OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Refs: F0522000; F0532000
Decision Ref: D0632000

Participants:

Kimberley Diamond Company NL
Complainant

- and -

Department of Resources Development
First Respondent

- and -

Argyle Diamond Mines Pty Ltd
Second Respondent

(No.2)

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - documents relating to the Argyle Diamond Mines Joint Venture - confidential communications - clause 8(1) - scope of exemption - whether breach of a contractual obligation of confidence - clause 8(2) - whether information of a confidential nature obtained in confidence - whether reasonable expectation of prejudice to future supply of information to the Government or to an agency - limit on exemption in clause 8(4) - whether disclosure is contrary to the public interest - onus on agency - clause 4(2) - information having a commercial value - whether disclosure would destroy or diminish commercial value - clause 4(3) - information relating to the business or commercial affairs of a person - whether disclosure could reasonably be expected to have adverse effect - clause 1(1)(d) - whether the documents were prepared to brief a Minister in relation to matters prepared for possible submission to an Executive body - clause 6(1) - deliberative processes - whether disclosure would, on balance, be contrary to the public interest – whether tender process likely to be adversely affected by disclosure - clause 7(1) - legal professional privilege - privileged communications - whether waiver of privilege.

Freedom of Information Act 1992 (WA) s. 102(3); Schedule 1 clauses 3(1), 4(2), 4(3), 4(7), 8(1), 8(2) and 8(4).
Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981
Bill of Rights 1689
Parliamentary Privileges Act 1897

Re Kimberley Diamond Company NL and Department of Resources Development and Another [2000] WAICmr 51
Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another [1997] WAICmr 29
Re West Australian Newspapers Limited and Western Australian Tourism Commission WAICmr [1998] 10
BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (1977) 16 ALR 363
Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR
Moorgate Tobacco Co Ltd v Phillip Morris Ltd and Another (No.2) (1984) 156 CLR
Ryder v Booth [1985] VR 869
Manly v Ministry of the Premier and Cabinet (1985) 14 WAR 550
Re Environmental Defenders Office WA (Inc) and Ministry for Planning [1989] WAICmr 35
Re Precious Metals Australia Ltd and Department of Minerals and Energy [1997] WAICmr 12
Re Jones and Jones and the Town of Port Hedland [2000] WAICmr 23
News Corporation v National Companies and Securities Commission (1984) 57 ALR 350
Re Waterford and Department of Treasury (No.2) (1984) 5 ALD 588
Ministry for Planning v Collins (1996) 93 LGERA 69
Esso Australia Resources Ltd v the Commissioner of Taxation [1999] 74 ALJR 339
Conlon v Conlon (1952) 2 AUER 462
Re Weeks and Shire of Swan [1995) WAICmr 5
Mann v Carnell (1999) 168 ALR 86

DECISION

The decision of the agency is varied. Save for Document 51 and the draft letters that form part of Document 52, which are exempt under clause 7 of Schedule 1 to the *Freedom of Information Act 1992*, the disputed matter is not otherwise exempt.

B. KEIGHLEY-GERARDY
INFORMATION COMMISSIONER

28 November 2000

REASONS FOR DECISION

1. These are applications for external review by the Information Commissioner arising out of two decisions made by the Department of Resources Development ('the agency') to refuse Kimberley Diamond Company NL ('the complainant') access to documents requested by it under the *Freedom of Information Act 1992* ('the FOI Act'). The background to these complaints is substantially the same as that described in my recent decision in *Re Kimberley Diamond Company NL and Department of Resources Development and Another* [2000] WAICmr 51. I repeat that information in these reasons because it is pertinent to these complaints.

2. In November 1981, the State of Western Australia and several Joint Venturers entered into an agreement ('the Agreement') relating to the exploration, development and marketing of diamond bearing ore deposits within two defined mining areas, described in the Agreement as the Argyle mining area ('Argyle') and the Ellendale mining area ('Ellendale') in the Kimberley area of Western Australia. The Agreement was signed and sealed by the State and by each of the Joint Venturers.

3. The Agreement imposed certain obligations on the State and on the Joint Venturers. Among other things, the State agreed to ratify the Agreement in legislation. Subsequently, in December 1981, the Parliament of Western Australia enacted the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981*. Under the Agreement, the Joint Venturers were granted certain rights in respect of land and mineral claims, including the right to explore and develop Argyle and Ellendale. The right to develop Argyle and Ellendale was conditional and required the Joint Venturers, among other things, to pay royalties to the State at an agreed rate.

4. In 1982 the Joint Venturers entered into a Management Agreement with Argyle Diamond Mines Pty Ltd ('the third party'). Under that Management Agreement, the third party was appointed to manage, carry out and conduct all relevant operations on behalf of the Joint Venturers, including the obligations of the Joint Venturers under the Agreement. The third party was also authorised to institute, prosecute, compromise or settle any legal proceedings on behalf of the Joint Venturers.

5. None of the original Joint Venturers is a current Joint Venturer. The current Joint Venturers are Capricorn Diamonds Limited, Ashton Argyle Holdings Pty Ltd and Perpetual Trustees WA Limited. Ashton Argyle Holdings Pty Ltd is, I understand, a wholly owned subsidiary of Ashton Mining Limited, one of the original Joint Venturers.

6. Under the terms of the Agreement, the Joint Venturers agreed, among other things, to submit to the relevant Minister detailed proposals for the development of Argyle and associated marketing arrangements and were required to keep the State fully informed in writing of the progress and results of their operations.

The Agreement stipulated, in clause 7, the details that were to be included in the proposal that the Joint Venturers were to submit to the relevant Minister for the development of Argyle. Among other things, the proposal had to include plans to mine and recover diamonds and those plans must include information about the location, area, layout, design, quantities, material and time programme for the commencement, completion of construction or the provision of each of those matters mentioned in paragraphs (a)-(j) of subclause (1) of clause 7.

7. Clause 9 of the Agreement further required the Joint Venturers to submit to the relevant Minister, on or before 31 December 1990, detailed proposals for the development of Ellendale, in detail similar to that required to be included in the proposal for the development of Argyle. Clause 40 of the Agreement gives the relevant Minister, at the request of the Joint Venturers, the power to extend, further extend or to vary any period or date referred to in the Agreement, including the due date for the submission of development proposals for Ellendale.

8. On 27 December 1990, pursuant to clause 40 of the Agreement, the third party on behalf of the Joint Venturers, applied to the Minister for Resources Development ('the Minister') for an extension of time for the submission of development proposals for Ellendale. It appears that that extension was granted. On 20 December 1993, the Joint Venturers sought another extension to 1998 and, on 11 December 1998, a further extension to December 2003 was sought.

9. The complainant was incorporated in 1993 for the purpose of exploring for diamonds in the West Kimberley region of Western Australia. The mining tenements held by the complainant are, I understand, adjacent to Ellendale. I further understand that the complainant has made several unsuccessful attempts to negotiate with the third party an agreement relating to the development of Ellendale.

10. In April 1999, the complainant lodged an application for an Exploration Licence over Ellendale. In May 1999, the third party, on behalf of the Joint Venturers, lodged an objection in the Broome Mining Warden's Court opposing the grant of an Exploration Licence to the complainant. In August 1999, the complainant lodged a number of complaints in the Broome Mining Warden's Court seeking forfeiture of the Joint Venturers' mineral claims over Ellendale.

11. In October 1999, the complainant applied to the agency for access under the FOI Act to various documents relating to its application for an Exploration Licence and the objections lodged by the third party on behalf of the Joint Venturers. In November 1999, the complainant made a second access application to the agency for access under the FOI Act to documents relating to the development proposal submitted to the Minister by the third party on behalf of the Joint Venturers, which the Minister approved on 18 November 1999.

12. The agency granted the complainant access to 26 documents that fell within the scope of the first application, but refused the complainant access to 54 documents on the grounds that they are exempt under clauses 4(2), 4(3), 6(1), 7

and 8 of Schedule 1 to the FOI Act. In respect of the complainant's second access application, the agency refused access to 2 documents on the grounds that they are exempt under clauses 4(2), 4(3), 6(1) and 8 of Schedule 1 to the FOI Act.

13. Following an internal review, the complainant was granted access to 4 additional documents, 3 in relation to its first application and one in relation to its second application. However, the internal reviewer confirmed the agency's decisions to refuse access to the balance of the requested documents.

14. On 8 March 2000, the complainant made two complaints to the Information Commissioner seeking external review of both the decisions on access. However, in relation to its first access application, the complainant sought external review only of the agency's decision to refuse it access to 20 of the 54 documents, being those numbered 47, 48, 51, 52, 53, 56, 58, 61, 62, 63, 64, 66, 73, 74, 75, 76, 77, 78, 79 and 80 in the agency's schedule.

REVIEW BY THE INFORMATION COMMISSIONER

15. I obtained the disputed documents from the agency. In the course of my dealing with these complaints, the third party applied to be joined as a party to both complaints on behalf of the current Joint Venturers, and was so joined. Various discussions took place to determine whether these complaints could be resolved by conciliation between the parties. Subsequently, the complainant withdrew its complaint in respect of 3 documents, and parts of others were disclosed following discussions between my office, the agency and the third party. However, the complaints could not otherwise be resolved by conciliation.

16. After considering submissions from the parties and other material, on 24 August 2000, the Acting Information Commissioner informed the parties in writing of his preliminary view of these complaints, including his reasons. It was the Acting Information Commissioner's preliminary view that part of Document 73, all of Document 75, and most of Documents 77 and 80 contained information that fell outside the scope of the complainant's first access application. It was also the Acting Information Commissioner's preliminary view that certain information about employees of the third party that appeared in various parts of some of the disputed documents may be exempt under clause 3(1), but that the disputed documents were not otherwise exempt.

17. The complainant withdrew that part of its complaint relating to the information contained in Documents 73, 75, 77 and 80, which the Acting Information Commissioner considered fell outside the scope of its first access application. The agency and the third party made further written submissions and maintained their claims for exemption. In addition, the third party claimed that Documents 51 and 52 are exempt under clause 7. At the conclusion of that stage of the review process, 17 documents or parts of documents remained in dispute between the parties.

18. Subsequently, I made my own inquiries to determine the extent of the disclosures made to the complainant, both in respect of these matters and following my decision in *Re Kimberley*. I also made inquiries to determine the nature of the material, if any, that was a matter of public record.

19. My inquiries established that, on 12 August 1999, the Minister informed the complainant that agreement had been reached with the third party for the disposal of the Ellendale leases held by tender and that the tender process would be audited by the agency to ensure that all tenderers were given a fair and equal opportunity to acquire the leases. On 13 August 1999, the Managing Director of the third party wrote to the Minister about the Joint Venturers' proposals for the development of Ellendale and the agency granted the complainant access to a copy of that letter. The letter of 13 August 1999 is, I understand, the final version of one of the documents that is in dispute in this matter, Document 47.

20. A number of other documents containing information about the Joint Venturers' assessments of Ellendale and their intentions for the development of Ellendale have been disclosed to the complainant by the agency, either in full or in edited form. Having regard to those disclosures and the documents disclosed following my decision in *Re Kimberley*, I consider that most of the matter, which is claimed to be exempt by the agency and by the third party, is information that has already been disclosed to the complainant, either directly or indirectly, or made public by other means. In light of those disclosures, I consider that the claims made by the agency and the third party for exemption based on confidentiality, as discussed below, carry less weight.

21. The Minister is reported, in articles published in *The West Australian* newspaper on 17 February 2000, 21 February 2000 and 14 April 2000, and in an article published in *The Australian Financial Review* on 21 February 2000, as confirming his approval of the Joint Venturers' proposal for the development of Ellendale through a tender process. Finally, following my decision in *Re Kimberley*, copies of the documents that were in dispute in that matter have been released to the complainant. Therefore, I consider that information about the Joint Venturers' assessments of Ellendale and their intentions for the development of Ellendale which was once confidential is no longer confidential because it is information that has been disclosed to the complainant or is otherwise in the public domain.

THE DISPUTED DOCUMENTS

22. The disputed documents are:

Document Number	Description	Disputed matter and exemptions claimed

2	Letter with hand written notation dated 4/11/99 from third party to the Minister, enclosing development proposal for Ellendale.	The whole document - clauses 8(1), 8(2), 4(2) and 4(3).
47	Facsimile transmission of a draft letter dated 16/7/99 from the third party to the Minister.	First paragraph, second and third sentences only - clauses 8(1), 8(2), 4(2) and 4(3).
48	Ellendale development process timetable dated 29/7/99.	The whole document - clauses 8(1), 8(2), 4(2) and 4(3).
51	Facsimile transmission dated 3/9/99 between third party and agency with attachment, being two draft letters of 2 pages each.	The whole document - clauses 8(1), 8(2), 4(2) and 4(3) and 7.
52	Letter dated 3/9/99 from third party to agency, including copies of Document 51.	Lines 13-20 only of the covering letter dated 3/9/99 in dispute, plus the whole of the attachment, being a copy of Document 51 – clauses 8(1), 8(2), 4(2), 4(3) and 7.
58	Draft letter dated 24/8/99 from third party to the Minister, including draft proposal for development of Ellendale with hand written notations.	Second and third paragraphs and 3rd, 4th and 5th words in line 19 of the letter and the whole of the draft proposal in dispute – clauses 8(1), 8(2), 4(2) and 4(3).
61	Internal agency memorandum dated 29/9/99.	The whole document - clause 6(1)
62	Internal agency memorandum dated 29/9/99 with hand written notations.	Whole document - clause 6(1)
63	Draft letter dated 24/8/99 from third party to the Minister, including draft proposal for development of Ellendale, with hand written notations.	Second and third paragraphs and 3rd, 4th and 5th words in line 19 of the letter and whole of the draft proposal in dispute – clauses 8(1), 8(2), 4(2) and 4(3).
64	Two facsimile messages dated 30/9/99 from agency to third party. One message was not sent because a connection could not be established. The second message includes hand written notations.	The whole of both documents - clauses 8(1), 8(2), 4(2) and 4(3).

66	Letter dated 1/10/99 from third party to the Minister, including development proposal for Ellendale.	The last sentence of the 2nd paragraph and all the 3rd paragraph of the covering letter dated 1/10/99 and the whole of the development proposal are in dispute – clauses 8(1), 8(2), 4(2) and 4(3).
73	Draft briefing note dated 6/8/99 from Chief Executive Officer of agency to the Minister.	The 1st paragraph; the first sentence and sub-paragraph (b) of the 2nd paragraph; the 4th paragraph; and the remainder of the document - clauses 8(1), 8(2), 4(2) and 4(3).
76	Briefing note for the Minister, undated	The whole document, except for the last sentence of the 4th paragraph - clauses 8(1), 8(2), 4(2), 4(3), 1(1)(d)(i) and 6(1).
77	Briefing note for the Minister, undated	The first 7 lines; lines 18-20 and lines 22-27 - clauses 1(1)(d)(i), 8(1), 8(2), 4(2), 4(3) and 6(1).
78	Transmission memorandum dated 11/10/99 from Chief Executive Officer of agency to the Minister.	The whole document - clause 1(1)(d)(i)
79	Briefing note, undated	The whole document - clauses 8(1), 8(2), 4(2) and 4(3).
80	Briefing note for the Minister dated 29/10/99	The whole document, except for paragraph 3 and the 5 dot points in that paragraph - clauses 8(1), 8(2), 4(2), 4(3) and 6(1).

THE EXEMPTIONS

(a) Clause 8 – Confidential communications

Clause 8(1)

23. The third party claims that the disputed matter in Documents 2, 47, 48, 51, 52, 58, 63 and 66 is exempt under clause 8(1). The agency claims that the disputed

matter in Documents 2, 64, 73, 76, 77, 79 and 80 is exempt under clause 8(1), but for different reasons. Clause 8(1) provides:

> *"(1) Matter is exempt matter if its disclosure (otherwise than under this Act or another written law) would be a breach of confidence for which a legal remedy could be obtained."*

24. In my decision in *Re Speno Rail Maintenance Australia Pty Ltd and The Western Australia Government Railways Commission and Another* [1997] WAICmr 29, I discussed the meaning and application of the exemption provided in clause 8(1) of Schedule 1 to the FOI Act. In that case, I determined that, because of its particular and unique terms, the exemption in clause 8(1) is limited in its application to a breach of confidence for which a remedy is available at common law, rather than merely in equity. That is, I consider that clause 8(1) applies to a breach of confidence, such as breach of a contractual obligation, for which a legal remedy may be obtained, rather than to an equitable breach of confidence, for which only an equitable remedy could be obtained.

The third party's submission

25. The third party submits that the Agreement is a contract between the State and the Joint Venturers and that clause 50 of the Agreement requires the parties to keep all of their communications confidential. The third party claims that, therefore, disclosure of the disputed matter in Documents 2, 47, 48, 51, 52, 58, 63 and 66 would constitute a breach of clause 50 of the Agreement, which would enable a legal remedy to be obtained by an aggrieved party.

26. I have examined the Agreement. Clause 50 of the Agreement is in the following terms:

> *"Consultation*
>
> *50. The Joint Venturers shall during the currency of this Agreement consult with and keep the State fully informed on a confidential basis concerning any action that the Joint Venturers propose to take with any third party (including the Commonwealth or any Commonwealth constituted agency authority instrumentality or other body) which might significantly affect the overall interest of the State under this Agreement."*

27. Having considered the words of clause 50, I do not understand that clause to be a confidentiality clause as claimed by the third party. Rather, clause 50 appears to me to require confidentiality in respect of certain communications only, being those between the Joint Venturers and the State relating to any action the Joint Venturers propose to take with any third party which might significantly affect the overall interest of the State under the Agreement. Even in respect of that kind of information, the nature and extent of the confidentiality required is not

clear. It seems to me that *"on a confidential basis"* is a rather imprecise term to be used in a legal document to refer to an obligation of confidentiality.

28. In my view, none of the disputed documents and, in particular, Documents 2, 47, 48, 51, 52, 58, 63 and 66, was created in the circumstances described in clause 50 of the Agreement nor were they submitted to the agency or to the Minister by the third party pursuant to the Joint Venturers' obligations under clause 50 of the Agreement. Documents 51 and 51 were submitted to the agency by the third party, shortly after the lodgement of Plaint 15/990 in the Broome Mining Warden's Court. Documents 2, 47, 48, 58, 63 and 66 were submitted to the agency and, ultimately, to the Minister, in accordance with the Joint Venturers' obligations under clause 9 of the Agreement, for the express purpose of seeking the Minister's approval of the Joint Venturers' proposals for the development of Ellendale.

29. Whilst those documents contain some information about the Joint Venturers' proposals for the development of Ellendale, as noted in paragraphs 18-21 above, other documents containing details and information about the Joint Venturers' assessment of Ellendale and their intentions for the proposed development of Ellendale have already been released to the complainant by the agency. Therefore, some of the disputed matter in those documents is information that is in the public domain. I consider that the information in the public domain is no longer confidential.

30. In his preliminary view letter, the Acting Information Commissioner informed the parties that, following an answer given to a Parliamentary Question by Hon. N F Moore, Minister for Mines, in the Legislative Council of the Parliament of Western Australia, on 23 November 1999, about the development of Ellendale, in his view, certain information in the disputed documents about the proposals for the development of Ellendale was now a matter of public record and that that kind of information was no longer confidential.

31. However, the third party asserts that, whilst there can be no objection to the use of *Hansard* to prove what was done and said in Parliament as a matter of history, the use of that statement offends Article 9 of the *Bill of Rights 1689*. The *Bill of Rights 1689* is an Act of the English Parliament, which, the third party submits, applies in Western Australia by virtue of s.1 of the *Parliamentary Privileges Act 1891*.

32. Article 9 of the *Bill of Rights 1689* states that freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. The third party contends that the answer given by the Minister for Mines forms part of the proceedings of the Parliament of Western Australia and that it offends Article 9 of the *Bill of Rights 1689* for me to rely on that answer as evidence that confidentiality has been lost in relation to the information in the disputed documents. The third party further claims that it is unlawful for the complainant to tender material from the proceedings in Parliament to me and that it is also unlawful for me to receive that material and rely on it in my decision.

33. I reject the third party's submissions on this aspect of the matter for the following reasons. Firstly, whether or not the *Bill of Rights 1689* applies in Western Australia, I am empowered by s.70(1) of the FOI Act to make such investigations and inquiries as I think fit, in order to deal with a complaint. I do not consider that my use of *Hansard*, a public document, to discover the nature of information that has been made public through the Parliamentary process amounts to an impeachment of the proceedings of Parliament. I have not sought to call into question the proceedings of Parliament. Rather, I have relied upon the report of the proceedings of Parliament in *Hansard* as evidence that certain information that was once confidential, is now a matter of public record and, therefore, no longer confidential.

34. Further, in July 2000, after informing the agency and the third party of the answer given by the Minister for Mines, edited copies of two documents containing information of the kind referred to by the Minister for Mines were released to the complainant by the agency. As I understand it, those documents contain information about the Joint Venturers' assessments of Ellendale and their intentions for the proposed development of Ellendale. Clearly, information about those assessments and the development proposal is both in the possession of the complainant and on the public record.

35. Taking into account the foregoing, I do not consider that the disputed matter in Documents 2, 47, 48, 51, 52, 58, 63 and 66 is confidential information that is covered by the exemption in clause 8(1). Accordingly, I find that the disputed matter in Documents 2, 47, 48, 51, 52, 58, 63 and 66 is not exempt under clause 8(1) of Schedule 1 to the FOI Act.36. Further, given that the final version of Document 47 has previously been released to the complainant by the agency, I do not consider that Document 47 is exempt under any of the other exemption clauses claimed by the third party. I have not considered Document 47 further in these reasons.

The agency's submission

36. The agency submits that the disputed matter in Documents 2, 64, 73, 76, 77, 79 and 80 is exempt under clause 8(1) because it is information that the agency is obligated to keep confidential. The agency asserts that an obligation of confidence arises through the existence of the Agreement and that the relationship of confidence that exists between the parties to the Agreement and the importance of that relationship to the State and to the public of Western Australia is, to some extent, evidenced by clause 50 of the Agreement. The agency submits that the relationship of confidence is also evidenced by the nature of State Agreements themselves.

37. The agency submits that the Agreement, like other State Agreements, is a private contract between the State and the Joint Venturers, which encapsulates government policy on the exploitation of State-owned minerals. The agency submits that, to facilitate the development of mineral resources for the benefit of the State, information relating to mineral resources is exchanged between the

State and the other parties to the Agreement on the understanding that the information remains confidential and that this relationship of trust would be breached by the disclosure of the disputed matter.

38. The agency submits that the existence of an obligation of confidence is not limited to the circumstances envisaged by clause 50, but extends to any information exchanged between the parties to the Agreement, which may detrimentally affect the operation of the Agreement. The agency submits that Document 2, which was provided to the Minister under clause 9 of the Agreement was, by virtue of the nature of the relationship between the parties to the Agreement, provided on the basis that it would remain confidential and that the mandatory requirement on the Joint Venturers to provide a development proposal under clause 9 strengthens the agency's claims about the confidential nature of the communication. The agency claims that, since the Joint Venturers are the only source of that information and the State is under an obligation not to disclose it to any third parties, the development proposals retain their confidential nature, notwithstanding that the Minister is briefed about their contents.

39. The agency claims that Documents 64 and 76 are confidential communications between the agency and the third party, on behalf of the Joint Venturers. The agency also claims that Documents 2, 73, 76, 77, 79 and 80 contain information about Ellendale, which was provided to the agency by the third party under clause 50 of the Agreement and on the understanding that the communications were confidential under the Agreement. The agency asserts that that understanding of confidentiality ought to be respected and that disclosure would breach the relationship of confidentiality between the agency, the third party and the Joint Venturers.

Consideration

40. Document 2 clearly states, on its face, that it was submitted to the Minister for his approval by the third party, pursuant to the Joint Venturers' obligations under clause 9 of the Agreement. It is also clear to me that Documents 58, 63 and 66 were submitted to the agency by the third party for the purpose of obtaining the Minister's approval of the Joint Venturers' proposals for the development of Ellendale. Therefore, I do not accept the agency's claims that those documents were provided to the Minister or to the agency under clause 50 of the Agreement.

41. As I understand it, the remainder of the agency's submission is that there is an implied term in the Agreement that the parties to the Agreement are required to keep secret and confidential any information exchanged between them because that information is exchanged on a mutual understanding of confidentiality that exists to facilitate the development of the mineral resources of the State for the benefit of the State.

42. In my decision in *Re West Australian Newspapers Limited and Western Australian Tourism Commission* WAICmr [1998] 10, I discussed, at paragraphs 34-45, the five criteria that must be satisfied before a term should be implied

into a written contract. Those criteria, first identified in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 16 ALR 363, have subsequently been adopted as authoritative by the High Court in *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR at 347 and 404, and also in *Moorgate Tobacco Co. Ltd v Phillip Morris Ltd and Another (No.2)* (1984) 156 CLR 414 at 435.

43. The criteria that must be satisfied before the Courts will imply a term into a contract are:

(i) the term to be implied must be reasonable and equitable;
(ii) it must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
(iii) it must be so obvious that "it goes without saying";
(iv) it must be capable of clear expression; and
(v) it must not contradict any express term of the contract.

44. It appears to me that the agency's submission is directed only toward the second of the five criteria referred to in paragraph 43 above. However, in my opinion, the agency has not established that the Agreement will be ineffective unless an implied term of confidentiality between the parties is implied into the Agreement. I note that the Courts are reluctant to imply terms into detailed commercial contracts. In the *Codelfa* case at 346 Mason J said:

> *"For obvious reasons the courts are slow to imply a term. In many cases, what the parties have actually agreed upon represents the totality of their willingness to agree; each may be prepared to take his chance in relation to an eventuality for which no provision is made. The more detailed and comprehensive the contract the less ground there is for supposing that the parties have failed to address their minds to the question at issue."*

45. Nothing has been put before me by the agency to establish any of the other four criteria, which are necessary for its submission to have any weight. As the Courts are reluctant to imply terms into a contract unless all of the criteria are satisfied, I am reluctant to imply such a term into the Agreement. The agency's submissions have not persuaded me that the disputed matter in Documents 2, 64, 73, 76, 77, 79 and 80 is exempt matter under clause 8(1). Accordingly, I find that the disputed matter in Documents 2, 64, 73, 76, 77, 79 and 80 is not exempt under clause 8(1) of Schedule 1 to the FOI Act.

Clause 8(2)

46. The third party claims that the disputed matter in Documents 2, 48, 51, 52, 58, 63, and 66 is exempt under clause 8(2). In addition, the agency claims that the disputed matter in Documents 2, 64, 73, 76, 77, 79 and 80 is exempt under clause 8(2). Clause 8(2) 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."*

47. There are two limbs to the exemption in clause 8(2). To establish a *prima facie* claim for exemption under clause 8(2), the requirements of both paragraphs (a) and (b) must be met. That is, it must be shown that the documents would, if disclosed, reveal information of a confidential nature obtained in confidence and also that disclosure could reasonably be expected to prejudice the future supply, to the Government or to an agency, of information of the kind under consideration.

Clause 8(2)(a) - confidential information obtained in confidence

48. Information is inherently confidential if it is not in the public domain. That is, the information must be known by a small number or limited class of persons. I accept that, when Documents 2, 48, 51, 52, 58, 63 and 66 were created the information in those documents was not in the public domain. Document 2 is marked "Commercial in Confidence". Taking into account its contents, I accept that Document 2, and the development proposal attached to that document, was provided to the Minister in confidence. However, none of the other disputed documents is marked confidential and there is nothing on the face of those documents to indicate that they were provided to, and received by, the Minister and the agency, on the basis of an express understanding of confidentiality.

49. However, the third party claims that Documents 2, 48, 51, 52, 58, 63 and 66 were given to and received by the agency and the Minister in confidence, and that there was an implied understanding of confidentiality based on a common understanding between the Joint Venturers and the Minister, and the Joint Venturers and the agency, at the time the communications were made. The agency also submits that its usual practice is to receive such documents in confidence.

50. Taking into account the contents of the disputed documents and the submissions from the agency and the third party about their understandings of confidentiality, I accept that, at the time the documents were created and sent to the Minister and to the agency, the agency and the third party believed there was an implied understanding of confidentiality of documents associated with the operation of the Agreement. I also accept that the third party and agency believed that the

information in Documents 2, 48, 51, 52, 58, 63 and 66 was confidential and that those documents were given to and received by the agency and the Minister in confidence.

51. However, the final version of Document 47 has been released to the complainant. In addition, edited copies of other documents containing information of the kind that is claimed to be exempt under clause 8(2) have already been released to the complainant by the agency. Therefore, I consider that any information that has already been disclosed to the complainant or has been made public by other means is no longer confidential and is, therefore, not exempt under clause 8(2). In my opinion, only a small amount of the disputed matter in Documents 2, 48, 51, 52, 58, 63 and 66 has not been disclosed to the complainant by either the agency or the Minister. Further, in respect of the matter in dispute in Documents 64, 73, 76, 77, 79 and 80, for which the agency claims exemption under clause 8(2), in my opinion, only a small amount of that information is inherently confidential because it is information that has neither been made public nor disclosed to the complainant.

52. Officers of the agency created Documents 64, 73, 76, 77, 78, 79 and 80. I accept that, at the time those documents were created, they contained some information provided to and received by the agency in confidence. However, having examined those documents and considered the information previously released to the complainant, in my opinion, most of the disputed matter in Documents 64, 73, 76, 77, 78, 79 and 80 is also information that is already in the public domain.

53. Whilst I consider that the requirements of paragraph (a) of clause 8(2) may be established in respect of parts of Documents 2, 48, 51, 52, 58, 63, 64, 66, 73, 76, 77, 78, 79 and 80, the requirements of paragraph (b) of clause 8(2) must also be established before the exemption applies.

Clause 8(2)(b) – prejudice to the future supply of that kind of information

54. In my view, paragraph (b) of the exemption in clause 8(2) is directed at the ability of the Government or an agency to obtain similar information in the future, and is not concerned with whether the third party will give information of that kind to the Government or to the agency in the future: see *Ryder v Booth* [1985] VR 869, at 872 per Young J. In the context of these complaints, I consider that the phrase "information of that kind" in clause 8(2)(b) refers to information of the kind which a party to a State Agreement is required to provide to the Government or to an agency.

The third party's submission

55. The third party asserts that, if it had known at the relevant time that documents could be disclosed to applicants under the FOI Act, then the information that it provided to the Government and to the agency under the Agreement may have taken a very different form. It is the submission of the third party that the future supply of information of the kind in the disputed documents could be severely

restricted if those documents were to be disclosed under the FOI Act and that it would also undermine the confidence of other parties to other State Agreements in the supply of similar information pursuant to other State Agreements. However, the third party did not elaborate on its claims.

The agency's submissions

56. The agency submits that the third party's statement that disclosure of the disputed matter will affect the amount of detail provided in future development proposals is evidence that supports the agency's claim that disclosure could reasonably be expected to prejudice the future supply of information of that kind to the agency. The agency further submits that, when considering the amount of information which is made available to the Minister, the Joint Venturers may consider that, in light of past successful FOI applications, it is not reasonably practicable to provide the Minister with anything more than a bare outline of the details required by clauses 6, 7 and 9 of the Agreement.

57. The agency asserts that, notwithstanding the requirement in clause 9(1) of the Agreement that the Joint Venturers must provide the Minister with detailed proposals, the "depth of detail" required under clause 9(1) is rather vague. As I understand it, the agency submits that the prejudice to the future supply of information arises because of the amount of detail that may be omitted from future development proposals. The agency submits that, therefore, disclosure could reasonably be expected to prejudice the supply of detailed information about resource development proposals to the agency, in the future.

58. The agency also submits that disclosure is likely to impede the proper workings of Government because, in future negotiations with other companies or organizations interested in developing mineral resources, those companies or organizations will be reluctant to fully disclose relevant information to the Government. The agency asserts that any failure on the part of companies or organizations to provide full and frank details of their businesses has the potential to severely impede the effective operations of the agency and its officers who negotiate contracts on behalf of the public.

59. The agency submits that the decision in *Ryder v Booth* is not relevant to the circumstances of this matter because the kind of information in dispute is information that is only available from the other party to the Agreement, in this case, the Joint Venturers. The agency contends that nothing in the Agreement prevents the Minister from accepting a proposal which merely outlines the development, and that an unwillingness to provide in-depth information, which the Minister may, in any event, be unaware of, would not necessarily mean the proposal would be rejected. However, the agency submits that the preferable position is for parties to a State Agreement to supply information candidly and in an unrestricted manner.

60. Finally, in respect of the limit on exemption in clause 8(4), the agency maintains that a failure by a party to a State Agreement to provide full and frank disclosure will have the potential to impede the effective operations of the agency. The

agency submits that the Agreement, like other State Agreements, is a private contract between the State and the Joint Venturers which encapsulates government policy on the exploitation of State owned minerals. The agency submits that the purpose of the Agreement is to facilitate the development of mineral resources for the State's benefit and, although parties to a State Agreement are obliged to deal with each other, given the Joint Venturers have indicated a reluctance in the future to provide information that they are not absolutely required to provide, it necessarily follows that the aims of the Agreement could be potentially (but perhaps unknowingly) frustrated by the failure of the Joint Venturers to make a full disclosure.

Consideration

61. I do not accept that disclosure of the disputed documents could reasonably be expected to prejudice the ability of the Government or the agency in the future to obtain from a party to a State Agreement information that is required to be provided by that party in accordance with that State Agreement. As I understand it, a State Agreement may be made for any number of purposes, but I also understand that each such State Agreement is made for the purpose specified in the enabling legislation enacted by the Parliament of Western Australia in order to ratify such State Agreements. Having examined a number of other State Agreement Acts (to which I have been referred by the third party), it is apparent to me that the relevant enabling legislation ratifies each particular State Agreement made between the State and another party or parties. Each specific State Agreement also contains details of the precise nature of the obligations and responsibilities imposed upon the parties to that State Agreement.

62. It is apparent to me that, in this matter, the Agreement was made for specific purposes, being the development of Argyle and Ellendale. The obligations under the Agreement, in my opinion, do not affect, and are unlikely to influence the quality and quantity of the information provided to the Government or the agency under any other State Agreement that currently exists or which may be negotiated between the State and other resource developers in the future. Each is unique to the particular circumstances of those State Agreements. The claims by the agency and the third party about the future supply of information, in my opinion, ignore the fact that each State Agreement is unique and the requirements to provide information are not uniform. Each requirement must be examined in light of the mutually agreed terms of the particular State Agreement.

63. Clause 9 of the Agreement requires detailed proposals to be submitted to the Minister for his approval and, as I understand it, the Joint Venturers could not develop Ellendale without the Minister's approval without breaching the Agreement. In those circumstances, I do not accept that the Joint Venturers would refuse to supply the information specified in the Agreement in order to obtain approval from the Minister, nor do I accept that the information provided

would be materially different from that stipulated in the Agreement. Clearly, any refusal or neglect to provide either the kind of information stipulated or the level of detail necessary to satisfy the Minister would jeopardise the rights of the Joint Venturers under the Agreement.

64. Further, clause 8 of the Agreement authorizes the Minister to, among other things, defer consideration of any proposal submitted by the Joint Venturers, until such time as either a further proposal is submitted or such other information as the Minister may require to be provided before approval will be given. Given that, under the terms of the Agreement, the Joint Venturers must first seek and obtain the Minister's approval of a development proposal before they could proceed to undertake a commercial resource development project, any refusal on the part of the Joint Venturers to provide information that may be required by the Minister would, in effect, mean that the development project would not proceed.

65. Further, the disputed documents do not, in my view, contain detailed information provided to the Government or to the agency on a purely voluntary basis by the Joint Venturers. Rather, the disputed documents appear to me to contain general information about the proposed development of Ellendale, most of which consists of information that has already been disclosed to the complainant and other information that, in my opinion, could reasonably be gleaned from the public record. Those documents summarise or refer to matters relating to the proposed development of Ellendale, including information of the kind referred to in clauses 6 and 7 of the Agreement, which the agency acknowledges the Joint Venturers must provide to the Minister to obtain his approval of the development proposal.

66. I consider that the claims made by the agency and the third party that disclosure will affect the detail to be provided to the agency in the future by other parties to State Agreements, and the candour with which those parties will provide such information, to be unsupported by any probative material placed before me. Neither the agency nor the third party has attempted to identify the specific, detailed and in-depth information which has purportedly been provided to the Minister, over and above the kind of information which is required under the terms of the Agreement. Aside from the fact that the Agreement only affects the parties to it, I do not accept that businesses engaged in significant resource development would be likely to prejudice their own commercial interests by refusing to provide information to the Government or to an agency, in accordance with the terms of an agreement negotiated between the State and the business concerned, and which has been or will be ratified by an Act of Parliament.

67. Pursuant to s.102(1) of the FOI Act, the onus is on the agency to establish that its decision was justified or that a decision adverse to another party should be made. Similarly, pursuant to s.102(2) of the FOI Act, the onus is on the third party to establish access should not be given or that a decision adverse to another party should be made. In this instance, I do not consider that there is any probative material before me from the agency or the third party upon which

I could reach the conclusion that there are real and substantial grounds for believing that disclosure of the disputed matter could reasonably be expected to prejudice the ability of the Government or the agency in the future to obtain information required under a State Agreement

68. In that regard, I refer the agency and the third party to the comments of Owen J, in *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at page 573, in relation to a claim for exemption under clause 4(3) of the FOI Act, where His Honour expressed the nature of the onus the agency bears as follows:

> *"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."*

69. For the reasons set out above, I consider that neither the agency nor the third party has established the requirements of paragraph (b) of clause 8(2) in respect of the disputed matter in Documents 2, 48, 51, 52, 58, 63, 64, 66, 73, 76, 77, 79 and 80. Accordingly, I find that the disputed matter in those documents is not exempt under clause 8(2) of Schedule 1 to the FOI Act.

(b) Clause 1(1)(d) – Cabinet and Executive Council

70. The agency claims that Documents 76, 77 and 78 are exempt under clause 1(1)(d)(i) of Schedule 1 to the FOI Act. Clause 1, so far as is relevant, provides:

> ***"1. Cabinet and Executive Council***
>
> ***Exemptions***
>
> *(1) Matter is exempt matter if its disclosure would reveal the deliberations or decisions of an Executive body, and, without limiting that general description, matter is exempt matter if it -*
>
> *…*
>
> *(d) was prepared to brief a Minister in relation to matters -*
>
> *(i) prepared for possible submission to an Executive body; or*
>
> *…*
>
> ***Limits on exemptions***

> *(2) Matter that is merely factual, statistical, scientific or technical is not exempt matter under subclause (1) unless -*
>
> *(a) its disclosure would reveal any deliberation or decision of an Executive body; and*
> *(b) the fact of that deliberation or decision has not been officially published.*
>
> …
>
> *(5) Matter is not exempt by reason of the fact that it was submitted to an Executive body for its consideration or is proposed to be submitted if it was not brought into existence for the purpose of submission for consideration by the Executive body."*

71. The term "Executive body" is defined in clause 1(6) to mean Cabinet; a committee of Cabinet; a subcommittee of a committee of Cabinet; or Executive Council. Clearly, the purpose of the exemption in clause 1 is to protect the confidentiality of, *inter alia*, Cabinet discussions and consultations between Ministers: see my decision in *Re Environmental Defenders Office WA (Inc) and Ministry for Planning* [1999] WAICmr 35. Amongst other things, the maintenance of Cabinet solidarity and collective responsibility for its decisions are generally accepted as essential to the Westminster system of government. The FOI Act recognises that in clause 1 and in the range of documents that are protected from potential disclosure by this exemption.

72. Documents 76 and 77 are briefing notes for the Minister. The agency claims that they were prepared to brief the Minister for a Regional Cabinet Meeting to be held at Derby. Document 78 is a single page memorandum of transmission from the Chief Executive Officer of the agency to the Minister. The agency submits that Document 78 is evidence of the fact that Documents 76 and 77 were used to brief the Minister about matters that were potentially to be discussed at the Regional Cabinet Meeting at Derby. The agency claims that the status of the Argyle Diamond Mines Joint Venture was a matter likely to be discussed at that meeting because it was a topical matter in the Kimberley Region. The agency claims the exemption applies to Documents 77 and 78 because the Minister requested briefing notes to ensure that he was fully informed and in a position to comment on matters that may possibly arise at the Regional Cabinet Meeting and that those documents were provided to him for that purpose.

73. There is nothing in Documents 76, 77 and 78, and nothing has been put before me by the agency, to establish that they were prepared to brief the Minister in relation to matters prepared for possible submission to an Executive body. Clearly, Documents 76 and 77 were prepared to brief the Minister about matters that may have arisen for discussion during the Cabinet meeting at Derby, or in meetings with local representatives, but none of the material before me indicates that Cabinet was required to make a decision or to formulate policy in respect of such matters. In my view, Document 78 is not a briefing note for the Minister. It is a transmission memorandum and nothing more.

74. The terms of the exemption in clause 1(1)(d)(i) require the agency to establish that the disputed documents were prepared to brief the Minister in relation to matters prepared for submission or possible submission to an Executive body. According to the plain words of the exemption clause, the briefing must be about matters prepared for possible submission to an Executive body, as defined. In my view, it does not require that the briefing be about matters that might be discussed in Cabinet. I consider that a discussion about topical matters that may or may not arise during a regional visit by Cabinet and the submission or possible submission of a matter to Cabinet for the express purpose of Cabinet considering it or making a decision with respect to it are two entirely different concepts.

75. According to the Australian Concise Oxford Dictionary, the meaning of "submit" includes "to present for consideration or decision". However, there is nothing in the documents themselves or from the agency to support the agency's claim that the Minister was being briefed about matters that were prepared for possible submission to Cabinet for its consideration or about which Cabinet would be required to make a decision. To the contrary, the agency's submissions state that Documents 76 and 77 were used to brief the Minister in relation to matters that were to be "potentially" discussed at the Derby Regional Cabinet Meeting. In those circumstances, it appears to me that the only action required of the Minister was to note the contents of the documents.

76. There is no evidence before me that the subject matter of those briefing notes was listed as an agenda item for the Cabinet meeting. My office made further inquiries with the Cabinet Secretariat Office at the Ministry of the Premier and Cabinet about this aspect. My office was advised that the subject matter of those briefing notes was not listed as an agenda item on the formal Cabinet agenda. My office was further informed that those briefing notes were collated, together with similar briefing notes received from other Ministers, into a background briefing paper that was provided to the Ministers who attended the Derby Regional Cabinet Meeting, as a brief on topical, local issues that may have been raised for discussion in meetings between the Cabinet and representatives of the local community, for example, the local government body, during the visit to the region.

77. Therefore, in my view, the agency has not established that its decision to refuse access to Documents 76, 77 and 78 under clause 1(1)(d)(i) was justified. Accordingly, I find that Documents 76, 77 and 78 are not exempt under clause 1(1)(d)(i).

(c) Clause 4 – Commercial or business information

78. Exemption is claimed for the disputed matter in Documents 2, 48, 51, 52, 58, 63, 64, 66, 73, 76, 77, 79 and 80 under clauses 4(2) and 4(3). Clause 4, so far as is relevant, provides:

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

Clause 4(2) – information that has a commercial value

79. Clause 4(2) is concerned with the protection from disclosure of information which is not a trade secret but which has a "commercial value" to person. The exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim under clause 4(2).

80. In my view, information may have a "commercial value" if it is valuable for the purpose of carrying on the commercial activities of a person or organization: see *Re Precious Metals Australia Ltd and Department of Minerals and Energy* [1997] WAICmr 12; *Re Jones and Jones and the Town of Port Hedland* [2000] WAICmr 23. I also consider that it is by reference to the context in which the information is used, or exists that the question of whether or not particular information has a "commercial value" to a person may be determined.

The submissions

81. The third party claims that Documents 2, 48, 58, 63 and 66 contain information that is commercially valuable to the Joint Venturers because those documents would, if disclosed, give the complainant unique access to an assessment made by the Joint Venturers of the viability of Ellendale, an assessment which the third party claims is still relevant despite the passage of time, because very few of the circumstances and results examined and assessed in those documents have altered. The third party informs me that it has, on behalf of the Joint Venturers, recently sought expressions of interest from parties interested in developing Ellendale, followed by a request for proposals.

82. The third party submits that it is essential for it to exercise control over the release of information about Ellendale, if it is to successfully attract commercially sound responses from interested parties. The third party claims that disclosure to the complainant (and potentially the market) of the disputed matter in Documents 2, 48, 58, 63 and 66, without any context or explanation, and at a time when steps are being taken to obtain proposals to develop Ellendale could reasonably be expected to diminish the commercial value of the information because it would give the complainant and other parties, an unfair competitive advantage in assessing and responding to the invitation to submit proposals to the Joint Venturers. The third party also submits that, if the disputed matter is disclosed, then it could affect the price that other parties may be prepared to pay for the right to develop Ellendale.

83. The submissions made to me by the third party under clause 4(2) are almost identical to the submissions made to me by the third party in relation to the disputed documents that were the subject of my decision in *Re Kimberley*. Nothing new has been placed before me by the third party in respect of this matter that was not before me in *Re Kimberley*.

84. The agency claims that the disputed matter in Documents 2, 73, 76, 77, 79 and 80 is exempt under clause 4(2) because it is, by its nature, commercially sensitive information and of particular commercial value to the third party because:

- it records the conclusions reached by the Joint Venturers about the commercial viability of Ellendale and that information potentially affects the future operation and development of Ellendale;
- the information is the result of efforts and analysis by the Joint Venturers involving the expenditure of significant money;
- release of the disputed matter is likely to affect the value that a third party would be willing to pay for development rights for Ellendale; and
- the information may be used by competitors of the Joint Venturers for their own commercial advantage and to the disadvantage of the Joint Venturers.

85. The agency submits that the disputed matter in Documents 2, 73, 76, 77, 79 and 80 has commercial value to the Joint Venturers because it comprises intellectual property developed by the Joint Venturers that will assist another company to develop the Ellendale deposits and because it reveals details and findings of feasibility studies. The agency further submits that the commercial value of the disputed matter is also evidenced by the desire of other companies, such as the complainant, to use that information to its commercial advantage in the development of Ellendale.

86. Notwithstanding the agency's claims in that regard, no probative material has been put before me by the agency to substantiate its claims. Further, the agency has not identified the commercial competitors of either the third party or the Joint Venturers, nor has it been explained to me by the agency how those competitors could be expected to use the disputed matter to their commercial advantage over that of the third party or the Joint Venturers.

87. The agency also submits that, under the proposed tender for the development of Ellendale, the successful tenderer will have the exclusive right to mine the Ellendale deposits and that disclosure of the disputed matter prior to the awarding of the tender contract may work to the detriment of the Joint Venturers, because it may prejudice the tender process and substantially reduce the value of the Ellendale deposits which the Joint Venturers have spent a substantial amount of money exploring and sampling. The agency submits that the tender process should be a level playing field and that the disclosure of the disputed matter may prejudice that process by placing one tenderer at an advantage over the others and, thereby, potentially lowering the price for the contact.

88. However, the agency's claims do not recognise the fact that, if the disputed documents are not exempt and they are subsequently disclosed, the disclosure of those documents is, effectively, disclosure to the whole world, including all of the other potential tenderers (see the comments of Woodward J in *News Corporation v National Companies and Securities Commission* (1984) 57 ALR 350 at 559). Similarly, if, as the agency claims, disclosure of the disputed documents could possibly prejudice the tender process then, in my view, it is open to the agency to release relevant information to all potential tenderers, thereby ensuring that the tender process is a level playing field.

Consideration

89. I have considered and taken into account the kind of information that has already been disclosed to the complainant by the agency, in documents that have been released to the complainant, either in full or in edited form, and I have taken into account the matters referred to in paragraphs 18-21 above.

90. Taking that into account, I do not accept that any commercial value of the disputed matter lies in its continued secrecy. There appears to me to be little of the disputed matter that has not already been disclosed to the complainant or

made public either directly or indirectly. However, I cannot give my reasons or further explanation for that conclusion without possibly breaching my obligation under s.74(2) of the FOI Act. Even if the disputed matter has a commercial value (which I do not accept has been established) to the third party or to the Joint Venturers, then I do not consider that the value of that information could reasonably be expected to be destroyed or diminished by its disclosure.

91. In my view, the claims of the agency and the third party about the likely effects of disclosure are merely speculative and are not supported by any material provided to me. I am not satisfied that a valid claim for exemption under clause 4(2) exists. Accordingly, I find that the disputed matter in Documents 2, 48, 51, 52, 58, 63, 64, 66, 73, 76, 77, 79 and 80 is not exempt under clause 4(2).

Clause 4(3) – information about business, professional, commercial or financial affairs

92. The exemption in clause 4(3) deals with information (other than trade secrets or information referred to in subclause (2)), about the business, professional, commercial or financial affairs of any person, including a company or incorporated body. It provides exemption for matter of that kind if its disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

93. The exemption in clause 4(3) recognises that the business of government is frequently mixed with that of the private sector and that neither the business dealings of private bodies, nor the business of government, should be adversely affected by the operation of the FOI Act. The exemption in clause 4(3) consists of 2 parts and both paragraphs (a) and (b) must be satisfied before a claim for exemption is established.

94. Having examined Documents 2, 48, 51, 52, 58, 63, 64, 66, 73, 76, 77, 79 and 80, I accept that those documents contain some information about the business and commercial affairs of the third party and the Joint Venturers, in respect of Ellendale. Accordingly, I accept that the requirements of clause 4(3)(a) are established. However, the requirements of paragraph (b) must also be satisfied before a *prima facie* claim for exemption under clause 4(3) is established.

95. The third party made no further submissions to me in support of its claims for exemption and relies upon the submissions made in support of its claims for exemption under clause 4(2) and clause 8(2). In summary, the third party claims that disclosure:

    (i) is likely to affect the price a third party is willing to pay for the right to develop Ellendale;

(ii) has the potential to damage the commercial interests of the Joint Venturers who have invested many millions of dollars in developing a valuable State resource; and

(iii) may give a commercial advantage to bodies in commercial competition with the Joint Venturers and cause commercial disadvantage to the Joint Venturers.

96. The third party made submissions of an almost identical nature to me in *Re Kimberley* and I rejected them for the reasons given in paragraphs 63-65 of that decision. I refer to those reasons and expressly incorporate them as part of my reasons for decision in this matter. For similar reasons, I reject the claims on this occasion.

97. In support of its claim that disclosure of the disputed matter could reasonably be expected to prejudice the future supply of information the agency relies on the submissions made to me in relation to the claims for exemption under clause 4(2), as set out in paragraphs 84-87 above. The agency claims that those submissions demonstrate the commercial detriment that may be suffered by the Joint Venturers if the disputed matter were to be disclosed and the likely effects on the ability of the agency to obtain information of that kind in the future. For the reasons given in paragraphs 61-68 and paragraphs 89-91 above, I do not accept those claims.

98. For the reasons given, I am not persuaded that the agency or the third party has satisfied the requirements for exemption under clause 4(3)(b) for the disputed matter. Accordingly, I find that the disputed matter in Documents 2, 48, 51, 52, 58, 63, 64, 66, 73, 76, 77, 79 and 80 is not exempt under clause 4(3).

(d) Clause 6(1) – Deliberative processes

99. The agency claims that Documents 61, 62, 76, 77, 79 and 80 are exempt under clause 6(1). Clause 6, so far as is relevant, 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."

100. To establish an exemption under clause 6, the agency must satisfy the requirements of both paragraphs (a) and (b) of subclause 1 of the 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 that matter would, on balance, be contrary to the public interest.

101. In my view, the deliberative processes of an agency are its "thinking processes"; the process of reflection, for example, on the wisdom and expediency of a proposal, a particular decision or course of action: *Re Waterford and Department of the Treasury (No.2)* (1984) 5 ALD 588; see also the comments of Templeman J in *Ministry for Planning v Collins* (1996) 93 LGERA 69 at 72.

102. However, the Tribunal in *Re Waterford* made it clear that not all documents will fall within the terms of clause 6. At paragraphs 59-60, the Tribunal said:

> *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 to be 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 an 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'…"*

Clause 6(1)(a) – the nature of the information

103. Documents 61 and 62 are internal agency documents created when a particular course of action in respect of Ellendale was being considered as an option. In my view, Documents 61 and 62 contain advice and opinions that were recorded as part of the agency's deliberative processes. I accept that the disclosure of Documents 61 and 62 would reveal information of the kind described in clause 6(1)(a).

104. Documents 76, 77, 79 and 80 are briefing notes prepared by the agency to brief the Minister for his attendance at the Regional Cabinet Meeting at Derby. Nothing in any of those documents indicates that they were prepared, recorded or obtained in the course of, or for the purposes of, the deliberative processes of the government, a Minister or the agency. Rather, it appears to me that those documents were prepared to merely inform the Minister about the status of issues that may have arisen for discussion with local representatives in the

Kimberley. I consider that Documents 76, 77, 79 and 80 are merely routine administrative documents. In my opinion, the disclosure of Documents 76, 77 79 and 80 would not reveal information of the kind described in clause 6(1)(a). However, even if it would, the agency must also establish that disclosure would, on balance, be contrary to the public interest.

Clause 6(1)(b) – contrary to the public interest

105. The agency submits that it would be contrary to the public interest to disclose Documents 61, 62, 76, 77, 79 and 80 for all of the reasons previously given in relation to its claims under clauses 4 and 8, and also because the disclosure of information provided to the agency by the Joint Venturers will prejudice the quality of future information that it will receive. However, for the reasons given in paragraphs 61-68 above, I do not accept that claim.

106. The agency also submits that an important public interest factor weighing against disclosure is the fact that the deliberative processes surrounding the tender process are not yet complete. The agency submits that inadequate weight has been given to the public interest in ensuring a fair tender process for the development of State owned resources and that there is a risk that the tender process would be prejudiced by the premature release of documents associated with the development of those resources, an activity which is being conducted in the interests of the public.

107. In support of that claim, the agency informs me the tender process is being conducted by the third party and not by the agency. However, I am advised that the agency is closely monitoring the tender process to ensure that it is fair and reasonable according to an undertaking given by the third party to enable the agency to keep the Minister informed and to give the Minister the opportunity to comment on the proposals. The agency submits that the assessment of the tender process by the Minister and the agency forms part of ongoing deliberations within the meaning of clause 6(1) and that that deliberative process will only end when the tender process concludes and the Minister is satisfied that it has been a fair and reasonable process.

108. Having examined the contents of Documents 61 and 62, I am not persuaded that disclosure of those documents would have any effect, adverse or otherwise, on the tender process currently being conducted by the third party. In my view, there is nothing on the face of those documents to establish any grounds for the agency's claim that the tender process could be prejudiced by their disclosure. Further, nothing has been put before me by the agency to explain how the tender process could be prejudiced or in what way that might occur.

109. It appears to me that the subject matter of the communications in Documents 61 and 62 has been overtaken by subsequent events and I am not persuaded that any public interest would be adversely affected by the disclosure of those documents. Accordingly, I find that Documents 61 and 62 are not exempt under clause 6(1).

110. Documents 76, 77, 79 and 80 are briefing notes provided to the Minister by the agency. They contain some information about Ellendale. However, those documents pre-date the Minister's decision to approve the Joint Venturers' development proposal and I consider that the Minister's deliberations about that development proposal have concluded. Further, none of the disputed matter in any of those documents relates to the tender process. I do not accept the claim that the disclosure of Documents 76, 77, 79 and 80 would have any detrimental effect on the tender process, nor do I accept that disclosure would, for any other reason, be demonstrably contrary to the public interest.

111. In the case of the exemption in clause 6, the complainant is not required to demonstrate that disclosure would be in the public interest; the complainant is entitled to access unless the agency can establish that disclosure would be contrary to the public interest. For the reasons given, I am not satisfied that disclosure would, on balance, be contrary to the public interest. Accordingly, I find that Documents 61, 62, 76, 77, 79 and 80 are not exempt under clause 6(1).

(e) Clause 7 – Legal professional privilege

112. The third party claims that Document 51 and the matter deleted from Document 52 are exempt under clause 7. Document 51 consists of two letters in draft form. Document 52 is a covering letter from an employee of the third party to an officer of the agency and it includes an attachment. The attachment consists of copies of Document 51.

113. Clause 7 provides that matter is exempt matter if it would be privileged from production in legal proceedings on the ground of legal professional privilege. Legal professional privilege protects from disclosure confidential communications between a client and his or her legal adviser which are made or brought into existence either for the dominant purpose of giving or seeking legal advice or for use in existing or anticipated legal proceedings: *Esso Australia Resources Ltd v The Commissioner of Taxation* [1999] 74 ALJR 339.

The third party's submission

114. The third party submits that Documents 51 and 52 were brought into existence following the lodgement of Plaint 15/990 by the complainant, in the Broome Mining Warden's Court in August 1999. The third party submits that, in response to that plaint, it consulted its legal advisers. The third party further submits that the course of action proposed in the covering letter, that forms part of Document 52, and the two attached draft letters, which are copies of Document 51, forms part of, and reflects, that legal advice. Finally, the third party submits that the draft letters formed part of confidential communications created by the third party's legal advisers in response to the lodgement of Plaint 15/990.

115. The third party submits that, although it provided copies of Documents 51 and 52 to the agency, that act does not amount to a waiver of privilege on the part of the third party. Rather, the third party submits that that act amounts to a limited

disclosure to the agency, which was a necessary consequence of the State having powers and responsibilities under the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981,* to take action to resolve the matter triggered by the lodgement of Plaint 15/990.

The complainant's submission

116. The complainant submits that one of the basic requirements of any document for which legal professional privilege is claimed is that the document is confidential between the solicitor and the client. The complainant submits that, if a document or the information in a document is revealed to a third party, the privilege is waived. The complainant further submits that legal professional privilege for documents produced for a non-litigious purpose is very limited and that documents cannot be shared between a number of parties (without that privilege being lost) unless their interests are identical and the legal advice in question is provided to all of them.

117. The complainant submits that the interests of the State and the third party are very different and that it appears that the third party is trying to claim legal professional privilege for documents in a situation where the documents or information has been divulged to a third party, in this case, the agency. The complainant submits that the decision in *Conlon v Conlon* (1952) 2 All ER 462 is authority for the proposition that making privileged information available to a third party, whatever the reason, results in the privilege that would otherwise attach to the document or information being lost.

Consideration

118. I have examined Documents 51 and 52 and considered the submissions relating to the third party's claim for exemption under clause 7. I accept that the third party sought legal advice from its legal advisers following the lodgement of Plaint 15/990. I also accept that Document 51 and part of Document 52 were prepared for the third party by its legal advisers and at the request of the third party. Taking into account the information before me concerning the events leading up to the creation of Documents 51 and 52, I accept that the draft letters form part of a confidential communication passing between the third party and its legal advisers made for the dominant purpose of giving or seeking legal advice, or for use in existing or anticipated legal proceedings. In my view, the draft letters would be privileged from production in legal proceedings on the ground of legal professional privilege.

119. However, there is no material before me to establish that the letter dated 3 September 1999 from the third party to the agency, which forms part of Document 52, was prepared by the third party's legal advisers or that it is a privileged communication between the third party and its legal advisers. That letter is, on its face, a request from an employee of the third party to an officer of the agency, suggesting that certain action be taken in respect of Ellendale. I am aware that an edited copy of that letter has been released to the complainant by the agency. Although that letter refers to the fact that the third party has taken

legal advice, the disputed matter, in my view, does not record the substance of the legal advice.

120. I do not consider that the covering letter, dated 3 September 1999, which forms part of Document 52, would be privileged from production in legal proceedings on the ground of legal professional privilege. Accordingly, I find that the letter dated 3 September 1999 is not exempt under clause 7.

Waiver

121. I have consider the decision in *Conlon's* case in respect of the claims that privilege has been waived. I do not consider that decision to be authority for the proposition put to me by the complainant. I consider that *Conlon's* case deals with the question of whether a plaintiff is required to answer a defendant's interrogatories concerning whether the plaintiff had authorised his solicitors to negotiate a settlement of his claim. The single issue considered by the Court of Appeal in *Conlon's* case was whether legal professional privilege extends to communications passing between a client and his solicitor, which the client had instructed his solicitor to repeat to the other party. In the circumstances, the Court decided that the rule as to privilege did not extend to such communications.

122. I dealt with the issue of waiver of privilege in my decision in *Re Weeks and Shire of Swan* [1995] WAICmr 5 at paragraphs 22-27. Waiver occurs when the person entitled to privilege performs an act which is inconsistent with the confidence preserved by it. The consequence of waiver where it occurs is that the person becomes subject to the normal requirements of disclosure of the communication: Byrne D and Heydon JD, *Cross on Evidence*, Butterworths, 4th Edition (1991), at paragraph 25010.

123. Waiver of privilege may be express or implied. The question of whether or not there has been an implied waiver of privilege most often arises when there has been a limited disclosure of the contents of the privileged material (as in this case) and the question will turn upon whether, in all the circumstances, the particular conduct is inconsistent with the maintenance of the confidentiality the privilege is intended to protect: *Mann v Carnell* (1999) 168 ALR 86.

124. In the circumstances of this matter, I do not consider that the disclosure of the draft letters (Documents 51 and 52) to the agency by the third party to have been an act by the third party amounting to express waiver of the privilege attaching to those documents. The question, therefore, is whether waiver should be imputed from the act of the third party disclosing the draft letters to the agency. What brings about such a waiver is the inconsistency which the courts, informed by considerations of fairness, perceive between the conduct of the client and maintenance of the confidentiality: *Mann v Carnell*.

125. In this instance, the legal advice sought and received by the third party related directly to a specific issue concerning to the State's powers and responsibilities

under the Agreement. The seeking of that advice was triggered by the complainant's lodgement of Plaint 15/990 in the Broome Warden's Court. In my opinion, the disclosure of the privileged communications by the third party to the other party to the Agreement, for the express purpose of requesting the agency take certain action in accordance with the State's responsibilities and obligations under the Agreement, and in circumstances where both parties to the Agreement believed that all communications between them were confidential, is not conduct inconsistent with the maintenance of the privilege and, in my opinion, did not, therefore, amount to an implied waiver of the privilege.

126. Accordingly, I find that Document 51, and the draft letters forming part of Document 52, are exempt under clause 7 of Schedule 1 to the FOI Act.

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