



OmbudsmanSA

DETERMINATION

External review - *Freedom of Information Act 1991*

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|---------------------------|---------------------------------------|
| Applicant | Mr Adrian Pederick MP |
| Agency | South Australian Forestry Corporation |
| Ombudsman reference | 2011/7389 |
| Agency reference | FD 11/338 |
| Provisional determination | The determination is varied. |

REASONS

Background

1. Through the South Australian Forestry Corporation (ForestrySA),¹ the SA government owns a significant portion of softwood plantation in the lower south east of the state, known as the Green Triangle. On 19 December 2008, the government announced in its 2008-09 Mid-Year Budget Review a proposal to 'sell the harvesting rights of ForestrySA plantations for up to three harvesting cycles'.² This was one of several measures proposed by the government to reduce the state's net debt in response to the global financial crisis and its impact on the state budget.³
2. The government indicated that it would be 'considering a range of issues' and undertaking 'consultation with affected parties and analysis of the regional [impacts of the proposed forward sale]'.⁴
3. External consultant, ACIL Tasman was commissioned by the government in December 2010 to provide the Department of Treasury and Finance (**the department**) with advice on the regional impact of the proposed sale.
4. On 10 February 2011, the Senate referred the following matter to the Senate Standing Committee on Rural Affairs and Transport (**the Senate Standing Committee**) for inquiry and report:

The impact of the decision by the South Australian Government to forward-sell the state's \$2.8 billion timber assets on the state's economy, timber industry and on jobs and any other broader impacts, with particular reference to:

- (a) the likelihood of regional job losses;
- (b) the flow-on effects to communities in timber-reliant regions;
- (c) the potential for the private buyer not to consider local impacts;
- (d) the potential for reduced value-adding locally and increased off-shoring; and
- (e) any other related matters.

¹ The South Australian Forestry Corporation was established on 1 January 2001 under the *Forestry Corporation Act 2000*. The corporation trades as ForestrySA and is subject to the provisions of the *Public Corporations Act 1993*.

² Government of South Australia, *Mid-Year Budget Review 2008-09*, presented by Hon Kevin Foley MP, SA Deputy Premier and Treasurer, p4.

³ Hon Jack Snelling MP, SA Treasurer, *Submission 7*, Senate Standing Committee on Rural Affairs and Transport, p1.

⁴ *Ibid.*

5. The SA Treasurer submitted to the Senate Standing Committee:

As part of the decision to investigate the sale of the forward harvest, the State Government has commissioned an independent external economics consulting firm, ACIL Tasman, to develop a Regional Impact Statement (RIS), to identify the potential social and economic impacts on the South East from selling the forward harvest.

ACIL Tasman has begun a comprehensive consultation process with interested parties including local councils, timber industry representatives, unions and chambers of commerce and it is expected that ACIL Tasman will deliver its report by the end of this month [March 2011]. The report will include:

- issues and views expressed through the consultation
- costs and benefits to the region and community, particularly looking at employment
- the impact of the proposal on social inclusion and economic development and
- strategies for managing identified risks and impacts, including those on downstream industries and mills in the area.⁵

6. The recommendations coming out of the Senate Standing Committee towards the end of April 2011 focussed on the need to release the findings by ACIL Tasman and for the SA government to implement a comprehensive public consultation process if it chose to pursue the proposed sale. The committee noted the significant impact of the sale on the Green Triangle with regards to the economy - both at a regional and state level, on economic development, jobs and the social fabric of the community. Accordingly, it recommended that in making any decision, the state government have regard to:

- the potential impact on the region's economy, employment opportunities, property values and business viability
- the conditions under which the sale might proceed having regard to these potential impacts, and
- the relative financial benefits and/or disbenefits of the sale to the state Government's finances in the short and longer term.⁶

7. On 6 April 2011, a Select Committee was established by the Legislative Council in the SA Parliament (**the Select Committee**) to inquire into and report on the government's proposed sale of the harvesting rights in ForestrySA plantation estates and any other related matters.

8. ACIL Tasman compiled a report dated 21 April 2011 titled 'ForestrySA and the South East Region of South Australia: Assessing the regional impacts of the proposed forward rotation sale of ForestrySA' (**the report**). The report was publicly released by the government on 3 May 2011. The report states on its cover that it was prepared for the Department of Treasury and Finance; and also in its Executive Summary, that 'This analysis will enable the preparation of a Regional Impact Assessment Statement (RIAS)'.⁷ In essence, the report noted that there would be no significant economic impact by the proposed sale, and also that any social or environmental impact would be unlikely.⁸

9. From the report, I understand that a RIAS was drafted on the appropriate template in accordance with DPC Circular 19, which was finalised by the department for Cabinet. Although the report is a public document, I understand that the RIAS is not.⁹

⁵ Hon Jack Snelling MP, SA Treasurer, *Submission 7*, Senate Standing Committee on Rural Affairs and Transport, pp1-2.

⁶ Recommendation 3.16.

⁷ www.treasury.sa.gov.au/public/download.jsp?id=3254, front cover and page iii.

⁸ Ibid.

⁹ See evidence of Mr Mark Barber and Mr Jeremy Justin of ACIL Tasman to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates, 27 October 2011, p156-157.

10. In his evidence to the Select Committee, the Chair of the ForestrySA Board (**the Chair**) expressed his concerns about the quality of the report; that it is a 'flawed' and 'deficient' document with a number of factual errors and assumptions that could not be validated;¹⁰ and that he had conveyed this view to the Treasurer and the Minister.¹¹
11. The Chair also submitted that on Thursday (28 April 2011) he was provided with a copy of the 'regional impact assessment statement' by the government. The Chair and the Chief Executive of ForestrySA (**the CE**) met and made notes in response that weekend, and gave the Treasurer an 'undertaking' that they would report to him on the following Tuesday. However, early in the week, the Treasurer announced that the government would be proceeding with the forward sale (after Cabinet met on Monday 2 May 2011, I understand),¹² and they were denied the opportunity to put their views beforehand.
12. In their submission to the Select Committee, the Green Triangle councils of Grant, Mount Gambier and Wattle Range expressed their concern about the economic, social and environmental impact of the government's proposal.¹³ Their submission also identified a 'significant amount of anomalies, discrepancies and bias' in the report.¹⁴ The councils offered a critique of the report in their submission,¹⁵ and commented that it was 'most disappointing that the decision by the Treasurer to forward sell up to three (3) rotations of ForestrySA plantations has relied on such an inaccurate report.'¹⁶
13. In evidence to the Select Committee, the department did not deny that the report contained errors; however, it was submitted that '... they do not impact on the overall conclusions that were reached in the impact statement'.¹⁷
14. The Interim Report of the Select Committee was released on 23 November 2011, and made 18 recommendations. These recommendations generally reflected the committee's concern about the sale process, and the need for an investigation by the Auditor General of that process.

FOI application for access

15. Against this background, by application under the Freedom of Information Act (**the FOI Act**) received by the agency on 25 July 2011, the applicant requested access to:

... a copy of the letters from the ForestrySA board to the Treasurer and the Minister for Forests expressing concern over the content and conclusions of the ACIL Tasman Regional Impact Assessment Statement.

I also request copies of any responses received by ForestrySA to the abovementioned letters.

I request a copy of any ForestrySA document that lists the concerns and flaws it identified in the ACIL Tasman Regional Impact Assessment Statement.

¹⁰ Evidence of Mr John Ross, Chair of ForestrySA to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates, 14 July 2011, p93.

¹¹ Minister for Agriculture, Forests and Fisheries, then Hon Michael O'Brien MP.

¹² Evidence of Mr John Ross Chair of ForestrySA to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates, 14 July 2011, p93.

¹³ See evidence of the Mayors of Grant, Mt Gambier and Wattle Range to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates, 13 July 2011.

¹⁴ Submission by 'Three councils of the Lower South East' to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates, 31 May 2011, p7.

¹⁵ Appendix 3 of the submission.

¹⁶ Submission by 'Three councils of the Lower South East' to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates, 31 May 2011, p7.

¹⁷ Evidence to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates by the Under Treasurer, Mr Brett Rowse, 3 August 2011, p113.

16. After invoking section 14A of the FOI Act, the CE later made a determination on 27 September 2011 (**the agency's determination**). The CE then forwarded a further letter to the applicant dated 29 September 2011 elaborating on his view in the determination.
17. The agency's determination advised that 11 documents had been identified as falling within the scope of the application. I have attached a copy of the schedule provided by the agency to the applicant listing and describing the documents (**Attachment 1**). I use the numbering ascribed to the documents in this schedule.
18. The agency's determination gave access to document 11. However with respect to the other documents, the determination refused access on various grounds under Schedule 1 to the FOI Act:
 - document 1 - clause 1(1)(a), clause 13(1)(a)
 - documents 2, 3, 4 - clause 9(1)
 - document 5 - clause 1(1)(a), clause 9(1)
 - documents 7, 8, 9, 10 - clause 1(1)(c)
 - document 6 - partial refusal of access (one sentence) - clause 13(1)(a)
19. The applicant then requested my external review of the agency's determination under section 39 of the FOI Act. I received this request on 11 October 2011.

External review process

20. I formally notified the agency of my review on 20 October 2011. I sought relevant documents, including additional evidence and argument which the agency considered justified its determination, in light of the provisions of section 48 of the FOI Act.
21. After some discussion with the agency, I received relevant documents on 16 November 2011 and then later, under summons on 30 November 2011.¹⁸
22. On 8 December 2012 I released to the applicant and the agency my provisional determination, and invited further submissions before finalising my view. My provisional determination was that the agency's determination should be reversed.
23. I received further written submissions from the agency dated 10 January 2012. The applicant did not make any submissions in response to my provisional determination, but informed my office that he wished to continue to pursue his right of access to the documents.
24. My deputy also met with the CE and later, the Deputy Under Treasurer, to further understand the background to the report, the related Cabinet process and the development of a RIAS in relation to the report. The Deputy Under Treasurer also provided responses to my deputy's additional questions by email.
25. In the following, I have incorporated the agency's further submissions and information provided by the CE and the Deputy Under Treasurer.¹⁹
26. Events have occurred since the agency's determination which have impacted on the status of the documents in my review. Notably, some of the documents are now publicly accessible. In accordance with my obligations under section 39(11), I have taken into account these events; and my determination is based on current circumstances.

¹⁸ The documents received under summons were those being claimed in the agency's determination as Cabinet documents.

¹⁹ Including the Deputy Under Treasurer's emails to Deputy Ombudsman dated 10 and 13 February 2012.

Relevant provisions of the FOI Act

27. The objects of the FOI Act are set out in section 3, to 'promote openness in government and accountability of Ministers of the Crown and other government agencies and thereby to enhance respect for the law and further the good government of the State'; and 'to facilitate more effective participation by members of the public in the processes involved in the making and administration of laws and policies'.
28. It is further stated in section 3(2) that the means by which these objects are intended to be achieved are:
 - (a) ensuring that information concerning the operations of government (including, in particular, information concerning the rules and practices followed by government in its dealings with members of the public) is readily available to members of the public and to Members of Parliament; and
 - (b) conferring on each member of the public and on Members of Parliament a legally enforceable right to be given access to documents held by government, subject only to such restrictions as are consistent with the public interest (including maintenance of the effective conduct of public affairs through the free and frank expression of opinions) and the preservation of personal privacy; ...
29. Section 3A(1) states that the Parliament has intended:
 - (a) that this Act should be interpreted and applied so as to further the objects of this Act; and
 - (b) that a person or body exercising an administrative discretion conferred by this Act exercise the discretion, as far as possible, in a way that favours the disclosure of information of a kind that can be disclosed without infringing the right to privacy of individuals.
30. The FOI Act provides that upon receipt of an application for access to documents, an agency is entitled to make a determination to refuse access where the documents are 'exempt'. The term 'exempt document' is defined as 'a document which is an exempt document by virtue of Schedule 1.²⁰ Schedule 1 to the FOI Act lists various clauses, which may be claimed by an agency as a basis for refusing access.
31. When making a determination to refuse access to documents, the agency must give reasons for its determination and the facts underlying these reasons, together with a reference to the sources of information on which those findings are based. I comment that it appears that the agency did not fully satisfy this obligation in its determination.
32. Under section 48 of the FOI Act, the onus is on the agency to justify its determination in any proceedings, which I consider includes the external review process.
33. Section 39(11) of the FOI Act provides that I may confirm, vary or reverse the agency's determination in an external review, based on the circumstances existing at the time of review.

Operation of the exemption provisions in Schedule 1 claimed by the agency

34. In **Attachment 2**, I have set out the relevant clauses in Schedule 1 to the FOI Act which are applicable in my review. I have also set out my views about the operation of these clauses, and what an agency needs to show in order to justify its determination in an external review. I have applied those views in making my determination, and I refer the parties to them.

²⁰ *Freedom of Information Act 1991*, section 4 definition, section 20(1)(a).

Consideration of the agency's determination

35. In my provisional determination, I considered that that apart from the public interest, the agency had failed to adequately address the components of each of the clauses claimed as a basis for refusing access to the documents as well as the contents of each of the documents. As such, there was not a sufficient basis for me to be persuaded that the agency had justified its determination.
36. I queried also whether the agency had turned its mind to section 20(4) of the FOI Act in relation to some of the documents, with the exception of document 6.

Document 1 - clause 1(1)(a), clause 1(1)(c)

37. The email in document 1 attaches excerpts from the 'RIS' and seeks the CE's comment. The excerpts appear to be extracts from a draft of the report (**the excerpts**). The excerpts are in effect replicated in the report, albeit with different numerical references (page, section and table reference numbers). The final paragraph on page 22 and the first three paragraphs on page 23 of the excerpts are the only passages that are not replicated *verbatim* in the report. The excerpts also include maps and diagrams which are replicated in the report. I note that most of these maps are publicly available in their own right.
38. In my provisional determination, I did not consider that the email or the excerpts attracted clause 1(1)(a) or clause 1(1)(c) exemptions, because neither the report nor its draft (the excerpts) appeared to have been 'specifically prepared for submission to Cabinet'; and nor were they a 'preliminary draft' of such a document within the meaning of clause 1(1)(a) and 1(1)(b), for the purposes of clause 1(1)(c). I reached this view on the basis of the statements in the report and the evidence of ACIL Tasman to the Select Committee, which indicate that the report was prepared for the department and to enable the preparation of a RIAS.²¹ I considered that the RIAS document itself may be a document 'specifically prepared' for Cabinet.

39. *Further submissions from the agency*

In his 10 January 2012 response to my provisional determination, the CE submits that:

- the statements in the report merely indicate that the report was commissioned by the department and prepared for the department's purposes:

It is vital therefore, to ascertain DTF's intended purpose for the report. The Ombudsman has failed to conduct any enquiries in this regard.

- he was advised that the department commissioned the report as part of a submission to Cabinet, and that the full report was in fact provided to Cabinet
- while the report has been released publicly, this was through the exercise of Cabinet's discretion; and this does not change the circumstances which gave rise to the preparation of the document
- as the draft report (the excerpts) has not been released publicly, ForestrySA does not have a discretion to release it (as it constitutes a Cabinet document)

²¹ See evidence of Mr Mark Barber and Mr Jeremy Justin of ACIL Tasman to the Select Committee on Harvesting Rights in ForestrySA Plantation Estates, Thursday 27 October 2011, p156 of; also the Interim Report of the Select Committee, 23 November 2011, p23.

- it is arguable that the agency should release those extracts of document 1 that reflect the (final) report pursuant to section 20(4) of the FOI Act. However, this would merely release a document that is easily accessible and would have already been accessed and reviewed by the applicant. The applicant would not wish to be given a copy of such extracts since he can access them at any time without recourse to ForestrySA.

40. *Submissions from the Deputy Under Treasurer*

The Deputy Under Treasurer has since informed my deputy that:

- the report was commissioned by the government in order to inform a Cabinet submission about the proposed sale process. The report also formed part of a locked Cabinet submission; however, the report was described in the submission as a 'Regional Impact Assessment Statement'. In the Cabinet submission, the report was accompanied by a four page summary of the report, which was described as a 'Regional Impact Statement Summary'. The Cabinet submission was approved on 2 May 2011 and announced publicly on 3 May 2011
- ACIL Tasman was engaged in late 2010, through a competitive tender process, 'to provide the [department] with advice on the regional impact of the proposed ForestrySA forward rotation sale'
- the four page Regional Impact Statement (Summary) that accompanied the Cabinet submission was compiled by the department from information in the report
- in response to the question 'Was the RIAS or RIS specifically prepared for Cabinet?':

The four page Regional Impact Statement Summary was prepared to accompany the Cabinet Submission. The Acil Tasman Report also went to Cabinet.

- the report was made public on 3 May 2011, with the announcement of the decision to proceed with the sale of forward harvesting rights
- as he recalled, the government had committed to making the report public 'well before it went to Cabinet'²²
- a recommendation in the Cabinet submission from the Treasurer stated ' I have received independent economic analysis about the proposed divestment of [Forestry SA] forward rotations through a Regional Impact Assessment Statement prepared by ACIL Tasman and I intend to release the report.'²³

41. *Response to the submissions*

- I remain of the view that the report is not an exempt document within the meaning of clause 1(1)(a) of Schedule 1 to the FOI Act. In light of the Deputy Under Treasurer's submissions above and the reasoning in my provisional determination, I consider that the purpose of the preparation of the report was not to 'specifically prepare' it for submission to Cabinet- even though it was so submitted. (I consider however, that the four page summary would be captured by the clause.)

²² Email to deputy Ombudsman dated 13 February 2012

²³ Email to Deputy Ombudsman dated 14 February 2012,

- In my view, clause 1(1a) must be strictly read. The specific purpose of the preparing the report appears to me to have been to inform the department and the Treasurer and hence a submission to Cabinet, about the sale.
- I am also not persuaded that document 1 attracts the operation of clause 1(1)(a) or clause 1(1)(c), because the email and the excerpts were not 'specifically prepared for submission to Cabinet', and nor were they a 'preliminary draft' of such a document within the meaning of clause 1(1)(a) and 1(1)(b), for the purposes of clause 1(1)(c).

The report - clause 1(1)(e)

42. Although not submitted by the agency, I consider that the report attracts the operation of exemption clause 1(1)(e) of Schedule 1 to the FOI Act, as it contains 'matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet'.
43. The provisions of clause 1(1)(e) are broad, by virtue of the words 'information concerning any deliberation or decision of Cabinet'. This wording was considered in the SA District Court judgement in *Rann v SA Water*.²⁴
44. The wording has a mirror provision in the now repealed NSW *Freedom of Information Act 1989*. In *McGuirk v Director General, The Cabinet Office*,²⁵ the NSW Administrative Decisions Tribunal commented that the clause is concerned with 'disclosing information concerning any deliberation or decision of Cabinet', not just 'disclosing a deliberation or decision of Cabinet'. He added:

35. I agree that only documents created contemporaneously with, or subsequent to, active discussion and debate within Cabinet are capable of disclosing Cabinet deliberations, however Clause 1(1)(e) is not merely concerned with 'disclosing Cabinet deliberations'. It also concerns 'information concerning any deliberation or decision of Cabinet'. This is a broader concept.

36 ...

[In] my view it is possible that a document that pre-dates a Cabinet meeting could still contain information that is 'relevant to' or 'concerns' the deliberative or decision-making process. I agree with the Cabinet Office's submissions that documents created before a Cabinet meeting which are deliberated upon during that Cabinet meeting may profoundly influence the course of any debate or discussion that takes place during that meeting and hence, any deliberations made during that meeting. For example, a Cabinet Minute that contains a series of recommendations upon which Cabinet deliberates logically contains subject matter that is 'relevant' to or 'about' these deliberations. To the extent that any document is so central to a Cabinet meeting that it shapes the course of, or outcome of, any deliberations of Cabinet, the disclosure of its contents could reveal information concerning the process of deliberation or decision-making.

45. I agree with this interpretation, and consider it is applicable to clause 1(1)(e).
46. Although I am not persuaded that the report was specifically prepared for submission to Cabinet, and although the report does not disclose actual deliberations or a decision of Cabinet, I consider it was 'central' to a Cabinet meeting within the meaning of *McGuirk* and contains matter the disclosure of which would reveal information concerning any deliberation or decision of Cabinet within the meaning of clause 1(1)(e). Thus the agency, in its discretion may refuse access to the report under the FOI Act.

²⁴ *Rann v SA Water* unreported 9 August 1996 DCCIV-96-1009, p5.

²⁵ [2007] NSWADT 9, p35.

47. I make two comments about this. Firstly, the clause (1)(e) states that a document is exempt if it simply 'contains matter' which would reveal information concerning a deliberation or decision of Cabinet. It is not necessary for the document to wholly consist of such matter before it can achieve exempt status.²⁶ In my view, the operation of the clause should be read in conjunction with section 20(4) of the FOI Act which provides:
- (4) If—
 - (a) it is practicable to give access to a copy of a document from which the exempt matter has been deleted; and
 - (b) it appears to the relevant agency (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to such a copy, the agency must not refuse to give access to the document to that limited extent.
48. However, I recognise that the breadth of the exemption clause in this instance suggests that section 20(4) has little role to play.
49. Secondly and more significantly, the report is in the public domain. Given that the excerpts are substantially replicated in the report, in my view, the issue of section 20(4) seems academic. It could reasonably be surmised that the applicant would not wish to be given access to a copy of the excerpts within the meaning of the section, because he can access the report from the SA parliament's website.

Document 1 - clause 1(1)(e)

50. For the reasons above, I consider that the excerpts are also exempt under clause 1(1)(e). I substantially agree with the CE's further submissions (see paragraph 38) that the public release of the report does not change the strict application of the (Cabinet) exemption provisions. However, an agency should nonetheless interpret the exemption provisions with the objects of the FOI Act in mind, as well as consider the discretion available to refuse access to an exempt document under section 20(1)(a) of the Act. I note also clause 1(2a) in this regard.
51. While the excerpts have not been released publicly, I reiterate that they are in substance, replicated in the report which is publicly available (see paragraph 36).
52. I do not consider the email in document 1 is exempt under clause 1(1)(e). It is not a Cabinet document in the sense intended in this provision.

Document 1 - clause 13(1)(a)

53. No evidence has been presented by the agency to support the submission that the email and the excerpts in document 1 are captured by clause 13(1)(a).

Document 2, 3, 4 - clause 9(1)

54. Document 2 is an email dated 21 April 2011 which records the CE's responses to the department about the excerpts. Document 3 is one sentence in a later email that day from the department to the CE requesting further information. Document 4 is a later email from the CE to the department addressing the request.

²⁶ See *Ekaton Corporation Pty Ltd v Chapman and Department of Health; Department of Health v Chapman* [2010] SADC 150, 9 December 2010, paras 15, 16, 61.

55. I agree that under clause 9(1)(a), documents 2, 3 and 4 are ‘consultations’ which have taken place between the department and the CE.
56. The agency correctly states in its determination that ‘to arrive at a decision that disclosure is against the public interest [under clause 9(1)(b)], it must be shown that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.’ The agency’s determination considers the factors against disclosure:
- (a) It is a communication at a high level, between the Chief Executive of ForestrySA and a Director of Department [of] Treasury and Finance
 - (b) It provides a critique of a draft report prepared by a third party, which that third party has submitted contains highly commercially sensitive matter
 - (c) Disclosure of the critique could injure the reputation and business of ACIL Tasman, which could impede the State’s ability to obtain similar draft reports from other consultants in the future (as such consultants may then be wary of their incomplete reports being subject to criticism which is then made public)
 - (d) It provides a critique of a draft report, which has been superseded by a final report, and therefore may lead to confusion or unnecessary debate on issues that are not present in the final report; and
 - (e) Disclosure of a critique of a draft report does not fairly disclose the reasons for the decision subsequently taken in this matter.
57. In *Everingham v Director-General of Education*, the District Court stated:
- In each case the documents must be viewed in the light of all relevant circumstances, their contents and purposes assessed, and that done, the question of balance decided.²⁷
58. The court has also commented on the ‘public interest balancing process’:
- This does not mean merely showing that there is something adverse to the public interest likely to flow from disclosure of the document, but that on balance the factors in the public interest against disclosure outweigh the factors in favour of disclosure.²⁸
59. Further, in *Everingham*, the court commented:
- Clearly the achievement of the objectives of the [FOI] Act is conducive to the public interest. It is a factor - and, I think, a fairly weighty factor - to be taken into account when determining where the balance lies.²⁹
60. Government accountability is a significant public interest factor in favour of disclosure of government information. It is the policy underpinning of the FOI Act. I note the comments of Mason J as he then was, in the case *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1981) 147 CLR 39:
- ... It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.³⁰

²⁷ Judge Bowering, *Everingham v Director -General of Education* D2959 unreported, 13 November 1992.

²⁸ Judge Lunn, *Iplex Information Technology Group Pty Ltd v Department of Information Technology Services SA* (1997) 192 LSJS 54 at p70.

²⁹ *Everingham v Director -General of Education* D2959 unreported, 13 November 1992.

³⁰ *Commonwealth of Australia v John Fairfax & Sons Ltd & Ors* (1981) 147 CLR 39 CLR, pp 51-52.

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61. Also the comments of McHugh J in *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86 at pp 190-191 are apposite:
- ... governments act, or at all events are constitutionally required to act, in the public interest. Information is held, received and imparted by governments, their departments and agencies to further the public interest.
62. In my provisional determination, I considered that the above comments suggest there is a public interest in disclosure of documents 2, 3 and 4. I remain of this view. Further, in light of surrounding events including the establishment of the Senate Select Committee and the Select Committee in the Legislative Council and its Interim Report, I consider there is a significant public interest in disclosure of the documents. The CE's view about the research conducted by ACIL Tasman in developing the report would also contribute to public debate on the proposed sale, and enhance scrutiny of the government's decision making in the matter.
63. I also comment that the agency's views about the report are already in the public domain, through not only the Select Committee's hearings and its Interim Report, but through the agency's 2010-2011 Annual Report and the media.
64. I am not persuaded that the public interest factors above set out by the agency outweigh those factors in favour of disclosure under clause 9(1)(b).

Document 5 - clause 9(1), clause 1(1)(a)

65. Document 5 is a letter to the Minister from the Chair dated 25 May 2011, which was after the government's announcement that the forward sale of the harvesting rights would proceed. Attached to the letter are comments from the Chair dated 3 May 2011 directed towards the Treasurer, consisting of five folios. I understand that these comments were compiled by the Chair and the CE just prior to the Treasurer's announcement of the proposed sale.
66. My provisional view about these claims was that document 5 was not exempt.
67. The agency further submits that document 5 was prepared for the Minister and ultimately for Cabinet, for the purposes of contributing to the decision-making of Cabinet. The CE has direct knowledge of the circumstances surrounding its preparation, and my provisional determination failed to set out my reasoning. In addition, the comments in document 5 were subsequently provided to the Select Committee and have been published on the parliamentary website.
68. I am not persuaded that document 5 was 'specifically prepared' for submission to Cabinet within the meaning of clause 1(1)(a). I also do not consider the document can reasonably be claimed to be exempt under clause 1(1)(e).
69. Given that the document is in the public domain, the claim of clause 9(1) must also fail. It makes no sense that it would be counter to the public interest to release a document which is publicly accessible.
70. Finally, as document 5 is publicly available,³¹ I see no practical purpose in continuing to consider the document as part of my external review.

³¹ See <http://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=3&CId=262> ForestrySA Board Minutes. The letter appears at page 73, and the attachment with the Chair's comments at pp 59-63.

Document 6 - partial refusal of access (one sentence) - clause 13(1)(a), clause 9(1)

71. This document is a 'thinking note' which was compiled by the CE before giving evidence to the Select Committee on 14 July 2011. The applicant has been given access to a copy of the document, with the exception of one line (**the deletion**). The CE submits that the deletion concerns a Request for Proposal (**RFP**) by the agency in relation to a saw log sale, which is still to be completed. The CE advises that he would not have released or made public the details in the deletion until the RFP was finalised. The RFP was meant to have been finalised around the time of the Select Committee hearing, but was not, due to market circumstances. The CE submits that negotiations are about to recommence in relation to the RFP. He considers that any pricing information arising from the RFP could prejudice negotiations and hence pricing outcomes.³²
72. No evidence has been put before me to show how disclosure of the deletion would found an action for breach of confidence under clause 13(1).
73. However, I consider that the deletion is able to be protected from disclosure under clause 9(1). The deletion represents the CE's 'deliberation' in the agency's decision-making process about the RFP; and I am satisfied that it would, on balance, be contrary to the public interest to release its contents. In reaching this view, I consider that the possible prejudice to the agency's negotiations in finalising the RFP process outweighs the public interest factors weighing in favour of disclosure (as set out in Attachment 2).

Documents 7, 8, 9, 10 - clause 1(1)(c)

74. As with document 6, documents 7, 8, 9, and 10 are 'thinking notes' or 'prompts' which the CE compiled to assist him in giving evidence before the Select Committee. They are notes which relate to the report, as evidenced by the page number references on the documents. The CE has confirmed this with my office. For the reasons I have set out above, I do not consider these are documents which are 'a copy of or part of, or contain an extract from a document' that has been specifically prepared for Cabinet or a preliminary draft of a document that has been specifically prepared for Cabinet, within the meaning of clause 1(1)(c).

Determination

75. In light of my views above, I vary the agency's determination in so far as, for the purposes of Schedule 1 to the FOI Act:
- the email in document 1 is not exempt under clause 1(1)(a), clause 1(1)(c) or clause 1(1)(e)
 - the excerpts are not exempt under clause 1(1)(a) or clause 1(1)(c). However, they are exempt under clause 1(1)(e). Be this as it may, they are in effect accessible by the applicant, as they are substantially contained within the report compiled by ACIL Tasman dated 21 April 2011 which is publicly available
 - the email in document 1 is not exempt under clause 1(1)(e)
 - neither the email nor the excerpts in document 1 are exempt under clause 13(1)(a)
 - documents 2, 3 and 4 are not exempt under clause 9(1)
 - document 5 is publicly available, and it is not necessary to consider the document in the review

³² Emails from the CE to the Deputy Ombudsman, 14 February 2012.

- the deletion in document 6 is not exempt under clause 13(1)(a); however, it is exempt under clause 9(1)
- documents 7, 8, 9, 10 are not exempt within the meaning of clause 1(1)(c).

Richard Bingham
SA OMBUDSMAN

14 February 2011

Atts

Attachment 1

SCHEDULE OF DOCUMENTS

| Doc No | Description | Date of Doc | Full Access | Part Access or Refused Access |
|--------|---|-------------|-------------|---|
| 1 | Email to Islay Robertson (FSA) from Julian Robertson (DTF) and attachment | 20/04/2011 | | Refused Access clause 1 & 13 Schedule 1 |
| 2 | Email to Julian Robertson from Islay Robertson re: review of draft extracts RIS | 21/04/2011 | | Refused Access clause 9(1) Schedule 1 |
| 3 | Email to Islay Robertson from Julian Robertson re: review of draft extracts RIS | 21/04/2011 | | Refused Access clause 9(1) Schedule 1 |
| 4 | Email to Julian Robertson from Islay Robertson re: clarification of capex authorities | 21/04/2011 | | Refused Access clause 9(1) Schedule 1 |
| 5 | Letter to Minister for Forests from John Ross re: concerns regarding ACIL Tasman RIS (provided by hand to Minister for Forests and Treasurer) | 25/05/2011 | | Refused Access clause 9(1) Schedule 1 |
| 6 | Islay Robertson notes to self (in preparation for Select Committee Inquiry) re: Export of Log | 14/07/2011 | | Part Access clause 13(1)(a) Schedule 1 |
| 7 | Islay Robertson notes to self (in preparation for Select Committee Inquiry) re: Domestic Log (Timber) Supply and Demand | 14/07/2011 | | Refused Access clause 1(c) Schedule 1 |
| 8 | Islay Robertson notes to self (in preparation for Select Committee Inquiry) re: Charter | 14/07/2011 | | Refused Access clause 1(c) Schedule 1 |
| 9 | Islay Robertson notes to self (in preparation for Select Committee Inquiry) re: ForestrySA Expansion | 14/07/2011 | | Refused Access clause 1(c) Schedule 1 |
| 10 | Islay Robertson notes to self (in preparation for Select Committee Inquiry) re: Long Rotation Expansion | 14/07/2011 | | Refused Access clause 1(c) Schedule 1 |
| 11 | Islay Robertson notes to self (in preparation for Select Committee Inquiry) re: Millennium Forestry | 14/07/2011 | Full Access | |

Attachment 2

Clause 1

1—Cabinet documents

- (1) A document is an exempt document—
- (a) if it is a document that has been specifically prepared for submission to Cabinet (whether or not it has been so submitted); or
 - (b) if it is a preliminary draft of a document referred to in paragraph (a); or
 - (c) if it is a document that is a copy of or part of, or contains an extract from, a document referred to in paragraph (a) or (b); or
 - (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet; or
 - (f) if it is a briefing paper specifically prepared for the use of a Minister in relation to a matter submitted, or proposed to be submitted to Cabinet.
- (2) A document is not an exempt document by virtue of this clause—
- (a) if it merely consists of factual or statistical material (including public opinion polling) that does not—
 - (i) disclose information concerning any deliberation or decision of Cabinet; or
 - (ii) relate directly to a contract or other commercial transaction that is still being negotiated; or
 - (ab) merely because it was attached to a document described in subclause (1); or
 - (b) if 20 years have passed since the end of the calendar year in which the document came into existence.
- (2a) A document is not an exempt document by virtue of this clause if—
- (a) the document has been submitted to Cabinet by a Minister; and
 - (b) a Minister has certified that Cabinet have approved the document as a document to which access may be given under this Act.
- (3) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

To justify claiming clause 1(1)(a), the agency must be able to show that the document was 'specifically' prepared for Cabinet. I consider that in the context of clause 1(1)(a) the word 'specifically' means 'specially' prepared for submission to Cabinet. Whether a document has been prepared for submission to Cabinet is to be ascertained by reference to the events at the time the document was created.¹

Clause 9

9 - Internal working documents

¹ *Re Fisse and Department of Treasury* (2008) 101 ALD 424, 434.

- (1) A document is an exempt document if it contains matter—
- (a) that relates to—
 - (i) any opinion, advice or recommendation that has been obtained, prepared or recorded; or
 - (ii) any consultation or deliberation that has taken place, in the course of, or for the purpose of, the decision making functions of the Government, a Minister or an agency; and
 - (b) would, on balance, be contrary to the public interest.
- (2) A document is not an exempt document by virtue of this clause if it merely consists of—
- (a) matter that appears in an agency's policy document; or
 - (b) factual or statistical material.

The agency must be able to show how the actual information in the document satisfies paragraphs (a) and (b).²

In relation to paragraph (a):

- the term 'relates to' is quite broad, and can be easy to make out
- the document must *relate to* (i) or (ii)
- under (i), the relevant activity (opinion, advice etc...) must be shown
- under (ii), the applicable decision-making function must be shown

In relation to paragraph (b):

- paragraph (b) limits the expansive scope of paragraph (a)
- a balancing process is required to show that *on balance*, the factors in the public interest against disclosure outweigh the factors in favour of disclosure. This would involve identifying both the public interest factors in favour of disclosure and the public interest factors against disclosure
- the public interest is not defined in the FOI Act and cannot be exhaustively defined³
- the 'public interest' is usually different from purely private or personal interests.

Some examples of public interest factors in favour of disclosure are:

- the objects of the legislation being satisfied
- ensuring transparency and accountability within representative government
- where disclosure will
 - contribute to informed community debate
 - inform the community of the operation of a government agency and the development of its policies
 - ensure accountability of an agency in its operations and expenditure of public funds
 - assist in revealing misconduct of a public official
 - show the reasons for a decision or contextual information that informed the decision
 - reveal public health risks
 - contribute to enforcement of the law or the administration of justice

² *Everingham v Director -General of Education* D2959 13 November 1992, Judge Bowering.

³ *Conway v Rimmer* [1968] AC 910 at 952; see generally FOI Information Sheet 1 - the public interest.

Examples of public interest factors against disclosure are where disclosure will

- prejudice the collective responsibility of Cabinet
- infringe the privacy of an individual
- prejudice efficient and effective workings of government or council, law enforcement, and the administration of justice

Clause 13(1)(a)

13–Documents containing confidential material

(1) A document is an exempt document–

- (a) if it contains matter the disclosure of which would found an action for breach of confidence; or ...

When justifying a claim for exemption under clause 13(1)(a):

- the agency must show that the relevant document contains matter ‘the disclosure of which would found an action for breach of confidence’
- the obligation of confidence may be contractual or equitable.⁴

A contractual obligation of confidence

- can arise from either express or implied terms in a contract
- the nature of the obligation will depend on the terms and circumstances surrounding the contract.

In an equitable obligation of confidence

- the information must be capable of being identified with particularity⁵
- the information must have a quality of confidence⁶ (it is not generally known)
- there must be an implied or express understanding that the information has been given and received in circumstances which import an obligation of confidence on the receiver⁷
- there must be actual or threatened misuse of the information.⁸

Other factors to consider are:

- the FOI Act provides protection for truly confidential information communicated between parties
- it is to be assumed that both government and the private sector will be aware of the FOI Act and of the kind of information which it protects and that the parties will thus be able to structure their negotiations accordingly⁹
- clause 13(2) imposes further requirements before a contract entered into by an agency after 1 January 2005 can be considered exempt under clause 13(1)(a).

⁴ *Bray and Smith v WorkCover* (1994) 62 SASR 218, 226 - 227.

⁵ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150 at [38] affirming the test from *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434, 443 per Gummow J.

⁶ *Ibid.*

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ekaton Corporation Pty Ltd v Chapman & Department of Health* [2010] SADC 150at [63].