 41 above other than the legal opinion, I am not satisfied that they contain information that is inherently confidential nor am I satisfied that the information was obtained in confidence. There is no material before me that provides a factual basis for concluding otherwise. The agency claimed that the communication was "without prejudice" and that those words are sufficient to meet the requirements of paragraph (a) of clause 8(2).

64. Even if I were to find that those words are sufficient to persuade me that the information contained in Document 6 is of a type described in paragraph (a) of clause 8(2), I would, nevertheless, be of the view that the requirements in paragraph (b) are not established by any material before me. By submitting Document 6 to the EPA as well as to the department for Resources Development, the third party was putting forward for consideration a proposal for the benefit of the third party. That outcome may only be achieved by providing relevant information to the EPA for its consideration.

64. However, given that the letter to the third party from its solicitors contains private legal advice to the third party to which privilege clearly attaches (whether or not is has, in fact, been waived) and which is clearly known to only a relatively small number of people, I accept that the information may be confidential in nature. Further, although I do not accept that the words “without prejudice” used in relation to the legal opinion in the memorandum to the agency could be understood to import an intention by the third party that the letter not be disclosed to any other party, I accept that the third party intended those words to indicate that intention and that the document was provided to the agency in confidence. I also accept that the agency received the document in confidence.

65. Further, I am of the view that disclosure of the third party’s legal advice could reasonably be expected to prejudice the future supply to the agency of information of that kind. I accept that it was not necessary that the third party provide a copy of its legal advice in support of the matter raised in the memorandum. It was not required to do so and it could have supported its argument without providing that document. The third party need only have referred to the advice, if it so wished, without providing a copy. In those circumstances, it is my view that it may be reasonable to expect that in future a company or person in the position of the third party may not provide a copy of its legal advice, if it were to become known that that may result in its disclosure to parties outside the agency. Accordingly, I find that the copy letter of 23 February 1994 to the third party from its solicitors is exempt under clause 8(2) of Schedule 1 to the FOI Act.

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