

# OFFICE OF THE INFORMATION COMMISSIONER (QLD)

**Decision No. 05/2004**  
**Application 423/03**

## **Participants:**

LIAM WALSH, AS AGENT FOR QUEENSLAND  
NEWSPAPERS PTY LTD  
**Applicant**

ERGON ENERGY CORPORATION LIMITED  
**Respondent**

## **DECISION AND REASONS FOR DECISION**

FREEDOM OF INFORMATION – refusal of access – report by a firm of business consultants appointed to investigate allegations of management impropriety and contracting irregularities by the respondent – whether matter excluded from the application of the *Freedom of Information Act 1992 Qld* by s.11A – whether matter was received or brought into existence by the respondent in carrying out activities conducted on a commercial basis.

*Freedom of Information Act 1992 Qld* s.11A, Schedule 2

*Electricity Act 1994 Qld* s.256

*Government Owned Corporations Act 1993 Qld* s.185, Part 11

*Hansen and Queensland Industry Development Corporation, Re* (1996) 3 QAR 265

## **DECISION**

I affirm that part of the decision under review (identified in paragraph 6 of my accompanying reasons for decision) by which it was decided that the document in issue (identified in paragraph 1 of my reasons for decision) is excluded from the application of the *Freedom of Information Act 1992* Qld by s.11A of that Act, and s.256 of the *Electricity Act 1994* Qld.

Date of decision: 29 June 2004

.....  
D J BEVAN  
**INFORMATION COMMISSIONER**

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## **REASONS FOR DECISION**

### **Background**

1. The applicant seeks review of a decision by the respondent, Ergon Energy Corporation Limited ("Ergon"), refusing him access, under the *Freedom of Information Act 1992 Qld* (the "FOI Act"), to a consultancy report dated 7 March 2003 by Deloitte Touche Tohmatsu ("Deloitte") entitled "Final Report into Investigation of Allegations within Ergon" (the "Deloitte Report").
2. In November 2002, the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia ("the CEPU") raised allegations regarding the conduct of a senior Ergon employee in respect of that employee's dealings with certain companies alleged to be related to him. Those allegations were the subject of an internal investigation by Ergon. They were subsequently investigated by a private consultancy firm (The Consultancy Bureau) pursuant to a requirement of Ergon's shareholding Ministers (who were, at that time, the Treasurer and the Minister for Innovation and Information Economy) under s.185 of the *Government Owned Corporations Act 1993 Qld* (the "GOC Act"). The review by The Consultancy Bureau concluded in late December 2002, with a report provided to Ergon and to Ergon's shareholding Ministers.
3. A number of other allegations had been made by the CEPU regarding improper behaviour by other senior Ergon officers, and irregularities in Ergon's contracting and tendering processes. In early January 2003, Ergon commissioned Deloitte to conduct an investigation into those allegations. The Deloitte Report was delivered in March 2003.

4. By letter dated 12 March 2003, the applicant applied to Ergon for access, under the FOI Act, to documents relating to the review by The Consultancy Bureau, and to a copy of the Deloitte Report. By letter dated 23 May 2003, Ms Teresa Bullock of Ergon informed the applicant that she had decided to refuse him access to the requested documents, saying:

*Section 11A of the FOI Act provides that the Act does not apply to documents received or brought into existence in carrying out commercial activities of a Government Owned Corporation ...*

*... both documents relate to the activities of awarding and letting of contracts and/or Ergon Energy's tendering processes and were brought into existence for the purpose of conducting a review of those activities. These activities clearly involve the process of determining the purchasing of goods and services by Ergon Energy and consequently the documents discuss aspects of those activities.*

*Accordingly, the release of the documents would be inconsistent with the intention of the provision of the Act, which is to ensure that GOCs are not disadvantaged in competition by disclosure of documents relating to commercial activities.*

5. Ms Bullock went on in her decision to state that, even if the requested documents were subject to the application of the FOI Act, the Deloitte Report would qualify for exemption under s.43(1) of the FOI Act, and that it, and the other documents in question, would also qualify for exemption under one or more of sections 40(c), 44(1), 45(1)(c) and 46(1) of the FOI Act.
6. By letter dated 26 May 2003, the applicant applied to Ergon for internal review of Ms Bullock's decision, but only insofar as it related to the Deloitte Report. By letter dated 12 June 2003, Mr David Pegg, Ergon's Company Secretary/Corporate Counsel, informed the applicant that he had decided to affirm Ms Bullock's decision to refuse access to the Deloitte Report. In his reasons for decision, Mr Pegg referred to s.11A and Schedule 2 of the FOI Act, and to s.256 of the *Electricity Act 1994 Qld*, and stated:

*The document [the Deloitte Report] was brought into existence in relation to allegations of wrongdoing against certain of Ergon Energy's executive and management personnel. Those allegations concern Ergon Energy's activities in relation to the procurement of goods and services and other commercial activities and in relation to the activities of those executive and management personnel.*

*I consider that the procurement of goods and services by Ergon Energy, the awarding of related contracts, and the other underlying activities are clearly activities conducted on a commercial basis, and therefore should properly be characterised as commercial activities for the purposes of section 256.*

*Ergon Energy's management of the manner in which it undertakes its commercial activities, and in particular, the seeking of material upon which to obtain legal advice in relation to allegations of wrongdoing by executive personnel in connection with the undertaking of its commercial activities is an intrinsic part of the undertaking of those commercial activities by Ergon Energy.*

*Having regard to the above considerations, I have determined that the Document was brought into existence by Ergon Energy in carrying out its commercial activities, and that therefore, the FOI Act does not apply to the Document.*

7. Mr Pegg also went on to state that, even if the Deloitte Report were subject to the application of the FOI Act, it would qualify for exemption under s.40(c), s.43(1), s.44(1), s.45(1)(c) and/or s.46(1) of the FOI Act.
8. By undated letter received on 23 June 2003, the applicant applied to the Information Commissioner for review, under Part 5 of the FOI Act, of Mr Pegg's decision.

#### **External review process**

9. A copy of the Deloitte Report was obtained and examined.
10. Ergon's solicitors lodged additional material in support of Ergon's case that the Deloitte Report was excluded from the application of the FOI Act. That material included written submissions, a statutory declaration dated 12 September 2003 by Mr Pegg, and a statutory declaration dated 16 September 2003 by Mr Scott Pelto, Account Director at "Deloitte Forensic" (the division of Deloitte that had conducted the relevant investigation).
11. Having reviewed the Deloitte Report, and the submissions and evidence lodged by Ergon in support of its case, the Deputy Information Commissioner wrote to the applicant on 18 November 2003, explaining that he had formed the preliminary view that the Deloitte Report had been received or brought into existence by Ergon in carrying out its commercial activities, and was therefore excluded from the application of the FOI Act by s.11A of the FOI Act. The Deputy Information Commissioner explained the reasons for his preliminary view, and provided the applicant with the relevant parts of Ergon's submissions and evidence.
12. By facsimile letter dated 28 November 2003, the applicant advised that he did not accept the Deputy Information Commissioner's preliminary view. The applicant stated that he did not accept the claim by Ergon that the Deloitte Report had been received or brought into existence by Ergon in carrying out commercial activities:

*The Courier-Mail contends the report was only brought into existence after inquiries from the State Government.*

*It was therefore not a part of its normal commercial operations.*

*It was an extraordinary undertaking made only after consultation with the State Government.*

*... the inquiry came after Treasurer Terry Mackenroth raised a number of questions about the adequacy of Ergon's tendering processes, internal review processes and additional allegations raised by the Electrical Trades Union.*

13. In support of his contentions, the applicant provided various documents obtained by him pursuant to an FOI access application he had made to Queensland Treasury. Included in those documents was an undated file copy of a letter from the Treasurer, Mr Mackenroth, to Mr K Hillless, the Chair of Ergon. The letter referred to the report prepared by The Consultancy Bureau, and requested advice as to Ergon's proposed response to various "systemic issues" referred to in The Consultancy Bureau's report, including the additional allegations made by the CEPU in respect of the conduct of other senior Ergon officers.

14. By letter dated 3 December 2003, the Deputy Information Commissioner provided Ergon's solicitors with a copy of the applicant's facsimile letter dated 28 November 2003 and attachments. In his letter, the Deputy Information Commissioner noted the applicant's central contention, i.e., that the Deloitte Report was not commissioned by Ergon in the course of carrying out its excluded commercial activities, but was commissioned in response to a direction from the Treasurer that Ergon's Board arrange for an investigation to be conducted into alleged management impropriety and various other "systemic issues" within Ergon. The Deputy Information Commissioner noted that Ergon, as a Government Owned Corporation ("GOC"), is subject to general and specific reporting and accountability requirements under Part 11 of the GOC Act, and invited Ergon to lodge further material in response to the applicant's contentions.
15. Ergon's solicitors subsequently lodged further submissions and evidence in support of Ergon's position. That material was provided to the applicant under cover of a letter dated 17 March 2004 from the Deputy Information Commissioner. The applicant responded by undated letter (received at my office on 23 March 2004). That letter was sent to Ergon's solicitors, who lodged final short points of reply by way of a letter dated 29 April 2004.
16. In making my decision in this matter, I have taken into account:
  - the contents of the Deloitte Report;
  - the applicant's FOI access application dated 12 March 2003, application for internal review dated 26 May 2003, and undated application for external review received on 23 June 2003;
  - Ergon's initial and internal review decisions, dated 23 May 2003 and 12 June 2003, respectively;
  - submissions and evidence provided by Ergon under cover of letters dated 12 September 2003, 11 February 2004, 18 February 2004 and 29 April 2004; and
  - submissions and evidence provided by the applicant under cover of a letter dated 28 November 2003, and under cover of an undated letter received on 23 March 2004.

**Issue for determination**

17. The issue for my determination is whether the Deloitte Report is excluded from the application of the FOI Act by s.11A of the FOI Act, and s.256 of the *Electricity Act*, on the basis that it was received or brought into existence in carrying out Ergon's commercial activities.

**Relevant legislative provisions**

18. Section 11A of the FOI Act provides:

*11A. This Act does not apply to documents received, or brought into existence, in carrying out the activities of a GOC mentioned in schedule 2 to the extent provided under the application provision mentioned for the GOC in the schedule.*

19. Schedule 2 relevantly provides:

**SCHEDULE 2**

**APPLICATION OF ACT TO GOCs**

*section 11A of the Act*

**GOC**

**Application provision**

...

3. *State electricity entity, within the meaning of the Electricity Act 1994* Electricity Act 1994, s 256

20. Section 256 of the *Electricity Act* relevantly provides:

**256.(1)** *In this section-*

**"commercial activities"** means activities conducted on a commercial basis.

**"excluded activities"** means-

(a) *commercial activities; or ...*

(2) *A regulation may declare the activities of a state electricity entity that are taken to be, or are taken not to be, activities conducted on a commercial basis.*

(3) *The Freedom of Information Act 1992 does not apply to a document received or brought into existence by a State electricity entity in carrying out its excluded activities.*

...

21. It is clear that Ergon is a GOC, and a state electricity entity within the meaning of the *Electricity Act*.

**Activities conducted on a commercial basis**

22. No regulation has been made under s.256(2) of the *Electricity Act* declaring activities of Ergon that are taken to be, or are taken not to be, activities conducted on a commercial basis. Section 256(1) of the *Electricity Act* simply defines "commercial activities" as activities conducted on a commercial basis. No other definition of "commercial" is contained in that Act, or in the *Acts Interpretation Act 1954* Qld. In *Re Hansen and Queensland Industry Development Corporation* (1996) 3 QAR 265, Commissioner Albietz discussed the application of s.11A of the FOI Act and the meaning, in a similar context, of "commercial activities" (at pp.274-275; paragraphs 25-26):

25. *Major dictionaries give the primary meaning of the adjective "commercial" as "of, connected with, or engaged in, commerce; mercantile" (Collins English Dictionary, Third Aust. Ed), "of, engaged*



*in, bearing on, commerce" (Australian Concise Oxford Dictionary), "of, or of the nature of, commerce" (Macquarie Dictionary). The corresponding primary meaning of the noun "commerce" is "the activity embracing all forms of the purchase and sale of goods and services" (Collins English Dictionary, Third Aust. Ed.), "exchange of merchandise or services ... buying and selling" (Australian Concise Oxford Dictionary), "interchange of goods or commodities" (Macquarie Dictionary). ...*

26. *There is a subsidiary meaning of the adjective "commercial" which may be appropriate to the context of the phrase "activities conducted on a commercial basis" in s.35 of the Queensland Industry Development Corporation Act 1994, that is, "having profit as the main aim" (Collins English Dictionary, Third Aust. Ed.), "capable of returning a profit; ... preoccupied with profits or immediate gains" (Macquarie Dictionary). ...*

23. In determining whether the Deloitte Report was received or brought into existence in carrying out the commercial activities of Ergon, the contents of the Report itself are relevant, but only to the extent that they assist the task of properly characterising the nature of the activity. It is possible for a document containing information about Ergon's commercial activities to have been brought into existence in carrying out an activity that was not conducted on a commercial basis, e.g., accounting to the shareholding Minister for the performance of Ergon's statutory functions. In such a case, the document would be subject to the application of the FOI Act, and a decision would be required as to whether any of the information contained in that document qualified for exemption under any of the exemption provisions contained in Part 3, Division 2, of the FOI Act (e.g., whether some commercially sensitive information qualified for exemption under s.45(1)(c) or s.46(1) of the FOI Act, as Ergon has argued in the alternative in this case). If, on the other hand, the document in question was received or brought into existence in carrying out a commercial activity, the document will be excluded from the application of the FOI Act.

#### **The participants' submissions**

24. Ergon contends that the Deloitte Report was received by it in the course of carrying out commercial activities that consisted of:

- investigating and managing allegations of impropriety against senior executive staff;
- informing itself of possible contractual breaches that may have resulted as a consequence of those improprieties; and
- seeking recommendations and advice as to how relevant commercial processes might be improved.

In addition, Ergon contends that, as Deloitte was retained by Ergon pursuant to commercial terms of engagement, the very production and delivery of the Deloitte Report was a commercial activity.

25. In their submissions dated 12 September 2003, Ergon's solicitors stated:

15. *Ergon submits that:*

- (a) *the allegations...which form the subject matter of the Report, each relate to the commercial activities of Ergon;*
- (b) *in particular, the allegations relate to alleged irregularities or alleged impropriety in the conduct of Ergon personnel in the course of the commercial activities of Ergon;*
- (c) *the allegations relate to Ergon's commercial relationships with its suppliers and contract counterparties, and potential suppliers and contract counterparties;*
- (d) *the allegations, and Ergon's position in relation to them and its response to them, may affect those commercial relationships;*
- (e) *the Deloitte investigation and Report was commissioned by Ergon in order to allow Ergon to consider its position, and its potential legal rights and liabilities, in relation to the allegations;*
- (f) *the Report contains recommendations in relation to the future conduct of Ergon's commercial procurement activities;*
- (g) *an independent investigation of, and the preparation of a report concerning, allegations of employee impropriety in relation to its commercial activities, is an activity which a prudent commercial enterprise would undertake in the course of its commercial activities;*
- (h) *Deloitte was engaged by Ergon on a commercial basis, and the Report was prepared by Deloitte and delivered to Ergon in accordance with the terms of that engagement;*
- (i) *the Report therefore not only contains information about Ergon's commercial activities, but was received by Ergon in carrying on an activity on a commercial basis.*

26. The applicant's central argument is that, in commissioning Deloitte to undertake its investigation and to prepare its report, Ergon was not carrying out an activity conducted on a commercial basis, but was instead acting at the behest of the Treasurer (a shareholding Minister of Ergon). The applicant contends that the Deloitte Report was commissioned in direct response to a demand from the Treasurer that Ergon's Board advise him of what it intended to do in response to the allegations that had been made against Ergon employees. Accordingly, the Report was received or brought into existence by Ergon for the purposes of Ergon accounting to its shareholding Ministers, pursuant to the reporting and accountability requirements under the GOC Act, rather than in carrying out commercial activities. In his undated letter (received on 23 March 2004), the applicant argued:

...

*The Courier-Mail again contends the report was only brought into existence after inquiries from the State government...*

*It [the engaging of Deloitte and the production of the Deloitte Report] was an extraordinary undertaking only made after consultation with the State Government, which was also in consultation with the Electrical Trades Union.*

27. The applicant provided the following documents (obtained pursuant to an FOI access application that he made to Queensland Treasury), as evidence in support of his position:

- an undated file copy of a letter from the Treasurer to Mr K Hilless, Chair of the Board of Ergon, referring to The Consultancy Bureau's report, and requesting "urgent advice" regarding a "number of systemic issues" including Ergon's tendering and contracting processes. (Inquiries made of Queensland Treasury by a member of my staff confirmed that the original of this letter, dated 24 December 2002, had been forwarded to Mr Hilless at Ergon.);
- a copy of a letter dated 17 January 2003 from the Treasurer, Mr Mackenroth to Mr R Williams, Secretary, Electrical Trades Union of Australia ("the ETU" – the Queensland branch of the CEPU), referring to an earlier meeting between them at which concerns in relation to Ergon were discussed, and noting that Ergon had instigated an "independent investigation" (i.e., the investigation by Deloitte); and
- a copy of a Ministerial briefing note dated 7 January 2003, apparently prepared to brief the Treasurer prior to his meeting with Mr Williams of the ETU referred to above.

28. In response to the applicant's arguments, Ergon's solicitors provided a chronology of relevant events leading up to the appointment of Deloitte and the preparation of the Deloitte Report, together with documents to verify the chronology, including correspondence, Minutes of Board meetings, and emails circulated to Ergon staff. Ergon argued that this material demonstrated that, prior to the request for "urgent advice" contained in the Treasurer's letter to Ergon dated 24 December 2002, Ergon had already resolved to have the outstanding allegations raised by the CEPU investigated independently. In support of that contention, Ergon pointed to the following evidence:

- minutes of a meeting dated 12 December 2002 of Ergon's Audit and Legal Compliance Committee at which the Committee noted the review by The Consultancy Bureau that was then occurring, and also noted that, at the conclusion of that review, "there might be additional reviews done to ensure the integrity of Ergon Energy processes and systems";
- a letter dated 23 December 2002 from Mr Hilless to the Treasurer advising (amongst other things) that "all issues currently raised by the CEPU will be reviewed"; and
- an email dated 23 December 2002 from Mr Kim Griffith, CEO of Ergon, to staff of Ergon, stating:

*...in conjunction with the Board's Audit and Legal Compliance Committee, I am implementing four particular actions:*

- *First, I have asked that all remaining information provided by the CEPU is reviewed...*

29. In view of the foregoing, Ergon submitted that:

3. *...unlike The Consultancy Bureau's investigation into the allegations concerning [a senior Ergon employee] which was formally initiated by Ergon's shareholding Ministers pursuant to section 185 of the Government Owned Corporations Act 1993 Qld ("the GOC Act"), Ergon independently commissioned the investigation by Deloitte Touche Tohmatsu in the absence of any request or direction by its shareholding Ministers to undertake such an investigation.*
4. *The Applicant asserts that the Treasurer's letter to Ergon's Chairman dated 24 December 2002 provides evidence that the investigation by Deloitte Touche Tohmatsu was commissioned by Ergon in response to a demand from the Treasurer that the Ergon Board account to him in respect of the matters referred to in the Treasurer's letter.*
5. *On the contrary, it is clear that as early as 12 December 2003, Ergon contemplated undertaking further independent investigations in relation to matters arising out of the CEPU's allegations against Ergon.*
6. *It is also clear from Ergon's Chief Executive Officer's email to all staff of 23 December 2003 and from Ergon's Chairman's letter of 23 December 2003 to the Treasurer that Ergon had independently determined to investigate all of the allegations raised by the CEPU prior to receiving the Treasurer's letter dated 24 December 2002 (which was received by Ergon on 3 January 2003).*

[Ergon's submissions dated 11 February 2004]

30. In addition, Ergon argued that, regardless of the sequence of events leading to the commissioning of the Deloitte Report, the Treasurer's request for advice as contained in his letter dated 24 December 2003 to Mr Hillless was not a direction or demand as such (that could be linked to a decision to commission a report from Deloitte), but merely a request for advice:

12. *In any event, Ergon submits that the Treasurer's letter of 24 December 2002 does not request that Ergon adopt any particular course of action (such as undertaking an independent review), but rather seeks advice from Ergon's Board in relation to its:*
  1. *proposed course of action in respect of [a named Ergon employee] and other employees associated with the matter; and*
  2. *response to the further matters raised in The Consultancy Bureau's report.*
13. *Ergon does not agree with the Applicant's assertion that because the Treasurer sought a briefing from Ergon in relation to its proposed course of action in respect of the matters referred to in paragraph 6 above that it follows that any action which Ergon ultimately took in respect of those matters (such as commissioning the independent investigation by Deloitte Touche Tohmatsu) was in response to a demand from the Treasurer. Instead, it continues to be Ergon's submission that the Deloitte Report was commissioned as part of the excluded commercial activities of Ergon, which activity was reported to Ergon's shareholding Ministers, in accordance with Ergon's obligations to keep its shareholding Ministers informed.*

31. In his final undated submission received on 23 March 2004, the applicant responded to Ergon's contentions as follows:

*... The documentation provided by Ergon does not show the Deloitte Touche Tohmatsu inquiry was brought about as part of its normal commercial activities.*

*...*

*The company, as pointed out in its documents, uses internal systems to conduct such audits into allegations.*

*...*

*Ergon's letter dated 23 December (annexure 9) only states: "All issues currently raised by the CEPU will be reviewed".*

*Ergon has consistently used its internal structures to review such processes.*

*Had this review been a part of its normal processes, such processes would have been used.*

*The letter from the Treasurer also refers to other "unsubstantiated allegations" about contract work, problems with internal review systems and employment contract details.*

*It was not until January 7 that Deloitte Touche Tohmatsu was appointed.*

*There is no indication as to why DTT was used instead of internal systems.*

*Indeed, as Ergon notes, issues raised by the Treasurer were "referred to DTT for consideration as part of that firm's investigations as they were relevant to and within the scope of the matters under investigation". There is no indication this was a part of its normal commercial operations.*

### **Analysis**

32. The applicant's central contention is that the Deloitte Report was prepared in response to a direction or demand from the Treasurer, and that it was therefore received or brought into existence by Ergon in carrying out its statutory reporting obligations under the GOC Act, rather than in carrying out its commercial activities. I will explain below why I consider that the material before me does not support the applicant's first contention. I will then discuss whether or not the Deloitte Report was received or brought into existence in carrying out commercial activities of Ergon.
- (a) Was there a direction or demand by the Treasurer?**
33. I consider that the evidence before me supports a finding that Ergon had decided, independently of the request made in the Treasurer's letter dated 24 December 2002, to commission an independent review of the additional allegations made against Ergon's staff.
34. The Consultancy Bureau's report was prepared on instructions from the Under Treasurer pursuant to a requirement by Ergon's shareholding Ministers, in accordance with s.185 of the GOC Act (that is made clear in a letter dated 9 December 2002 from the Under Treasurer to Ergon, annexed to Ergon's submissions dated 11 February 2004). That report can properly be characterised as a report received or brought into existence in carrying out the statutory accountability obligations imposed on Ergon under the GOC Act, rather than in carrying out Ergon's commercial activities.

35. There was no similar requirement from the Treasurer leading to the appointment of Deloitte. The Treasurer's letter dated 24 December 2002 asked Mr Hillless for advice as to what further action was proposed by Ergon in relation to various issues, including the outstanding allegations against Ergon staff that had not been dealt with in The Consultancy Bureau's report.
36. While the allegations referred to in the Treasurer's letter were among those referred to Deloitte for investigation, the evidence indicates that the appointment of Deloitte to investigate and report was not initiated as a consequence of the Treasurer's letter, or at the Treasurer's direction. Ergon had foreshadowed further investigations of the balance of the CEPU allegations as early as 12 December 2002, and had indeed resolved to conduct those further investigations on 23 December 2002. The Treasurer's letter to Ergon requesting advice was dated 24 December 2002, and was not received by Ergon until Friday 3 January 2003. Deloitte was appointed to investigate the outstanding allegations on Tuesday 7 January 2003.
37. The applicant has pointed out that the Minutes, and the letter and email dated 23 December 2002 (referred to in paragraph 28 above), refer only to a further "investigation" or "review", as opposed to an "independent" investigation or review. However, the closeness in time between Ergon's decision to conduct a further review (made on 23 December 2002, immediately before the Christmas/New Year period) and the appointment of Deloitte (on 7 January 2003), supports Ergon's submission that it had been Ergon's own intention to brief and engage external consultants to review the outstanding CEPU allegations.
38. I understand part of the applicant's argument to be that the appointment of an external consultancy firm, such as Deloitte, to investigate the allegations made by the CEPU, was a departure from Ergon's usual practice in dealing with allegations of impropriety (which was to conduct an internal investigation) and should therefore be regarded as evidence of an "extraordinary undertaking" by Ergon, made only after intervention by the State government. That is not sufficient, of itself, to support a finding that the commissioning of a report by Deloitte must have occurred as a result of a requirement by a shareholding Minister. It cannot displace the weight of other evidence which supports a finding that Ergon made an independent decision to appoint Deloitte to investigate and report on the outstanding CEPU allegations.
39. I also note that, having received the Deloitte Report, Ergon did not initially provide a copy to the Treasurer:

*17. ...in a verbal briefing to its shareholding Ministers on 28 February 2003, Ergon advised that it could not provide its shareholding Ministers with a copy of the Deloitte Report. Ergon submits that if the Deloitte Report had in fact been brought into existence by Ergon in response to a demand from the Treasurer as is asserted by the Applicant, it would be expected that Ergon would have provided its shareholding Ministers with a copy of the report as a matter of course. Ultimately, the Deloitte Report was only provided to Ergon's shareholding Ministers within the report of the Under Treasurer which its shareholding Ministers requested under section 185 of the GOC Act.*

[Ergon' submissions dated 11 February 2004]

Had the Deloitte Report been commissioned at the direction of Ergon's shareholding Ministers, it is reasonable to expect that they would have been provided with a copy upon its receipt by Ergon.

40. Accordingly, I am satisfied that Ergon made an independent decision to commission a report from Deloitte, and that the report was not commissioned pursuant to a requirement of the Treasurer, as one of Ergon's shareholding Ministers.

**(b) Commercial activities of Ergon**

41. It is clear from my examination of the Deloitte Report that it contains information about Ergon's commercial activities, including existing contractual relationships, and its tendering and procurement arrangements. However, as noted at paragraph 23 above, the mere fact that a document contains information about Ergon's commercial activities does not necessarily mean that it was received or brought into existence by Ergon in carrying out commercial activities. It is necessary to have regard to the character of the activity being carried out when the Deloitte Report was received or brought into existence.
42. Ergon submitted that, unlike the documents under consideration in *Re Hansen*, the Deloitte Report considered matters extending beyond internal staff management issues. It discussed external commercial relationships and dealings with suppliers and service providers. The report was commissioned as a commercial decision on the part of Ergon itself, rather than under any statutory entitlement of staff to seek review of a decision affecting an employee's rights and entitlements (as in *Re Hansen*).
43. Although the Deloitte Report deals with allegations of improper conduct on the part of Ergon employees (and thus is connected to the issue of employee management), those allegations went beyond merely internal management matters: they related to the actions of senior Ergon officers in their commercial dealings with external contractors, suppliers and service providers. The allegations made by the CEPU related to the integrity and efficiency of Ergon's commercial dealings with external parties, and involved senior Ergon personnel who were charged with establishing and maintaining those commercial dealings and relationships.
44. This aspect of the character of the allegations made against Ergon staff supports a finding that, in appointing Deloitte, Ergon was pursuing a commercial course of action with a view to ensuring that its commercial interaction with external suppliers and service providers was effective and appropriate. Ergon was seeking to ensure that it was meeting appropriate standards of corporate governance, and thus avoiding irregularities, inefficiencies and possible exposure to further adverse publicity and/or commercial liability, both of which would negatively affect its commercial reputation and performance. While the Deloitte Report related to the management of Ergon's staff, it is not appropriate in the circumstances of this case to characterise the relevant activity as purely administrative or managerial. The functions and responsibilities with which the relevant senior Ergon officers were charged, and to which the CEPU allegations related, were of a fundamentally commercial nature.
45. In addition, it is significant that Deloitte not only investigated and reported upon the veracity or otherwise of the CEPU allegations, but provided recommendations as to how Ergon could improve its internal management of staff operations affecting external commercial relations. Deloitte made various recommendations for improvement, certain of which involved purchasing and implementing proprietary systems unique to Deloitte. Accordingly, taking into account this aspect of the retention by Ergon of Deloitte, it can be said that, in commissioning Deloitte, Ergon was engaging external management consultants to provide it with a business service, designed not only to ensure the integrity and viability of various of Ergon's commercial relationships and activities, but to obtain advice and recommendations as to how those activities might be enhanced.

- 46. I consider that the principal factor motivating the commissioning by Ergon of the Deloitte Report to address the residual allegations raised by the CEPU was a corporate responsibility to investigate and improve relevant aspects of Ergon's commercial performance. The essence of the exercise was one of ensuring that Ergon was maintaining and enhancing its corporate governance standards and risk management strategies, through ensuring that senior management adhered to appropriate standards of corporate behaviour in their commercial dealings with external suppliers and service providers. In my view, the nature of the exercise related to the broader business objective of ensuring satisfactory commercial performance, and was an inherently commercial activity. I accept the submission of Ergon that, in receiving or bringing the Deloitte Report into existence, Ergon was engaging in "an activity which a prudent commercial enterprise would undertake in the course of its commercial activities" (see paragraph 25 above).
- 47. In summary, I find that, in commissioning and receiving the Deloitte Report, Ergon was engaged in an activity conducted on a commercial basis. It follows that the Deloitte Report is excluded from the application of the FOI Act by s.11A of the FOI Act and s.256 of the *Electricity Act*.
- 48. Whether those provisions produce a satisfactory outcome in terms of affording an appropriate level of accountability and public scrutiny, in respect of the performance of a corporation owned by the Queensland government on behalf of Queensland electors and taxpayers, and established to provide essential services to the people of Queensland, is not a matter that I have jurisdiction to consider, and is one better left to further public debate and parliamentary consideration.

**Conclusion**

- 49. For the foregoing reasons, I decide to affirm that part of the decision dated 12 June 2003 by Mr David Pegg on behalf of Ergon, by which it was decided that the Deloitte Report is excluded from the application of the FOI Act by s.11A of the FOI Act and s.256 of the *Electricity Act*.

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D J BEVAN

**INFORMATION COMMISSIONER**