COURT: SUPREME COURT OF TASMANIA

CITATION: *Forestry Tasmania v Ombudsman* [2010] TASSC 39

PARTIES: FORESTRY TASMANIA
v
OMBUDSMAN
BOOTH, Kim, MHA
SOUTHERN CROSS TELEVISION (TNT 9) PTY LTD

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Victorian Public Service Board v Wright (1986) 160 CLR 145; *Accident Compensation Commission v Croom* [1991] 2 VR 322, applied.
Aust Dig Administrative Law [1157]

Administrative Law – Freedom of information – Exempt documents – Documents relating to business affairs – Information acquired by an agency from a business undertaking exempt if disclosure likely to expose the undertaking to competitive disadvantage – Information of an agency of a business commercial or financial nature exempt if disclosure likely to expose the agency to competitive disadvantage – Agency contracting with business undertaking for production of television programs – Whether negotiation figures and contract fees exempt information – Meaning of "competitive disadvantage".
Freedom of Information Act 1991 (Tas), ss31(1)(b), 32(a)(ii).
Australian Competition & Consumer Commission v Baxter Healthcare Pty Ltd [2005] FCA 581; *Accident Compensation Commission v Croom* [1991] 2 VR 322, referred to.
Aust Dig Administrative Law [1171]

REPRESENTATION:

Counsel:

Applicant:	N J O'Bryan SC and J R McDonald
First Respondent:	(Submitted to the Court's jurisdiction)
Second Respondent:	(Submitted to the Court's jurisdiction)
Third Respondent:	(Submitted to the Court's jurisdiction)
Attorney-General:	P Turner

Solicitors:

Applicant:	John McDonald
First Respondent:	In person
Second Respondent:	Fitzgerald and Browne
Third Respondent:	In person
Attorney-General as *amicus curiae*	Director of Public Prosecutions

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FORESTRY TASMANIA v OMBUDSMAN, KIM BOOTH MHA, SOUTHERN CROSS TELEVISION (TNT 9) PTY LTD

REASONS FOR JUDGMENT

PORTER J
27 August 2010

Introduction

1 This is an application for judicial review of a decision of the Ombudsman made following a review carried out pursuant to the *Freedom of Information Act* 1991[1] ("the Act"), s48. Section 48(2) enables a person who has applied for information to apply to the Ombudsman for a review of a decision, (amongst others), that the information requested is exempt information. The Ombudsman decided that certain requested information was not exempt.

2 In March 2009, The Hon Kim Booth MHA applied to Forestry Tasmania for information relating to commercial arrangements between it and Southern Cross Television ("TNT") relating to the "*Going Bush*" television program. Forestry Tasmania ("FT") determined that eight documents were relevant, of which one was released in its entirety, the remaining seven were released with substantial deletions. The deleted material was said to be exempt because it was information which fell within ss31 and 32 of the Act being information of a business, commercial or financial nature that would be likely to expose TNT or the agency to competitive disadvantage. Mr Booth requested an internal review of that decision, pursuant to the Act, s47. The decision was upheld upon review by the principal officer of FT. In May 2009, Mr Booth applied to the Ombudsman for the review. On 10 March 2010, the Ombudsman concluded that none of the information at issue was exempt from release and that it should be released to Mr Booth in response to his request. Pursuant to the Act, s48(7), FT was notified that it was required to take all such action as may be necessary to implement the decision.

The provisions of the Act

3 Section 7 of the Act creates a right to information contained in records in the possession of a Minister or government agency unless the information is exempt by virtue of a provision of Pt 3. There are a number of classes of exempt information created by Pt 3. As is apparent, this application concerns ss31 and 32 of the Act[2], and the concept of "competitive disadvantage". Relevantly, the sections provide as follows:

> "**31 — Information relating to trade secrets, &c, of undertakings**
>
> **(1)** Information is exempt information if its disclosure under this Act would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking, and —
>
> **(a)** the information relates to trade secrets; or
>
> **(b)** the disclosure of the information under this Act would be likely to expose the undertaking to competitive disadvantage.
>
> **(2)** In deciding for the purpose of subsection (1)(b) whether disclosure of information would expose an undertaking unreasonably to competitive disadvantage an agency or Minister may take account of any consideration the agency or Minister considers relevant including whether the information –
>
> **(a)** is generally available to competitors of the undertaking; or

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1 This Act was repealed by the *Right to Information Act* 2009 with effect from 1 July 2010.

2 The equivalent provisions in the *Right to Information Act* 2009 are ss37 and 38. Sections 37(1)(b) and 38(a)(ii) are in almost identical terms to ss31(1)(b) and 32(a)(ii) of the Act.

(b) would be exempt information if it were generated by an agency or a Minister; or

(c) could be disclosed without causing substantial harm to the competitive position of the undertaking —

and shall also, in particular, take into account whether there are any considerations in the public interest in favour of disclosure that outweigh considerations of any competitive disadvantage to the undertaking.

...

32 — Information relating to trade secrets, &c, of agency

Information is exempt information —

(a) if it is —

(i) a trade secret of an agency; or

(ii) in the case of an agency engaged in trade or commerce – information of a business, commercial or financial nature that would, if disclosed under this Act, be likely to expose the agency to competitive disadvantage; or

(b) ...".

Forestry Tasmania – objectives and functions

4 Before proceeding further it is desirable to say something about the nature of FT and the role it is required to perform. It is a government business enterprise, governed by the *Government Business Enterprises Act* 1995. As such, it has by virtue of s7 of that Act, the principal objectives of:

- performing its functions and exercising its power so as to be a successful business by operating in accordance with sound commercial practice and as efficiently as possible, and achieving a sustainable commercial rate of return that maximises value for the State;
- performing on behalf of the State its community service obligations in an efficient and effective manner.

5 The *Forestry Act* 1920, s70, makes FT's objectives the optimisation of the economic returns from its wood production activities, and the benefits to the public and the State of non-wood values of forests. The functions of FT are set out in s8 of that Act, and include the exclusive management and control of all forest products on State forest, including the processing, removal, on-selling or other disposition of those forest products, to use multiple use forest land for wood production and for other conservation, environment and recreation purposes, and to foster an internationally competitive wood production and processing industry in Tasmania. Additionally, by the *Forestry Act*, s10, FT may promote and encourage the use of State forests for purposes other than wood production, and may provide to the public information and educational programs on sustainable forest management. The making of the *Going Bush* television program would seem to be an exercise of the latter activity, but the fact remains that there is one government business enterprise charged with all of those various functions, and there is no argument that it is not engaged in trade or commerce.

Further background

6 The following is taken from the Ombudsman's reasons for decision and is accepted by the applicant as an accurate summary of the relevant history of the matter and of the positions of the parties:

"The request

This review relates to a request under the *Freedom of Information Act 1991* dated 19 March 2009 made by Kim Booth MP to Forestry Tasmania (FT).

Mr Booth's request was in these terms –

'Please supply all documentation pertaining to negotiations between Forestry Tasmania and Southern Cross television relating to the commissioning and production of the "Going Bush" program including details of sponsorship; details of commitments made by Forestry Tasmania to provide funding for the program; under what terms funding is provided by Forestry Tasmania to Southern Cross and the amount of funds expended by Forestry Tasmania since the program was first developed.'

FT's response to the request

FT identified 8 documents which fell within the terms of the request. It provided Mr Booth with 1 of the documents in full and partially released the remaining documents. In doing so, it deleted from the 7 documents information *'about prices and costs and specific market arrangements'*, which information FT claims is exempt from production under s 31 (1) (b) (the exemption for information relating to the exposure of an undertaking to competitive disadvantage) and s 32 (1) (a) (I) and (ii) (the exemption for information relating to trade secrets of an agency or exposure of an agency to competitive disadvantage) of the Act.

For completeness, I note that FT also deleted some information from 3 documents which FT says is not responsive to the terms of the request. I have not been requested to review the deletion of that information.

...

The case relates to contractual arrangements under which FT engaged Southern Cross Television (TNT9) Pty Limited (TNT) as a consultant to film, produce and edit two separate serious of a television program entitled 'Going Bush'. TNT is a wholly owned subsidiary of Southern Cross Media Australia Pty Limited.

I sought submissions from TNT in the course of the review.

The issue for determination

The issue for my determination in this review is whether the information which FT has deleted from the documents is exempt information under s 31 or 32 of the Act.

In making my decision I have taken into account all of the material received during the review process. I will only repeat any of the material where it is necessary to understand these reasons for decision.

The relevant sections of the Act

...

The documents

The documents from which FT has deleted information, listed in the same order that FT gave them to me, consist of –

[seven listed documents]

On examination, Documents 1, 2, 4 and 5 relate to the agreement between FT and TNT to produce *'Going Bush Series 2'*. Documents 3, 6 and 7 relate to the production of *'Going Bush 1'* In sending me a copy of the documents, FT highlighted the information it had deleted from the documents. In what follows, I refer to this information as 'the information at issue'.

The position of FT

As stated, FT claims that the information at issue is exempt from production under ss 31 (1) (b) and 32 (a) (I) and (ii) of the Act. The grounds on which FT supports its claims for exemption are set out in the decisions made within FT on the request and in a written submission made by FT to my office during the external review process.

Dr Hans Drielsma, Executive General Manager of FT, made the initial decision on the request. The decision dated 15 April 2009 states –

'Information about prices and costs and specific market arrangements may expose both Forestry Tasmania and its consultant to competitive disadvantage.

For Forestry Tasmania, release of such information may significantly reduce its negotiating power and lessen its ability to achieve best returns for its shareholders in current and future negotiations. For our consultants, it allows competitors to model their costs of production and profitability, potentially exposing them to competitive market positions that exploit exposed areas of vulnerability in their business models.'

Bob Gordon, the Managing Director of FT carried out the internal review. His decision dated 1 May 2009 states –

'As a Government Business Enterprise, Forestry Tasmania is obliged to maintain its commercial viability. The release of this information would cause the business commercial disadvantage in its future negotiations with consultants.'

Fat's [sic]written submission made to my office dated 4 June 2009 states –

'In considering this request, I determined that certain information was exempt under Sections 31 (1) (b) and 32 (a) (i and ii) as it is in formation that is commercial-in-confidence between Forestry Tasmania and Southern Cross Television. Information excluded under th ese Sections of the Act specifically relates to the cost of producing the television series Going Bush, which formed part of a consultancy agreement negotiated between the two parties. The release of this information, even as a total cost figure, would expose both parties to the contract to significant commercial disadvantage.

As a Government Business Enterprise, Forestry Tasmania is obliged to maintain a competitive position and maximize its return to its shareholder. The public release of this information would expose Forestry Tasmania to competitive disadvantage in its future dealings with other consultants, by significantly reducing its negotiating power.

During third party consultations, Southern Cross Television objected to the release of this information on the grounds that it would expose it to commercial disadvantage. It noted that its main competitor has recently started producing similar television programs, and that releasing the financial arrangements pertaining to the production of Going Bush would weaken its position as a producer of local television programs.

Given these objections, the release of this information would adversely affect Forestry Tasmania's ability to enter into similar agreements with Southern Cross Television, and by extension, with other private sector businesses.'

The submissions from TNT

TNT claims that the disclosure of the information at issue would expose TNT to competitive disadvantage within the meaning of s 31 (1) (b) of the Act. The grounds on which TNT relies are set out in a written submission dated 10 December 2009 which contains the following statements, extracted from the text -

- *TNT regards the Financial Information to be highly commercially sensitive, confidential information. The fees which TNT charges for the production of television programs (and also commercials) are integral to TNT's business and a key component of its revenue model.*

- *TNT maintains confidentiality in its production arrangements. We do not believe that competitors of TNT have any knowledge of how TNT str uctures the fees it charges for production services, or what the quantum of those fees are.*

- *If the fees that TNT charges for the production of television programs or commercials were to be made publicly available (pursuant to a release under the Act), a competitor would be able to use this information to its own advantage (which would be to TNT's detriment).*

- *There is fierce competition in the Tasmanian commercial television market – for viewers, for advertisers, and for local production projects.*

• *Releasing the Financial Information would mean that a competitor could use the Financial Information in the development of its own fee structures in respect of local programming (including when it tenders for production work against TNT, or when it approaches potential clients). This would significantly disadvantage TNT in the Tasmanian local production marketplace, as the competitor does not currently have access to that information.*

• *The Financial Information is of no less relevance in 2009 than it was a year or two ago when the Production Agreements were entered into. There has been no material change in the fees that TNT charges for local productions since that time.*

The position of Mr Booth

Understandably, Mr Booth asserts that the information withheld from the documents should be disclosed on public interest grounds.

Mr Booth says –

> *'Forestry Tasmania is still the recipient of a great deal of public money and, as such, has a responsibility to the Tasmanian public to be as open and transparent as possible in its expenditure of those funds'.*

Mr Booth further says –

> *'Such a figure, if divulged, would not expose the agency to "competitive disadvantage" as it would not indicate precisely what the agency has spent on separate parts of the "Going Bush" deal, rather it would reveal the total dollar amount for the wider project cost.*
>
> *I would submit that the provision of a dollar figure, encompassing the broader expenditure incurred by Forestry Tasmania on the "Going Bush" project, would not cause substantial harm, competitive disadvantage or harm the competitive position of either party as the exact breakdown of the expense incurred by FT would not need to be provided. There are many examples of government departments who put out to tender projects that involve media production, and these tenders are often accompanied by a dollar figure.'*

Finally, Mr Booth says that he does *'not seek financial information in such details as to reveal the precise negotiations between FT and Southern Cross Television, however (he does wish) to be provided with a broader dollar figure, by FT, of how much money they have invested in the commissioning of the "Going Bush" project'."*

7 It can be seen from the last paragraph quoted that in his application to the Ombudsman for review, Mr Booth seems to have amended his request, confining the information sought to the total figure paid by FT in relation to the project. However, the Ombudsman made determinations as to all of the information which initially was in contention, although no complaint is made about that. He classified the information as set out below, and this classification was not the subject of any criticism.

> "The information at issue is essentially of three types. One type of information represents information provided by TNT to FT as to the amount that TNT wished to be paid for the production of the relevant series (Documents 1, 2 and 7). The second type of information discloses the contract fees agreed to be paid by FT to TNT, as recorded in formal contracts between the parties, and an associated contract coversheet (Documents 4, 5 and 6). The third type of information is information about what FT was prepared to pay TNT for the first series, following preliminary discussions (Document 3)."

The Ombudsman's decision

8 The Ombudsman first dealt with the application of s31(1)(b). As to the first type of information, he said that it was acquired by FT from TNT, but that the third type was not so acquired and could not be covered by the provision. He said that whether the second type of information (the contract fees agreed to be paid) was "acquired" was a live issue, which he resolved by concluding that

the information was not "acquired" but was "on an objective basis the price upon which the parties have agreed".

9 Returning to the first type of information, the Ombudsman said:

> "The issue at this point is whether the disclosure of the quoted information would be likely to expose TNT unreasonably to competitive disadvantage. The requirement for unreasonableness arises from the text of s 31(2).
>
> In *Morris v Forestry Tasmania,* Case 0708009, decided on 28 July 2008, I stated-
>
> > *Turning to the exemption in s 31(1) (b), this requires that the disclosure of that information would be likely to expose the undertaking to competitive disadvantage. This latter term must also be given its ordinary meaning, and I know of no authority which directly assists with this. No other jurisdiction in Australia uses the concept of 'competitive disadvantage' in its freedom of information legislation. It is perhaps sufficient to note that the notion of competitive disadvantage presupposes that there is a market within which the undertaking competes with others for business, within which it might be disadvantaged in its competitive position by the release of the information.*
>
> I accept that that there is a market in Tasmania for the production of local commercial television programs, which includes the television series. I also accept that TNT competes in that market, and that it has expertise in issues relating to local television production projects. However, I am not satisfied that, in the factual context which will arise with the release of the contract fees upon which FT and TNT agreed, the disclosure of the quoted information would be likely to expose TNT to competitive disadvantage.
>
> I say this as a result of comparing the quoted information with the contract fees. *Accepting that the contract fees will be known*, there is nothing about the quoted information, and nothing in the other evidence before me, which satisfies me that the disclosure of the quoted information would be likely to expose TNT to competitive disadvantage, unreasonably or otherwise.
>
> I conclude therefore that s 31(1)(b) does not operate to exempt any of the information at issue." [Emphasis added]

10 The Ombudsman then turned to the application of s32(a). He identified the live issue as whether the disclosure of any of the information would be likely to expose FT to competitive disadvantage. He referred to FT's argument under this provision that "*the release of this information would adversely affect Forestry Tasmania's ability to enter into similar agreement with Southern Cross Television, and by extension, with other private sector businesses.*"

11 The reasons continue as follows:

> "In *Morris (supra)*, FT raised a somewhat similar argument, which effectively involved the proposition that FT competes with its customers. I there observed –
>
> > *'FT does not compete with its customers, but with other suppliers on domestic and international markets. If the terms that it has offered one customer become known to a new, prospective customer, this puts FT at a disadvantage in its negotiations with that customer. Having to provide the new customer with an equivalent or better deal than the one which it struck with the previous customer may mean that the operations of FT are less profitable overall, but that does not necessarily equate to being placed at a disadvantage in competing with its other suppliers for market share. The terms of trade which it struck with the new customer may enable it to be more competitive, albeit less profitable. On the other hand, it might happen that FT cannot improve upon the terms of trade that it offered the previous customer, and a new and prospective customer is lost to another supplier. In that situation, competitive disadvantage would arise.'*

> The argument raised in the current case involves the proposition that FT competes with the consultants and other persons with whom it contracts for goods and services. This argument also mistakes the concept of 'competitive disadvantage' to be found in ss 31(1)(b) and 32(a)(ii). If FT competes with anyone, it competes with organisations and individuals which market similar goods and services to those which it markets, in Australia or overseas. It does not compete with those with whom it contracts for the provision of goods and services as part of carrying on its business.
>
> It is conceptually possible that an agency might be so disadvantaged in its profitability by the release of information that compromises its ability to negotiate appropriate deals with customers and/or contractors that its ability to compete with other businesses is likewise compromised. However, this is an improbable scenario, and FT has not provided me with any evidence to make out such a case here.
>
> I conclude on this reasoning that none of the information at issue is exempt under s 32(a) of the Act."

The grounds of the application

12 The application for review is brought on three grounds which are rather lengthy. In summary, the three complaints are that:

- the Ombudsman erred in law in his construction of the Act, s31(1), in that he wrongly introduced the element of "unreasonableness", so that for information to be exempt, its disclosure had to be likely to unreasonably expose the undertaking to competitive disadvantage;
- as to the first type of information, the Ombudsman erred in law and/or took into account an irrelevant consideration, in that the assumption that the contract fees "will be known" is incorrect, and the reasoning on which that assumption was based is flawed because of the error identified in ground 3;
- the Ombudsman erred in law in that he misconstrued the concept of "competitive disadvantage" as it appears in ss31(1)(b) and 32(a)(ii) of the Act.

13 As can be seen, there is no challenge to the findings that the second and third information types were not "acquired" within the meaning of s31(1). On its face this application relates to the conclusion reached under s31(1)(b) about the first information type, and the conclusions under s32(a)(ii) about all three types.

Ground 1 — "Unreasonableness" in s31(1)(b)

14 It will be recalled that in considering the first type of information (TNT's quoted fees) the Ombudsman said that the point was whether the disclosure would be likely to expose TNT unreasonably to competitive disadvantage, the requirement for unreasonableness arising from the text of s31(2).

15 Section 31(1)(b) makes information exempt information, if its disclosure would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking, and the disclosure would be likely to expose the undertaking to a competitive disadvantage. Section 31(2) is very badly drafted. It provides that "in deciding for the purpose of subsection (1)(b) whether disclosure of information would expose an undertaking *unreasonably* to competitive disadvantage" [emphasis added] an agency or Minister may take account of any considerations thought to be relevant, including a number of specified factors: see s31(2)(a) – (c). The factor specified in subs(2)(c) is whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking. In addition to the factors which may be taken into account, s31(2) provides that the agency or Minister shall "also, in particular, take into account whether there are any considerations in the public interest in favour of disclosure that outweigh considerations of anti-competitive disadvantage to the undertaking".

16 One reading of s31(2) and the one which FT urges as the correct one, is that the opening words merely recite the task which falls to the Minister or the agency under subs(1), with the sub-section then going on to prescribe what factors may be taken into account in carrying out that task. The alternative construction is that subs(2) modifies and expands the concept of exempt information as initially established by subs(1). That is to say, the wording in subs(2) means that the word "unreasonably" has to be read into subs(1)(b), so that the latter reads " ... likely to expose the undertaking unreasonably to disadvantage", and what is defined as exempt information is modified in that way.

17 To assist in resolving this ambiguity, I was referred to the Hansard record of the debate in the House of Assembly of 26 September 1990. This was no doubt pursuant to the *Acts Interpretation Act* 1931, s8B(3)(g). The House was debating amendments made by the Legislative Council upon the return of the Bill. The Council had amended cl 31(1) by deleting the word "unreasonably", and the Council's amendment was agreed to. In the course of the debate it was pointed out by one Member that the word "unreasonably" remained in subcl (2), and that it seems this should also have been removed by the Council. The Hon Member said, "*But obviously, to be consistent that word should also have been removed. That can be done at some later date when it has been tidied up, no doubt.*" No other Member commented on this point. Plainly enough, the matter was not tidied up, and subs(2) was enacted and remained in that form.

18 That strongly suggests that the existence of the word "unreasonably" in subs(2) was a legislative oversight. I accept that it is difficult to construe the opening words of subs(2) as doing anything more than reciting the task facing the agency or Minister, and as having a function in terms of defining the particular category of exempt information when that seems to be the province of subs(1). This of course, involves ignoring the word "unreasonably" in subs(2). It is true that as a general principle courts should try to give meaning to every word of a provision: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 382 [71]. There is a presumption that words are not used without a meaning and are not superfluous but this presumption is of "limited application": *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 per Mason CJ at 12 – 13. It is recognised that there are occasions on which meanings to every word of the provision simply cannot be given: *Solution 6 Holdings Ltd v Industrial Relations Commissioner (NSW)* (2004) 60 NSWR 558 per Spigelman CJ at [74] – [75].

19 FT's argument that "unreasonably" is to be ignored, did not address the possible effect of the requirement in subs(2) for the agency or Minister to take into account public interest considerations. The existence of that requirement might suggest that subs(2) is intended to modify what subs(1) says as to what is exempt information. Although as drafted, that requirement is made part of the process of deciding whether disclosure of the information would have a particular effect, it introduces a completely different exercise, and one which conceptually does not easily fit within the apparent purpose of the sub-section.[3] The combined effect of the relevant parts is that in making a decision about the effect of disclosure, it is necessary to consider whether the public interest in disclosure would outweigh considerations of competitive disadvantage. That does not make sense. The two exercises surely should be separate ones, in the sense that that would be first a decision as to whether the information would expose the undertaking to competitive disadvantage, and if so, then determine whether the public interest in favour of disclosure outweighs such considerations. All of that leads me to think that, notwithstanding the way in which the sub-section is worded as a whole, the requirement for "public interest" considerations is a separate aspect, and one unrelated to the task of deciding the nature of the information.

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[3] *The Right to Information Act* 2009, s37(2), suffers from the same difficulty in that the description of the task of deciding, as recited, does not coincide with what decision actually has to be made under s37(1).

20 For those reasons, I would be inclined to hold that the word "unreasonably" in s31(2) has no bearing on the meaning of "exempt information" as used in s31(1)(b), and has no role to play in the operation of s31(2). But I do not see it as necessary to finally resolve the point because the question arises of whether, in any event, the Ombudsman made a material vitiating error in posing the question in terms of whether the information was likely to expose TNT *unreasonably* to competitive disadvantage. I should have regard to the Ombudsman's words which reveal the reasoning process leading to the conclusion that s31(1)(b) did not operate to exempt the information. As is shown above, the Ombudsman said that there was nothing in the evidence which satisfied him "*that the disclosure of the quoted information would be likely to expose TNT to competitive disadvantage, unreasonably or otherwise.*" [My emphasis].

21 This aspect of the Ombudsman's reasons was not addressed in argument. I would have to assume that the words "or otherwise" were intended to have some meaning. On that basis, it would have to be accepted that the Ombudsman has considered whether the quoted information would be likely to expose TNT to competitive disadvantage as such, without reference to any requirement that the exposure be unreasonable before the information becomes exempt. Accordingly, although the test which the Ombudsman proposed may well be, for the reasons I have given, the incorrect one, the applicant has not demonstrated that this error affected the outcome as to this issue.

Ground 2 — The assumption as to the contract fees

22 It will be recalled that in considering the application of s31(1)(b), the Ombudsman:

- accepted that TNT competed in a market for the production of local commercial television programs;
- said that he was not satisfied that "*in the factual context which will arise with the release of the contract fees ... the disclosure of the quoted information would be likely to expose TNT to competitive disadvantage*"; and
- said that "*accepting that the contract fees will be known, there was nothing about the quoted information, and nothing in the other evidence which satisfied him that the disclosure of quoted information would be likely to expose TNT to competitive disadvantage ...* ".

23 The focal point of FT's submissions as to this ground is the assumption that the contract fees would be released and become "known". FT submits that this assumption was based on the Ombudsman's intended ruling as to the application of s32(a)(ii) and, of course, an error of law is alleged in the approach to that section, which error is said to taint the outcome in respect of both the contract fees and what sum FT was prepared to pay (the second and third information types). Accordingly, in its terms, ground 2 is made dependent upon ground 3. I would have to accept that the Ombudsman's reference to the release of the contract fees and the acceptance of the fact that the contract fees would be known, were indeed references to what he proposed to do in relation to that information under s32. Were it to be otherwise, then there was no evidence upon which the particular decision under s31(1)(b) could have been made. Indeed the material strongly suggested the contrary: that neither FT nor TNT would make publicly known the contract fees.

24 FT also submits that in approaching the determination of the particular question under s31(1)(b), the Ombudsman made a jurisdictional error in the sense that he posed himself the wrong question in relation to s31(1)(b) by not first determining whether the information was exempt under s32. In argument, ground 2 was addressed before ground 3, but in the circumstances it is best if I deal with ground 3 first and then return, if necessary, to a consideration of s31(1)(b).

Ground 3 — The meaning of "competitive disadvantage"

The issue and the evidence

25 As to this ground, the relevant aspects of the Ombudsman's reasons are that he:

- said that FT's argument involved the proposition that it competed with consultants and other persons with whom it contracts for goods and services;
- said that this argument mistakes the concept of competitive disadvantage to be found in two sections;
- said that if FT competed with anyone, it competed with organisations and individuals which market similar goods and services to those which it markets, and held that it did not compete with those with whom it contracted for the provision of goods and services as part of carrying on its business;
- observed that it was conceptually possible that an agency might be so disadvantaged in its profitability by the release of information that its ability to negotiate appropriate deals with customers and/or contractors was compromised, so that its ability to compete with other businesses was likewise compromised; and
- found that this was an improbable scenario and there was no evidence to make out such a case.

26 FT submits that the Ombudsman misconstrued the concept of competitive disadvantage by restricting its scope to the market in which it operates as a supplier of wood and wood products, and excluding from consideration the markets in which FT is an acquirer of goods and services. The resolution of the ground involves considering the meaning of the term "competitive disadvantage" in the context in which it appears, and determining its effect. I should note that FT's submissions were confined to its own position under s32. The only information which could affect it is that of the second and third types. Ground 3 alleges an error of construction as to "competitive disadvantage" in both 31(1)(b) and 32(a)(ii). No differentiation was sought to be made as between the two provisions, and no submissions were made as to TNT's position under s31. For present purposes I need only observe that s31(2)(c) permits consideration to be given to the question of whether the information could be disclosed "without causing substantial harm to the competitive position of the undertaking". That provision is not repeated in s32.

27 As to the term itself, FT submits that it has a quite well settled meaning within the law of competition, and that it is well understood in the field of economics as developed in the context of the *Trade Practices Act* 1974 (Cth) ("the TPA"). FT submits that the term, whilst perhaps not having a meaning which can be described as "technical", has a specialised or more sophisticated meaning beyond the ordinary meaning of the words. Reliance was placed on *Re Queensland Co-Operative Milling Association Ltd* (1976) 25 FLR 169 at 188 – 189, in which the Trade Practices Tribunal described the "very rich concept" of competition and said that it was a mechanism for the discovery of market information (the kinds of goods and services the community wants and the manner in which these may be supplied in the cheapest possible way), and for enforcement of business decisions in light of that information. The Tribunal said that competition expressed itself as rivalrous market behaviour and, having noted that whether firms compete is very much a matter of the structure of the markets in which they operate, set out a number of elements of market structure which were stressed as "needing to be scanned" in any particular case.

28 FT sought to rely on an affidavit of Professor Stephen King, Dean of the Faculty of Business and Economics, Monash University, Melbourne. An opinion exhibited to the affidavit addresses the economic meaning of the term. Professor King also makes comment, as he was requested to do, on the reasoning employed by the Ombudsman in relation to the question of competitive disadvantage.

At the hearing, there was some argument about the admissibility of the evidence, but it was agreed that I should take it provisionally.

29 The countervailing considerations to the admissibility of evidence of this type and a number of the relevant authorities were canvassed by Parker J in *Re Michael; ex parte Epic Energy (WA) Nominees Pty Ltd* (2002) 25 WAR 511, at [100] – [107]. At 542 [103], his Honour noted, relying on *Pepsi Seven-Up Bottlers Perth Pty Ltd v Commissioner of Taxation* (1995) 62 FCR 289, that knowledge of the technical meaning of a word or term may assist in providing the context, background or surrounding circumstances necessary for the construction of the words used. In the *Pepsi* case, Hill J, at 298 – 299, said that evidence may be given of the meaning and usage of a word in a trade where, amongst other things, the trade usage assists in supplying the context or background of surrounding circumstances necessary to the construction of a word used, and where the trade usage may assist the court by way of background to determine whether the word in the statute is used in the specialised usage, or in accordance with ordinary English usage.

30 At 301, his Honour also pointed out that under the Uniform Evidence Law (*Evidence Act* 2001 (Tas), s76), the only obstacles to the admission of evidence going to the meaning of words as used in a statute would be (assuming the evidence is properly characterised as within the opinion rule) "whether the testing is relevant to the issue to be determined, that is to say the meaning of the particular word in the statute, and whether the witness does have specialised knowledge based on training, study or experience to support the opinion evidence that he or she is to give."

31 In the *Epic Energy* case, the court was dealing with the meaning of a number of words and phrases, in particular industry-based legislation, parts of which dealt with competition in the market. Parker J, at 543 [107], expressed the view that expert evidence "may relevantly and usefully inform the court as to ... specialised usage, of which the court would otherwise be unaware, so that the court can determine whether the [legislation] is using particular words or phrases in their ordinary everyday usage, or in the specialised usage among those versed in the school of economics."

32 It has been held that the word "competition" and other critical words and terms used in Part IV – Restrictive Trade Practices of the TPA are used in a commercial or economic sense: see for example *Adamson v West Perth Football Club* (1979) 39 FLR 199. It has not been uncommon for courts to receive evidence from expert economists and the like as to the meaning of particular words and terms in that legislation: see for example, *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd* (1978) 32 FLR 305 ("control or dominate"), and *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (1982) 66 FLR 12 (in which the Full Court, without comment, referred to the evidence taken at first instance as to "competition" in a market). In my view, the evidence is admissible. What weight I give to it and the extent to which it assists in the issue of construction are, of course, separate questions.

Professor King's evidence

33 The two sections of the report dealing with the economic meaning of competitive disadvantage, and the Ombudsman's reasoning are each divided into parts headed "Opinion" and "Reasons". What follows is a summary of the first opinion part:

- As a matter of economics, the term "competitive disadvantage" refers to a situation where one firm, who is a competitor against another firm or firms, for some reason or due to some circumstance, is unable to make as high a level of profit relative to its competitive rivals as would be expected, if all else being equal, the firm did not face the relevant reason or circumstance.
- The underlying reason or circumstance leading to the relatively lower profit is the "competitive disadvantage". The underlying reason or circumstance places a particular firm in a position of competitive disadvantage relative to its rivals. The term "competitor" can be used in a broad or narrow sense. Usually it would refer to a competitor in a market that sells or buys goods or

services that are substitutable for the goods or services sold or bought by the firm that is of interest.

- However, the term may also be used more broadly to refer to any situation where one firm or business is in a situation of conflict with another firm or business, for example over division of gains from trade. While that broader approach is not wrong as a matter of economics, the approach that focuses on the competitor in a market would be the more usual use of the term "competitive disadvantage".

34 A summary of Professor King's reasons as to both sections is as follows:

- "Competitive advantage" refers to a situation where one firm who is a competitor against another firm, for some reason or due to some circumstance, is able to make relatively higher profits than its competitive rivals. The advantage refers to relative profits in the sense that it is an advantage relative to competitive rivals, and refers to the underlying distinction or difference between the firms that leads one firm to have relatively higher profits. The definition of both competitive advantage and disadvantage requires the identification of the relevant competitors which in general, are those firms seeking to either buy or sell goods or services in competition with the relevant firm.
- "Competition" is sometimes used in economics to refer to any situation of rivalry where a gain of profit to one firm or business involves a reduction of profit to another firm or business. The difference between what a buyer is willing to pay and the seller is willing to accept is called the "surplus" in the transaction, and it can be said that the bargaining process involves the buyer and seller competing over shares of the surplus.
- This is a broader interpretation of competition, and in that sense, a competitive disadvantage for the buyer would be a reason or circumstance which decreases the share of surplus which may accrue to it; in other words, a competitive disadvantage would arise where there is less ability to compete for the share of the surplus.
- This broader use of "competitive disadvantage" is not wrong as a matter of economics, but the more standard use of "competitive disadvantage" as a generic economic term, is in the context of firms competing against one another as buyers or sellers.
- As to TNT's position, the release of the information might lead to a reduction in its share of surplus from future negotiations with customers (a competitive disadvantage broadly defined), and might lead to a reduction in its profitability relative to its rivals (a competitive disadvantage narrowly defined).
- As to FT's position, the release of the information might place it at a competitive disadvantage under the broader definition, because if it were to negotiate for production services in the future with a party other than TNT, its ability to secure a low price might be undermined. Under the narrow approach, the undermining of its future bargaining position with its suppliers as such lowers its relative profitability.

FT's submissions

35 FT argues that the Ombudsman wrongly confined consideration of whether there was likely exposure to competitive disadvantage, to the market in which FT competed as a supplier of wood and wood products. It says that the correct focus in terms of the relevant market, was the market in which FT was an acquirer of the services provided by TNT. Having identified that market, the exposure to competitive disadvantage which would follow from the release of the second and third types of information, was that in any future similar transaction TNT's competitors would know both what FT had paid to TNT, and was prepared to pay TNT for the production of the series. The identified disadvantage was (as I have interpreted the point) that FT would lose the opportunity, or be less able to negotiate a competitive price with an alternative supplier. In terms of the likelihood of exposure to

such disadvantage, FT submits that on the material it cannot be shown to be improbable that FT would in the future, wish to undertake a similar production exercise. It is said that this arises from the fact that there were two separate arrangements made in 2007 and 2008, with the latter covering the period in 2009.

36 As is apparent, FT's argument in reality is not that the Ombudsman interpreted the term other than in a business or commercial sense, but that he took the view that the notion of competition applied only to the position of the agency in which it operated as a supplier, and that any disadvantage had to arise in that particular context. There was some debate about whether the term under consideration had anything other than its ordinary meaning, the establishment of which is a question of fact: *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389. It might be thought that because the sections deal with business, commercial and financial undertakings and information, and agencies engaged in trade or commerce, the concept of competition and the word "competitive", now have an ordinary meaning. However, as Finkelstein J pointed out in *Grocery Holdings Pty Ltd v Chief Executive Officer of Customs* [2004] FCAFC 85 at [10], most words have several meanings, and the determination of the meaning of words in a statute by reference to their context is often a legal process not raising questions of fact. Further, whether a word or phrase has its ordinary meaning or a technical or other meaning is a question of law, and as the High Court said in the *Agfa* case at 401, trade meaning and the ordinary meaning do not necessarily stand at opposite extremities of the interpretive register. That may well be the case here and in any event, the effect or construction of a term whose meaning or interpretation is established is a question of law: *Agfa* at 395 – 397.

Approach to the interpretation of the exemption provisions

37 As the issue of the approach to the construction of exemption provisions was the subject of argument, I will deal with it. Some assistance may well be obtained from the provisions which set out the objectives of the Act and establish the right to information. Those provisions are as follows:

> "**3 Object of Act**
>
> (1) The object of this Act is to improve democratic government in Tasmania –
>
> (a) by increasing the accountability of the executive to the people of Tasmania; and
>
> (b) by increasing the ability of the people of Tasmania to participate in their governance.
>
> (2) This object is to be pursued by giving members of the public the right to obtain information contained in the records of agencies and Ministers limited only by necessary exceptions and exemptions.
>
> ...
>
> (4) It is the intention of Parliament –
>
> (a) that this Act be interpreted so as to further the object set out in subsection (1); and
>
> (b) that discretions conferred by this Act be exercised so as to facilitate and promote, promptly and at the lowest reasonable cost, the provision of the maximum amount of official information.
>
> ...
>
> **7 Right to information**
>
> A person has a legally enforceable right to be provided, in accordance with this Act, with information contained in records in the possession of an agency or a Minister unless the information is exempt information."

38 In *Victorian Public Service Board v Wright* (1986) 160 CLR 145, the High Court was dealing with the review and appellate powers of the Victorian County Court in relation to exempt documents

under the Victorian *Freedom of Information Act* 1982. In a joint judgment[4] the court set out s3(1) and (2) of that Act, the terms of which are very similar to s3(1), (2), and (4) of the Tasmanian Act. After referring to the Victorian s16(1), which requires Ministers and agencies to administer the Act with a view to making the maximum amount of government information promptly and inexpensively available, the court said at 153: "In light of these sections it is proper to give to the relevant provisions of the Act a construction which would further, rather than hinder, free access to information."

39 Later, in *Accident Compensation Commission v Croom* [1991] 2 VR 322, Young CJ referred to the difficulties "imposed upon the court by legislation which is couched in vague and imprecise language."[5] Without referring to the *Victorian Public Service Board* case, his Honour said at 323:

> "*The difficulties are created largely by the fact that exempt documents, that is to say documents which are exempt from disclosure are described in terms which admit of no very precise meaning. In such circumstances all that the court can do in any particular case is to attempt to give some meaning to the sections relied upon as exempting the documents in question from disclosure and in doing so make the law which Parliament has failed to make.* ***Presumably in the light of s3 of the Act, the court should lean in favour of disclosure. In other words, the exemptions should be narrowly construed, although of course, in the end all that the court is faced with is a question of statutory construction.***" [My emphasis]

40 In *Sobh v Police Force of Victoria* [1994] 1 VR 41 at 61, Ashley J said that Young CJ was correct in saying that while the issue was ultimately one of statutory construction, the court should lean in favour of disclosure. Having regard to s3(1),(2) and (4) of the Act, and the High Court's comments in the *Victorian Public Service Board* case, I think that the approach outlined by Young CJ is the correct one and should be applied to the Tasmanian Act, notwithstanding the absence of an equivalent of the Victorian s16(1). The *Acts Interpretation Act*, s8A, mandates that preference be given to an interpretation that promotes the purpose or object of an Act to one that does not. The right to information is limited only by *necessary* exemptions and care should be taken not to give an inappropriately wide and benevolent view of those exemptions. At the same time, the ordinary rules of construction apply to them.[6]

Discussion

41 First, although the term "competitive disadvantage" is the subject of the argument, because of the way in which the Ombudsman ultimately resolved the issue, some consideration should be given to the whole of the phrase in which the term appears. Both ss31 (1)(b) and 32(a)(ii) provide that information is exempt if its disclosure would be "likely to expose" the entity to competitive disadvantage. In this context, I think "likely" undoubtedly means a real or not remote chance or possibility, rather than more probable than not: *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 31, per Deane J at 346; *Monroe Topple & Associates Pty Ltd v Institute of Chartered Accountants in Australia* (2002) 122 FCR 110 per Heerey J at [91]; *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at 330 [750]. "Expose", in this context no doubt has the ordinary meaning of to "lay open to something...; [to] subject to risk": *New Shorter Oxford English Dictionary* 1993.

42 Next, I turn to make some comments on Professor King's evidence and the senses in which the relevant terms may be used. As a general proposition, the "more standard use" of the notion of

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4 Gibbs CJ, Mason, Wilson, Deane and Dawson JJ.

5 Section 34 of the Victorian Act in 1991 dealt with broadly the same concepts as ss31 and 32 of the Tasmanian Act. Section 34(4) used the expression "likely to expose the agency to disadvantage". (It now reads "expose ... unreasonably to disadvantage".) The comments of Young CJ as to the imprecise meaning of the terms defining exempt documents can be applied to the Tasmanian Act.

6 Compare *Re Bell and CSIRO* (2007) 96 ALD 450, per Dep P Forgie at 486 [119].

competition as outlined by Professor King, with its focus on competitors as buyers or sellers in a market, is in keeping with the thrust of the restrictive trade practices provisions in the TPA: see for example *Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd* (1982) 64 FLR 238, per Smithers J, at 259; *Re Media Council of Australia (No 2)* (1987) 88 FLR 1, at 32. However, the provisions of Part IV of the TPA are more concerned with the level of competition in a market, than with the ability of a particular business to compete. The effect on a particular competitor may be the subject of inquiry but the ultimate issue, again broadly speaking, is the level of competitive behaviour in the particular market: *Outboard Marine Australia Pty Ltd v Hecar Investments No 6 Pty Ltd* (above) at 134; *ASX Operations Pty Ltd v Pont Data Australia Pty Ltd (No 1)* (1991) 27 FCR 460 at 478; *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2001) 215 CLR 374 per McHugh J at [261]. Further, I think it should be noted that proof of anti-competitive conduct and restrictive trade practices is very often a difficult task which frequently involves the assistance of expert evidence in relation to market structure and the behaviour of rivals in particular industries.

43 The broad sense of "competition" is that it relates to any situation of conflict or rivalry. In the context of the acquisition of goods or services from a supplier, a firm competing with a supplier for a share of the surplus generated by the transaction is in "competition". An acquiring firm may suffer a competitive disadvantage if the supplier is armed with information as to the firm's bargaining position. This is so because if a firm is seeking to acquire goods or services, in many instances it would expect to be able to negotiate competitive rates. If the supplier knows the ambit of the acquirer's bargaining position, then the acquirer would be at a competitive disadvantage in that sense. These broader economic senses of competition and competitive disadvantage which relate to rivalry between buyer and seller, have been recognised in the particular context of freedom of information legislation and in other legal contexts.

44 Section 34(4)(a) of the Victorian *Freedom of Information Act* 1982, makes a document an exempt document if it contains, in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that "would be likely to expose the agency to disadvantage" if disclosed. "Disadvantage" is not directly qualified, although the provisions of s34 which dealt with undertakings, as distinct from agencies, contain a provision similar to s31(2)(c) of the Act, referring to competitive position. In *Thwaites v Metropolitan Ambulance Service* [1994] VICCAT 6, the Administrative Appeals Tribunal took the view that release of contract documents between an agency and its contractors would result in prejudice to the agency in a commercial sense in that it would reduce the agency's ability to maintain competitiveness between contractors, and interfere with its ability to provide cost-effective services. It seems to have accepted evidence that disclosure of the contracts would create an imbalance of bargaining power and lessen the agency's ability to competitive negotiate rates.

45 "Competitive disadvantage" also arises in the context of the *Corporations Act* 2001 (Cth), as it did in its predecessors. In that Act, Parts 2M.2, 2M.3 and 2M.4 create obligations to lodge financial and other reports. The Australian Securities and Investments Commission can make an exemption order, the criteria for which appear in s342. One criterion is whether complying with the relevant requirements would "impose unreasonable burdens". The meaning of "unreasonable burden" is explored by ASIC in its Regulatory Guide 43. Competitive disadvantage is discussed as an example of an unreasonable burden. RG 43.38 explains the need to demonstrate "that if the disclosure requirement is complied with, competitors, *suppliers* or customers will be able to extract precise information ... and this information can then be used to gain an advantage over the applicant company, giving rise to detrimental consequences"[7]. [My emphasis].

46 In short, as I see it, what principally distinguishes the narrow sense from the broader one is the notion of who is in "competition". There is also the inclusion in the narrow sense of the

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[7] See for example the discussion in *'SAQ' v ASIC* [2005] AATA 553.

consideration of profits relative to competitors, using "competitors" to mean rivals competing in the same market, and focussing on the ultimate effect on overall profitability. To put it in Professor King's words, if a firm is unable to secure as favourable deals with its suppliers as it would otherwise be able to secure, and this reduces its profit relative to its rival suppliers, then as a matter of economics, that reason or circumstance creates a competitive disadvantage. Using the broad sense, the disadvantage can arise in a more particular and discrete way and may occur when the firm's ability to competitively negotiate with a supplier is compromised, leading to financial detriment. That of course, may ultimately lead to a negative impact on overall profitability, but the disadvantage arises simply when the impediment to negotiation occurs. And as Professor King said, a competitive disadvantage may be transitory or sustained.

47 It seems clear though, that as to the narrow sense in particular, the reference to profitability is really a reference to a notional impact on profitability, in that a judgment does not have to be made as to any potential impact on actual net profits. The reference to relative profitability is really to a measure by which the impact on competitiveness of a particular factor can be properly assessed. Many factors may be at play which will affect net earnings before tax. The disclosure of information may have an adverse impact financially, although overall profitability remains unchanged because of unrelated but countervailing factors.

48 In this context, I should perhaps again mention *Accident Compensation Commission v Croom* (above) in which the court had to consider the meaning of the word "disadvantage" in s34(4)(a) of the Victorian Act which section I have already explained. It makes a document an exempt document if it contained, in the case of an agency engaged in trade or commerce, information of a business, commercial or financial nature that "would be likely to expose the agency to disadvantage" if disclosed. At 331, O'Bryan J (with whom Young CJ and Vincent J agreed) said that the word "disadvantage" in the context of trade or commerce and information of a business, commercial or financial nature, meant "injury of a financial kind". The suggestion that it included mere tactical disadvantages in the context of a disputed claim for compensation was rejected. I do not see that this approach differs in any marked way from the notions discussed by Professor King.

49 Lastly, as shown in the discussion as to ground 1, s31(2) provides some guidance as to what factors may be taken into account in deciding whether disclosure of information would expose an undertaking to competitive disadvantage. One of those factors is whether the information could be disclosed "without causing substantial harm to the competitive position of the undertaking"; s31(2)(c). Curiously, the provision is not replicated in s32 and no reference is made to the competitive position of an agency. As a rule of construction, the same meaning should be given to the same words appearing in different parts of the statute unless reason appears to do otherwise: *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611, per Mason J, at 618. Given the purpose of the two sections, and notwithstanding the absence of an equivalent of s31(2), in s32, I see no reason for the term competitive disadvantage to be given different meanings in the different sections. The reference to the competitive position of the undertaking does not seem to add much to what may be made of "competitive disadvantage", but does serve to focus on the required aspect of competition. Without deciding the point, I am prepared to proceed on the basis that the term has the same meaning in each section.

Resolution of the question

50 There is no doubt that the term is used in the two sections in the Act in a commercial or economic sense. As I have shown, the notion of competition is so used in Part IV of the *Trade Practices Act* 1978 (Cth), and in *Australian Competition & Consumer Commission v Baxter Healthcare Pty Ltd* [2005] FCA 581, Allsop J at [612], said that "competitive conduct" in the context of the TPA, s46, should be understood in a practical business sense. His Honour went on to say, relying on *Boral Besser Masonry Ltd v Australian Competition & Consumer Commission* (2001) 215

CLR 374 at [159] and [261], that this should be consistent with the subject, scope and purpose of the legislation, including the stated objects. Those comments should be applied to the provisions of the Act under consideration. The task is to determine what is meant by the term in its context, accepting that it is used in a practical business sense, and with the overall objects of the Act in mind as well as the rationale for the exemptions.

51 In general, ss31 and 32 recognise that the disclosure of particular information would not be desirable or in the public interest, where its disclosure may have a prejudicial effect on the business affairs of non-government entities – hence members of the community – as well as the agencies themselves. Plainly implicit in the object of the Act as set out in s3, is the desirability of public scrutiny of governmental functions and operations, but the relevant provisions seek to protect information of a commercially sensitive nature acquired by or generated by agencies. Equally plainly, the purpose of s31 is to protect businesses which deal with government agencies from exposure to competitive disadvantage, the likelihood of which would arise from the disclosure of information relating to them through the Act. Section 32 aims at protecting government agencies engaged in trade and commerce from exposure to competitive disadvantage by disclosure of information under the Act. It is not always the case that government agencies operate in a competitive market environment; they may be a monopoly provider. In both cases, the agencies may wish to guard commercially sensitive information just as zealously as private sector undertakings.

52 For the information to be exempt, its disclosure needs to be likely to expose the undertaking or agency not to *any* disadvantage, but a disadvantage which relates to or is characterised by competition. The requirements in ss31 and 32 of the Act that the disadvantage relate to competition may have the preservation of the competitive process as a broad ultimate goal, but primarily the provisions are concerned with the potential impact on the undertaking or agency acting as a competitor in a market. The use of the descriptor "competitive", when applied to disadvantage, of course excludes disadvantages which do not relate to that situation. For instance, information may have some disadvantageous impact on internal management, but is not likely to impact on the competitive business functions of the undertaking or agency.

53 I think it can fairly be said that "competition" has a commonly understood meaning of market rivalry where there is a "striving for custom between rival traders in the same commodity": *New Shorter Oxford English Dictionary* 1993. The subject matter has been the subject of much judicial discussion. Professor King's evidence establishes that in economic terms, the concepts of competition and competitive disadvantage go beyond what might be regarded as the ordinary notions of rivalry in a market, to include rivalry between supplier and acquirer. His evidence explains how, from the economic perspective, competitive disadvantages can arise within both the more confined concept, and the broader one. As to the narrow sense, I do not think that to describe a disadvantage which lessens the comparative ability to make as a high a level of profit relative to competitors as a "competitive" one, involves any arcane economic notions.[8] And as I have demonstrated in the above discussion, I do not think that the broader notion sits at the extreme trade or technical end of the register of meaning.

54 Even leaving aside the notion of supplier and acquirer competing for the surplus of a transaction, something which lessens an entity's ability to maintain competition between suppliers, and which affects its capacity to secure a lower or "competitive" cost for goods or services acquired, must be a disadvantage relating to competition. In any event, a disadvantage which results in a reduced ability to achieve profitability levels relative to a competitor may arise in a number of ways, some having a more direct effect than others. General profitability depends on the cost of overhead

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[8] This is the sense in which, in a completely different context, the term "competitive disadvantage" was used by Perram J in *Betfair Pty Ltd v Racing New South Wales* [2010] FCA 603 at [166] when speaking of taxes and other burdens encountered by one competitor in one State, not faced by another. See also *Re Virgin Blue Airlines Pty Ltd* [2005] A Comp T 5 at [539].

expenses, which in turn involve the costs of acquiring goods and services. Something which increases acquisition costs, and which is not faced by competitors, would be a disadvantage having a potential adverse impact on profit relative to those competitors. In that sense there may be no material distinction between a disadvantage which relates directly to an entity's position relative to a competitor in a market in which it operates as a supplier, and a disadvantage which arises in the entity's capacity as an acquirer.

55 In stating what follows I do not wish to be taken as offering an all embracing definition of the term "competitive disadvantage". In my view, what the provisions refer to as a competitive disadvantage is something which affects one entity to the extent that it may not be able to generate as high a level of profit relative to its competitive rivals as would be expected, if all else being equal, the particular entity did not face the reason or circumstance. A competitive disadvantage will not necessarily be something which, in strict terms, impacts on an actual ability to compete, and the level of competition. That would involve a process which I do not think Parliament intended. What the concept entails is something which puts one entity at a disadvantage in relation to a matter which affects its profit making capacity relative to its competitive rivals. Further, I think that practical business sense compels the view that the term would include a disadvantage to an undertaking or agency in negotiating with a supplier of goods or services. That is, a competitive disadvantage arises when a supplier acquires information which gives it a negotiating advantage leading to financial detriment.

56 It is important to bear in mind however that under both sections of the Act, information will be exempt if its disclosure is *likely to expose* the undertaking or agency to competitive disadvantage, and it is that risk – the likelihood of exposure – which needs to be assessed, along with the nature of the disadvantage. Those are the words used by Parliament and there is no warrant to frame the test in terms of eventuation of the risk or actual lessening of competitive ability.

The Ombudsman's reasoning

57 FT's submissions were principally directed to that part of the Ombudsman's reasons in which he said that FT did not compete with persons with whom it contracts for goods and services. For the reasons given, I think that is an erroneous approach. However, the Ombudsman went on to say that it was conceptually possible that an agency might be so disadvantaged in its profitability by release of information that compromises its ability to negotiate appropriate deals with contractors, that its ability to compete with other businesses was likewise compromised. He added that this was an improbable scenario, and no evidence had been provided to make out such a case.

58 In my respectful view, this also shows a mistaken approach to the task and involves an error of law. The Ombudsman correctly recognised the possibility that information might disadvantage an agency's profitability by the release of information which compromises its ability to negotiate "appropriate" deals with suppliers. However, he posed the test for exemption in terms that the suggested disadvantage must be one of profitability such as to actually compromise the agency's ability to compete with other businesses. In my view, that is not what the section contemplates. This ground is made out, at least insofar as it relates to the Ombudsman's determination as to the contract fees and what FT was prepared to pay for the services.

Disposition of the application

59 The application should be granted. My ruling as to ground 3 means that the wrong test was applied and that, subject to one issue, the Ombudsman's determinations as to the second and third information type should be set aside. The application of the correct approach involves an assessment of the facts, and findings as to likely exposure to the relevant disadvantage. The matter as it relates to those information types will have to be remitted for further consideration in accordance with these reasons. The issue to which I refer is Mr Booth's apparent amendment of his request to exclude the

third information type: what FT was prepared to pay. If the request is properly taken to be so amended, there is no point in the remitter as to that point and the decision should be set aside accordingly as being beyond jurisdiction. But whether or not the application for review to the Ombudsman should be taken as amended may be a matter best left to him to decide.

60 My ruling in respect of ground 3 also means that the assumption on which the Ombudsman's conclusions as to TNT's quoted fees was misplaced, and falls away. Ground 2 is therefore made out. Subject to the same issue, the matter of the review insofar as the first type of information is concerned should also be remitted to the Ombudsman for further consideration, in that the application of s31(1)(b) will need to be determined in the absence of any assumption that the contract fees "will be known" by their release. The likelihood of TNT's exposure to competitive disadvantage needs to be assessed in relation to its competitors in the provision of similar services. The issue of the apparent amendment also arises as to this information type. If the request is properly taken to be amended, there is no point in the remitter but the same comments I have made above apply. I will hear from counsel before making final orders.