OFFICE OF THE INFORMATION COMMISSIONER (W.A.)

File Ref: F2009037
Decision Ref: D0352010

Participants:

Apache Northwest Pty Ltd
Complainant

- and -

Department of Mines and Petroleum
First Respondent

- and -

Lander and Rogers, Lawyers
Second Respondent

DECISION AND REASONS FOR DECISION

FREEDOM OF INFORMATION - refusal of access - Safety Cases and other documents relating to offshore oil and gas infrastructure - whether documents copyright - clause 4(2) - commercial value - standard of proof - clause 4(3) - adverse effect on business affairs - clause 5(1)(a) - impair effectiveness of lawful methods or procedures - clause 5(1)(b) - prejudice an investigation - clause 5(1)(d) - prejudice fair trial - endanger life or physical safety - clause 5(1)(f) - endanger property security - clause 5(1)(g) - prejudice public safety - clause 3(1) - personal information - section 24 - editing.

Freedom of Information Act 1992: ss.24, 27(1)(b), 27(2)(c), 102(2); Schedule 1, clauses 3(1), 4(2), 4(3), 5(1)(a), 5(1)(b), 5(1)(d), 5(1)(e), 5(1)(f) and 5(1)(g)
Freedom of Information Regulations 1993: regulation 9
Petroleum Pipelines Act 1969
Offshore Petroleum and Greenhouse Gas Storage Act 2006 (Cth)
Petroleum (Submerged Lands) Act 1982
Petroleum (Submerged Lands)(Occupational Safety and Health) Regulations 2007
Petroleum (Submerged Lands)(Management of Safety on Offshore Facilities) Regulations 2007
Petroleum (Submerged Lands)(Pipelines) Regulations 2007
Copyright Act 1968 (Cth): s.43
Interpretation Act 1984

Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others [2006] WAICmr 12
Re Brown and Minister for Administrative Services (1990) 21 ALD 526
Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another [2007] WAICmr 20
Re Cannon and Australian Quality Egg Farms Ltd (1994) 1 QAR 491
Re Read and Public Service Commission [1994] WAICmr 11
Re Public Interest Advocacy Centre and Department of Community Services & Health and Schering Pty Ltd (1991) 23 ALD 714
Re QMS Certification Services Pty Ltd and Department of Land Administration and Another [2000] WAICmr 48
Re City of Subiaco and Subiaco Redevelopment Authority [2009] WAICmr 23
Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft (1986) 10 FCR 180
Manly v Ministry of Premier and Cabinet (1995) 14 WAR 550
Police Force of Western Australia v Winterton (1997) WASC 504
Re Kimberley Diamond Company NL and Department for Resources Development and Another [2000] WAICmr 51
Re Gahan and City of Stirling [1994] WAICmr 19
Re Searle Australia Pty Ltd v Public Interest Advocacy Centre (1992) 102 ALR 163
Re Neville and the State Housing Commission [1996] WAICmr 42
Re Sanfead and Medical Board of Western Australia [1995] WAICmr 50
Re West Australian Newspapers Limited and Western Power [2006] WAICmr 10
Re Blight and Police Force of Western Australia [1996] WAICmr
Re O'Reilly and Queensland Police Service (1996) 3 QAR 20
Re Thies and Department of Aviation [1986] 9 ALD 454

DECISION

The decision of the agency is varied.

I find that:

- Documents 1, 3, 4, 4A and 9 are subject to copyright and access should be given by way of inspection only.
- Documents 1, 3, 4, 4A and 9 are not exempt under clauses 4(2), 4(3), 5(1)(a), 5(1)(b), 5(1)(d) or 5(1)(g) of Schedule 1 to the FOI Act.
- The information in Documents 1, 3, 4A and 9 listed in the appendix to this decision is exempt under clauses 5(1)(e) and 5(1)(f) of Schedule 1 to the FOI Act.
- Documents 23A-23H are not exempt under clauses 4(3), 5(1)(a), 5(1)(b) or 5(1)(d) of Schedule 1 to the FOI Act.
- A small amount of personal information about individuals contained in the disputed documents, which is not ‘prescribed details’, is exempt under clause 3(1) of Schedule 1 to the FOI Act.

Sven Bluemmel
INFORMATION COMMISSIONER

30 December 2010

REASONS FOR DECISION

1. This complaint was made under the *Freedom of Information Act 1992* ('the FOI Act') by Apache Northwest Pty Ltd ('ANPL') on its own behalf and that of Apache Energy Limited ('AEL') - collectively 'Apache' - against a decision of the former Department of Industry and Resources ('DOIR') - now the Department of Mines and Petroleum ('the agency') - to give access to certain documents. The access applicant, Lander and Rogers Lawyers ('the Applicant'), is joined as a party to this complaint.

BACKGROUND

2. Varanus Island is located about 116 km west of the coastal town of Dampier in the north west of Western Australia ('WA') and is the hub for the oil, condensate and gas gathering infrastructure belonging to the East Spar, John Brookes and Harriet Joint Ventures. ANPL is a subsidiary of AEL, which is the Australian subsidiary of US company Apache Corporation. ANPL is the operator of the facilities on Varanus Island and in the surrounding offshore area (together 'the Facilities') and a participant in the Harriet Joint Venture, as well as one of the licensees of the pipeline which serves the facilities on Varanus Island. On 3 June 2008, a pipeline explosion at the oil and gas production facilities on Varanus Island cut WA's gas supply by approximately 30% ('the Incident').

RELEVANT LEGISLATION

3. The agency's document "*Explorer's Guide – Petroleum and Geothermal Energy*" (2009) at p.75 refers to the relevant regulatory regime as follows:

> *"Western Australia is the only Australian State that has a petroleum code common to both its onshore and offshore areas. The code is similar to that in the Commonwealth* Offshore Petroleum and Greenhouse Gas Storage Act 2006 *('OPGGS Act') which was established by the Federal Government in conjunction with all Australian State Governments and that of the Northern Territory.*
>
> …
>
> *The basic premise for this common petroleum code is that all petroleum resources of Western Australia and its adjacent offshore areas are reserved to the Crown, as is the right of access for the purpose of searching for, and recovering, those resources. In this regard, exploration for and production of petroleum is permitted only under the provisions of legislation applying to Western Australia and its adjacent offshore areas.*
>
> *The Western Australian* Petroleum and Geothermal Energy Resources Act 1967 *('PGER Act') covers all onshore areas of the State, including its islands ...*

> *The Western Australian* Petroleum Pipelines Act 1969 *('PP Act') applies to petroleum pipelines in onshore areas.*
>
> *The Western Australian* Petroleum (Submerged Lands) Act 1982 *('PSL Act') applies to Western Australia's territorial sea to the three nautical mile (nm) mark, including the territorial sea around State islands, and under certain circumstances, some areas of internal waters.*
>
> *The* [OPGGS Act] *applies to the offshore areas of the continental shelf beyond the three nm territorial sea boundary, which are designated as being adjacent to Western Australia. Both the PGER Act and the PSL Act are administered solely by Western Australia, while the* [OPGGS Act]*, in respect to the Western Australian adjacent offshore areas, is administered by a Joint Authority, comprising the Commonwealth and State Ministers responsible for petroleum administration. The division of State and Commonwealth waters occurs at the three nm mark of the territorial sea."*

4. The National Offshore Petroleum Safety Authority ('NOPSA') is the occupational safety and health regulator for the Australian offshore petroleum industry. NOPSA is a Commonwealth statutory agency that regulates under the OPGGS Act in Commonwealth waters and designated coastal waters of the States and the Northern Territory. NOPSA was established by amendments made to the Commonwealth *Petroleum (Submerged Lands) Act 1967* ('the Cth PSL Act') by the *Petroleum (Submerged Lands) Amendment Act 2003*. The Cth PSL Act was replaced by the OPGGS Act. Section 638 of the OPGGS Act defines the laws that NOPSA and its Occupational Health and Safety inspectors administer in Commonwealth waters. Those laws include Schedule 3 to the OPGGS Act and relevant regulations.

5. WA, like the other States and the Northern Territory, amended its PSL Act in order to create an equivalent Occupational Safety and Health regime to that established under Schedule 3 of the OPGGS Act. For this State, the NOPSA administered laws are set out in Schedule 5 of the PSL Act and include the following regulations, each of which corresponds to one set of the Commonwealth regulations:

   - *Petroleum (Submerged Lands)(Occupational Safety and Health) Regulations 2007* ('the OSH Regulations')
   - *Petroleum (Submerged Lands)(Management of Safety on Offshore Facilities) Regulations 2007* ('the MSOF Regulations')
   - *Petroleum (Submerged Lands)(Pipelines) Regulations 2007* ('the Pipelines Regulations')

6. The Varanus Island facilities are regulated under the PP Act which was administered by DOIR, and is now administered by the agency.

Safety cases and pipeline management plans

7. Following the 1988 Piper Alpha disaster in the North Sea which resulted in 167 deaths and substantial financial losses to the United Kingdom Government and the petroleum industry, Australia introduced a new approach to dealing with the danger to health and safety posed by offshore petroleum facilities. This is known as the 'Safety Case' approach, which is based on the premise that the regulator identifies hazards and risks for the industry but the ongoing management of safety is the responsibility of the operator of a facility. The legislation sets the broad safety goals to be attained and the operator of the facility develops the most appropriate methods of achieving those goals.

8. A Safety Case document describes a facility, provides details on the risks associated with that facility and outlines a safety management system ('SMS') designed to manage those risks. The MSOF regulations set out the requirements for the content of Safety Cases, which must comply with the MSOF regulations. Under the PSL Act and its regulations, Apache is required to have a Safety Case in force for the Facilities. The current Safety Case was accepted by NOPSA in October 2007 and by the agency in December 2007.

9. Under the PP Act and its subsidiary legislation, the agency is responsible for regulating the processing and conveyance of petroleum in WA, including the safety of the Facilities. The agency carries out its responsibilities based on advice from NOPSA under a service level agreement. The agency regulates to ensure that operators have identified the risks and put in place appropriate measures to control those risks. This is done through a program of audits and inspection of facilities, undertaken by NOPSA. In addition, operators are required to provide an independent validation that facilities are fit for purpose at the time that facility licences are issued or renewed.

10. Pipeline licences were issued by DOIR under the PP Act for the Facilities. The relevant licences include Pipeline Licence No. 12 ('PL 12'), which is held jointly by ANPL and two other co-licensees for the Harriet Joint Venture facilities and associated onshore pipelines. PL 12 covers the area of Varanus Island affected by the Incident.

11. Another key safety-related measure in the offshore petroleum industry is the Pipeline Management Plan ('PM Plan'). The PSL Act and associated regulations require licensees of pipelines to have a PM Plan in force. The PM Plan contains information prescribed in regulations 26-32 of the Pipelines Regulations, including a Pipeline Safety Management plan ('PSM Plan'), which provides for the health and safety of personnel working at or near the pipeline. At the time that Apache drafted its PM Plan, the relevant regulations were the *Petroleum (Submerged Lands)(Pipelines) Regulations* 2001.

12. The Minister for Mines and Petroleum must accept the PM Plan but can do this only after NOPSA has approved and accepted the PSM Plan. In March 2008, the agency, under its delegated powers, accepted the PM Plan currently in force for all pipelines operated by AEL on the North West Shelf.

Investigations and legal action

13. Immediately following the Incident the agency, in conjunction with NOPSA, carried out an investigation into the cause of the explosion ('the NOPSA Investigation'). The report on that investigation – entitled "*Final report of the findings of the investigation into the pipe rupture and fire incident on 3 June 2008 at the facilities operated by Apache Energy Ltd on Varanus Island"* – was publicly released on 10 October 2008 and can be obtained from the agency. At the time that the report was made public, further testing of pipe samples remained to be made.

14. The report concluded that the evidence gathered indicated the main causal factors in the Incident were:

    (a) ineffective anti-corrosion coating at the beach crossing section of the 12 inch sales gas pipeline, due to damage and/or dis-bondment from the pipeline;
    (b) ineffective cathodic protection of the wet-dry transition zone of the beach crossing section of the 12 inch sales gas pipeline on Varanus Island; and
    (c) ineffective inspection and monitoring by the Apache companies of the beach crossing and shallow water section of the 12 inch sales gas pipeline on the Island.

15. The agency identified potential breaches of ss.36A and 38B of the PP Act by ANPL and its co-venturers and raised issues in relation to compliance with pipeline licence conditions. Apache disagreed with those conclusions as being premature and misleading.

16. In August 2008, the Senate Standing Committee on Economics began an inquiry into the Incident. On 3 December 2008, the majority on that Committee handed down its report entitled "*Inquiry into matters relating to the gas explosion at Varanus Island, Western Australia*" ('the Senate Report'), which described the former WA Labor Government's response as adequate. In addition, a dissenting minority report by two coalition senators was also provided which alleged that the former WA Labor Government's management of the crisis was incompetent.

17. In light of the Senate Report, the incoming WA Liberal Government announced, on 23 December 2008, the setting up of a joint inquiry with the Commonwealth into the effectiveness of regulation for upstream petroleum operations ('the Joint Inquiry'). The terms of reference included a focus on the Incident. On 9 January 2009, Mr Agostini and Mr Bills were appointed by the Federal Minister for Resources and Energy ('the Federal Minister') and the Minister to a two-person expert panel to undertake that inquiry.

18. Apache commenced proceedings in the Federal Court of Australia to challenge the panel's use of documents that had been compulsorily obtained by the agency under s.63 of the PP Act and successfully argued that the Joint Inquiry was given confidential and commercially sensitive information to which it was not legally entitled. On 22 May 2009, the Federal Court held that provision of the

documents by government officers to the panel for the purposes of the Joint Inquiry was not for the purposes of the PP Act and regulations.

19. In view of that decision, the panel prepared two reports for the Federal Minister to examine better practice, regulation and the role of NOPSA and ways of improving the interface between NOPSA and the Australian Maritime Safety Authority. Those reports – entitled "*Offshore Petroleum Safety Regulation – Better Practice and the Effectiveness of the National Offshore Petroleum Safety Authority*" and "*Offshore Petroleum Safety Regulation – Marine Issues*" – were completed in June 2009 and are public documents.

20. On 8 May 2009, the Minister announced that the results of further testing of pipe samples were now available and that Mr Agostini and Mr Bills would be appointed as inspectors under the PP Act to coordinate finalisation of the technical investigation into the Incident. This would be a separate WA inquiry, the scope of which would include:

    - the sequence of events on Varanus Island during the Incident;
    - the likely cause or causes of the Incident; and
    - any actions or omissions by ANPL, as the operator of the Varanus Island facilities, or its contractors leading up to and during the Incident, that may have contributed to that event.

21. The final report of that particular inquiry ('the Final Report') was expected to be provided to the Minister by 30 June 2009. However, on 27 May 2009, the State Government commenced proceedings in the Magistrates Court – which I understand are still on foot – to prosecute ANPL and its co-licensees in relation to the Incident. It is alleged that the accused failed to maintain the damaged pipeline in good condition and repair, in breach of s.38B of the PP Act ('the Current Proceedings'). The particulars of the prosecution notice allege that:

    > "*… the pipeline was not maintained in a good condition and repair in that the 12" Sales Gas pipeline was corroded from a nominal wall thickness of 11.1mm down to a wall thickness of 3-4mm in the area of the pipeline rupture which occurred at the pipeline beach crossing on Varanus Island on 3 June 2008".*

22. The Final Report was completed on 18 June 2009. On 23 June 2009, Apache initiated proceedings in the Supreme Court of WA seeking declarations and injunctions to prevent the Minister from seeing that report until after Apache had been given an opportunity to review and comment upon it. On 14 August 2009, the Supreme Court refused to grant an injunction but concluded, among other things, that Apache must be afforded procedural fairness if the Minister decided to publish the report. Apache filed an appeal against that decision. On 22 December 2009, the Court of Appeal in *Apache Northwest Pty Ltd v Agostini* [No 2] 2009 WASCA 231 dismissed the appeal. From reports in the media, I understand that the Minister had hoped to table the Final Report in State Parliament in March 2010 but that AEL has urged the Minister to wait until the State's prosecution of the company is resolved.

Access application

23. On 15 September 2008, the Applicant applied to the agency under the FOI Act for access to 28 documents, or categories of document, relating to Apache and the Facilities. Following the receipt of the Applicant's application, the agency consulted with the former Department of Consumer and Employment Protection ('DOCEP') and NOPSA, as the latter had received similar applications under the Commonwealth FOI legislation, and referred some of the documents held by it to NOPSA. The Applicant agreed to have DOCEP and NOPSA deal with certain documents, rather than the agency.

24. On 21 October 2008, the agency wrote to Apache seeking its views on disclosure in relation to certain documents which originated from Apache. On 30 October 2008, Apache provided the agency with a detailed 20-page submission in response to that letter.

25. On 12 November 2008, the agency provided the Applicant with its notice of decision. Insofar as that decision related to the Apache documents, the agency refused access to Documents 1, 3 and 9 under clauses 4(2), 4(3), 5(1)(e) and 5(1)(f), and to Documents 4, 4A and 7 under clause 5(1)(a), and advised that Documents 1, 3 and 9 were subject to copyright. In addition, the agency decided to give the Applicant access in edited form to Documents 11, 14A-14G and 23A-23J, deleting certain personal information under clause 3(1) of Schedule 1 to the FOI Act.

26. On 8 December 2008, Apache sought internal review of the agency's decision to give access in edited form to Documents 11 and 23A-23H. On the same date, the Applicant sought internal review of the agency's decision to refuse access to documents, including Documents 1, 3, 4, 4A, 7 and 9.

27. On 22 December 2008, the agency's internal review decision-maker, Mr Neil Tyers, Petroleum Operations Engineer in the Petroleum and Royalties division of the agency, reversed the agency's decision in relation to Documents 1, 3, 4, 4A, 7 and 9 and decided to give the Applicant access to those documents. The agency's original decision to give access in edited form to Documents 11 and 23A-23H was confirmed.

28. On 13 January 2009, the agency's FOI Coordinator wrote to Apache enclosing copies of Documents 4 and 4A, and said:

> *"As discussed, the documents were not previously referred to you because at the time of the Department's original decision on 12 November 2008, they were considered to contain information which was part of the investigation into the incident on Varanus Island, and therefore exempt under clause 5(1)(a) of the FOI Act."*

29. Under the FOI Act, an agency is not required to consult with third parties about documents containing their commercial or business information if the agency does not intend to give access to those documents. Initially, the agency had refused access to Documents 4 and 4A. However, the agency should have

consulted Apache in relation to those documents as soon as it had changed its view as to access and, in any event, prior to issuing its decision on internal review.

30. On 22 January 2009, Apache applied to the Information Commissioner for external review of the agency's decision to give the Applicant access to Documents 1, 3, 4, 4A, 9, 11 and 23A-23H.

REVIEW BY INFORMATION COMMISSIONER

31. Following the receipt of this complaint, the former A/Information Commissioner required the production to him of the disputed documents and the agency's file maintained in respect of the Applicant's application. In addition, the agency provided this office with further information.

32. Apache clarified that its claims for exemption were made under clauses 3(1), 4(2), 4(3), 5(1)(a), 5(1)(b), 5(1)(d) , 5(1)(e), 5(1)(f) and 5(1)(g) of Schedule 1 to the FOI Act.

33. The Applicant was joined as a party to the complaint and both Apache and the Applicant made submissions in writing to me. Apache's submissions were set out in a letter to the agency dated 30 October 2008; a letter to the former A/Information Commissioner dated 22 January 2009 and letters to my office dated 5 June 2009 and 8 July 2009. The Applicant provided me with its submissions on 5 August 2009.

34. On 16 April 2010, I wrote to all of the parties setting out my preliminary view of this complaint. My preliminary view was that certain documents were subject to copyright; a small amount of information contained in the documents was exempt under clause 3(1) of Schedule 1 to the FOI Act; none of the documents was exempt under clauses 4(3), 5(1)(a), 5(1)(b) or 5(1)(d); and Documents 1, 3, 4, 4A and 9 were not exempt under clauses 4(2), 5(1)(e), 5(1)(f) or 5(1)(g). The parties were invited to respond to me by 14 May 2010.

35. Following the receipt of that letter, the agency contacted a number of third parties referred to in the disputed documents to invite them to make submissions to me and/or to be joined as parties to this complaint. Two of those third parties provided me with written submissions but none was joined as a party to the complaint. Neither the Applicant nor the agency made further submissions to me.

36. On 25 June 2010, after additional extensions of time, Apache made a detailed submission to me in respect of clauses 4(2), 4(3), 5(1)(e) and 5(1)(f), although Apache did not withdraw its claims for exemption under clauses 3(1), 5(1)(a), 5(1)(b), 5(1)(d) and 5(1)(g) of Schedule 1 to the FOI Act.

37. Following the receipt of those submissions, I obtained information on, among other things, safety cases from NOPSA, pursuant to s.70(1) of the FOI Act, in order to assist my understanding of this matter,

THE DISPUTED DOCUMENTS

38. The documents in dispute in this matter are documents originating from or sent to Apache. Apache has sought external review in relation to the documents listed in the agency's schedule of documents as Documents 1, 3, 4, 4A, 9, 11 and 23A-23H. I understand that Document 11 as listed on the agency's schedule is a duplicate copy of Document 23B. References in this decision to Document 23B are taken to include reference to Document 11.

39. The disputed documents are described as follows:

Document 1:	Varanus Hub Safety Case dated 27 September 2000 (171 pages).
Document 3:	Varanus Hub Safety Case dated 5 July 2007 (1,954 pages).
Document 4:	Sales Gas Pipelines - 5 year Integrity Review dated 30 May 2007 (19 pages).
Document 4A:	31/5/06 PL 12 Renewal - Assessment Report dated 31 May 2006 (214 pages).
Document 9:	Operational Pipeline Management Plan dated 10 April 2008 (1,632 pages).
Document 23A:	A letter dated 1 May 2007 from DOIR to AEL.
Document 23B:	A letter dated 3 April 2008 from DOIR to AEL.
Document 23C:	A letter dated 11 June 2007 from DOIR to AEL.
Document 23D:	A letter 11 December 2006 from DOIR to AEL.
Document 23E:	A letter dated September 2006 from DOIR to AEL.
Document 23F:	A letter dated 10 March 2006 from DOIR to AEL.
Document 23G:	A letter dated 25 November 2005 from DOIR to AEL.
Document 23H:	A letter dated July 2005 from DOIR to AEL.

Documents 23B-23H all refer to the attachment of "inspection reports". However, the agency advises me that those inspection reports were created by NOPSA and the parties agreed that NOPSA, not the agency, would deal with those reports under the separate FOI application which the Applicant had made to NOPSA. Consequently, those attachments do not form part of this external review.

EXEMPTIONS AND OTHER CLAIMS

40. Apache claims that Documents 1, 3, 4, 4A, and 9 are subject to copyright; Documents 1, 3, 4, 4A and 9 are exempt under clauses 4(2), 4(3), 5(1)(a), 5(1)(b), 5(1)(d), 5(1)(e), 5(1)(f) and 5(1)(g) of Schedule 1 to the FOI Act; Documents 23A-23H are exempt under clauses 4(3), 5(1)(a), 5(1)(b) and 5(1)(d); and that certain information in Documents 1, 3, 4, 4A, 9 and 23A-23H is exempt under clause 3(1).

COPYRIGHT

41. Apache submits that it has copyright over Documents 1, 3, 4, 4A and 9 and that s.27(2)(c) of the FOI Act prohibits the reproduction of those documents because

that would be in breach of s.43 of the *Copyright Act 1968* (Cth) ('the Copyright Act').

42. In its notice of decision of 22 December 2008, the agency acknowledged that Documents 1, 3, 4, 4A and 9 are subject to copyright. However, the Applicant submits that it should be entitled to have copies of all of the disputed documents in accordance with s.27(1)(b) of the FOI Act, on the basis that none of those documents is exempt. In the alternative, the Applicant submits that access should be by way of inspection.

43. Although copyright belonging to a person other than the State is not a ground of exemption under the FOI Act – nor is it a basis on which access to a document can be refused – it does have an effect in terms of the manner in which access to the document may be given: see *Re Zurich Bay Holdings Pty Ltd and City of Rockingham and Others* [2006] WAICmr 12 at [109].

44. Section 27(2)(c) of the FOI Act provides that, if an applicant has requested that access to a document be given in a particular way, the agency has to comply with the request unless giving access in that way would involve an infringement of copyright belonging to a person other than the State, in which case access may be given in some other way.

45. Having examined Documents 1, 3, 4, 4A and 9, I consider that they are *prima facie* the copyright of AEL. Consequently, pursuant to s.27(1)(a) of the FOI Act, any access to those documents should be by way of inspection.

CLAUSE 4(2) – COMMERCIAL VALUE

46. Apache claims that Documents 1, 3, 4, 4A and 9 are exempt under clause 4(2) of Schedule 1 to the FOI Act. Clause 4(2) provides:

"Matter is exempt matter if its disclosure –

> *(a) would reveal information (other than trade secrets) that has a commercial value to a person; and*
>
> *(b) could reasonably be expected to destroy or diminish that commercial value."*

47. Clause 4(2) is concerned with the protection of information which, although not a trade secret, has commercial value to a person. The word 'person' in paragraph (a) of clause 4(2) includes a company or an incorporated body (see s.5 of the *Interpretation Act 1984*).

48. Section 102(2) of the FOI Act provides that the onus is on Apache to establish that access to Documents 1, 3, 4, 4A and 9 should not be given. Thus, Apache must establish that disclosure of the relevant documents would reveal information of commercial value to the Apache companies and also that the disclosure of that information could reasonably be expected to destroy or diminish its commercial value.

The agency's submissions

49. In its notice of decision dated 22 December 2008, the agency made the following points:

    (a) Since Document 1 was, and Document 3 is, available to the personnel at Varanus Island via the island's intranet system, those documents are not absolutely confidential.

    (b) The agency is not persuaded that Documents 1 and 3 contain proprietary information which might diminish the commercial value of the information they contain.

    (c) Document 3 has superseded Document 1, which is no longer a valid Safety Case and was not current at the time of the Incident.

The Applicant's submissions

50. In summary, the Applicant makes the following submissions:

    (a) Based on the nature and description of the disputed documents, any commercial value would *prima facie* relate only to the operation of the gas processing facilities on Varanus Island and not to Apache's business practices more generally. There is insufficient information to reasonably conclude that information contained in those documents has a commercial value to Apache - insofar as it represents Apache's 'approach' or business practices generally - which extends outside the context of Varanus Island.

    (b) Document 1 has been superseded by Document 3. A document ceases to have commercial value if it is old or out of date: see *Re Brown and Minister for Administrative Services* (1990) 21 ALD 526 at 533.

    (c) Disclosure could not reasonably be expected to destroy or diminish any commercial value in the relevant information because that information does not appear to be of any utility outside the context of the operation on Varanus Island.

    (d) Apache's claim that a competitor could adopt Apache's facility configurations, systems, processes and procedures or aspects of each ('the Information') to improve its competitive position and thereby diminish Apache's competitive position in the marketplace is fanciful. Apache has not identified any such competitor or any such facility in which the Information could be deployed.

    (e) Apache's claim that its competitors could use the Information to create, review and update their own documents is far-fetched since any other facilities or operations would require their own individual operating policies and procedures and those used by Apache would not necessarily have application outside the specific context of Varanus Island.

(f) Apache's claim that an understanding of the Information by a competitor would significantly impact on Apache's ability to negotiate commercial arrangements with other parties (by, for example, disclosing its throughput capacities – and thus its capacity limitations) is not made out. Apache has not identified any particular commercial arrangements that could be affected by disclosure of the disputed documents nor explained how those arrangements would be affected.

(g) There is insufficient information to support Apache's claim that the disputed documents have a commercial value to Apache and that, if Apache were to sell certain assets, those documents would be sold with those assets and, as part of the sale, a significant price would be placed on them, which price would be destroyed or diminished if those documents were to be publicly disclosed.

51. The Applicant submits that, to the extent that the disputed documents relate to the operational capacity or profitability of the Facilities, such material could be edited without prejudice to the balance of the documents.

Apache's submissions

52. In relation to the documents generally, Apache submits that it operates in a competitive global marketplace and that the WA market is worth approximately $17 billion annually, which accounts for approximately 30% of all natural resources produced in the State. Apache submits that it competes in that marketplace with large and sophisticated companies and it has identified a number of specific competitors to me.

53. In brief, Apache makes the following submissions in support of its claim that Documents1, 3, 4, 4A and 9 each has a commercial value to Apache:

(a) Although the basic process by which hydrocarbons are extracted and processed is generally common to all oil and gas facilities, what is unique to Apache is the specific facility configurations, systems, processes and procedures contained in the disputed documents adopted for the extraction and processing of oil and gas. That kind of information consists of valuable operational management tools and separates competitors within the marketplace and is why such information is kept confidential. Apache has confidentiality provisions in its agreements with staff, contractors and consultants to ensure that confidentiality. In particular, Apache submits that Documents 1 and 3 - the Safety Case documents - contain detailed and specific information concerning the Facilities and the design, construction and operation of platforms, including their capacities.

(b) The Information constitutes Apache's intellectual property, which is a valuable commercial asset. It is proprietary to Apache because it evidences the operational procedures specific to Apache, the integration of those procedures having significant impact on the profitability of the undertaking. The disputed documents and the Information are the product of extensive financial and intellectual investment. The relevant legislation

sets out what Safety Cases are required to include but the legislation does not reveal the actual content of the Safety Cases. The commercial value in Document 1 does not lie in its operational status as a Safety Case. For example, the SMS Description - set out in Part III of Document 3 **-** is a central element of Apache's business and is applicable to all Apache owned and operated facilities. Consequently, the operation of the SMS is not site-specific.

(c) Apache went to considerable expense and spent considerable time - in conjunction with industry experts - to create the Information and operate the Facilities referred to in Documents 1, 3, 4, 4A and 9. To the extent that the Information represents the financial investment, research and development of Apache's systems and procedures, it constitutes information having commercial value to Apache. Information contained within any application to a government body, in particular an application for a pipeline renewal, has an inherent commercial value as such applications are the result of the expenditure of significant effort by corporations, the benefit of which should not be provided to the world at large.

(d) If the Varanus Island assets or part of them were sold, "*documents relating to the facilities, systems, processes and procedures underlying the operations for sale would form a central aspect of that sale*" and a genuine buyer at arms-length would be prepared to pay for the Information.

(e) Documents 1, 3, 4, 4A and 9 are a key component of Apache's operations and the information they contain gives Apache a competitive advantage by achieving outcomes that all of its competitors are seeking to achieve. The Information has enabled Apache to maintain a competitive advantage by:

- minimising downtime, maximising efficiency and maintaining an excellent safety record over 20 years;
- recruiting and retaining the best staff in a competitive labour market;
- successfully obtaining production licences and other government grants;
- being selected as operator in various joint ventures (eg.Varanus and new Devil Creek domestic gas plant);
- managing operations profitably; and
- bidding for and obtaining contracts with customers who know that Apache is able to provide a consistent supply of its products at a competitive market rate.

54. In support of its claim that the disclosure of the Documents could reasonably be expected to destroy or diminish their commercial value, Apache submits that its success as a profit-making venture relies on its ability to remain competitive. Central to its competitive position is the importance of the Information remaining confidential. The disclosure of the Information would destroy or

diminish its commercial value by reducing Apache's competitiveness. If the Information were disclosed, it would have the following consequences:

(a) Competitors could adopt the Information (or aspects of it) to improve their own operations and competitive position at Apache's expense, thus reducing Apache's competitive position and its ongoing profitability and viability. Apache acknowledges that the processing facilities (including offshore platforms) on Varanus Island are typical of its competitors' facilities producing in the North-West Shelf. However, the detailed descriptions in the documents of the facilities, systems, processes and procedures could be adapted and adopted by Apache's competitors to enhance their own operations. For example, Apache's efficient coordination of its maintenance systems enables it to manage its assets and minimise costs whilst maximising production thereby giving it a competitive edge. By way of analogy, Ford and Holden maintain separate production facilities which produce a similar product. It could not be said that Ford would not suffer a competitive disadvantage were Holden able to obtain detailed information about Ford's production facilities, systems, processes and procedures.

(b) A purchaser would not pay for the relevant documents but would obtain them under the FOI process, so that the sale price obtained by Apache would be reduced.

(c) Competitors could use Apache's strategy for continuous improvement - which is confidential internal corporate information concerning Apache's efficiencies and central to Apache's future profit making ability - to improve their own operations, thereby diminishing the commercial value of the information to Apache. In that way, Apache's lead in safety and health systems formulation, management and control, would be prejudiced and its competitive position in the marketplace diminished.

(d) Competitors provided with detailed facility descriptions, including throughput capacities, could use that information to determine the capacity limitations of Apache's facilities and utilisation of that capacity. A competitor could build up an overall picture of Varanus Island's production, storage and transmission capability from information in the documents on current use of land space and restrictions on expansion; the size of piping, pressure vessels, pipelines, compressors, pumps, storage tanks; inlet and outlet pressures; and gas and fluid compositions. With that information, instead of relying on assumptions, a competitor could easily calculate Apache's capability to process, store and flow gas and liquid hydrocarbons, which would limit Apache's negotiating position whilst giving its competitors a competitive edge in commercial negotiations. Apache's competitors would also have the benefit of seeing Apache's approach, which would be to Apache's commercial disadvantage. Thus, Apache's ability to negotiate commercial arrangements with its competitors and other parties would be adversely affected.

(e) Competitors could use information in the documents in "destructive competition" by erroneously using that information as the basis for providing misinformation to a potential customer or joint venturers, for example, by saying that Apache does not have the production ability to meet their requirements.

(f) Customers (who are large and sophisticated mineral processing, industrial and commercial operators) could use information about Apache's production capacities and redundant capacity against Apache in negotiations on the quantity and price of hydrocarbons to be delivered - such as whether and how easily Apache could increase its supply and what proportion of Varanus Island's production a customer is taking - to enhance that customer's market power in any negotiations. Apache's website provides generic details of production, such as: "*Production for the two joint ventures is approximately 8,000 Bpd of oil and condensate and 365 TJ/d of gas*". Such information is a general statement of the production achieved and not a statement of Apache's production capacity. "*It is one thing for a competitor to know how much a facility is producing, it is another altogether for a competitor to know how much a facility can produce and therefore the ability of Apache to increase or reduce its production levels.*"

(g) At a minimum, the significant cost incurred by competitors in creating, reviewing and updating similar documentation for their own operations would be reduced, which would provide them with a competitive advantage. The documents' creation incurred considerable time and expense and are confidential to Apache. The benefit of Apache's significant effort would be lost if provided to the world at large.

Consideration – clause 4(2)(a)

55. The first question for my consideration is whether Documents 1, 3, 4, 4A and 9 have a commercial value to Apache. In my view, the applicable legal principles in relation to clause 4(2) are as set out in *Re West Australian Newspapers Limited and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20 at [115]–[125] which are, in summary, as follows:

- Information may have a commercial value if it is valuable for the purposes of carrying on the commercial activities of a person or organisation. That is, 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.

- Information may have a commercial value if a genuine 'arms-length' buyer is prepared to pay to obtain that information.

- It is not necessary to quantify or assess the commercial value of the relevant matter.

- It is by reference to the context in which the matter is used or exists that the question of whether it has a commercial value can be determined.

- The investment of time and money is not, in itself, a sufficient indicator of the fact that the information has a commercial value.

- Information that is aged or out-of-date has no remaining commercial value.

- Information that is publicly available has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation.

56. Clearly, Apache is engaged in the production of oil and gas and operates in a competitive commercial environment within a global market. I accept Apache's submission that it competes with other large energy resources companies for, for example, venture capital; joint venture arrangements; exploration permits; and the right to produce the resource and to construct pipelines and other infrastructure.

57. I do not accept Apache's submission that because the Information is the product of significant time and expense it has a commercial value. In *Re Cannon and Australian Quality Egg Farms Ltd* (1994) 1 QAR 491, the Queensland Information Commissioner considered a similar submission in relation to s.45(1)(b) of the former *Freedom of Information Act 1992 (Qld)* – the equivalent of clause 4(2) – and said:

> "*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.*"

I agree with that view and have taken those factors into account in this case.

58. The agency submits that because the workers on Varanus Island have ready access to Document 3, the Safety Case, that document is not confidential. Apache submits that "*all personnel attending Varanus Island have duties of confidentiality and have contractual arrangements with Apache*". Apache's lawyers provided me with copies of the standard confidentiality provisions found in Apache's employment contracts and contractors' agreements which, without identifying specific documents, broadly require those persons to keep confidential "*any information*" obtained in the course of their work.

59. I agree with the view of the former Information Commissioner that information is inherently confidential if it is not in the public domain and is known only by a small number or limited class of persons: see *Re Read and Public Service Commission* [1994] WAICmr 11 at 28. Accordingly, I do not agree with the agency's view that Document 3 – or other of the disputed documents – is not confidential if disclosed to a limited class of persons – in this case, Apache's workers.

60. I accept that some of the disputed documents may be confidential. Although that is not determinative of the question as to whether those documents have a commercial value to Apache, it is a factor relevant to my determination.

61. Apache has not identified to me any information that is public information but it is evident that some, at least, of the information in the disputed documents is in the public domain. For example:

    - Much of the introductory matter in the documents appears to be information that is public information.
    - Figure 1.2 of Document 9 is apparently taken from a publication by DOIR.
    - The Apache Infrastructure Schematic appears numerous times throughout the documents and can be downloaded from Apache's website at www.apache-energy.com.au.
    - Some weeks after the Incident, Apache published on its website a document entitled "*Corporate Response of Apache Northwest Pty Ltd to the Questions posed by the DOIR for the Production Manager, Ivor Alexander"*('the Response to DOIR') which appears to contain matter found in the Information relating to, among other things, the SMS and PM Plan.
    - Matter in the NOPSA Investigation report includes matter contained in the Information relating to, amongst other things, the SMS and the PM Plan.
    - Matter in Document 4A relating to PL 12 and associated applications for renewal and variation is information that is publicly available.
    - The agency advises me that the PL 12 Validation Summary Report dated 10 May 2007 is or was available from its website and it seems to me that material contained in that document also appears in Document 4A.

62. As noted, information that is in the public domain has no commercial value that can be destroyed or diminished by disclosure under freedom of information legislation: see *Re Public Interest Advocacy Centre and Department of Community Services & Health and Schering Pty Ltd* (1991) 23 ALD 714 at p.724. Accordingly, I consider that information in the disputed documents that can be identified as public information is not exempt under clause 4(2).

63. Apache submits that the Information is a valuable commercial asset because it outlines its business methods, including its strategy for continuous improvement, and sets out in detail its unique operational procedures. In effect, Apache claims that the Information is directly related to, and underpins, Apache's profit making activities and ability to remain competitive. Apache asserts that it maintains its competitive advantage through the operation of those

procedures, which include recruiting the best staff, minimising downtime and maximising efficiency.

64. I understand Apache to contend that commercial value resides in both the operational nature of Documents 3, 4, 4A and 9 and in the Information – that is, the information about the specific facility configurations, systems, processes and procedures contained in each of Documents 1, 3, 4, 4A and 9.

65. In the present case, I note that Document 1 - which is dated 27 September 2000 - was prepared in line with the then relevant legislation and guidelines. Document 3, the current Safety Case, is dated 5 July 2007 and was prepared in line with the current legislation and guidelines, including the Pipelines Regulations. It is a revised version of Document 1 with updated and expanded descriptions of the facilities on Varanus Island. It was accepted in October 2007 by NOPSA and in December 2007 by DOIR. As can be seen from the description of the disputed documents, Document 1 consists of 171 pages and Document 3 of 1,954 pages. The main reason for the disparity in the number of pages between the two documents is that Document 1 is incomplete and does not cover the whole of the Facilities, including all of the offshore facilities. The complete Facilities description lists the plants and infrastructure on Varanus Island and the 15 offshore platforms, monopods and other offshore facilities. Much of the information in Document 3 is the same information repeated as relevant to each of those listed facilities.

66. Apache acknowledges that Document 1 has been superseded as an operational document but submits that the existence of Document 3 does not rob Document 1 of its commercial value in relation to the mutual content. Apache submits:

> "*If a document listing a company's top ten client list were determined to have commercial value, surely that document, if replaced by a new version with updated phone numbers for the same clients, could not be said to have lost its commercial value simply because the updated version becomes the 'operational' document. This example evidences that it is the underlying information within a document and not its 'operational status' that determines whether the document has commercial value."*

67. In my opinion, Apache's example is distinguishable from the present case. The ten clients' names presumably have commercial value because that information is important or essential to the profitability or viability of that particular business. That is not so evidently the case here. As at 16 April 2010, I was not persuaded that the underlying information in Documents 1 and 3 had a commercial value (only that the information in Document 3 had a commercial value because of its operational status). Some, at least, of the information contained in those documents is publicly available as noted in paragraph 61 above. In other words, my preliminary view was that any commercial value in Documents 1 and 3 related only to their use as operational documents. Apache acknowledges that Document 1 has been superseded by Document 3 as an operational Safety Case document.

68. The Applicant does not contest that information relating to the operation of the Facilities may have a commercial value but submits that there is insufficient evidence to conclude that Apache's business methods or 'approach' outside the context of Varanus Island could have commercial value.

69. I accept that particular methodologies or proprietary techniques may have a commercial value: see *Re QMS Certification Services Pty Ltd and Department of Land Administration and Another* [2000] WAICmr 48 at [40]-[44]; *Re City of Subiaco and Subiaco Redevelopment Authority* [2009] WAICmr 23; and *Re West Australian Newspapers Ltd.* Accordingly, in considering the disputed documents and, in particular, Documents 1 and 3, I have tried to identify the information that Apache claims has a commercial value.

70. Apache does not agree with my view - expressed in my letter to the parties of 16 April 2010 - that the information in the Safety Case documents is set out in general terms. In that letter, I referred to an extract from p.23 of the NOPSA Investigation report, which took a similar view in relation to the description of the SMS contained in Document 3. In response, Apache said:

> "*The SMS is an all encompassing system which has been developed by Apache to manage its operations for the exploration and production of petroleum products. To say that the SMS is no more than general information is to grossly understate the processes, procedures, objectives, performance standards, policies, standards, tools and controls which Apache has developed through experience and with the assistance of expert consultants and by which Apache operates its business and maintains its competitive advantage.*"

71. From the information before me I understand that the SMS is composed of a suite of documents, policies, standards, tools and controls that together make up the SMS and that Part III of Document 3 is simply intended to be a description of that system and is not intended to set out in full all of the relevant documents, policies, standards that make up that system in its entirety. Consequently, Document 3 only contains the SMS *description* (I note that Document 1 omits the SMS description entirely). I am not persuaded that that general information, without more, has a commercial value to Apache. Moreover, the 15 core elements that make up the SMS is information that Apache agreed to disclose to the Applicant in exchanging submissions in the course of this external review. From my re-examination of Documents 1 and 3, it is not evident that those documents would disclose much more than the general information required to be provided under the legislation, albeit that that information relates to specific platforms and other facilities.

72. For example, Apache cites Element 3 of the SMS as an example of the uniqueness of its procedures but does not explain how or in what way those procedures are unique. I have examined Element 3, which covers three pages in Document 3. Much of it appears to me to be factual information that is required to be included in the safety case and is in line with NOPSA's Guidance Note "*Hazard Identification*". That Guidance Note gives detailed information on this element and states [at pp.5 and 12]:

> "*The aim of this guidance note is to provide guidance on the approaches and methodologies that an operator could use to systematically and comprehensively identify hazards, and to communicate the findings effectively"* and "*The methodology should be chosen by the operator to meet the objectives as efficiently as possible give the available information and expertise. It may be a standard technique following an established protocol, a modification of one or a combination of several*".

73. Page 14 of the Guidance Note lists the more common hazard identification techniques and states that the techniques must be appropriate to the identified hazard.

74. Having examined Element 3 and the information before me and having considered Apache's claims, I am not persuaded that Element 3 discloses unique procedures that maximise Apache's production and give it a competitive advantage. Even if the particular combination of 15 elements in the SMS were unique to Apache, I am not persuaded that it gives Apache any competitive advantage. As I understand it, Apache is required to have an approved Safety Case. Safety Cases are required to contain certain information. The safety authority, NOPSA, must accept the Safety Case if it is appropriate to the facility and to the activities conducted at the facility. Consequently, the fact that one Safety Case is better or worse than another is not relevant. If a Safety Case fulfils the relevant requirements it will be accepted, regardless of whether it is inferior to any other company's Safety Case.

75. Apache has also referred me to its strategy for continuous improvement as being information that has a commercial value to it. Apache advises me that its continuous improvement strategy is not identifiable as a particular set of information "*as the entirety of the contents of the Documents themselves form part of the process by which the strategy of continual improvement is achieved and by which Apache derives a competitive advantage."*

76. Continuous improvement is a key objective of the relevant safety regulations. NOPSA's Guidance Note "*The Safety Case in Context*" sets out the key principles of continuous improvement, which involve identifying hazards, assessing risks, identifying controls and implementing controls as a continuum.

77. Apache refers me to p.3 of the SMS Description in Document 3 which shows how the 15 elements of the SMS operate to fulfil the continuous improvement requirement. In effect, I understand Apache to submit that it has devised a systematic approach to the management of safety in all aspects of its business.

78. Apache states that "[i]*t is one thing for a competitor to know that Apache has a strategy of continual improvement, it is another altogether for a competitor to be provided specific details of the assessments, reviews, studies and procedures etc that are adopted to achieve this goal. Such information is commercially sensitive and valuable to Apache"*. However, it seems to me that the specific details of those assessments, reviews, studies and procedures are not provided in the SMS Description in Document 3, although more generalised information is

provided. For the same reason in respect of Element 3 (above), I am not persuaded that the disclosure of this information would give Apache's competitors any competitive advantage.

79. My view might be different if Apache had persuaded me that the Safety Case documents contain some novel approach or particular process, strategy or matter that a competitor could use to achieve better results or a more cost-efficient process that would give it a competitive edge but I am not satisfied that Apache has identified any such process, strategy or information.

80. I accept Apache's submission that Document 3 has a commercial value because it would be included in any sale of the Varanus Island assets as a current operational document. However, I do not consider that the Varanus Island facilities or part of them could realistically be sold without documents that are required for their functioning, such as the Safety Case, whether or not those documents - or part of them - are in the public domain. In any event, I note that, as part of the strategy of continuous improvement they are constantly updated so that what might be disclosed under the FOI Act may differ from what is ultimately sold as part of an asset sale.

81. I accept that Documents 3, 4, 4A and 9 constitute Apache's intellectual property and that they have operational value to Apache in that without those documents Apache would be unable to undertake its commercial activities centred on Varanus Island. However, I am not satisfied that any of the disputed documents contain unique operational methods or novel approaches that would have a commercial value to Apache over and above their operational value.

82. Accordingly, I consider that the requirements of clause 4(2)(a) are satisfied in respect of Documents 3, 4, 4A and 9, but not in respect of Document 1.

Clause 4(2)(b) - could disclosure reasonably be expected to destroy or diminish the commercial value?

83. The second question for my consideration is whether the disclosure of Documents 3, 4, 4A and 9 could reasonably be expected to destroy or diminish the commercial value in the Information.

84. In *Attorney-General's Department and Australian Iron and Steel Pty Ltd v Cockcroft* (1986) 64 ALR 97, the Full Federal Court said, at p.106, that the words 'could reasonably be expected', in s.43(1)(c)(ii) of the *Freedom of Information Act 1982* (Cth), were intended to receive their ordinary meaning and required a judgment to be made by the decision-maker as to whether it is reasonable, as distinct from something that is irrational, absurd or ridiculous, to expect the stated consequences to follow if the documents in question were to be disclosed.

85. A number of decisions have considered whether the phrase 'could reasonably be expected' in clauses 4(2), 4(3) and 5(1) of Schedule 1 to the FOI Act affect the relevant standard of proof. In *Manly v Ministry of Premier and Cabinet* (1995) 14 WAR 550 at 573, Owen J considered the relevant standard of proof in

relation to a claim for exemption under clause 4(3) of the FOI Act. His Honour said, at p.573:

> *"The support does not have to amount to proof on the balance of probabilities. Nonetheless, it must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker."*

86. That view was guided by the comments of Bowen CJ, Beaumont J and Sheppard J in *Cockcroft*, which relied on a similar provision to clause 4(3) contained in the Commonwealth legislation.

87. In *Police Force of Western Australia v Winterton* (1997) WASC 504 Scott J considered the standard of proof in connection with clause 5(1)(b) of Schedule 1 to the FOI Act. In that case Scott J said, in relation to the comments of Bowen CJ and Beaumont J in *Cockcroft* at 190:

> "*With respect to their Honours, for my part, I can see no other sensible meaning for the words "could reasonably be expected to" than to conclude that the intention of Parliament was that the standard of proof should be that it was more likely than not that such was the case ... I am therefore of the view that for the purposes of* [clause 5(1)(b) of Schedule 1 to the FOI Act] *the standard is the balance of probabilities so that the appellant has to establish that it is more likely than not that the documents come within the exemption."*

88. Scott J distinguished the reasoning of the Federal Court in *Cockcroft* on the ground that the Commonwealth legislation expressly refers to "prejudice" in relation to the future supply of information but that clause 5(1)(b) (at the relevant time) did not.

89. In *Re WA Newspapers Ltd and Another and Salaries and Allowances Tribunal and Another* [2007] WAICmr 20, A/Information Commissioner Shanahan considered at [101]-[104] the decisions in *Manly* and *Winterton* in the context of the application of clauses 4(1), 4(2) and 4(3) and the relevant standard of proof. At [103], A/Commissioner Shanahan said:

> "*In this instance I am concerned with the exemption at clause 4(1) which does not contain the phrase dealt with by Owen J or Scott. It appears clear that in the absence of such expressions the standard of proof to be applied must be the balance of probabilities. I note that the same observation does not apply in respect of clauses 4(2)(b) and 4(3)(b) which both contain references to the phrase 'could reasonably be expected to' ...".*

90. I understand that to mean that where the phrase 'could reasonably be expected to' is not used in clause 4, the relevant standard is the balance of probabilities but when that phrase is used a different standard applies. However, in *Re WA Newspapers Ltd*, A/Commissioner Shanahan went on to find that the agency had not satisfied the onus placed on it to establish the more straightforward

requirements of clauses 4(2)(a) and 4(3)(a) on the balance of probabilities, and therefore it was unnecessary for him to consider whether disclosure *could reasonably be expected to* have the effects referred to in clauses 4(2)(b) and 4(3)(b).

91. I have considered the authorities above in detail. In my view, it is preferable to separate the standard of proof into two distinct limbs. The first limb describes the level of rigour to be applied to the argument and reasoning, while the second limb describes the outcome. In legislative provisions such as clauses 4(2)(a) and 4(3)(a), the outcome is described in absolute terms, and it is a matter of proving that a certain event will happen. However, in legislative provisions such as clause 4(2)(b), 4(3)(b) and 5(1), the outcome is itself expressed as a probability or expectation.

92. While I do not consider it desirable to attempt to quantify the standard of proof, the distinction between the two limbs of the standard of proof identified in the preceding paragraph can best be illustrated by an example. It can easily be proved on the balance of probabilities (or, indeed, beyond reasonable doubt) that the mathematical chance of rolling a four with a six-sided die is one in six. This is quite different from proving on the balance of probabilities that a particular roll of the die will actually result in a four being rolled. The former proposition is analogous to the situation in clauses 4(2)(b), 4(3)(b) and 5(1). The latter proposition is analogous to the situation in clauses 4(2)(a) and 4(3)(a), which require a person to prove that disclosure *will* reveal certain information, not that disclosure *could reasonably be* expected to have a certain result.

93. In other words, I consider that clauses 4(2)(b), 4(3)(b) and 5(1) require a person to prove *on the balance of probabilities* that a certain outcome *could reasonably be expected*. This is a less onerous task than requiring a person to prove on the balance of probabilities that the outcome *will occur*. I believe that the result of this interpretation is consistent with the analyses of Owen J in *Manly* and A/Commissioner Shanahan in *Re WA Newspapers Limited*. I believe it is also consistent with the reasoning of Scott J in *Winterton*, who noted in the context of clause 5(1)(b) that *"…the appellant has to establish that it is more likely than not that the documents come within the exemption"*. His Honour did not say that the appellant has to establish that it is more likely than not that disclosure of the documents would reveal an investigation.

94. In view of this, I proceed on the basis that the most instructively expressed precedent is that of Owen J of the Supreme Court in *Manly,* who held that the correct standard of proof to apply in relation to the term 'could reasonably be expected' in clause 4(3) "*...does not have to amount to proof on the balance of probabilities"* but "*must be persuasive in the sense that it is based on real and substantial grounds and must commend itself as the opinion of a reasonable decision maker"*.

95. In effect, the standard to be applied overall is less onerous in respect of clause 4(2)(b) than in respect of clause 4(2)(a). This result is consistent with the fact that clause 4(2)(b) uses the word 'could' while clause 4(2)(a) uses the word 'would'. I consider that Parliament would have used the word 'would' in both

clauses if it had intended the same overall standard to apply to both. The less onerous standard is, therefore, the standard which I have applied in relation to the term 'could reasonably be expected' in clauses 4(2)(b), 4(3)(b), 5(1)(e) and 5(1)(f) in the present case.

96. Apache submits that the disclosure of the disputed documents would - by providing its competitors with a competitive advantage - correspondingly disadvantage Apache because competitors could use that matter to improve their own competitive position which would result in a corresponding diminution of Apache's competitive position.

97. Apache rejects the Applicant's contention that this argument is fanciful because the Information relates only to the Varanus Island operations and has no use outside that specific context. Apache submits, for example, that its SMS is not site-specific.

98. Nonetheless, having examined Documents 3, 4, 4A and 9, I consider that a good deal of the material is very site-specific. For example, Document 9 consists largely of risk assessments of particular aspects of Apache's operations which are relevant only to the particular sites. It seems to me that the commercial value of the documents to Apache essentially lies in the operation of the particular facilities and not in any transferable processes, particular formulae or specific systems or strategies. As already noted, I am not persuaded that the SMS description is enough, on its own, to be of commercial value to Apache. Since Apache has gained all necessary approvals to set up and operate the Facilities, I am not persuaded that it is in competition with anyone insofar as the right to operate the Facilities is concerned.

99. Nor am I persuaded that any competitor operating or intending to operate offshore gas and oil production facilities could access the Information and apply it to its own facilities. Much of the information in the disputed documents is information that is required to be provided in respect of the particular facilities. In short, I consider that even if the relevant documents were disclosed to a competitor, their commercial value to Apache would not be diminished because such disclosure would not harm the Varanus Island operations.

100. Apache acknowledges that the processing facilities on its offshore platforms and on Varanus Island are typical of its competitors' facilities in the North West Shelf region and that the basic process by which oil and gas are extracted and processed is generally common to all such facilities. Nevertheless, Apache submits that the focus of competition is the difference between facilities' configurations, systems, processes and procedures. Apache asserts that the Information, as documented in Documents 1, 3, 4, 4A and 9, has a commercial value because it gives Apache a competitive advantage for the reasons set out in paragraph 53, item (e) above.

101. However, there is no information before me, other than Apache's assertions, to establish that Apache has maintained a competitive advantage over its competitors by, for example, recruiting and retaining better staff than its competitors. As Apache's major competitors (which it has identified to me)

appear to have been similarly successful in obtaining contracts and setting up and operating gas and oil extraction and processing facilities based on their particular versions of the Information, I am not persuaded on that account alone that the Information has a commercial value to Apache, which disclosure could reasonably be expected to destroy or diminish.

102. In my view, Apache's claim that the disclosure of the Information could reasonably be expected to destroy or diminish its commercial value because the detailed descriptions contained in Documents 1, 3, 4, 4A and 9 could be adapted and adopted by its competitors to enhance their own operations is speculative. I am not satisfied that those documents contain sufficient detail to enable competitors to enhance their own operations. For example, as I have already noted, the SMS Description in Document 3 is an outline of various elements that are put into effect using a suite of documents and policies not included in that description. The most detailed information in the disputed documents appears to be set out in the schematics, a large number of which I now consider to be exempt under clauses 5(1)(e) and (f), for the reasons given later in this decision.

103. I have considered Apache's submissions on its customers' and competitors' ability to use information contained in Documents 1, 3, 4, 4A and 9 to calculate throughput and the capacity use and limitations of the Varanus Island facility. However, I am not persuaded by that argument. Apache has not identified to me the specific information in the documents that discloses throughput capacities or provided me with any material or calculations to explain how the capacity limitations and the utilisation of that capacity could be determined. In my view, any such calculation would still amount to an assumption and it seems to me that similar calculations could be made in any event from industry knowledge and information, such as relevant industry standards, that are in the public domain. For example, with regard to Apache's item 2.14 (d)(i)(A)(i) on page 42 of its letter to me of 25 June 2010, I consider that particular information would be obtainable from public information. Another example of information already in the public domain is the information on the 12" Sales Gas Pipeline contained in the NOPSA Report. In addition, I understand that any bidding process between Apache and its competitors for the development of a new field would be subject to transparency requirements.

104. With regard to Apache's submission that, if disclosed, the documents could be used by competitors to provide misinformation, again, I consider that to be merely speculative. Competitors bent on deception could provide misinformation whether or not the documents the subject of this exemption claim are disclosed. In my view, any responsible authority or company would seek to check the correctness or otherwise of assertions made about Apache directly with Apache or with appropriate third parties.

105. Apache claims that its significant costs in creating the documents would be lost if disclosed and that such disclosure would reduce its competitors' costs. I am not persuaded that disclosure could reasonably be expected to destroy or diminish any commercial value in Documents 1, 3, 4, 4A and 9 since it seems to me that Apache would still use, for example, the SMS at each of its owned and operated facilities. Nor am I persuaded that there would be any significant

reduction in the costs to its competitors of creating a similar set of documents for their own facilities because I consider that much of the information to be both general in nature and site specific.

106. On the information before me, I do not consider that Apache has satisfied its onus to establish the requirements of paragraph (b) of clause 4(2) in relation to Documents 3, 4, 4A and 9. In light of that, and in light of my findings in relation to Document 1, I find that Documents 1, 3, 4, 4A and 9 are not exempt under clause 4(2).

CLAUSE 4(3) – BUSINESS, PROFESSIONAL, COMMERCIAL OR FINANCIAL AFFAIRS

107. Apache claims that Documents 1, 3, 4, 4A, 9 and 23A-23H are exempt under clause 4(3) of Schedule 1 to the FOI Act. Clause 4, insofar as is relevant, provides:

"(3) Matter is exempt matter if its disclosure –

(a) would reveal information (other than trade secrets or information referred to in subclause (2)) about the business, professional, commercial or financial affairs of a person; and

(b) could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.

…

(7) Matter is not exempt matter under subclause (3) if its disclosure would, on balance, be in the public interest."

108. The exemption in clause 4(3) is more general in its terms than the exemption in clause 4(2). The exemption consists of two parts and the requirements of both parts (a) and (b) must be satisfied in order to establish a *prima facie* claim for exemption.

109. I concur with the former Information Commissioner's view that private organisations or persons having business dealings with government must necessarily expect greater scrutiny of and accountability for those dealings but should not suffer commercial disadvantage because of them: see *Re Kimberley Diamond Company NL and Department for Resources Development and Another* [2000] WAICmr 51.

The agency's submissions

110. The agency made the following submissions:

(a) Since Documents 1 and 3 are, or were, accessible by workers at Varanus Island, their disclosure could not have an adverse effect on Apache's business.

(b) The disclosure of Documents 1, 3, 4, 4A and 9 is in the public interest.

(c) While it is possible that Documents 23A-23H may be taken out of context, that risk exists with any document taken in isolation and "[t]*he supply of information to government has always included a risk of FOI release therefore the argument that release might prejudice the supply of information to Government appears ... to be a weak argument*."

The Applicant's submissions

111. In its letter to me of 5 August 2009, the Applicant made the following submissions:

(a) Apache's claim that the use of the information could diminish its reputation is unreasonable because Apache's business reputation already appears to have been significantly adversely affected by the Incident. The Applicant bases this submission on the publicity surrounding the Incident; the fact that gas supply to WA only returned to full capacity in June 2009; the existence of the NOPSA Investigation, the Joint Inquiry and the subsequent criminal proceedings. In light of that, the Applicant submits that the disclosure of any additional information is not likely to further damage Apache's reputation. In any event, Apache would be free to make a corrective statement to any damage caused to its reputation by disclosure of the disputed documents.

(b) Apache's claim that, in certain unspecified circumstances, the information in the disputed documents could be misunderstood if considered out of context and used by a third party in a way adverse to Apache's interests is unfounded and unreasonable. Such a risk is inherent to all documents. Apache does not identify any specific information that could be prone to misconstruction nor any particular person who might seek to use the information in a manner adverse to the business affairs of Apache.

(c) The disputed documents are in the possession of the agency which is prosecuting Apache in the Current Proceedings so that it is likely that the information contained in the documents will be used in that court action.

(d) For the reasons given in the Applicant's submissions in relation to clause 4(2), Apache's claim that its business affairs could be unreasonably and adversely affected if the information that is contained in Documents 1 and 3 is obtained by a competitor is unsubstantiated.

(e) Central to Apache's submission that disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information to the agency is the contention that the information contained in those documents is above and beyond that required by law. However, significantly, Apache only refers to Document 9 as containing any specific information about what Apache is required by law to provide to the agency.

(f) The essential obligations on Apache at law in respect of the Safety Case for the Facilities are proscriptive. For example, under s.36A of the PP Act, Apache (as licensee) is obliged to operate the licensed pipeline in a proper and workmanlike manner and to ensure the safety, health and welfare of persons engaged in operations in connection with the pipeline. Further, the matters required under the legislation to be included in a PM plan are framed in general terms only. For example, a PM plan must include a comprehensive description and assessment of the risk of significant pipeline accident events and other risks to the integrity of the pipeline associated with each prescribed activity in respect of which the plan is submitted. In the circumstances, there is no rational basis to conclude that the disputed documents contain information above and beyond Apache's legal obligation. On the contrary, the disputed documents appear to represent Apache's attempt to comply with its legal obligations.

(g) The public interest in favour of disclosure of the disputed documents is significant and outweighs any adverse impact on the private business affairs of Apache, as can be seen from:

- the large amount of publicity following the Incident;
- the extent to which the cessation in the gas supply following the Incident impacted upon gas users in WA (where the gas supplied from Varanus Island accounts for approximately 30% of the total WA gas supply);
- the NOPSA Investigation;
- the Joint Inquiry concerning the occupational health and safety and integrity regulation for upstream petroleum operations which followed the incident; and
- the impact of the Incident upon the WA economy in particular and the Australian economy generally.

In support of its public interest claim, the Applicant cites a number of estimates concerning the likely economic impact of the incident, taken from the Senate Report.

Apache's submissions

112. In brief, Apache submits that Documents 1, 3, 4, 4A, 9 and 23A-23H all contain information about its business affairs, including the operation of its onshore and offshore facilities and the maintenance of an extensive pipeline system.

113. Apache submits that the disclosure of the disputed documents could reasonably be expected to have an adverse effect on Apache's business affairs for the following reasons:

(a) If disclosed "*evaluative information concerning the functioning and operation of Apache's operations, their vulnerabilities and assessments of the same*" could, in certain circumstances, reasonably be expected to have an adverse effect on Apache's business affairs because that information

could be construed in a way adverse to Apache's interests when it is, in fact, part of Apache's ongoing efforts to improve its systems and procedures. Any adverse comment made in a commercially sensitive environment where information – such as the SMS or Documents 23A-23H – is used inappropriately or out of context may diminish Apache's reputation and could severely impact on Apache's market position if potential investors became reluctant to invest. There is a significant risk that disclosure would lead to misinformation and uninformed public debate about Apache's "*safety facilities, systems, processes and procedures*".

While any document in isolation may be taken out of context, there is no general rule that can be applied to all documents to say that this is not a basis for exemption. The circumstance and context in which a document may be dealt with and the subsequent impact on a third party should be considered.

(b) The disclosure of information on Apache's confidential operational procedures and facility status has the potential to significantly impact upon Apache's competitive position. For example:

(i) The master table in Document 3 provides a guide that can be extrapolated to a methodology that may reveal information concerning Apache's business affairs. Without the benefit of context, that information, if disclosed, may be used to misinform or create speculation about Apache's business affairs, thereby potentially causing Apache a disadvantage in the marketplace.

(ii) Documents 4 and 4A contain extensive detail as to Apache's specific systems and operational procedures. The integration of those procedures has a significant impact on the profitability of the undertaking and provides Apache with a business advantage. Apache's competitive position could reasonably be expected to be significantly diminished if the information were disclosed in an unrestricted way to a competitor who instituted like systems and procedures.

(iii) Document 9 represents a consolidation of information contained in Documents 1 and 3 on Apache's pipelines and the disclosure of that information to a competitor could reasonably be expected to expose Apache to commercial disadvantage and adversely affect its lawful business affairs.

(c) Apache repeats its submissions made in relation to its claim under clause 4(2) regarding the adverse effects to its business that could result if the disputed documents are disclosed.

(d) Apache also submits that the disclosure of the disputed documents could reasonably be expected to prejudice the future supply of information of that kind to the Government or to the agency for the following reasons:

(i) The agency's ability as regulator to properly administer the law depends upon open and honest communication between the parties. The importance of "*freely given compliance and facilitation of the regulator's role cannot be understated.*" The information given to the agency in the disputed documents goes beyond that required by law, which is quite general in its requirements. For example:

- The relevant regulations require Safety Cases to contain, among other things, "*a detailed description*" of the formal safety assessment for the facility and the SMS. Documents 1 and 3 total over 2000 pages and contain more details than required by the legislation.

- The Pipelines Regulations, which prescribe the contents of Document 9, state that a PM Plan must contain "*a comprehensive description of*", among other things, the design for the pipeline and its route and the risk of significant pipeline accidents; as well as "*a comprehensive demonstration of the effectiveness of*" measures taken to reduce the risks to levels that are low as reasonably practicable and the arrangements for monitoring, auditing and reviewing systems to manage those risks. From that it is clear that there is a significant amount of subjective interpretation to determine the level of detail considered to be 'a comprehensive description'. Apache notes that Document 9 contains over 1600 pages and contains a significant amount of information above and beyond that required under the legislation.

- The information contained in Documents 23A-23H relates to inspections conducted by NOPSA pursuant to s.63 of the PP Act. Inspectors under that provision do not have power to request information or interview employees of Apache. However, employees have cooperated with those inspectors by providing information at interviews.

(ii) The level of detail provided by Apache to the Government is given on the understanding that it remains confidential and Apache has recently sought to enforce the confidentiality of such documents in the courts. Information given to regulatory bodies often includes more than what is strictly required by law and it is reasonable to expect that the disclosure of such information will make companies consider the extent to which they will provide information in the future. If the disputed documents are disclosed under the FOI Act, it is likely that only the minimal amount of information required to be produced would be submitted in future to the Government. Companies "*will no longer be concerned solely with ensuring that* [the agency] *is provided with the best possible information to understand the industry which it regulates, but rather will have to*

consider the potential implications of the release of those documents to [their] *competitors."*

(iii) In view of the media discussion and distortion regarding the Incident, it is appropriate to take this factor into account when determining whether or not to disclose the disputed documents. Where government bodies release company information to the world at large, and that information used out of context to damage that company's reputation, it is reasonable to expect that companies will consider the extent to which they will provide such information in future. Notwithstanding the compellability of this kind of information, companies may consider providing only compellable and minimal information to agencies in future.

(iv) The agency is responsible for encouraging companies to explore and develop the State's natural resources for the benefit of the State and the agency's ability to encourage such development will be severely hindered in future, if the disputed documents are disclosed.

(v) The public interest in the free flow of communication between government regulators and the industry regulated to ensure that the safety of the industry is maximised far outweighs any public interest in disclosing the disputed documents. Disclosure will compromise the efficient regulation and safety of oil and gas operations, which is manifestly not in the public interest.

114. Two third parties made submissions to the effect that information concerning their business affairs should not be disclosed without Apache's consent.

Consideration

115. Section 102(2) of the FOI Act places the onus on Apache to establish that disclosure of the disputed documents could reasonably be expected to have an adverse effect on its business or commercial affairs or, alternatively, prejudice the future supply of information of that kind to the Government or to an agency.

Would disclosure reveal information about the business affairs of Apache?

116. Neither the agency nor the Applicant disputes the fact that Documents 1, 3, 4, 4A, 9 and 23A-23H all contain information about Apache's business affairs. I accept that the requirements of clause 4(3)(a) are satisfied in respect of those documents because each contains information about the oil and gas operations on and around Varanus Island.

Could disclosure reasonably be expected to have an adverse effect on the business affairs of Apache?

117. The Applicant claims that - since Apache's reputation has already been adversely affected by the Incident - the disclosure of the disputed documents is not likely to cause further damage to Apache's reputation. I disagree. If there is

information in the disputed documents that might be misconstrued to Apache's disadvantage or that might reflect on Apache's good safety record or management then, notwithstanding that Apache's reputation has already suffered damage, the disclosure of such matter could, in my view, reasonably be expected to have an adverse effect on Apache's reputation by, for example, reinforcing previous adverse views.

118. However, to date, although requested to do so, Apache has not identified to me the specific information which might, if disclosed, have the adverse effect claimed. Although Apache has cited the SMS and Documents 23A-23H as being relevant examples, it has not identified the particular matter in question to which it refers. It is clear from my examination of the disputed documents that by far the greater part of the information that they contain would not fall into that category.

119. I agree with the agency and the Applicant that it is possible for any information or document to be taken out of context but I also consider that it is open to Apache to correct any misinformation or to add the appropriate context through its website and media releases, as it has taken the opportunity to do on a number of occasions in the past.

120. The Applicant notes that all of the disputed documents are in the possession of the agency which is prosecuting Apache in the Current Proceedings. However, in my view, the fact that the agency can potentially disclose the disputed documents in the course of that action is not the same as the documents being released into the public domain under the FOI Act and I do not consider that the existence of those proceedings means that Apache cannot rely on a claim made under clause 4(3).

121. Apache submits that the disclosure of the disputed documents would have a significant adverse effect on its competitive position in the industry but has given me no information about its position *vis a vis* other competitors or how its competitive position would be significantly impacted by the documents' release. Apache provided me with examples of ways in which its business affairs could be adversely affected by the disclosure of the disputed documents but has not explained to me exactly how the disclosure of any particular information identified in the documents would have the adverse effects claimed. For example, it is not evident to me that information taken from the master table in Document 3 could be extrapolated to a particular methodology or – in the event that could be demonstrated – that the 'methodology' could be used in such a way as to misinform or create speculation about Apache's business affairs.

122. On the information before me, I am not satisfied that the disclosure of the disputed documents or any particular information in those documents could reasonably be expected to have the adverse effects claimed.

Could the disclosure of the documents reasonably be expected to prejudice the future supply of information of that kind to the Government or to an agency?

123. The phrase "*...could reasonably be expected to prejudice the future supply of information of that kind to the Government or an agency*" in clause 4(3)(b) applies not to whether, in this case, Apache could reasonably be expected to refuse to supply such information in the future, but whether disclosure could reasonably be expected generally to prejudice the future supply of such information to the Government or an agency: *Re Gahan and City of Stirling* [1994] WAICmr 19.

124. Apache submits that the information contained in the disputed documents that it supplied to the Government goes beyond that required to be provided by law. I understand Apache's submission to refer only to Documents 1, 3, 4, 4A and 9, since Documents 23A-23H are letters from DOIR to AEL and do not contain information provided by the Apache companies.

125. Apache advises me that the information which it argues goes beyond legal requirements was given on the understanding that it remained confidential and that is evidenced by the fact that Apache has recently sought to enforce the confidentiality of such documents in court. I have given little weight to that submission since Apache has provided me with no material to support its statement that any such additional information was supplied on the understanding that it would remain confidential. In *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 108 ALR 163, the Full Court of the Federal Court of Australia said, at p.180:

> *"Prior to the coming into operation of the FOI Act, most communications to Commonwealth Departments were understood to be confidential because access to the material could be obtained only at the discretion of an appropriate officer. With the commencement of the FOI Act on 1 December 1982, not only could there be no understanding of absolute confidentiality, access became enforceable, subject to the provisions of the FOI Act. No officer could avoid the provisions of the FOI Act simply by agreeing to keep documents confidential. The FOI Act provided otherwise."*

Such is the case in WA since the FOI Act came into operation on 1 November 1993.

126. As I understand it, Documents 1, 3, 4, 4A and 9 contain information that is required to be provided by Apache to the Government under the relevant legislation. I agree with the Applicant that the only information which potentially goes beyond that required by law may be some information in Document 9. In support of that view, I note that p.12 of the Response to DOIR refers to the fact that the PM Plan went beyond that required by the legislation and included information covering all of Apache's pipelines but Apache has not identified that specific matter contained in Document 9 to me.

127. I do not accept Apache's claim that potential oil and gas producers would, in the future, refuse to provide information of the required kind to the Government, where a licensee or potential licensee must provide that information in order to comply with its obligations under the relevant legislation. If they wish to obtain the licences in question, they have no option but to provide that information.

128. I am not persuaded by Apache's submission that, if additional information of the kind relating to pipelines in Document 9 is disclosed, other companies will be deterred from providing that kind of information. That submission is not supported by any probative material placed before me. Apache has not specifically identified the information which has purportedly been provided to the Government over and above the kind of information which is required under the legislation.

129. In my opinion, it is not reasonable to expect that oil and gas companies would no longer cooperate with the industry regulator to maximise the safety of the industry, and that the free flow of communication between those bodies would cease. I consider Apache's submissions in this regard to be speculative. For example, I do not think that the disclosure of Documents 23A-23H could reasonably be expected to result in other companies which have experienced serious incidents refusing to cooperate with NOPSA by denying information or interviews with employees.

130. From the material before me, I am not persuaded that a claim for exemption under clause 4(3) has been established with respect to any of the disputed documents.

Limit on exemption – clause 4(7) – the public interest

131. Even if I were satisfied that Apache had discharged its onus under s.102(2) of the FOI Act of establishing that the disputed documents meet the requirements of clause 4(3), clause 4(7) provides that matter that is *prima facie* exempt under clause 4(3) is not exempt if its disclosure would, on balance, be in the public interest. Section102(3) provides that the Applicant in this case bears the onus of establishing that disclosure would, on balance, be in the public interest.

132. I understand the Applicant's submission to be that the detriment to the economies of both the State and the nation and the damage to business and the community as a result of the Incident, were so serious that the public interest in the disclosure of the disputed documents – which contain information on the management and maintenance of the Facilities – would, on balance, outweigh any public interest in the business affairs of the Apache companies suffering adverse effects.

133. I also consider that where resources are owned by the Crown and developed for profit by licensees, there is a strong public interest in the disclosure of information that demonstrates that those resources are managed in a manner that is consistent with licensees' statutory obligations. However, since I find that the disputed documents are not exempt under clause 4(3), I am not required to consider the operation of clause 4(7).

CLAUSE 5 – LAW ENFORCEMENT, PUBLIC SAFETY AND PROPERTY SECURITY

134. Apache claims that all of the disputed documents are exempt under clauses 5(1)(a), 5(1)(b) and 5(1)(d) and that Documents 1, 3, 4, 4A and 9 are also exempt under clauses 5(1)(e), (f) and (g) of Schedule 1 to the FOI Act. Those clauses provide:

"5. Law enforcement, public safety and property security

(1) Matter is exempt if its disclosure could reasonably be expected to –

(a) impair the effectiveness of any lawful method or procedure for preventing, detecting, investigating or dealing with any contravention or possible contravention of the law;

(b) prejudice an investigation of any contravention or possible contravention of the law in a particular case, whether or not prosecution or disciplinary proceedings have resulted;

(c) ...

(d) prejudice the fair trial of any person or the impartial adjudication of any case or hearing of disciplinary proceedings."

(e) endanger the life or physical safety of any person;

(f) endanger the security of any property;

(g) prejudice the maintenance or enforcement of a lawful method for protecting public safety".

135. Clause 5(5) defines 'contravention' in clause 5 to include a failure to comply and 'the law' to mean "*the law of this State, the Commonwealth, another State, a Territory or a foreign country or state*".

Clauses 5(1)(a), (b) and (d)

The agency's submissions

136. In its notice of decision dated 22 December 2008, the agency submitted that the individual in charge of the NOPSA investigation had no objection to the release of Documents 4, 4A and 9 because those documents were not generated for the purpose of the investigation. The agency's decision maker, Mr Tyers, also acknowledged that the Facilities were subject to security threat, but did not consider the documents exempt on that basis.

137. I also understand the agency submits that giving access to Documents 1, 3, 4, 4A and 9 by way of inspection reduces the chance that any security-related material would fall into the wrong hands.

The Applicant's submissions

138. The Applicant makes the following submissions:

(a) Since the disputed documents were created well before the various inquiries were commenced, there is obviously nothing in them relating to the conduct of either the NOPSA Investigation or the Joint Inquiry. Further the existence and the status of the relevant investigations is not a matter of any secrecy. In addition, the NOPSA Investigation and the Joint Inquiry have now ended so that there is no prospect that the disclosure of the disputed documents could reasonably be expected to impair the effectiveness of either investigation. On the other hand, since the disputed documents will inevitably be made available to the prosecution in the Current Proceedings, there is no reasonable risk that their disclosure will impair the effectiveness of those proceedings.

(b) There is no basis to conclude that disclosure of the disputed documents could reasonably be expected to prejudice the fair trial of Apache and others in the Current Proceedings. Apache has failed to identify any real (as opposed to notional) risk of prejudice to the fair trial of Apache which might flow from the disclosure of the disputed documents and its submissions are misconceived because the prosecution will no doubt have the disputed documents in its possession in any event.

(c) Whether disclosure of a particular document could reasonably be expected to endanger a person's life or physical safety is required to be determined objectively in the light of all the relevant evidence, including any evidence obtained from or about the claimed source of the danger, and not simply on the basis of what evidence is known to persons claiming to be at risk of endangerment: *Re Scholes and Australian Federal Police* (1996) 44 ALD 299; *Re Murphy and Queensland Treasury* (1995) QAR 744.

Apache's submissions

139. As I understand it, Apache submits, in brief, as follows:

(a) Whether or not the persons conducting any ongoing investigation consent to the release of the documents is not determinative of whether the documents should be exempt. The integrity of the evidence that an investigating body or court is bound to consider could be impaired by being made public and misinterpreted. There ought to be no disclosure of documents that may be relevant to the trial of the prosecution in the Current Proceedings as disclosure may interfere with the proper administration of justice.

(b) The potential for public comment and misinterpretation by the members of the public concerning the Incident is high. An investigating body or court's ability to consider the evidence objectively could be impaired by the incursion of uninformed public opinion so the integrity of the evidence under consideration should be protected.

(c) In relation to a previous access application in 2008, the agency advised Apache that Safety Cases would not be disclosed because to do so could reasonably be expected to impair and/or prejudice the effectiveness of an investigation into a contravention or possible contravention of the law.

Consideration – clauses 5(1)(a), (b) and (d)

140. In applying the clause 5 exemptions, I consider that the term 'the law' is used in its broad sense and is not limited in its application to the criminal law only but includes legislation such as the PP Act: see *Re Neville and the State Housing Commission* [1996] WAICmr 42 at [18].

141. The exemption in clause 5(1)(a) is concerned with protecting from disclosure the means employed to prevent, detect, investigate or deal with any contravention or possible contravention of any law of this jurisdiction or another, provided that those methods or procedures are themselves lawful: see *Re Sanfead and Medical Board of Western Australia* [1995] WAICmr 50 at [10]-[12].

142. The exemption in clause 5(1)(b) is concerned with preventing prejudice to the progress of an investigation into a particular matter, where that investigation is for the purpose of determining whether there was a failure to comply with the provisions of a law: see *Re West Australian Newspapers Limited and Western Power* [2006] WAICmr 10 at [90]-[91]. In that case, the former A/Information Commissioner considered the meaning of the term 'prejudice' and concluded that, on its plain meaning, "*to prejudice an investigation*" in clause 5(1)(b) means to impair the progress or effectiveness of an investigation. In other words, the term 'impair' in clause 5(1)(a) has broadly the same meaning as the term 'prejudice' in clause 5(1)(b) (and, in my view, in clause 5(1)(d)).

143. I consider the fact that, in relation to a different access application, the agency had previously advised Apache that Documents 1 and 3 would not be disclosed is not pertinent to the matters for my determination because it does not relate to any material questions of fact relevant to establishing the requirements of the clause 5 claims. Nor do I accept the Applicant's submission that, since the disputed documents pre-date the various inquiries, there can be nothing in the documents relevant to the questions of whether their disclosure could have the effects described in clauses 5(1)(a) and 5(1)(b).

144. In my view, Apache's submissions essentially equate the two separate exemption claims in clauses 5(1)(a) and 5(1)(b) on the basis that the 'lawful method or procedure' in the former amounts to any inquiry or investigation into the Incident and/or any contravention or possible contravention of the PP Act or

related legislation. Consequently, I understand Apache to claim that the disclosure of the disputed documents could reasonably be expected to:

- impair (or prejudice) the effectiveness of any inquiry or investigation into the Incident for the purpose of investigating any contravention or possible contravention of the law (clause 5(1)(a)); or

- prejudice (or impair) an investigation of any contravention or possible contravention of the PP Act or similar law (clause 5(1)(b)).

145. Previous cases concerning clause 5(1)(a) have considered that lawful methods or procedures for the purpose of the exemption include surveillance techniques, forensic procedures and the interviewing of witnesses. In effect, those lawful methods and procedures have been held to be investigative methods and procedures: see *Re Blight and Police Force of Western Australia* [1996] WAICmr at [19].

146. In the present case, I understand Apache to claim that a lawful method or procedure for investigating any contravention or possible contravention of the law includes an investigation into the Incident. I accept that, on the plain meaning of the words in clause 5(1)(a), a lawful method or procedure for investigating any contravention or possible contravention of the law could include an authorised inquiry or investigation, such as that which took place in relation to the Incident in this case.

147. I agree with Apache's submission that the consent of an investigator to the release of documents is not determinative of whether those documents should be exempt, although I accept that it is a factor relevant to the question of whether or not disclosure is likely to impair the effectiveness of or prejudice an investigation.

148. On the information before me, the terms of reference for the NOPSA Inquiry included identifying potential breaches of the legislation. In addition, the separate WA inquiry that arose from the Joint Inquiry looked at the likely cause or causes of the Incident and any relevant actions or omissions of AEL. However, those two inquiries have both concluded. In consequence, I agree with the Applicant's submission that the disclosure of the disputed documents could not have the effect of impairing the effectiveness, or prejudicing, those particular investigations.

149. As I understand it, the only ongoing matter is the Current Proceedings in the Magistrates Court. In my view, clause 5(1)(b) is not applicable to the Current Proceedings, because those proceedings concern a legal action or prosecution rather than an investigation; in other words, matters have moved past the investigation stage so that clause 5(1)(b) has no application and the question of the Current Proceedings is more appropriately dealt with under clause 5(1)(d).

150. On the information before me, I do not consider that Apache has established the requirements of either clause 5(1)(a) or clause 5(1)(b) in relation to the disputed

documents and, in my view, the documents are not exempt under either of those provisions.

151. Turning to clause 5(1)(d), I consider that the plain meaning of the words "*the fair trial of any person*" relate to a criminal rather than a civil action. However, I also consider that the words "*the impartial adjudication of any case*" in that provision are broad enough to encompass any action before the courts, including a civil suit.

152. The term 'person' in clause 5(1)(d) is not defined in the FOI Act but s.5 of the *Interpretation Act 1984* provides that where the term 'person' is used in any written law passed by the Parliament of WA, its meaning includes, among other things, a public body or company.

153. In the present case, the agency has brought the Current Proceedings against ANPL and its co-licensees under s.38(b) of the PP Act for failing to maintain and repair the pipeline that ruptured in the Incident. Any breach of s.38(b) is subject to the payment of a penalty. Section 66B(1) of the PP Act provides that if the penalty provided under that Act is or includes imprisonment, the offence is a crime. Accordingly, in this case, I consider that Apache's submission is made on the basis that the disclosure of the disputed documents could reasonably be expected to prejudice the fair trial of ANPL or its co-licensees.

154. Apache has not explained to me how such disclosure would have the effect claimed but simply asserts that the disputed documents "*may be relevant*" to that matter and that their disclosure "*may interfere*" with the proper administration of justice. I accept the Applicant's submission that Apache has failed to identify any real risk of prejudice to the fair trial of ANPL (or the impartial adjudication of the case). I also agree with the Applicant that, if the disputed documents are relevant to the Current Proceedings then the agency, which brought those proceedings, already has those documents in its possession.

155. Having considered Apache's submissions, I do not accept that there is any reasonable basis to expect that the disputed documents, if disclosed, could prejudice the fair trial of ANPL or the impartial adjudication of the Current Proceedings. In my view, Apache has not established the requirements of clause 5(1)(d) and the disputed documents are not exempt under that provision.

Clauses 5(1)(e) and (f)

The agency's submissions

156. The agency's submissions are the same as those made in relation to clauses 5(1)(a), (b) and (d).

The Applicant's submissions

157. The Applicant submits that there is insufficient evidence to reasonably conclude that disclosure of the disputed documents could endanger or prejudice the safety of the Facilities for the following reasons:

(a) From their content and description, the disputed documents do not appear *prima facie* to contain any information directly relating to the security of the Facilities. Apache has not identified any specific information contained in the disputed documents; any information about the claimed source of the danger; or how the disclosure could reasonably be expected to undermine the security of the Facilities.

(b) The Facilities present a relatively low security threat, Varanus Island being in a remote location some 100km off the coast of WA.

(c) Insofar as Documents 1 and 3 contain information about the inspection and maintenance of the relevant pipelines, that particular information has no reasonable bearing upon security at the Facilities and the remaining documents appear to be wholly irrelevant to that security.

(d) The Safety Cases are already available to all those working at Varanus Island. Irrespective of any duty of confidentiality, there is no greater risk that those documents could pass from the Applicant to a person who represents a security risk.

Apache's submissions

158. Apache states that parts of Documents 1, 3, 4, 4A and 9 concern the security and integrity of its facilities and notes that the FOI Act expressly recognises the need to protect property, public safety and the life or physical safety of persons by providing for such documents to be exempt from disclosure.

159. Apache submits that Documents 1, 3, 4, 4A and 9, by their very nature, highlight vulnerabilities in Apache's infrastructure, safety systems and procedures because they contain extensive information concerning the integrity of the SMS and set out comprehensive detail concerning pipeline management and operations. For example, Documents 1 and 3 have security-sensitive information located extensively throughout the documents; Documents 4 and 4A detail systems overviews, safety control management, facilities schematics, helicopter and marine operations, integrity management systems, equipment and layout descriptions; and Document 9 contains comprehensive detail concerning hazardous substances management, fire protection, sensitive design features relating to the safety, security and integrity of pipelines, comprehensive risk summaries and assessments and evaluation of risk management and mitigation.

160. In summary, Apache makes the following submissions:

(a) The fact that Documents 1 and 3 are available to personnel on Varanus Island in no way diminishes the significant security issues associated with those documents.

(b) There are inherent dangers with gas and pipeline facilities and incidents such as fire and explosion are potentially catastrophic. The onshore and offshore facilities at Varanus Island are highly secure areas and all

personnel on the island have duties of confidentiality and have contractual arrangements with Apache. The security threat posed to the Facilities was acknowledged by the agency in its decision of 22 December 2008.

(c) The disputed documents are part of a suite of documents by which Apache maintains the safe operation of the Varanus Island facilities. By their very nature, the entirety of those documents highlights vulnerabilities in the infrastructure, safety systems and procedures: "*To attempt to extract that information ... would render the remainder of the document so devoid of content as to be meaningless.*"

For example, in Documents 1 and 3 the hydrocarbon production process, when read together with the facility schematics and process flow diagrams, provides a roadmap as to the location, purpose, pressure and temperature of each vessel within the facility. If disclosed, the following, among other things, could reasonably be expected to endanger the life and physical safety of individuals or the security of property: the type and location of equipment; the layout of the facilities; the common facilities such as power generation and distribution; the stock level and location of hazardous substances; the isolatable inventories for defined process units; facility shutdown initiations and effects; safety critical items; fire and explosion analysis; safety systems, refuges, emergency power, communication and lighting; emergency system survivability analysis and quantitative risk analysis.

Document 9 contains detailed facilities descriptions and formal safety assessments for each of 41 pipelines. Among other things, Document 9 contains reports highlighting the worst-case consequences for each pipeline and includes approximately 66 detailed schematics and process flow diagrams which identify the location, specification and/or operating conditions of each piece of equipment; crucial process junctures and flows; the movement of hydrocarbons through the facility; the location of fuel supplies and flammable/hazardous inventories. The schematics and process flow diagrams are in effect the 'blueprints' of the facilities and would provide an unprecedented level of information to persons of malicious intent.

(d) The potential to endanger Apache's property, personnel or public safety would be significant, particularly where vulnerabilities in infrastructure can be identified and exploited. Individuals intent on causing harm could gain unprecedented access to information concerning the design and operation of the Facilities in Documents 1, 3, 4, 4A and 9 and exploit that information to cause maximum damage and loss of life. Consequently, if those documents were disclosed there is "*a substantial, real and quantifiable risk*" to the security of property and the safety of people.

(e) Oil and gas facilities are interconnected with various critical process juncture points central to the operation of the facility which cannot be obtained from a 'Google Earth' search. The disclosure of that kind of information would identify targets that would, if attacked, cripple the

Facilities. In short, the information in Documents 1, 3, 4, 4A and 9 (which is not publicly available) provides a road map as to what could maximise the effect of an attack. The mosaic theory has specific application here since this information, if released, can be put together with other publicly available information to create a picture that would compromise the security of Apache's facilities. The information would be released for all time.

(f) The Federal Government has recognised the reality of the threat by extending Australia's maritime security regime to Australia's offshore oil and gas facilities (see the *Maritime Transport and Offshore Facilities Security Act 2003).* For national security reasons, the USA has adopted policies to protect information such as engineering drawings, plant layouts, process flow information and process chemistry, in order to ensure that oil and gas facilities are appropriately protected because it is aware that such facilities are high risk targets for terrorist attack. The disclosure of that kind of information should be compared to the disclosure of similar information in relation to a nuclear reactor. In matters of national security the bar should be set extremely high and a final determination made on the basis that any documents released "*will be reviewed by highly sophisticated terrorists with an appropriate understanding of engineering."*

(g) Transnational terrorism, according to statements made by the Department of Foreign Affairs and Trade, uses unconventional and unexpected means to wreak maximum damage and terrorists are "*diverse, complex, adaptable and continually evolving"*. Such terrorists are technically skilled and educated people, use modern technology to their advantage, conduct meticulous long-term planning and have sought to target critical infrastructure. In any event, disclosure could facilitate a 'low-tech' attack with minimal effort and maximum impact. Such concern is not hypothetical because in 2006 there were 344 significant attacks against oil and gas targets globally (see *Oil and Gas Terrorism Monitor 2007* from Threat Resolution Ltd).

Consideration - clauses 5(1)(e) and 5(1)(f)

161. Documents 1 and 3 are the safety case documents which are required by legislation to deal with the risks implicit in the operation of offshore petroleum facilities from the standpoint of occupational health and safety; Documents 4 and 4A concern the condition of the Sales Gas pipelines and their management, together with the renewal of PL 12; and Document 9 is the operational PM plan prepared as prescribed in the Pipelines Regulations.

162. Documents 1, 3, 4, 4A and 9 will be exempt under clauses 5(1)(e) and 5(1)(f) if their disclosure could reasonably be expected to cause the harm described in those provisions. I accept the Applicant's submission that, in the context of clause 5, whether disclosure of the documents in question could reasonably be expected to result in the harm claimed, is to be judged objectively in light of all relevant information.

163. I have reviewed Documents 1, 3, 4, 4A and 9 in light of Apache's additional submissions following my preliminary view of this matter and in light of information obtained from NOPSA. I am satisfied that, although available to Apache's personnel, Documents 1, 3, 4, 4A and 9 are not documents that are in the public domain.

164. I accept that there are inherent dangers in working on and around Varanus Island and that any accidents, sabotage or attack on the Facilities could have potentially catastrophic consequences. However, the question for my consideration is whether those consequences to personnel and property could reasonably be expected from the disclosure of Documents 1, 3, 4, 4A and 9.

165. I do not accept, as Apache claims, that all of the information in Documents 1, 3, 4, 4A and 9 is exempt under clauses 5(1)(e) and (f). Some of that information is clearly public information (see, for example, Part 1, section 1, item 1.4 of Document 3). Even though Varanus Island is in a relatively remote location, there is a good deal of published material on WA's offshore oil and gas industry to have already identified the Facilities as a possible terrorist target. Information such as views of Varanus Island and its infrastructure can be downloaded from the internet as also can information that certain platforms are manned or unmanned. Moreover, pipeline routes are marked on navigational charts.

166. Some information - such as the general principles of plant shutdown or the hydrocarbon production process - would, as Apache has acknowledged, be common industry knowledge. Other information - such as the function of various structures - could be inferred from satellite images.

167. It is possible that some of that published information could assist a terrorist attack. Consequently, it does not appear to me that the action of disclosing the same publicly available information as contained in the disputed documents could reasonably be expected to have the effects claimed in clauses 5(1)(e) and 5(1)(f).

168. In my view, a distinction can be drawn between matters relating to occupational health and safety and the operational functioning of the Facilities on the one hand, and matters relating to the security and protection of the Facilities from persons with malicious intent on the other. In my opinion, Documents 1, 3, 4, 4A and 9 relate to the former rather than to the latter, although there is clearly some cross-over between the two and I accept that it would be possible to use some of the information contained in those documents to assist in formulating a sabotage plan.

169. I am satisfied that certain information in Documents 1, 3, 4A and 9 (but not Document 4) that relates to, among other things, the layout of the facilities on Varanus Island, facility schematics, process flow diagrams and the stock level and location of hazardous substances could, if disclosed, reasonably be expected to endanger the life or physical safety of persons and the security of Apache's property. Such information is not publicly accessible and could, in my view, assist in aiding any planned attack on the Facilities or maximising the effect of

such an attack. The information that I have identified, which is listed in the appendix to this decision, would in my view reveal vulnerabilities that have the potential to cause damage to life and property if obtained by persons of malicious intent. If that information were to be made public, I consider that it would realistically be of interest to such persons and, if disclosed, could reasonably be expected to have the effects set out in clauses 5(1)(e) and (f).

170. I have made a distinction between two categories of information contained in Documents 1, 3, 4A and 9. The first is information that is relevant to possible gradual damage (such as corrosion) to the Facilities and natural events such as storms, tsunamis or earthquakes. The second category is information relating to instantaneous or malicious damage caused by, for example, fire or explosion. In my opinion, only disclosure of the latter type of information could reasonably be expected to endanger the life or physical safety of any person or the security of any property. As a result, I have excluded from disclosure information such as detailed schematics or information that relates to hazardous substances, critical juncture points and the likely outcomes of different events, where it seems to me that that information is not publicly available but if disclosed could reasonably be expected to endanger the life or physical safety of persons at the Facilities or endanger the security of the Facilities if it were obtained by persons of malicious intent, because it could assist those persons to achieve their aims.

171. I have considered Apache's claims concerning the cumulative effects of disclosure of the disputed documents together with other information that might be accessible. That claim is also known as the ‘mosaic theory’. It was discussed by the Queensland Information Commissioner in *Re O'Reilly and Queensland Police Service* (1996) 3 QAR 20 at [18]-[22]. In *Re O'Reilly*, the Commissioner made the point that the disclosure of information should not necessarily be viewed in isolation. However, the mosaic theory does not give rise to any separate exemption and can only be used to establish a factual basis for satisfaction of an exemption provision in the FOI Act. I agree with those comments. Based on the material before me, I am not persuaded that there is any factual basis for its application in the circumstances of this complaint, other than in respect of the information listed in the appendix.

Clause 5(1)(g)

172. The agency and the Applicant made no submissions in relation to this provision. Apache repeats its submissions (d)-(g) of paragraph 160 made in respect of clauses 5(1)(e) and (f). In addition, Apache advises me that its ‘lawful measure for protecting public safety’ is to restrict access to the Facilities and to material describing the Facilities.

Consideration – clause 5(1)(g)

173. I can identify no decisions by my predecessors on this particular provision. I note that the wording of the equivalent provision in s.37(2)(c) of the Cth FOI Act is very similar - “*A document is an exempt document if its disclosure under this Act would, or could reasonably be expected to prejudice the maintenance or enforcement of lawful methods for the protection of public safety*” - and was

considered by the Commonwealth Administrative Appeals Tribunal ('the Tribunal') in *Re Thies and Department of Aviation* [1986] 9 ALD 454. In that case, the document in question was the transcript of a radio message transmitted to a pilot. In considering the meaning of s.37(2)(c) in the context of s.37 as a whole, the Full Tribunal concluded at [37] that:

> *"'public safety' in section 37(2)(c) does not extend beyond safety from violations of the law and breaches of the peace. It does not extend to air travel safety, except to the extent that that might be put at risk by such violations or breaches."*

174. In other words, the Tribunal in *Re Thies* considered that "*the protection of public safety*" referred to in s.37(2)(c) was concerned not with public safety generally but with "*the maintenance or enforcement of lawful methods for the protection of public safety*", so that there must be some related breach of the law.

175. The context of clause 5 of Schedule 1 to the FOI Act is effectively the same as the context of s.37 of the Cth FOI Act. The former is headed "*Law enforcement, public safety and property security*"; the latter "*Documents affecting enforcement of law and protection of public safety*". Clauses 5(1)(a)-(g) are broadly analogous to ss.37(1) and (2) of the Cth FOI Act.

176. The dictionary meaning of 'measure', insofar as it is relevant to clause 5(1)(f), is "*suitable action to achieve some end ... a legislative enactment*". Taking into account the plain meaning of the word 'measure' and the context of clause 5 as a whole, I consider that clause 5(1)(g) is intended to safeguard lawful measures put in place to protect public safety from violations of the law or breaches of the peace.

177. In the present case, Apache claims that the disclosure of Documents 1, 3, 4, 4A and 9 could reasonably be expected to prejudice Apache's ability both to restrict access to the Varanus Island and to material describing the Facilities and that its ability to do those things amounts to a lawful measure or measures to protect public safety. In my view, even if Apache's ability to restrict access to the Facilities and/or information about the Facilities could arguably be described as a lawful measure or measures to protect public safety – which in my view is doubtful – I do not consider that the maintenance or enforcement of those measures would be prejudiced by the disclosure of Documents 1, 3, 4, 4A and 9 because those measures would remain in place. By contrast with clause 5(1)(a), clause 5(1)(g) does not refer to prejudice to the 'effectiveness' of lawful measures or procedures but to prejudice to the maintenance or enforcement of such measures. Consequently, I am not satisfied that Documents 1, 3, 4, 4A and 9 are exempt under clause 5(1)(g) of Schedule 1 to the FOI Act.

CLAUSE 3 - PERSONAL INFORMATION

178. In its letter of 22 January 2009 to this office seeking external review, Apache referred to the fact that Document 4 contains references to employees of Apache

and submits that that information would be exempt under Clause 3(1) of Schedule 1 to the FOI Act. Clause 3, insofar as it is relevant, provides:

> "*(1) Matter is exempt matter if its disclosure would reveal personal information about an individual (whether living or dead).*
>
> *(2) ...*
>
> *(3) Matter is not exempt matter under subclause (1) merely because its disclosure would reveal, in relation to a person who is or has been an officer of an agency, prescribed details relating to -*
>
> *(a) the person;*
> *(b) the person's position or functions as an officer; or*
> *(c) things done by the person in the course of performing functions as an officer.*
>
> *(4) ...*
>
> *(5) ...*
>
> *(6) Matter is not exempt matter under subclause (1) if its disclosure would, on balance, be in the public interest."*

179. The term 'personal information' is defined in the Glossary to the FOI Act to mean:

> "*... information or an opinion, whether true or not, and whether recorded in a material form or not, about an individual, whether living or dead –*
>
> *(a) whose identity is apparent or can reasonably be ascertained from the information or opinion; or*
>
> *(b) who can be identified by reference to an identification number or other identifying particular ...".*

180. That definition makes it clear that any information or opinion about a person from which that person can be identified is *prima facie* exempt under clause 3(1). In my view, the purpose of the exemption in clause 3(1) is to protect the privacy of individuals about whom information may be contained in documents held by State and local government agencies.

Consideration

181. Having examined the disputed documents, I consider that a very small amount of information in Documents 3, 4, 4A, 9 and 23A-23H is 'personal information' as defined in the FOI Act. That personal information includes the names, initials and job titles of various individuals. All of that information is *prima facie* exempt under clause 3(1) unless any of the limits on the exemption

applies. In my view, the only limits that have relevance to this matter are clauses 3(3) and 3(6).

Clause 3(3)

182. Clause 3(3) provides that certain kinds of personal information - the 'prescribed details' - about officers of State and local government agencies, which relate to their work functions and activities, are not exempt under clause 3(1). Those prescribed details are set out in full in regulation 9 of the *Freedom of Information Regulations 1993.* They include an officer's name, position, functions and duties and anything done by that officer in the course of performing, or purporting to perform, those functions and duties. Information in Documents 3, 4, 4A, 9 and 23A-23H that is prescribed details is not exempt under clause 3(1).

183. However, the information that identifies individuals who are not officers or contractors of agencies wherever it appears in the disputed documents should be obscured or deleted before access is given by way of inspection (Documents 1, 3, 4, 4A and 9) or by way of providing edited copies (Documents 23A-23H).

Clause 3(6)

184. Clause 3(6) provides that matter is not exempt under clause 3(1) if its disclosure would, on balance, be in the public interest. In the present case, no submissions have been made to me on this point and I am not persuaded that clause 3(6) applies to any personal information in the disputed documents.

EDITING

185. Having considered all of the disputed documents, I do not accept Apache's submission that editing would render them meaningless. Section 24 of the FOI Act provides:

"*If –*

(a) the access application requests access to a document containing exempt matter; and

(b) it is practicable for the agency to give access to a copy of the document from which the exempt matter has been deleted; and

(c) the agency considers (either from the terms of the application or after consultation with the applicant) that the applicant would wish to be given access to an edited copy,

the agency has to give access to an edited copy even if the document is the subject of an exemption certificate."

186. The application of that provision, and particularly the qualification contained in paragraph (b), was discussed by Scott J in *Winterton*'s case, as follows:

> "*It seems to me that the reference to the word "practicable" is a reference not only to any physical impediment in relation to reproduction but also to the requirement that the editing of the document should be possible in such a way that the document does not lose either its meaning or its context ...however, in my opinion, s.24 should not be used to provide access to documents which have been so substantially altered as to make them either misleading or unintelligible.*"

187. With regard to Documents 1, 3, 4A and 9, the edited information is contained in discrete sections of the documents (and much of it is repetitive) and its removal does not render the remainder meaningless or devoid of context. Accordingly, I consider that it is practicable to provide the Applicant with edited copies of Documents 1, 3, 4A and 9 from which the information that I have identified in the appendix to this letter has been deleted. Further, I do not consider that the deletion of personal information from Documents 23A-23H would significantly affect the meaning of those letters.

CONCLUSION

188. I find that:

- Documents 1, 3, 4, 4A and 9 are subject to copyright.
- Documents 1, 3, 4, 4A and 9 are not exempt under clauses 4(2), 4(3), 5(1)(a), 5(1)(b), 5(1)(d) or 5(1)(g) of Schedule 1 to the FOI Act.
- The information in Documents 1, 3, 4A and 9 listed in the appendix to this decision, is exempt under clauses 5(1)(e) and 5(1)(f) of Schedule 1 to the FOI Act.
- Documents 23A-23H are not exempt under clauses 4(3), 5(1)(a), 5(1)(b) or 5(1)(d) of Schedule 1 to the FOI Act.
- A small amount of personal information about third parties contained in the disputed documents, which is not 'prescribed details' is exempt under clause 3(1) of Schedule 1 to the FOI Act.

****

APPENDIX

Document 1

Part II – Facilities description

Section 9: Items 3.3, 4.1 and 4.2 and figure 5.1.

Section 10: Items 3.3, 4.1 and figure 5.1.

Section 11: Items 3.3, 4.1 and figure 5.1.

Part IV – Formal Safety Assessment

Section 9: Table 2.1, item 3.3 and table 3.4.

Document 3

Part II – Facilities description

Section 2: Figures 6.1 and 6.2.
Section 3: Figures 2.1 and 2.2, item 3.3 in full (ie. 3.3.1-3.3.4), items 4-6 in full, items 7.3-7.5, figure 8.1 and items 8.3-8.5 and 9.3.2.
Section 4: The third bullet point in item 1.6.1; and item 3.3.
Section 7: The last bullet point in item 1.6.1, item 2.5.5, tables 3.2 and items 3.3 and 4.
Section 8: Items 3.3 and 4.
Section 9: Items 2.5.7 and 3-5 in full.
Section 10: Items 3.3 and 4 and figure 5.1.
Section 11: Items 3.3 and 4 and figure 5.1.
Section 12: the last bullet point in item 1.6.1 and items 2.5.5, 3.3 and 4.
Section 13: Items 2.5.5, 3.4 and 4.
Section 16: Items 2.5.5, 3.3 and 4.
Section 17: Items 2.5.7, 3.3 and 4.
Section 18: Items 2.5.8, 3.3 and 4.
Section 19: Items 2.4.6 and item 3.3.
Section 20: Items 2.5.7, 3.3 and 4.
Section 22: Items 2.5.8, 3.4 and 4.

Part IV – Formal Safety Assessment

Section 2: Tables 2.1 and 3.1.
Section 3: Tables 2.1 and 2.2, items 4.3-4.4 and 8.5.
Section 4: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 7: Tables 2.1 and 2.2, items 4, 5.3 and the last row in table 8.1.
Section 8: Tables 2.1 and 2.2, item 5.2.3 and table 7.1.
Section 9: Tables 3.1 and 3.2, items 5, 6.3, 7, tables 9.1 and 9.2, items 9.4.1, 9.5 and 10.3.
Section 10: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 11: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.

Section 12: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 13: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 16: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 17: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 18: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 19: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 20: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.
Section 22: Tables 2.1 and 2.2, items 4, 5.3, 5.4.2 and the last row in table 8.1.

Formal Safety Assessment Attachment Reports (in full)

Document 4A

Figures 2.2, 4.1-4.5 and 5.3, and item 4.3.

Appendix B: Varanus Island Facilities Overall General Arrangement plan.

Appendix C: Varanus Island Facilities Second Sales Gas Pipeline Licence, Lease and Easement Plans wherever they appear; Apache Wonnich Field Development Varanus Island Facilities Onshore Pipeline General Arrangement plans wherever they appear; Varanus Island Facilities Overall General Arrangement plans wherever they appear; Varanus Island Facilities Location of Proposed Amenities Upgrades, Licence Lease and Easement Plan; Lowendal Island Facilities Preliminary Layout plan.

Document 9

All detailed schematics and diagrams (eg. Agincourt 4" Gas Lift pipeline schematic) but not Tree diagrams (eg. Airlie 20” Tanker Loading Pipeline Summary of Safety Risk Reduction).

Item 2.0: Facilities Description 2.0 (in full).