OFFICE OF THE INFORMATION COMMISSIONER (QLD))) S 94 of 1993 (Decision No. 94009)

Participants:

PETER GERARD CANNON
Applicant

- and -

AUSTRALIAN QUALITY EGG FARMS LIMITED
(A.C.N. 060702034)
Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - matter concerning the respondent's commercial relationship with a customer and with another body engaged in the marketing of eggs - whether exempt matter under s.45(1) of the *Freedom of Information Act 1992 Qld* - explanation of the requirements of s.45(1)(a), s.45(1)(b), s.45(1)(c) and s.45(2) of the *Freedom of Information Act 1992 Qld* - explanation of the characteristics of "trade secrets" - words and phrases: "commercial value"; "could reasonably be expected to".

FREEDOM OF INFORMATION - whether all documents falling within the terms of the applicant's FOI access request have been identified and dealt with - interpretation of the terms of the applicant's FOI access request - need for applicants to describe with precision the documents to which access is sought - duty imposed on agencies to assist applicants to make FOI access applications in a way that complies with s.25 of the *Freedom of Information Act 1992 Qld* - desirability of consultation with applicant where the terms of an FOI access request are imprecise or ambiguous - explanation of the requirements of s.25 of the *Freedom of Information Act 1992 Qld*.

Freedom of Information Act 1992 Qld s.5(1)(a), s.5(1)(b), s.5(2), s.25(2), s.25(3), s.25(3)(a), s.25(3)(b), s.25(4), s.26, s.27(3), s.32, s.40(c), s.40(d), s.44(1), s.44(2), s.45(1)(a), s.45(1)(b), s.45(1)(b)(i), s.45(1)(c), s.45(1)(c)(i), s.45(1)(c)(ii), s.45(2), s.46(1)(a), s.46(1)(b), s.47, s.49, s.52, s.71(1), s.71(1)(b), s.73(3), s.80, s.88(1)
Freedom of Information Act 1982 Cth s.22, s.43(1)(a), s.43(1)(b), s.43(1)(c), s.43(1)(c)(ii)
Freedom of Information Act 1989 NSW s.32(1)(b), s.32(1)(c)
Freedom of Information Act 1982 Vic s.34, s.34(1)(a), s.34(4)(a)(ii)
Acts Interpretation Act 1954 Qld s.36
Business Names Act 1962 Qld
Commonwealth of Australia Constitution Act s.92
Egg Industry (Restructuring) Act 1993 Qld s.3, s.4, s.12, s.13(2), s.42(1), s.42(2), s.42(3)
Primary Producers' Organisation and Marketing Act 1926 s.1A, s.2, s.9(i), s.9(2), s.11A, s.11(3A), s.13, s.13(i), s.13(iiiA), s.13(iiiA)(a), s.13(iv), s.14, s.14F, s.15(1), s.15(3), s.15(7), s.20(1), s.20(2), s.20(3)

DECISION

1. The decision under review (being the decision of Mr K Sheather dated 14 April 1993) is set aside.

2. In substitution for it, I decide that the applicant is entitled to have access to the three documents identified by the respondent as falling within the terms of the applicant's FOI access request dated 18 December 1992, subject to the deletion of the following parts of the memorandum dated 14 August 1992 from the Director, Strategic Policy Unit, Department of Primary Industries, to the Minister for Primary Industries on the subject "Approval for Use of Trading Name by Egg Marketing Board", which comprise exempt matter under s.45(1)(c) of the *Freedom of Information Act 1992 Qld*:

   (a) the last sentence of the third paragraph of the memorandum;
   (b) the last six words of the fourth paragraph of the memorandum;
   (c) the last fourteen words of the fifth paragraph of the memorandum; and
   (d) the last six words of the eighth paragraph of the memorandum.

Date of Decision: 30 May 1994

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INFORMATION COMMISSIONER

TABLE OF CONTENTS

Page

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REASONS FOR DECISION

Background

1. The applicant, a solicitor, seeks review of a decision refusing him access to documents. The decision was made by the Egg Marketing Board (South Queensland), an agency which has ceased to exist but the functions of which have been taken over by the above-named respondent (the process by which this occurred is explained below at paragraph 98).

2. The applicant's FOI access application dated 18 December 1992 was originally made to the Department of Primary Industries, but on 8 February 1993 it was transferred to the Egg Marketing Board (the Board) pursuant to s.26 of the *Freedom of Information Act 1992 Qld* (referred to in these reasons for decision as the FOI Act or the Queensland FOI Act) on the basis that the documents sought were more closely related to the functions of the Board. The applicant sought access to:

> *All documents that relate to, either directly or indirectly, the approval by the Minister for Primary Industries, pursuant to s.11(3A)* Primary Producers' Organisation and Marketing Act 1926 *in favour of the Egg Marketing Board (South Queensland).*

3. The FOI access application did not specify the nature or identity of the particular Ministerial approval to which it was directed. It should be noted that s.11(3A) of the *Primary Producers' Organisation and Marketing Act 1926* (the PPOM Act) provides that a primary producers' marketing board may, subject to the approval of the Minister, carry on business under a business name registered under the *Business Names Act 1962 Qld*.

4. The initial decision, made on behalf of the Board by Ms M Ansell, was dated 3 March 1993. Ms Ansell's decision letter said: *"Whilst your* [FOI access] *request did not identify a specific approval it has been assumed by this agency that you are referring to the approval for the Egg Marketing Board to use the name 'Smoothshell', granted in August 1992."* Ms Ansell identified three documents as being responsive to the applicant's FOI access request. She decided to grant access to the three documents, but with some segments of two of the documents deleted (in accordance with s.32 of the FOI Act) on the basis that those segments comprised exempt matter under s.45(1)(c) of the FOI Act.

5. By letter dated 5 March 1993, the applicant sought internal review under s.52 of the FOI Act of the decision "to delete exempt matter from the disclosed documents". That letter made no complaint to the effect that the Board had failed to identify and deal with all documents that fell within the terms of the applicant's FOI access request. In fact, the applicant's letter of 5 March 1993 attached a fresh FOI access application for "documents that relate to any agreement between the Egg Marketing

Board and Tamworth Egg Producers Co-operative for sale of their Queensland business operations". The outcome of that separate FOI access application has not been raised for my consideration by an application for review under Part 5 of the FOI Act.

6. By letter dated 14 April 1993, the Board's internal reviewer, Mr K Sheather, advised that he had reviewed the decision conveyed to the applicant and had decided to affirm the decision of the initial decision-maker. The applicant applied for external review under Part 5 of the FOI Act, by letter dated 17 May 1993.

Interpretation of the Terms of the Applicant's FOI Access Request

7. Mr Cannon's application for external review attempted to raise for the first time an issue as to the "materiality and sufficiency of the disclosure" made by the Board in response to his FOI access application. The application for external review says:

> *The* [FOI access] *application has been made in general terms and relates to the circumstances surrounding the approval given by the Minister for Primary Industries pursuant to section 11(3A) Primary Producers Organisation and Marketing Act 1926.*
>
> *The extent and reasons for the enquiry may travel some distance beyond the strict approval granted by the Minister.*

If that was the applicant's intention the terms of his FOI access request were poorly framed to achieve it.

8. The terms in which an FOI access application is framed set the parameters for an agency's response under Part 3 of the FOI Act, and in particular set the direction of the agency's search efforts to locate all documents of the agency which fall within the terms of the FOI access request. The search for relevant documents is frequently difficult, and has to be conducted under tight time constraints. Applicants should assist the process by describing with precision the document or documents to which they seek access. Indeed the FOI Act itself makes provision in this regard with s.25(2) not only requiring that an FOI access application must be in writing, but that it must provide such information concerning the document to which access is sought as is reasonably necessary to enable a responsible officer of the agency to identify the document.

9. While s.25(2) casts an obligation on the applicant to provide sufficient information to clearly identify what is being sought, s.25(3) casts a corresponding duty on an agency or Minister to assist a person to make an FOI access application in a way that complies with s.25. That duty applies to an agency or Minister both before (see s.25(3)(a)) and after (see s.25(3)(b)) the receipt of an FOI access application. (Thus s.25(3) should encourage intending applicants to contact an agency's FOI Co-ordinator prior to making an FOI access request to discuss the nature of the documents being sought and obtain assistance in the framing of the request. This does not seem to occur very often - many applicants are simply unaware that agencies are under a duty to assist them to make applications in the correct manner, while others are suspicious or distrustful of efforts by an agency to steer the direction of their intended FOI access applications.)

10. If an FOI access application is framed in terms which are imprecise or ambiguous, a question of interpretation arises. Whenever a question arises as to the interpretation of a written document, the object of the exercise is to ascertain the author's intended meaning. The question is not necessarily to be approached in the same manner as the interpretation of a statute or legal document. Unlike the words of a statute, it is possible to seek clarification of the intended meaning of an FOI access request direct from its author, and indeed to negotiate with the author to reach agreement on the phrasing of the FOI access request or a clear understanding of precisely what information is being sought (see also s.27(3) of the FOI Act). Such a practice on the part of FOI administrators is to be

encouraged, if undertaken in furtherance of the object of the FOI Act (i.e. "to extend as far as possible the right of the community to have access to information held by Queensland government"). It can rarely be appropriate to apply legal construction techniques to the words of an FOI access request in preference to consulting with the author of the words to clarify the author's intended meaning and agree upon more precise wording for the terms of the FOI access request. This is within the intended spirit of the administration of the FOI Act, though it is only a matter of obligation for FOI administrators in the circumstances contemplated by s.25(3) and (4). Likewise an applicant is not obliged to agree to unwanted changes in the terms of an FOI access application, nor should the applicant be pressured to do so, provided that the FOI access application complies with the requirements of s.25(2).

11. I have noted in paragraph 3 above that Mr Cannon's FOI access application was imprecise in that it failed to specify the nature or identity of the particular Ministerial approval under s.11(3A) of the PPOM Act to which it was directed. The Board made an assumption in this regard, which must have been a correct assumption since it has not been challenged by the applicant. There is otherwise no ambiguity in the applicant's description of the subject matter in which he was interested, apart from any that is suggested by the use of the phrase "directly or indirectly".

12. The use of the phrase "directly or indirectly" in an FOI access application is particularly unhelpful. Either a document relates to a nominated subject matter or it does not. Too often when this phrase is used, the applicant really intends to seek access to documents relating to another identifiable subject matter, which in the applicant's mind is connected with the nominated subject matter. Sometimes the connection will be obvious to an FOI administrator receiving the access request, and I certainly would not wish to discourage FOI administrators from being as helpful as possible to an applicant in interpreting the ambit of an FOI access request. In my opinion, however, FOI administrators cannot ordinarily be expected to perceive the nature of an indirect connection between the subject matter specifically nominated in an FOI access request and another subject matter, which connection may be apparent to the mind of the applicant for access, but which the applicant has not been prepared to expressly describe in the FOI access application itself. Some reasonable regard must be had to the difficulties faced by an FOI administrator in undertaking searches for all documents in the possession or control of an agency that fall within the terms of an FOI access request. (It is also common in my experience to encounter FOI access requests in which an applicant seeks "all documents that relate to me directly or indirectly". While a search can be undertaken by reference to files bearing the applicant's name, if the applicant is aware of the existence of files that relate to the applicant but which are not likely to bear his or her name, the applicant should describe the nature of those files to assist the agency's search.)

13. The applicant suggested on external review that his FOI access application should be interpreted as extending beyond documents relating to the Ministerial approval to encompass documents relating to commercial transactions by which the Board acquired the business of the organisation which had previously been entitled to use the business name "Smoothshell". In my opinion that is not a reasonable interpretation of the terms of the FOI access request, which quite clearly focus on the Minister's approval under the particular statutory provision specified. Moreover, if that category of documents was being sought, it could have and should have been clearly spelled out. The applicant was advised by letter dated 19 May 1993 that it could not be seen how the agency's response was insufficient given the terms in which the FOI access request was framed. It was suggested that the most appropriate course would be for the applicant to lodge a fresh FOI access request spelling out in more precise detail the nature of the documents to which he was seeking access.

14. Where an applicant considers that an agency has failed (in its initial response to an FOI access request) to identify and deal with all documents which fall within the terms of the FOI access request, that issue (consistently with the spirit of the scheme of the FOI Act and in particular the obvious purpose underlying s.73(3)) should be raised in an application for internal review under

s.52 of the FOI Act. As noted at paragraph 5 above, Mr Cannon's application for internal review raised no issue of this kind. Nevertheless, there appears to be nothing in the relevant provisions of Part 5 of the FOI Act to prevent an applicant from raising a "sufficiency of search" issue for the first time on external review, provided that the applicant has sought internal review of the agency's initial decision, this being a prerequisite to the entitlement to apply to the Information Commissioner imposed by s.73(3). Provided s.73(3) has been complied with, the Information Commissioner has jurisdiction to investigate and review decisions of the kinds specified in s.71(1) which include "decisions refusing to grant access to documents in accordance with applications under s.25" (see s.71(1)(b)), which in turn must include the question of whether all documents of the relevant agency which fall within the terms of an application under s.25 have been identified and dealt with. Indeed the Information Commissioner is entitled to raise and deal with a sufficiency of search issue, even when it has not been raised by an applicant, given the terms of s.88(1) which provides:

> *88.(1) In the conduct of a review, the Commissioner has, in addition to any other power, power to -*
>
> *(a) review any decision that has been made by an agency or Minister in relation to the application concerned; and*
>
> *(b) decide any matter in relation to the application that could, under this Act, have been decided by an agency or Minister;*
>
> *and any decision of the Commissioner under this section has the same effect as a decision of the agency or Minister.*

15. Where it has become apparent to me in the course of investigating and reviewing a decision that an agency has failed to identify and deal with some documents which clearly fall within the terms of the applicant's initial FOI access request, I have regarded it as proper to make those documents subject to review and determination under Part 5 of the FOI Act, unless the applicant is able to indicate that access is not sought to those documents.

16. In the present case, however, the problem lies not with the sufficiency of search undertaken by the respondent for documents responsive to the terms of the applicant's FOI access request, but with the terms of the FOI access request itself. I do not see how I could determine that the Board's response to the applicant's FOI access request was insufficient given the terms in which the applicant's FOI access request was framed. The terms of that request focussed expressly on the approval given by the Minister for Primary Industries, pursuant to s.11(3A) of the PPOM Act, in favour of the Board (the relevant approval having apparently related to the use of the business name "Smoothshell"), and I am satisfied that the respondent has identified and dealt with all documents which relate to that approval.

The Review Process

17. The three documents identified by the Board as being responsive to the applicant's FOI access request were obtained and examined. In the light of issues raised at a conference with representatives of the Board, convened pursuant to s.80 of the FOI Act, the Board agreed to release some parts of the matter previously claimed to be exempt, and I authorised the Board to give the applicant access to that matter.

18. The matter then remaining in issue comprised parts of a memorandum dated 14 August 1992 from the Director, Strategic Policy Unit, of the Department of Primary Industries to the Minister for Primary Industries, on the subject: "Approval for use of trading name by Egg Marketing Board".

19. The Board was invited to lodge a written submission in support of its remaining claims for exemption. Specifically, the Board was requested to address the following matters:

(a) the extent to which the market for sale of eggs in Queensland, and for that matter New South Wales, is a commercially competitive environment;

(b) the facts and circumstances on which the Board bases its claim that release of the matter in issue would prejudice the commercial relationship between the Board and the customer mentioned in the matter remaining in issue; and

(c) the provisions of s.45(1)(c) of the FOI Act, specifying how each component of that exemption is satisfied in relation to the matter in issue, including the public interest balancing test.

20. Mr Sheather, who was the decision-maker on internal review, and the General Manager of the Board, subsequently left the employ of the Board. This occasioned some delay, but eventually the Board provided a short submission by letter dated 4 October 1993. In it, the Board agreed to the release of some more material from the memorandum dated 14 August 1992, and I have authorised the Board to give the applicant access to that material.

21. The Board's submission succinctly explained its reasons for wishing to withhold the remaining matter deleted from the memorandum dated 14 August 1992. It was not possible to provide the applicant with a copy of the Board's submission without disclosing the matter claimed to be exempt. However, the nature and effect of the Board's submission were paraphrased in a letter to the applicant dated 8 October 1993, in which I invited the applicant to provide a written submission setting out all facts, matters and circumstances, and any legal arguments, which he wished to rely upon to contend that the matter remaining in issue is not exempt from disclosure under the FOI Act.

22. It was discovered in November 1993 that the applicant had left the firm of solicitors of which he had been a partner, and had commenced to practise on his own account. A further copy of the letter of 8 October 1993 was forwarded to him at his new business address. No response had been received by 5 January 1994 when a further letter was forwarded to the applicant allowing until 21 January 1994 to lodge a written submission in support of his case, failing which the appeal would be determined in light of the available material. The applicant has not responded to that letter.

The Matter Remaining in Issue

23. The matter which still remains in issue at this stage (all of which is contained within the memorandum dated 14 August 1992 referred to in paragraph 18 above) can be divided into two categories. The first category comprises one sentence and three other parts of sentences, all of which refer to, and (with one exception) mention the name of, a major customer with which the Board had (and the respondent continues to have) commercial dealings, but which make assertions about the commercial relationship between that customer and the Board which are incorrect. The memorandum in issue was not prepared by the Board but by an officer of the Department of Primary Industries. I have been supplied with a letter signed by the Director-General of the Department of Primary Industries which acknowledges that the references to the named customer are incorrect. The respondent contends that disclosure of the information falling within the first category would sour the business relationship between the respondent and the customer concerned, and on this basis it could reasonably be expected that disclosure of the information would have an adverse effect on the business or commercial affairs of the respondent.

24. The second category comprises one sentence which refers to an ongoing business arrangement between the Board (and its successor, the respondent) and another body engaged in the marketing of

eggs. The respondent contends that disclosure of this information could reasonably be expected to adversely affect certain commercial activities of the other body, and to adversely affect marketing strategies which the respondent is pursuing.

The Relevant Provisions of the FOI Act

25. Subsections 45(1) and (2) of the FOI Act provide as follows:

> ***45.(1)*** *Matter is exempt matter if -*
>
> *(a) its disclosure would disclose trade secrets of an agency or another person; or*
>
> *(b) its disclosure -*
>
> *(i) would disclose information (other than trade secrets) that has a commercial value to an agency or another person; and*
>
> *(ii) could reasonably be expected to destroy or diminish the commercial value of the information; or*
>
> *(c) its disclosure -*
>
> *(i) would disclose information (other than trade secrets or information mentioned in paragraph (b)) concerning the business, professional, commercial or financial affairs of an agency or another person; and*
>
> *(ii) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of such information to government;*
>
> *unless its disclosure would, on balance, be in the public interest.*
>
> ***(2)*** *Matter is not exempt under subsection (1) merely because it concerns the business, professional, commercial or financial affairs of the person by, or on whose behalf, an application for access to the document containing the matter is being made.*

26. Subsections 45(3) and (4) are not relevant to the issues raised in this external review and will not be considered.

Overview of s.45(1) and (2)

27. Section 45(1) is the primary vehicle for reconciling the main objects of the FOI Act (i.e. promoting open and accountable government administration, and fostering informed public participation in the processes of government) with legitimate concerns for the protection from disclosure of commercially sensitive information.

28. Agencies and Ministers come into possession of commercially sensitive information in a variety of ways. At the most obvious level, government agencies are major consumers of goods and services supplied by the private sector, and by other government agencies. Commercially sensitive information can be acquired in the process of negotiating, and supervising the performance of, contracts for goods and services, and especially through the competitive tendering processes by

which government agencies commonly do business. Other government agencies manage programs for the provision of subsidies and incentives for various kinds of business activity, and those seeking such government assistance must supply information concerning their eligibility for benefits under the relevant government program. Moreover, a significant proportion of the activities of government involve the regulation of private sector business activity in the interests of the greater public good, with regulatory agencies commonly possessing coercive powers to compel the production of necessary information. Some examples include:

(a) industrial health and safety legislation;
(b) fair trading laws to combat the exploitation of consumers by deceptive practices;
(c) laws prohibiting anti-competitive trade practices to ensure that consumers obtain the benefits of fair competition in the market place;
(d) laws regulating the provision of credit, to prevent the exploitation of consumers who borrow from commercial lenders;
(e) laws regulating pollution to ensure that enterprises incur the costs of reducing pollution to levels which do not pose a danger to the health or safety of the public;
(f) laws regulating relations between employees and employers, including the regulation of remuneration for and terms and conditions of employment;
(g) regulation of entry to, and the standards of conduct of, many occupations and professions;
(h) the system of statutory licences, permits or approvals that are required for the carrying on of many commercial activities, or the use of land for particular purposes; and
(i) Queensland's longstanding system of regulation of the marketing of many kinds of primary produce.

29. In addition, it has become relatively common for governments to establish agencies to provide goods or services to the public on a commercial basis, sometimes from the position of being a monopoly provider, and sometimes in a competitive market environment. Those agencies may wish to guard their commercially sensitive information just as jealously as private sector business entities.

30. The avowed objects of the FOI Act of "enhancing government's accountability and keeping the community informed of government operations" (see s.5(1)(a) and (b) of the FOI Act) must also logically extend to facilitating an appropriate level of scrutiny of how well the functions of government referred to above are performed in the interests of the public. On the other hand, in s.5(2) of the FOI Act, the Queensland Parliament has explicitly recognised that the disclosure of particular information could be contrary to the public interest because its disclosure in some instances would have a prejudicial effect on the business affairs of members of the community in respect of whom information is collected and held by government. The provisions of the FOI Act itself are intended to strike a balance between those competing interests. Section 45(1) is the most important of the exemption provisions which provide a means of preventing disclosure of some kinds of business-related information. (Other relevant exemption provisions in this regard include s.46 and s.49.)

31. The legitimate concerns of business for the protection of commercially sensitive information acquired or generated by government agencies which are subject to freedom of information legislation, have been recognised from the earliest stages of the development of such legislation in this country. For instance it is recorded in the proceedings of the Senate on 11 September 1980 (at pages 810-811 of Hansard Parliamentary Debates) that the then Commonwealth Attorney-General, Senator Durack, said:

> *The business community is understandably concerned, in the light of experience in the United States, that information supplied to government by commercial enterprises should not be available to their competitors through freedom of information requests.*

32. However, the approach taken in the Commonwealth of Australia has not been one of total capitulation to concerns for the protection of business information held by government agencies; rather the approach has been *"to balance the interests of commercial undertakings which have supplied material to government agencies and the interests of members of the public in gaining access to that information"* (see the 1979 Report of the Senate Standing Committee on Constitutional and Legal Affairs, entitled "Freedom of Information" at p.267, paragraph 25.1). The 1979 Senate Report made the following observations (at p.268, paragraphs 25.5-25.6):

> *The Committee takes the view that there is no right to total corporate privacy. Business corporations are created under Federal and State laws and are properly subject to regulation by governments for the common good. A corollary of this is the public's right to know how well that regulation is being carried out on its behalf. In the words of Theodore Roosevelt, corporations "exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with those institutions". It would be totally unacceptable to allow a situation in which a corporation could prevent the public disclosure, for an indefinite period, of information provided by it to a government agency (in many cases with a view to receiving some benefit) simply by marking the documents in question as confidential. Yet this is a view which was put to us by a number of corporate witnesses.*
>
> *The Committee does not doubt, however, that the suppliers of commercially sensitive information should be afforded some protection against disclosure of material which falls within the categories listed in clause 32* [of the Commonwealth Freedom of Information Bill then under consideration]. *The difficulty lies, of course, in determining the extent of protection to be afforded so as not to negate the legitimate interests of other members of the public in gaining access to some material supplied by business organisations which the latter might prefer not to be disclosed.*

33. Peter Bayne in "Freedom of Information" (Law Book Company, 1984) endorsed the Committee's views (at p.194):

> *The general justifications for the FOI Act underline this approach. The considerable interaction between government and business, much of which protects business against unregulated competition, justifies close scrutiny of government's dealings with business. The Act, of course, is designed to facilitate such scrutiny. The argument for scrutiny applies whether or not the government body is doing business with a business enterprise, or whether it is regulating or supervising an enterprise. Regulatory agencies may be 'captured' by the businesses they regulate, a result partly due to intensive lobbying by these businesses of such agencies. Consumer or public interest groups are disadvantaged by the law and by their lack of finance to match the lobbying of the regulated businesses, and the Act could be a means to redress the balance. There is also an argument that freedom of information disclosure is desirable in order to ensure that regulation is equal between the regulated businesses.*

34. At the risk of over-simplification, the basic object of s.45(1) of the Queensland FOI Act is to provide a means by which the general right of access to documents in the possession or control of government agencies can be prevented from causing unwarranted commercial disadvantage to:

(a) persons carrying on commercial activity who supply information to government, or about whom government collects information; or

(b) agencies (according to the definition of the term "agency" in s.8 of the FOI Act) which carry

on commercial activities.

In s.45, the word "person" has the meaning given to it by s.36 of the *Acts Interpretation Act 1954 Qld*, i.e. "person" includes an individual or a corporation. There is nothing in the context or subject matter of s.45 to indicate that a different meaning is intended or required; *cf.* paragraph 21 of my reasons for decision in *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported).

35. Section 45(1) of the Queensland FOI Act follows the pattern of s.43(1) of the *Freedom of Information Act 1982 Cth* (the Commonwealth FOI Act) in providing for three distinct and self-contained grounds of exemption. (In fact, s.43(1)(a) and s.43(1)(b) of the Commonwealth FOI Act are, for practical purposes, virtually the same as s.45(1)(a) and s.45(1)(b), respectively, of the Queensland FOI Act. The Commonwealth case law on those provisions should therefore be of assistance in interpreting and applying the corresponding Queensland provisions. There are, however, some significant differences between s.45(1)(c) of the Queensland FOI Act and s.43(1)(c) of the Commonwealth FOI Act. This means that the accumulated case law on the latter provision needs to be used with some caution and an awareness of the relevant points of difference.)

36. Section 45(1)(a) provides that matter, the disclosure of which would disclose trade secrets of an agency or another person, is exempt matter. There is no need to prove or describe the harm that would be occasioned to the business interests of the agency or person affected. The provision assumes that any disclosure of trade secrets is damaging. Parliament has adjudged that there is an unqualified public interest in protecting agencies and other persons from having to disclose trade secrets under the FOI Act, in that s.45(1)(a) is not qualified by a public interest balancing test. The meaning of "trade secrets" is considered further at paragraphs 42 to 49 below.

37. Section 45(1)(b) applies to information other than trade secrets that has a commercial value to an agency or another person, where disclosure of the information could reasonably be expected to destroy or diminish the commercial value of the information. Section 45(1)(b) is also not qualified by a public interest balancing test. If the constituent elements of s.45(1)(b) can be established , no public interest considerations telling in favour of disclosure are to be taken into account against the interests of an agency or another person in protecting commercially valuable information from diminution or destruction of that commercial value through disclosure of the information under the FOI Act.

38. While s.45(1)(a) and s.45(1)(b) have a comparatively narrow scope of operation, s.45(1)(c) has a potentially very broad field of operation. Its potential sphere of operation covers any information, other than trade secrets or information mentioned in s.45(1)(b), which concerns the business, professional, commercial or financial affairs of an agency or another person. The first requirement of s.45(1)(c) then is that the information in issue can be properly so characterised. If so, information will be *prima facie* exempt if its disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of an agency or another person, or to prejudice the future supply to government of information of a like character to the information in issue. Section 45(1)(c), however, is qualified by a public interest balancing test, such that a *prima facie* case for exemption (made out if the requirements of s.45(1)(c)(i) and (ii) are satisfied) can be overridden if public interest considerations favouring disclosure of the information in issue can be identified, and they are of such weight that disclosure would, on balance, be in the public interest.

39. Applied literally, the words of s.45(1) produce the result that information concerning the business, professional, commercial or financial affairs of a particular person would, or could, be exempt from access by that person, even though that person may have supplied the information to the government in the first place. Section 45(2) therefore provides an exception to the operation of s.45(1), i.e., that matter is not exempt under s.45(1) merely because it concerns the business,

professional, commercial or financial affairs of the applicant for access. The presence of the word "merely" in s.45(2), however, places a significant qualification on the scope of the s.45(2) exception: if matter concerns the business, professional, commercial or financial affairs of another person as well as those of the applicant for access, and the two are inextricably interwoven such that severance in accordance with s.32 of the FOI Act is not practicable, then the s.45(2) exception to the s.45(1) exemptions does not apply. Since the very nature of business and commerce involves transactions between two or more parties, business and commercial information will often fall outside the scope of the s.45(2) exception because of the qualification imposed by the use of the word "merely".

40. The purpose and effect of s.45(2) in the context of the s.45(1) exemptions are virtually identical to the purpose and effect of s.44(2) in the context of the s.44(1) exemption. The purpose and effect of s.44(2) were analysed in my reasons for decision in *Re "B" and Brisbane North Regional Health Authority* (Information Commissioner Qld, Decision No. 94001, 31 January 1994, unreported) at paragraphs 174 to 176. That analysis, with appropriate modifications for the different context of s.45, is capable of applying, by analogy, to s.45(2).

41. The use of the term "business, professional, commercial or financial affairs" in s.45(2) does not restrict that subsection to operating as an exception only to s.45(1)(c). In the scheme of s.45, that term has been selected because it is the lowest common denominator of the nature of the kinds of information covered by s.45(1)(a), (b) and (c). The term is to be read distributively across s.45(1)(a), (b) and (c) in order to determine whether the s.45(2) exception is applicable to the exemptions provided for by s.45(1)(a), (b) and (c).

Observations on s.45(1)(a) - trade secrets

42. Section 43(1)(a) of the Commonwealth FOI Act appears to have appropriated the use of the term "trade secrets" from exemption 4 of the United States FOI Act. American law is generally more accepting of the concept of trade secrets as a species of property than is our law. For example, in *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, Gowans J of the Victorian Supreme Court observed (at p.46) that *"the conception of trade secrets"* was only *"a particular subject matter to which the principles relating to breach of confidence have been applied"*. It is true that there may be substantial overlap between s.45(1)(a) and s.46(1)(a) or (b) of the FOI Act, in that information which would disclose trade secrets is generally likely to have been communicated to a government agency in circumstances which would enliven the s.46(1) exemption (as to the requirements of which, see generally *Re "B" and Brisbane North Regional Health Authority*). However, the application of s.45(1)(a) depends primarily on the proper characterisation of the information in issue as matter that would disclose trade secrets of an agency or another person. There is no need to specifically identify a confider and confidee, nor to explore whether the circumstances of communication of the information give rise to an obligation of confidence.

43. In the *Ansell Rubber* case, Gowans J found assistance in the American "Restatement of the Law of Torts" (1939; Volume 4, paragraph 757) which refers to a trade secret as *"any formula, pattern or device or compilation of information which gives an advantage over competitors who do not know or use it"*. Gowans J referred to the following passage from the "Restatement of the Law of Torts":

> Secrecy. *The subject matter of a trade secret must be secret. Matters of public knowledge or of general knowledge in an industry cannot be appropriated by one as his secret. Matters which are completely disclosed by the goods which one markets cannot be his secret. Substantially, a trade secret is known only in the particular business in which it is used. It is not requisite that only the proprietor of the business know it.*

> *He may, without losing his protection, communicate it to employees involved in its use. He may likewise communicate it to others pledged to secrecy. Others may also know of it independently, as, for example, when they have discovered the formula by independent invention and are keeping it secret. Nevertheless, a substantial element of secrecy must exist, so that, except by the use of improper means, there would be difficulty in acquiring the information. An exact definition of a trade secret is not possible. Some factors to be considered in determining whether given information is one's trade secret are: (1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.*

44. The six factors referred to in the above passage were adopted by the Commonwealth Administrative Appeals Tribunal (the Commonwealth AAT) for the purpose of considering the application of s.43(1)(a) of the Commonwealth FOI Act in *Re Organon (Australia) Pty Ltd and Department of Community Services and Health* (1987) 13 ALD 588 at 593-4; however, the Commonwealth AAT added an additional factor, namely, *"whether the information is of a technical character".*

45. Interestingly, in cases under exemption 4 of the United States FOI Act the courts have adopted a narrower view of what constitutes a trade secret. In *Public Citizen Health Research Group v Food and Drug Administration,* 704 F.2d 1280 (1983), the Court of Appeal of the District of Columbia adopted a narrower test which stressed that there must be *"a direct relationship between the information at issue and the productive process",* so that, for the purpose of exemption 4, a trade secret was *"a secret, commercially viable plan, formula, process, or device that is used for the making, preparing, compounding, or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort"* (at p.1288).

46. In *Re Public Interest Advocacy Centre and Department of Community Services & Health and Searle Australia Pty Ltd* (Commonwealth AAT, Nos. N88/1222 and N89/529, O'Connor J (President), Mrs McClintock, Dr Thorpe, 19 September 1991, unreported) the applicant argued in the Commonwealth AAT that this narrower American view of the meaning of trade secret should be adopted in the interpretation of s.43(1)(a) of the Commonwealth FOI Act. The Commonwealth AAT said:

> *It is true that the United States courts have taken a restrictive approach to the interpretation of* ["trade secrets"]. *In so doing, however, the DC Circuit specifically noted in* Public Citizen, *supra at 1286-7, that there is a wider approach to that phrase in other contexts. We agree with the submissions of Miss Henderson and Dr Flick that that wider approach is the approach taken in Australia to the question of trade secrets. In general, we agree that the approach in* Re Organon, *supra, is a useful guide to the interpretation of "trade secrets".*

47. The Tribunal went on to accept an argument by the applicant that health and safety data (in relation to an IUD contraceptive device) did not satisfy what the Tribunal referred to as one of the "tests" laid down in *Re Organon,* as it was not information of a technical character. The tribunal observed that the information required no technical expertise to be understood and in fact could be understood by an educated lay person.

48. The *Searle* case went on appeal to a Full Court of the Federal Court of Australia (see *Searle Australia v Public Interest Advocacy Centre* (1992) 108 ALR 163) which held that this finding by the Tribunal involved an error of law. The court stressed that the indicia stated in *Re Organon* were

merely guides. The Full Court observed (at p.172-4):

> *Reference was made during argument to several United States authorities. We do not think that they assist in the application of s.43(1)(a) of the FOI Act. The United States legislation is different to the Australian and the approach taken there to analogous provisions is not the same. The FOI Act has adopted an expression which is well known in commerce, in judicial decisions and in Australian legislation. It should be given the meaning well understood in this country.*
>
> *The determination of what is a trade secret is primarily a question of fact for the administrative decision-maker. Nevertheless, it is an error of law for a decision-maker to define a statutory criterion in terms which are not reasonably open: see* Hope v Bathurst City Council *(1980) 144 CLR 1 at 7-8 per Mason J; 29 ALR 577;* Lombardo v Federal Commissioner of Taxation *(1979) 28 ALR 574 at 576 per Bowen CJ. There may also be an error of law if a decision-maker considers a case pursuant to criteria which are not stated by the statute in preference to the words which the statute uses. See for example Bowen CJ and Beaumont J in* Cockcroft, *supra, at FCR 190, ALR 106. This is because the words of the statute are the means which Parliament has adopted to convey its will. If a term is used in legislation, Parliament is to be taken as requiring that individual cases will be judged against that term, not against other terms or criteria not used in the statute.*
>
> *In the present case the Tribunal applied the criteria listed in* Re Organon *(1987) 13 ALD 588. Those criteria are not stated in s.43(1)(a). They introduce a limitation, namely that the information is of a technical character, which does not appear in the statute and is not inherent in the term "trade secret". Information may be a secret whether or not it is of a technical character. In determining the facts on the criteria stated in* Re Organon *rather than the words of the statute, the Tribunal erred in law.*
>
> *In so far as legal judgments elucidate the basic concept of what is a trade secret, it is useful to refer to* Lansing Linde Ltd v Kerr *(1990) 21 IPR 529, in which Staughton LJ said at 536:*
>
> > In *Faccenda Chicken Ltd v Fowler* [1985] 1 All ER 724 Goulding J at first instance had defined three classes of information, as follows: (i) information which, because of its trivial character or its easy accessibility from public sources of information, cannot be regarded by reasonable persons or by the law as confidential at all; (ii) information which the servant must treat as confidential but which once learned necessarily remains in the servant's head and becomes part of his skill and knowledge; (iii) specific trade secrets so confidential that, even though they may necessarily have been learned by heart and even though the servant may have left the service, they cannot lawfully be used for anyone's benefit but the master's. There the dispute was as to the second class so defined. Goulding J expressed the view that it could be protected by an express covenant; this court was of the contrary opinion: see [1987] Ch 117; [1986] 1 All ER 617. Subsequently other judges have touched on the topic in *Balston Ltd v Headline Filters Ltd* [1987] FSR 330 and *Lock International plc v Beswick* (1989) 16 IPR 497; [1989] 3 All ER 373; [1989] 1 WLR 1268.
> >
> > It appears to me that the problem is one of definition: what are trade

> secrets, and how do they differ (if at all) from confidential information? Mr Poulton suggested that a trade secret is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret. I would add first, that it must be information used in a trade or business, and secondly that the owner must limit the dissemination of it or at least not encourage or permit widespread publication.
>
> That is my preferred view of the meaning of trade secret in this context. It can thus include not only secret formulae for the manufacture of products but also, in an appropriate case, the names of customers and the goods which they buy.

There is no reason therefore why there cannot be trade secrets in respect of the manufacture of medical or health products as much as for other products. To take Staughton LJ's example, the trade secrets of such a manufacturer may include formulae for the products as well as information concerning customers provided, in each case, that the information is in fact kept secret and would be to the advantage of trade rivals to obtain.

The necessity for secrecy means that such matters as the dimensions of products, and of parts of products, already on the market are unlikely to be trade secrets, the products being inspectable, such matters usually will not be secret. Similarly, the composition of a product, though secret in the first instance, may cease to be secret because it has become known through testing, reporting in trade journals, or discussion at seminars or conferences. Information, originally secret, may lose its secret character as time passes. See Attorney-General v Jonathan Cape Ltd *[1967] QB 752 at 771 ...*

The indicia stated in Re Organon*, supra, were merely guides. It may be that the more technical the information is, the more likely it is that, as a matter of fact, the information will be classed as a trade secret. But technicality is not required. Many valuable trade secrets could be readily understood by a lay person, if informed of them. See, for example, the reference by Staughton LJ to "the names of customers and the goods which they buy". As Farwell LJ said in* Sir W C Leng & Co Ltd v Andrews *[1909] 1 Ch 763 at 774:*

> ... it would be a breach of confidence to reveal trade secrets, such as prices, &c, or any secret process or things of a nature which the man was not entitled to reveal.

Paragraph (a) of the indicia enunciated in Re Organon *was not stated by Gowans J in* Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd *[1967] VR 37, whose indicia were otherwise adopted in* Re Organon*.*

An aspect of the concept of "trade secrets" which was not discussed by the Tribunal is that the secrets must be used in or useable in the trade. A trade secret is an asset of the trade. Past history and even current information, such as mere financial particulars, may be confidential. The law may protect the disclosure of such information by a person who has obtained it in the course of a relationship which requires confidentiality, such as that of employee, solicitor or accountant. But such information may not be a trade secret.

It may be that some of the documents in issue before the Tribunal would disclose

information of that type, namely information which Searle has maintained confidential to itself but which is not a trade secret because it is not information now used for the benefit of Searle's business.

The determination in any particular case of the question whether information is a trade secret is a determination of fact. Accordingly, it is for the Tribunal to determine whether the documents described by the undefined term, "health and safety data", contain trade secrets. No general statement may be made about those documents. As we understand the evidence in the present case, there is information in the possession of the Department concerning the efficacy and effects of "Gravigard", and "Mini-Gravigard" and regarding tests which had been undertaken on or in relation to them. This information has hitherto been kept confidential. It may, therefore, properly be described as "secret". It is less apparent that it is information now useable in trade. The question must be determined by the Tribunal, having regard to the content of each of the relevant documents but free of any requirement that the information contained in the document be of a technical character.

49. The net result of the Full Court's discussion of the meaning of "trade secrets" appears to be that the term should be given its usual meaning in Australian law, which appears to correspond very closely to the passage (set out at paragraph 43 above) from the 1939 American "Restatement of the Law of Torts", as referred to by Gowans J in the *Ansell Rubber* case and subsequently applied by the Supreme Court of Victoria in *Mense v Milenkovic* [1973] VR 784. Certainly the Full Court accepted that the six indicia set out in that passage are appropriate for use as guides. As to the seventh added by the Tribunal in *Re Organon*, the Full Court emphasised that technicality is not a requirement, although the more technical the information is, the more likely it is that, as a matter of fact, the information will be classed as a trade secret. The other factors that received emphasis in the Full Court's judgment in *Searle* (nearly all of which are covered in the passage from the American "Restatement of the Law of Torts" which is set out at paragraph 43 above) are:

- the necessity for secrecy, including the taking of appropriate steps to confine dissemination of the relevant information to those who need to know for the purposes of the business, or to persons pledged to observe confidentiality;
- that information, originally secret, may lose its secret character with the passage of time;
- that the relevant information be used in, or useable in, a trade or business;
- that the relevant information would be to the advantage of trade rivals to obtain;
- that trade secrets can include not only secret formulae for the manufacture of products, but also information concerning customers and their needs.

Analysis of s.45(1)(b)

50. The relationship between s.45(1)(a) and s.45(1)(b) is intriguing, since it would be characteristic of a trade secret that it has a commercial value to its owner that would be destroyed or diminished by disclosure (though this quality would not be sufficient in itself to give information the status of a trade secret - other necessary qualities are referred to above). In any event, the wording of s.45(1)(b) makes it clear that it applies only to information other than trade secrets.

Section 45(1)(b)(i) - commercial value

51. The first requirement for the application of s.45(1)(b) is that the matter in issue must comprise information which itself has a commercial value to an agency or another person. The meaning of "commercial value" has received surprisingly little attention in cases reported under the

Commonwealth FOI Act, where the same term appears in s.43(1)(b). In *Re Rogers Matheson Clark and Australian National Parks and Wildlife Service* (1991) 22 ALD 706 at p.714, the Commonwealth AAT held that the names and addresses of overseas customers of the applicant (an exporter of kangaroo products) comprised information having a commercial value, without any attempt at explaining the nature of that commercial value. The Tribunal seemed to regard this, and the fact that the value of the information to the applicant would be diminished by disclosure, as self-evident. It seems that information concerning the customers of a business and their requirements, will often have a special commercial sensitivity and value. (It was noted in paragraph 49 above that information of this kind may amount to a trade secret, if other requirements for that status are satisfied.) Similarly, in *Re Organon*, the Tribunal merely observed (at 13 ALD p.595, paragraph 31) that it had evidence before it that the information in documents 1 and 2 (described as containing information as to the composition and properties of the plastic component of the IUD) had a commercial value, which evidence the Tribunal accepted, again without any explanation as to the nature of that commercial value. It is understandable that Tribunals have been reluctant to go into any detail in respect of information which they are prepared to find exempt on the basis that disclosure of it would diminish or destroy its value. What is surprising is the lack of any attempt to expound a precise meaning for the term "commercial value".

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

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

I am not prepared to accept that the investment of time and money is a sufficient indicator in itself of the fact that information has a commercial value. It could be argued on that basis that most, if not all, of the documents produced by a business will have a commercial value because resources were invested in their production, or money expended in their acquisition. This is surely too broad a proposition. Information can be costly to produce without necessarily being worth anything. At best, the fact that resources have been expended in producing information, or money has been expended in acquiring it, are factors that may be relevant to take into account in determining whether information has a commercial value for the purposes of s.45(1)(b) of the Queensland FOI Act.

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

Johnston (Deputy President), Major General K J Taylor, Mr S D Hotop, 18 June 1993, unreported), after noting that certain information in relation to a drug marketed by the Roche pharmaceutical company was already in the public domain, observed (at p.26):

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

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

55. The second interpretation of "commercial value" which is reasonably open is that information has commercial value to an agency or another person if a genuine, arms-length buyer is prepared to pay to obtain that information from that agency or person. It would follow that the market value of that information would be destroyed or diminished if it could be obtained from a government agency that has come into possession of it, through disclosure under the FOI Act. The fact that there is a genuine market for information used by an agency or another person in carrying on commercial activity could also be regarded as a strong indication that the information is valuable for the purpose of carrying on that commercial activity; i.e. that the primary meaning referred to above is satisfied. I do consider, however, that information can be capable of having a commercial value to an agency or another person even though it could not be demonstrated that an arms-length buyer would be prepared to pay to obtain that information. The difficulties of proof of the material facts which would bring information within the ambit of the second meaning of "commercial value" to which I have referred will probably mean that it is not relied upon on many occasions.

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

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

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

57. In the last mentioned case and a related case, *Re Public Interest Advocacy Centre and Department of Community Services & Health and Searle Australia Pty Ltd* (cited above at paragraph 46), the

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

58. In the *Schering* decision (which was not taken on appeal to the Federal Court) the Tribunal said that some of the health and safety data in issue may be commercially valuable to Schering Pty Ltd, *"if not already in the public domain"*. This suggests that, in some circumstances, the fact that information is in the public domain can affect the initial inquiry as to whether the information has commercial value to an agency or another person, as well as the second stage of the inquiry (i.e. whether disclosure under the FOI Act could further diminish any commercial value possessed by information which is already in the public domain).

59. In both the *Schering* and *Searle* cases, the Tribunal found that information contained in certain documents did have a commercial value, then said:

> *The Tribunal considers that if information of an identical kind to that in the documents has already been disclosed to the public, then its commercial value would not be further diminished by disclosure under the FOI Act.*

60. The Full Court in the *Searle* appeal does not appear to have dissented from the general proposition underlying this statement. It did, however, criticise the Tribunal for not going on to make specific findings that were required in the circumstances. Because the documents included information as to particular tests made by Searle, the Full Court said (at p.177):

> *But to find that similar results were stated in public articles would not conclude the inquiry. Commercial value may attach to information contained in any documents which concerned the nature of, techniques used in, and the actual results of Searle's tests. The Tribunal did not make the findings required in this respect.*

Section 45(1)(b)(ii) - destruction or diminution of commercial value

61. Establishing that the matter in issue comprises information which itself has a commercial value to an agency or another person is merely the first hurdle. It must then be established that disclosure of the information in issue could reasonably be expected to destroy or diminish its commercial value. Much information which is valuable for the purpose of carrying on commercial activity will remain valuable even though it is fairly widely disseminated, for example, the trade or professional knowledge commonly referred to as "know-how", which characteristically is generally known among competitors in a particular industry.

62. The phrase "could reasonably be expected to" in s.45(1)(b) of the FOI Act bears the same meaning

as it does in s.46(1)(b) of the FOI Act, which meaning was explained in *Re "B" and Brisbane North Regional Health Authority* at paragraphs 154-161. In particular, I stated at paragraph 160:

> *... The words call for the decision-maker ... to discriminate between unreasonable expectations and reasonable expectations, between what is merely possible (e.g. merely speculative/conjectural "expectations") and expectations which are reasonably based, i.e. expectations for the occurrence of which real and substantial grounds exist.*

63. It is appropriate to record what was said by the Full Court of the Federal Court in *Searle's* case (at p.176) about the comparable test in s.43(1)(b) of the Commonwealth FOI Act:

> *In the application of s.43(1)(b), there would ordinarily be material before the decision-maker which would show whether or not the commercial value of the information would be or could be expected to be destroyed or diminished if the information were disclosed. It would be for the decision-maker to determine whether, if there were an expectation that this would occur, the expectation was reasonable.*
>
> *In para 58 of its reasons, the Tribunal said:*
>
> > A decision maker is required to make a judgment as to whether there is a "reasonable" basis for a claim that disclosure of information would destroy or diminish the commercial value of such information, as distinct from something that is "irrational, absurd or ridiculous".
>
> *However, the question under s.43(1)(b) is not whether there is a reasonable basis for a claim for exemption but whether the commercial value of the information could reasonably be expected to be destroyed or diminished if it were disclosed. These two questions are different. The decision-maker is concerned, not with the reasonableness of the claimant's behaviour, but with the effect of disclosure. The Administrative Appeals Tribunal failed to determine that question and erred in law in this respect.*

64. As is illustrated by the cases of *Schering, Searle* and *Caruth* referred to above, an issue which commonly arises under this aspect of the test for exemption is whether the information in issue is already in the public domain, or is a matter of common knowledge in the relevant industry, and whether, therefore, disclosure under the FOI Act could reasonably be expected to diminish its commercial value.

65. Since the s.45(1)(b) exemption contemplates that disclosure of the relevant information could destroy or diminish its commercial value, it will not be appropriate for an FOI decision-maker, in reasons for a decision to claim the exemption, to disclose the information in question or to disclose too much about its nature, for fear of defeating the very purpose of the exemption. The same considerations must also apply in respect of reasons for decision given by the Information Commissioner on external review. It will still be incumbent, however, on the agency or third party claiming reliance on s.45(1)(b) to satisfactorily explain to the Information Commissioner on external review, the nature of the commercial value which the information in issue has to the agency or third party. In this regard, the agency or third party may have to explain the commercial context in which it operates, and the significance of the information in that context. It would also have to satisfy the Information Commissioner that there is a reasonable basis for an expectation that the commercial value of the information would be destroyed or diminished by its disclosure.

Analysis of s.45(1)(c)

66. Just as the words of s.45(1)(b) exclude trade secrets from its sphere of operation, the s.45(1)(c) exemption is so worded (see paragraph 25 above) that it applies only to information other than trade

secrets or information mentioned in s.45(1)(b). This means that particular information cannot ordinarily be exempt under more than one of the s.45(1)(a), s.45(1)(b) or s.45(1)(c) exemptions. (However, an agency or other participant may wish to argue on a review under Part 5 of the FOI Act that information is exempt under one of those provisions, and put arguments in the alternative as to which is applicable). Whereas both s.45(1)(a) and (b) require that the information in issue must have an intrinsic commercial value to be eligible for exemption, information need not be valuable in itself to qualify for exemption under s.45(1)(c). Thus, where information about a business has no commercial value in itself, but would, if disclosed, damage that business, s.45(1)(c) is the only one of the exemptions in s.45(1) that might be applicable. For information to be exempt under s.45(1)(c) it must satisfy the cumulative requirements of s.45(1)(c)(i) and s.45(1)(c)(ii), and it must then survive the application of the public interest balancing test incorporated within s.45(1)(c).

The first element of s.45(1)(c) - characterisation of the information in issue

67. The first requirement of s.45(1)(c) is that the matter in issue must comprise information (other than trade secrets or information mentioned in s.45(1)(b)) concerning the business, professional, commercial or financial affairs of an agency or another person. The meaning of the word "concerning" (according to both the Collins English Dictionary (Aust. Ed) and the Australian Concise Oxford Dictionary) is *"about, regarding"*, and that meaning is appropriate in this context. The application of s.45(1)(c)(i) essentially requires a proper characterisation of the information in issue to determine whether it falls within the words of s.45(1)(c)(i).

68. The application of s.34(1)(a) of the *Freedom of Information Act 1982 Vic* (the Victorian FOI Act) calls for a very similar exercise in characterisation namely, whether information *"relates to ... matters of a business, commercial or financial nature"*, and the Victorian case law on this issue is particularly helpful. (Generally, however, s.34 of the Victorian FOI Act has so many substantial differences from the structure and wording of s.45 of the Queensland FOI Act that the Victorian case law cannot often be of great assistance.)

69. In *Re Croom and Accident Compensation Commission* (1989) 3 VAR 441, the respondent submitted that information created for the purpose of dealing with a claim for compensation for industrial injury, namely statements of witnesses obtained by a firm of accident investigators plus a medical report on the claimant, was information which related to "matters of a business, commercial or financial nature" for the purposes of s.34(1)(a) of the Victorian FOI Act, and "information of a business, commercial or financial nature" for the purposes of s.34(4)(a)(ii) of the Victorian FOI Act. Jones J (President) of the Victorian AAT said (at p.464):

> *For the exemption to apply, the information must relate to matters of a business, commercial or financial nature not merely be derived from a business or concerning it or have some connection with it. ... Is the essential quality or character of the matter business, commercial or financial? I am not persuaded that the information in issue here can be so categorised. ...*

70. The Accident Compensation Commission appealed to a Full Court of the Supreme Court of Victoria (see *Accident Compensation Commission v Croom* [1991] 2 VR 322) which affirmed the Tribunal's approach to the issue and its findings. Young CJ said (at p.324-5):

> *Under s.34(1)(a) it was said that disclosure of the witnesses' statements would disclose information acquired by the appellant from a business undertaking and that the information relates to* "other matters of a business nature". *I am clearly of the opinion, however, that the information in the investigator's report does not relate to matters of a business nature. The information is rather of a nature that concerns the investigation of an industrial injury and that is not covered by the exemption. Nor does the information in the medical report relate to matters of a business nature. It plainly relates to matters*

of a medical nature. ...the information in a particular document must relate to matters of a business nature before exemption can be claimed and that requirement is not satisfied by the contention in this case that the information is required for the purposes of the appellant's business. The requirement can only be satisfied by the proper characterisation of the nature of the information itself. Here the information is of a medical and not of a business nature.

The same reasoning answers the submissions made for exemption under s.34(4)(a)(ii) and I find it unnecessary to go further for the purposes of deciding the case.

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

Although each of the words [in s.34(1)(a) of the Victorian FOI Act] *employed by the legislature must be accorded its ordinary meaning that meaning must, of course, be determined by reference to the context in which it is used. It is clear, I consider, that Parliament did not intend to exempt from the operation of the Act every piece of written information which is obtained by an agency merely on the basis that it had been acquired and provided by a business undertaking in the course of its ordinary activities. ...*

I accept that the appellant is engaged in the business of insurance when it performs functions under Part III of the Accident Compensation Act ... but the information in the investigator's report is unrelated to matters of a business nature.

The report contains information of the circumstances of the employment of the respondent, the nature of her work, the relationship between her occupation and illness and the opinions of Mr Hartfield as to the liability of Duncan Rubber at common law. The report does not contain information of a business, commercial or financial nature but is of an industrial injury investigative nature. The circumstances that the information will be used by the appellant in the course of its activity or undertaking of insurance does not mean that the information relates to the business of insurance. Such a connection is too tenuous to fall within the protection of s.34. Likewise the information in the medical report does not relate to insurance business. For an exemption to be granted the information must relate to matters of a business, commercial, or financial nature and it is not sufficient that the information will be used by an agency in the course of a business undertaking.

...

Further, the use to which the information can be put by an agency does not change or extend the nature of the information.

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

Can it, however, be said that the report contains information concerning the business, professional, commercial or financial affairs of any person? Since, as I have already noted, the redeveloped site is far from operational, and since the material contained in the report is limited to that which I have set out above, there being nothing in the report

> *dealing with such matters as, the cost of acquiring, and installing, and modifying the proposed "rides" and other amusements or the cost of operating the proposed "rides" and other amusements, and the profits likely to arise therefrom, it is, in my view, impossible to characterise the information in the report as information relating to the business - whether present or projected - or relating to the professional, commercial or financial affairs of any person - on the contrary, the information is information as to the likely acoustic impact on the neighbourhood of an amusement park of the type presently proposed, operating on the site (see, for example,* Accident Compensation Commission v Croom *(supra)).*

73. A question closely related to this characterisation exercise is the meaning of "business, professional, commercial or financial affairs". None of these terms is defined in the FOI Act, so they are to be given their ordinary meaning, or whichever of their accepted meanings is most appropriate to the statutory context. The only word which strikes me as presenting any difficulties in this regard is the word "professional", and I propose to give it detailed consideration in a forthcoming decision (no issue as to its meaning arises in the present case). I have already referred (in paragraph 54 above) to the ordinary meaning of "commercial" which is appropriate in the context of s.45(1). In *Re Stewart and Department of Transport* (Information Commissioner Qld, Decision No. 93006, 9 December 1993, unreported), I referred to the distinction between "personal affairs" and "business affairs" which is evident in the scheme of the FOI Act, and I suggested (at paragraph 103) that:

> *For a matter to relate to "business affairs" in the requisite sense, it should ordinarily, in my opinion, relate to the affairs of a business undertaking which is carried on in an organised way (whether it be full time or only intermittent) with the purpose of obtaining profits or gains (whether or not they actually be obtained).*

74. In *Re Timms and Department of Employment, Vocational Education, Training and Industrial Relations* (Information Commissioner Qld, Decision No. 93007, 17 December 1993, unreported), I took this a step further by suggesting (at paragraphs 22 and 23) that the principles applied in income tax law to the determination of whether a particular activity constitutes a business can provide some guidance in determining whether, for the purposes of the FOI Act, information in documents should properly be characterised as relating to a person's business affairs.

75. Assistance in interpreting the scope of the phrase "business affairs" can also be obtained from what was said in *Croom's* case about the comparable expression "matters of a business nature". O'Bryan J considered (at p.330) that for information to relate to a matter of a business nature under s.34(1)(a) of the Victorian FOI Act:

> *... it would be necessary to show that the information impinged in some way or other upon the actual conduct or operations of the undertaking itself.*

76. The ordinary meaning of "financial" comprehends information about the finances (i.e. money resources) of an agency or another person, and in particular the management of money resources, including credit. In the context of s.45(1)(c), the term "financial affairs" of an agency is broad enough to cover the finances of government agencies which do not carry on a function of supplying goods and services on a commercial basis. Such agencies, however, are less likely to be able to establish a reasonable expectation of an adverse effect on their financial affairs through the disclosure of information concerning their financial affairs, than are agencies which operate in a competitive market environment.

77. Some examples, from decided cases, of information which has been found to concern business, commercial or financial affairs, include:

- statements of financial information provided to the Australian Broadcasting Tribunal by commercial television licensees, and containing -
  - audited balance sheets and profit and loss accounts for companies;
  - information on costs of production for Australian programs; and
  - information about revenue earned from resale of Australian television rights.

  (see *Re Actors' Equity and Australian Broadcasting Tribunal (No. 2)* (1985) 7 ALD 584);

- information as to a company's pricing structure (see *Re Drabsch and Collector of Customs*, Commonwealth AAT, No. Q84/77, Deputy President Forgie, 5 November 1990, unreported, at p.46, paragraph 88);

- information gathered to prove the efficacy or otherwise of a product manufactured by a company, including health and safety information on a particular drug gathered by a pharmaceutical company (see *Schering's* case, at p.725, paragraph 50);

- information supplied by Tasmanian woodchipping companies to State and Commonwealth agencies, in the nature of operating and financial information, including future strategies, anticipated export market movements, selling prices of produce and overseas customers (see *Re Angel and Department of Arts, Heritage and Environment* (1985) 9 ALD 113);

- a report provided to the Victorian Ministry of Transport by a firm of property consultants which had analysed tenders received for a property development program (see *Re Heffernan and Ministry of Transport* (1987) 2 VAR 1);

- Ship's Master's report made in respect of a voyage to the Middle East carrying a cargo of live sheep exported from Australia (see *Re Livestock Transport & Trading and Australian Maritime Safety Authority*, Commonwealth AAT, O'Connor J (President), Members Fayle and Hotop, 24 December 1991, unreported).

<u>The second element of s.45(1)(c) - the prejudicial effects contemplated by s.45(1)(c)(ii)</u>

78. Once information has been properly characterised as falling within s.45(1)(c)(i), a *prima facie* case for exemption will be established upon demonstration that disclosure of the information could reasonably be expected to have either of the two prejudicial consequences identified in s.45(1)(c)(ii).

79. The meaning of the term "could reasonably be expected to" in s.45(1)(c) is identical to the meaning of the same term as it appears in s.45(1)(b), so that my comments in paragraphs 62 and 63 above are equally applicable here.

80. The words "adverse effect" carry their ordinary meaning in this context. To get to s.45(1)(c)(ii), the information in issue must first have been properly characterised as information concerning one or more of the categories of affairs mentioned in s.45(1)(c)(i). The adverse effect contemplated by s.45(1)(c)(ii) must be an adverse effect on the business, professional, commercial or financial affairs of the agency or other person, which the information in issue concerns.

81. The words "business, professional, commercial or financial" are hardly apt to establish distinct and exclusive categories; there must in fact be substantial overlap between the kinds of affairs that would fall within the ambit of the ordinary meanings of the words "business", "commercial" and "financial", in particular. The common link is to activities carried on for the purpose of generating income or profits. (I refer to income because some government agencies are established to provide

goods or services to the community for a fee, but with no expectation of ever generating profits: rather the aim is to pursue some government policy objective, e.g. regional development, and/or to obtain income to offset some of the cost of providing a service to the public, which probably could not be profitably supplied on a fully commercial basis. There is arguably a strong public interest in access to information about government activities of this kind on the basis that taxpayers who are called upon to subsidise such quasi-commercial activities should be informed about strategies and costs.)

82. Thus an adverse effect under s.45(1)(c) will almost invariably be pecuniary in nature, whether directly or indirectly. For example, an adverse effect on a corporation's business reputation or goodwill (the term "goodwill" is commonly defined by the courts as "the attractive force which brings in custom") is feared ultimately for its potential to result in loss of income or profits, through loss of customers. No requirement can be drawn from the terms of s.45(1)(c), however, that the adverse effect must be pecuniary in nature.

83. For similar reasons to those noted in respect of s.45(1)(b) (see paragraphs 59, 60 and 64 above), if information is already in the public domain, or is common knowledge in the relevant industry, it will ordinarily be difficult to show that disclosure of that information under the FOI Act could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the agency which, or person whom, the information concerns.

84. In most instances, the question of whether disclosure of information could reasonably be expected to have an adverse effect will turn on whether the information is capable of causing competitive harm to the relevant agency, corporation or person. Since the effects of disclosure of information under the FOI Act are, with few exceptions, to be evaluated as if disclosure were being made to any person, it is convenient to adopt the yardstick of evaluating the effects of disclosure to a competitor of the agency which, or person whom, the information in issue concerns. (This yardstick is also appropriate when considering the application of s.45(1)(b).) A relevant factor in this regard would be whether the agency or other person enjoys a monopoly position for the supply of particular goods or services in the relevant market (in which case it may be difficult to show that an adverse effect on the relevant business, commercial or financial affairs could reasonably be expected), or whether it operates in a commercially competitive environment in the relevant market.

85. The second kind of prejudice contemplated by s.45(1)(c)(ii) focuses not on the protection of the legitimate commercial interests of agencies and private sector business undertakings, but on protecting the continued supply to government of information (of the kind referred to in s.45(1)(c)(i)) which it is necessary for the government to have to undertake the functions expected and required of it in the public interest (including those functions identified in paragraph 28 above). The words "prejudice the future supply of such information" also appear in s.46(1)(b) of the FOI Act, and what I said about those words in *Re "B" and Brisbane North Regional Health Authority* (at paragraph 161) is also apposite in the context of s.45(1)(c)(ii):

> *Where persons are under an obligation to continue to supply such ... information (e.g. for government employees, as an incident of their employment; or where there is a statutory power to compel the disclosure of the information) or persons must disclose information if they wish to obtain some benefit from the government (or they would otherwise be disadvantaged by withholding information) then ordinarily, disclosure could not reasonably be expected to prejudice the future supply of such information. In my opinion, the test is not to be applied by reference to whether the particular* [supplier] *whose ... information is being considered for disclosure, could reasonably be expected to refuse to supply such information in the future, but by reference to whether disclosure could reasonably be expected to prejudice future supply of such information from a substantial number of the sources available or likely to be available to an agency.*

86. I note in this regard the comments made by the Commonwealth AAT in *Schering's* case, when applying s.43(1)(c)(ii) of the Commonwealth FOI Act (at p.726-7):

> *We are of the view in considering whether it is "reasonable" to expect that the future supply of information will be prejudiced, that a factor to be taken into account is the context in which such information is supplied, including whether it may be compulsorily required.*
>
> *(57) The importation into Australia of therapeutic goods is highly regulated. The evaluation of such goods for marketing approval is the responsibility of the Department of Community Services and Health. ...*
>
> *NDF4 sets out the type of information to be submitted with applications and the form in which the information should be presented. It is a very lengthy document and very detailed. The Tribunal was informed that the department requires each application to be in the form set out in the guidelines.*
>
> *(58) Dr Flick submitted that in carrying out its functions the department relies on the voluntary supply of information from pharmaceutical companies. Mr Pflaum told the Tribunal that the department has sought additional information from companies beyond that supplied in accordance with NDF4. In answering a question from Dr Flick as to whether when seeking additional information the department exercised any compulsory power or merely requested the information, Mr Pflaum replied: 'Well, it has requested the information on the basis that the application would not be further considered without that information'. Dr Riisfeldt told the Tribunal that if any information provided to the department by Schering Pty Ltd, including material already published, was disclosed, the future supply of information would be prejudiced. Mr Pflaum told the Tribunal that should such material be released there would be a reduction in volume and scope of the information supplied by applicant companies. He said that any reduction would lead to a lengthening of the approval process as the Commonwealth would need to specifically identify and request certain information.*
>
> *(59) The Tribunal has difficulty in accepting the submissions of Dr Flick ... This is not a situation where information is supplied to the Commonwealth in a purely voluntary fashion, for example by informants in the law enforcement area. Here companies themselves are seeking approval from the Commonwealth to market a particular product in Australia. As Dr Riisfeldt acknowledged in answer to a question by Dr Cashman, the company would go out of business if it was not prepared to submit information to the Department of Health. The information which is required to be submitted is set out in detail in NDF4. Thus we do not consider that prejudice to the future supply of information arises in these circumstances.*

<u>The third element of s.45(1)(c) - the public interest balancing test</u>

87. If the elements of s.45(1)(c)(i) and (ii) are established, the information in issue is *prima facie* exempt. However, the public interest balancing test which is incorporated within s.45(1)(c), must then be applied. This means in effect that Parliament has adjudged that, if information satisfies the tests stipulated in s.45(1)(c)(i) and (ii), there will exist a public interest consideration favouring non-disclosure of that information. However, Parliament has also adjudged that (in contrast to the unqualified public interest in non-disclosure of information which satisfies the tests for exemption in

s.45(1)(a) or s.45(1)(b)) the public interest inherent in the satisfaction of s.45(1)(c)(i) and (ii) will not necessarily always be such a strong and compelling one that it should automatically be entitled to prevail over competing public interest considerations which favour the disclosure of the information in issue. If information satisfies the cumulative requirements of s.45(1)(c)(i) and (ii), a *prima facie* ground of justification in the public interest for non-disclosure of the information is established, unless the further judgment is made that the *prima facie* ground is outweighed by other public interest considerations favouring disclosure, such that disclosure of the information in issue would, on balance, be in the public interest. (Further explanation of the nature of a public interest balancing test, and illustrations of its application, are to be found in my decisions in *Re Eccleston and Department of Family Services and Aboriginal and Islander Affairs* (Information Commissioner Qld, Decision No. 93002, 30 June 1993, unreported) and in *Re "B" and Brisbane North Regional Health Authority*, at paragraph 179 and following.)

88. Section 43(1)(c) of the Commonwealth FOI Act has substantially different phrasing to s.45(1)(c) of the Queensland FOI Act, and does not contain an explicit public interest balancing test; however, the Full Federal Court in *Searle's* case considered that the words "disclosure ... would, or could reasonably be expected to, unreasonably affect that person adversely", and in particular the word "unreasonably", permitted (or perhaps, required) public interest considerations to be taken into account in the application of s.43(1)(c) of the Commonwealth FOI Act. The Full Court said (at p.178):

> *If it be in the public interest that certain information be disclosed, that would be a factor to be taken into account in deciding whether a person would be* unreasonably *affected by the disclosure; the effect, though great, may be reasonable under the circumstances. To give two examples: if the relevant information showed that a business practice or product posed a threat to public safety or involved serious criminality, a judgment might be made that it was not unreasonable to inflict that result though the effect on the person concerned would be serious. Of course, the extent and nature of the effect will always be relevant, often decisive.*

Similarly, under s.45(1)(c) of the Queensland FOI Act, disclosure of information which shows, for instance, that a company has illegally polluted the environment may adversely affect the business affairs of that company, but it might be considered that disclosure of that information would, on balance, be in the public interest.

Application of s.45(1) to the Matter in Issue

89. As noted above, matter cannot ordinarily be exempt under more than one of s.45(1)(a), s.45(1)(b) or s.45(1)(c). The present case is relatively straightforward since I am satisfied that the matter in issue comprises information that has no intrinsic commercial value. It has none of the character of a trade secret about it. It is not information that can be used to further the respondent's business operations. Rather, the claim for exemption must rest solely on the basis that disclosure could reasonably be expected to adversely affect the respondent's business, commercial or financial affairs, as contemplated by s.45(1)(c). The information in issue was not supplied to government by persons outside government, and there is no basis for a suggestion that its disclosure could reasonably be expected to prejudice the future supply of such information to government.

90. It is necessary to examine the functions of the respondent to confirm that it is an agency which has "business, commercial or financial affairs", and (as noted at paragraph 84 above) it is also relevant to examine whether it operates from a monopoly position or in a commercially competitive environment.

91. The respondent's predecessor, the Egg Marketing Board (the Board), was constituted under the

Primary Producers' Organisation and Marketing Act 1926 (the PPOM Act). That Act establishes "commodity boards" for the purpose of organising the marketing of various products of primary industry, which are called "commodities" in the terminology of the PPOM Act. A "commodity" is defined in s.2 of the PPOM Act to include eggs. The effect of creation of a commodity board is that the PPOM Act applies to the board as a statutory vehicle by which the board may carry out its functions (s.9(i)).

92. Section 11A of the PPOM Act provides that, in addition to other functions, a board shall be concerned with the preservation, expansion and economic well-being of the industry which the board represents. The board is to take cognisance of all agricultural and marketing problems arising out of or associated with its particular industry. The general powers of a commodity board are set out in s.13 of the PPOM Act and include a number of commercial functions such as the power to purchase, contract for the use of, or otherwise provide and hold any land or personal property which may be required by a board (s.13(i)), to deal with promissory notes, bills of exchange, bills of lading and other negotiable instruments (s.13(iiiA)), to acquire shares (s.13(iiiA)(a)), and to take such action as may be approved for, and to co-operate with the Department of Primary Industries and other relevant bodies, in studying markets, accumulating data regarding marketing processes and costs, disseminating correct market information, and eliminating waste and unnecessary market expenses (s.13(iv)).

93. A commodity board that is a marketing board is given specific powers of marketing pursuant to s.14 of the PPOM Act, namely that such a board may market or arrange for the marketing of the commodity. A number of incidental powers are given to such boards in order to allow them to perform these tasks. The term "marketing" is defined in s.2 so as to include all activities associated with the movement of a commodity from the appointed point of production or preparation to the point of consumption, including storage, transport and handling of the commodity and such other activities as are necessary to convert the commodity into a saleable form or condition, and to advertise the commodity and take such other measures as are designed to promote the sale of the commodity.

94. Having considered the powers given to the Board by the PPOM Act, I am satisfied that the Board carried on commercial functions under that Act. It is also relevant to identify whether the market in which the Board traded was a competitive market, or whether the Board enjoyed a monopoly position in the marketing of eggs.

95. The PPOM Act prescribes a marketing scheme which is compulsory in the sense of being binding on all producers of a particular commodity in Queensland. The principal features of the scheme are that all of the commodity shall be delivered by producers to the marketing board (s.15(1)) and there is a prohibition on sale or purchase of the commodity concerned (s.15(3)), except to the extent that the commodity does not vest in the board concerned (s.15(7)). By s.9(2) of the Act, the Governor in Council may, by Order-In-Council, declare that a particular commodity shall vest in the commodity board established to deal with that commodity.

96. The proviso contained in s.15(7) was no doubt drafted in the form that it was, so as not to infringe s.92 of the *Commonwealth of Australia Constitution Act* (the Constitution), the object of which is to preserve freedom of interstate trade. The PPOM Act does not purport to vest in the Board ownership of eggs in places other than Queensland, or in eggs produced in places other than Queensland, but brought into Queensland. A similar intention to avoid infringing s.92 of the Constitution is evidenced in s.20(3) of the PPOM Act which excludes interstate contracts from the effects of s.20(1) and (2) (which provisions may be used to render void certain contracts for sale of commodities). Section 1A of the PPOM Act evidences a similar intent, and provides that the Act is to be read and construed subject to the Commonwealth Constitution, so as not to exceed the legislative powers of the State. Finally, s.14F provides that a marketing board may, subject to the

prior approval of the Minister, purchase a commodity, whether from Queensland or not, if the board considers it necessary or expedient to do so. There is nothing in the PPOM Act which prevents the sale, in Queensland, of eggs produced outside Queensland.

97. Following consideration of these provisions, I am satisfied that, although the Board was accorded a very strong market position by the provisions of the PPOM Act, it was not in a position of being a monopoly power in the market for sale of eggs in Queensland, but was open to commercial competition from producers outside Queensland who sought to market eggs in Queensland.

98. During the course of this external review, the Board was legislatively restructured by the *Egg Industry (Restructuring) Act 1993 Qld* which took effect on 1 January 1994. The objects of that Act, as set out in s.3, are to provide for transfer of the assets and liabilities of the Board (and the Central Queensland Egg Marketing Board, although its position is irrelevant for the purposes of this external review), to take over the marketing functions of the Board, to assume a general responsibility for the marketing of eggs produced in the State of Queensland, and to provide for a compulsory marketing scheme to be administered by the respondent company, Australian Quality Egg Farms Limited. Section 12 of the Act provides that the assets and liabilities of the Board are transferred to the company on the transfer date and then become the assets and liabilities of the company. (See s.4 for the definitions of the various entities). Section 13(2) makes it clear that a proceeding by or against a former egg marketing authority that was incomplete at the transfer date may be continued by or against the company. Thus, the name of the company has been substituted for the Board as the respondent to this external review. Section 28(1)(a) makes it clear that the company is a public authority for the purposes of the FOI Act.

99. Part 4 of the *Egg Industry (Restructuring) Act* sets out the compulsory marketing scheme which is similar to the scheme which applied under the PPOM Act. The operative provision is s.42(1) which provides that all eggs to which Part 4 of the Act applies vest in the company, and the vesting takes effect from the time that eggs are laid (s.42(2)). Section 42(3) provides that, instead of having a right to ownership of the eggs, the producer has a statutory right to payment after the eggs are delivered to, and accepted and sold by, the company. The requirements of Part 4 indicate a high degree of control over the fate of eggs produced for commercial consumption in the State of Queensland. However, the compulsory scheme does not extend to producers outside Queensland. Also, there is nothing in the Act which prevents any person from selling eggs in Queensland.

100. I am satisfied that the respondent company, like the Board before it, is open to competition, in the market for eggs in Queensland, from interstate egg producers. Indeed the respondent has supplied me with an article from the 11 April 1994 issue of the journal, "Business Queensland", which indicates that competition in the market is quite intense:

> ***New South Wales eyes egg market***
>
> *New South Wales egg producers plan to snare 50 percent of the South-East Queensland egg market by June this year.*
>
> *Nelson May, Queensland manager of Eric's Eggs, says New South Wales-produced eggs now account for 33 percent of the South-East Queensland market.*
>
> *Queensland consumes about 460,000 dozen eggs a week.*
>
> *Eric's Eggs, owned by May and the New South Wales-based Good Egg Co-operative, began supplying the Queensland market less than two years ago.*
>
> *May says Queensland has one of Australia's fastest-growing egg markets with 1,000 new consumers moving to the state each week.*

Eric's Eggs plans to further capture market share following the successful recruitment of one of Sunny Queen Egg Farms' most experienced sales representatives. ...

101. I now turn to apply the elements of s.45(1)(c) to the matter in issue, which falls into the two categories described above at paragraphs 23 and 24.

102. Applying the characterisation exercise required by s.45(1)(c), I am satisfied that all of the matter remaining in issue is information concerning the business or commercial affairs of the respondent. The information in the first category (described at paragraph 23 above) concerns the state of the commercial relationship between the Board and a major customer, and refers to commercial dealings between them. The information in the second category (described at paragraph 24 above) refers to an ongoing business arrangement between the respondent and another body engaged in the marketing of eggs.

103. I am also satisfied that disclosure of those parts of the information in the first category which would identify the customer named therein, could reasonably be expected to have an adverse effect on the business or commercial affairs of the respondent, by souring the commercial relationship between the respondent and a major customer which continues to operate its business concerns in the Queensland market. Those parts contain incorrect information about the state of the commercial relationship between the Board and the customer. The expectation that disclosure of those parts would result in a souring of the commercial relationship between the respondent and the customer (which in turn could prompt the customer to give preference to other suppliers) is, in my opinion, reasonably based. I note in this regard that s.45(1)(c)(ii) states the test for exemption in terms of a reasonable expectation of "an adverse effect", rather than of "a substantial adverse effect" as required by s.40(c), s.40(d), s.47 and s.49 of the FOI Act.

104. However, not all of the information in the first category could reasonably be expected to have an adverse effect on the business, commercial or financial affairs of the respondent. At paragraph 23 above, I described the information in the first category as comprising one sentence and three other parts of sentences. The one full sentence comprises the fourth paragraph of the memorandum. The last six words of that sentence identify the customer referred to above, and for the reasons given above, I am satisfied that their disclosure could reasonably be expected to have an adverse effect of the kind which satisfies s.45(1)(c)(ii). The same applies to another two parts of sentences, namely, the last 14 words in the fifth paragraph of the memorandum, and the last six words in the eighth paragraph of the memorandum. However, the balance of the sentence which comprises the fourth paragraph of the memorandum contains a rather innocuous statement of historical fact about penetration of the market for eggs in South-east Queensland by eggs produced in New South Wales. I do not accept that its disclosure could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the respondent or another person, and hence it is not exempt matter under s.45(1)(c) of the FOI Act.

105. The final piece of information in the first category comprises 13 words in the middle of the second sentence of the tenth paragraph of the memorandum. Disclosure of those words could arguably have an adverse effect if the identity of the customer referred to in the memorandum were also to be disclosed. However, since that identity is to be withheld, the 13 words will reveal nothing that is not already disclosed in the first 35 words of the fifth paragraph of the memorandum, and the respondent has previously agreed to give the applicant access to those 35 words. Accordingly, I do not accept that disclosure of the 13 words deleted from the second sentence in the tenth paragraph of the memorandum could reasonably be expected to have an adverse effect on the business, professional, commercial or financial affairs of the respondent or another person, and hence they are not exempt matter under s.45(1)(c) of the FOI Act.

106. The information in the first category which satisfies the requirements of both s.45(1)(c)(i) and s.45(1)(c)(ii) is *prima facie* exempt, but the public interest balancing test in s.45(1)(c) must be considered and applied. With a document of the general nature of the memorandum containing the matter in issue, there will ordinarily be a public interest consideration, in enhancing the accountability of government, which favours disclosure. That would also apply to incorrect information in a document, as there is a public interest in ensuring that government decisions are made on the basis of factually correct information. In this instance, however, the mistake in the memorandum to the Minister for Primary Industries has been acknowledged, and the mistake was not, in my opinion, one that could, or should, have had any material effect on the granting of the Ministerial approval under s.11(3A) of the PPOM Act. I take account also of the fact that nearly all of the memorandum (including the considerations material to the granting of the Ministerial approval) has been made available for access under the FOI Act. In my opinion, any public interest in enhancing the accountability of government that might be served by disclosure of this information, is not, in these circumstances, of sufficient weight to overcome the public interest in non-disclosure which is inherent in the satisfaction of the requirements posed by s.45(1)(c)(i) and (ii). I am not able to identify any other public interest considerations which favour disclosure of this information, and the applicant has not referred me to any.

107. As to the information in the second category, the respondent has submitted that its disclosure could reasonably be expected to have the following adverse effects:

(a) an adverse effect on a marketing strategy which the respondent is pursuing in the highly competitive market for eggs in South-east Queensland; and

(b) an adverse effect on the commercial activity (in another market) of the other organisation involved in the relevant business arrangement with the respondent.

108. I am not satisfied that the expectation of the adverse effect claimed in (b) above is reasonably based. The nature of the information in the second category is such that I consider that the expectation claimed in (b) is merely speculative, and lacking in any substantive basis.

109. As to (a), however, the respondent has supplied me with material explaining why it is expected that disclosure would have an adverse effect on the marketing strategies which the respondent is pursuing. I am unable to provide any details of that material without risking harm to the commercial interests which the respondent is seeking to protect. Suffice it to say that the material provided to me has satisfied me that the expectation of adverse effects on the respondent's business or commercial affairs is reasonably based. I find, therefore, in accordance with s.45(1)(c)(ii), that disclosure of the information in the second category could reasonably be expected to have an adverse effect on the business or commercial affairs of the respondent.

110. When the public interest balancing test is applied to the information in the second category, some weight must be given to the public interest in enhancing accountability of government. However, it is also in the public interest that the respondent not be unduly impeded in the pursuit of initiatives that are designed to achieve improved economic efficiency, for the benefit of both producers and consumers of eggs in Queensland. Drawing the line between disclosure of information which promotes an appropriate level of accountability and public scrutiny of a government agency operating in a competitive commercial environment, and disclosure which unduly impedes the effective pursuit of that agency's operations, will often involve fine questions of judgment. Here the information in issue is of such a character that its present commercial sensitivity is likely to be lost with the passage of time. However, judgments on the prejudicial effects of disclosure of information must be made according to the relevant facts and circumstances prevailing at the time a decision, applying the provisions of the FOI Act, is made. I am unable to find, in this instance, that any public interest considerations favouring disclosure are of sufficient weight to overcome the

public interest in non-disclosure which is inherent in the satisfaction of the requirements posed by s.45(1)(c)(i) and (ii).

111. The s.45(2) exception does not apply to the matter in issue. The matter in issue does not concern the business, professional, commercial or financial affairs of the applicant, and in the circumstances of this case it is immaterial that the matter in issue might possibly concern the business, commercial or financial affairs of some undisclosed principal for whom the applicant may be acting. (The applicant may be acting in a personal capacity, but if he is acting on behalf of a client, he has not disclosed that fact, nor his client's identity.) Even if the applicant were acting on behalf of either of the other two business entities who are mentioned in the matter in issue, s.45(2) still would not apply because the information in issue clearly concerns the business or commercial affairs of the respondent, and is inextricably interwoven with information concerning the business or commercial affairs of the other business entities. It cannot, therefore, merely concern the business, commercial or financial affairs of any client on whose behalf the applicant might be acting (see my observations on the meaning of s.45(2) at paragraphs 39 and 40 above).

Conclusion

112. The decision under review (being the internal review decision made on behalf of the Board by Mr K Sheather on 14 April 1993) was to the effect that the applicant be allowed access to the three documents which fall within the terms of the applicant's FOI access request, subject to deletions from two of those documents of matter claimed to be exempt under s.45(1)(c) of the FOI Act. During the course of this review, the respondent has agreed to the release in full of one of the two documents from which matter had been deleted, and to the release of some of the matter initially claimed to be exempt in the one document now remaining in issue. I have already authorised the respondent to allow the applicant access to that matter.

113. In terms of a formal decision, it is therefore appropriate that I set aside the decision under review, and substitute my decision that the applicant is entitled to have access to the three documents identified by the respondent as falling within the terms of the applicant's FOI access request dated 18 December 1992, subject to the deletion of the following parts of the memorandum dated 14 August 1992 (from the Director, Strategic Policy Unit, Department of Primary Industries, to the Minister for Primary Industries on the subject "Approval for Use of Trading Name by Egg Marketing Board"), which comprise exempt matter under s.45(1)(c) of the *Freedom of Information Act 1992 Qld*:

(a) the last sentence of the third paragraph of the memorandum;
(b) the last six words of the fourth paragraph of the memorandum;
(c) the last fourteen words of the fifth paragraph of the memorandum; and
(d) the last six words of the eighth paragraph of the memorandum.

.....
F N ALBIETZ
INFORMATION COMMISSIONER