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Freedom of Information Act 1982

Section 65AB

STATEMENT OF REASONS FOR SEEKING LEAVE TO APPEAL

Introduction

On 10 June 2010, the Victorian Civil and Administrative Tribunal (VCAT) constituted by Senior Member R. Walker made a decision in the matter of Clay Manners v Northern Victoria Irrigation Renewal Project (VCAT reference G888/2008). The relevant agency involved in this matter is called 'State Owned Enterprise for Irrigation Modernisation in Northern Victoria', which is also known as 'Northern Victoria Irrigation Renewal Project'.

The VCAT ordered the part release of a document entitled 'NVIRP Business Case' dated 18 August 2008 ('Document') in respect of which exemption had been claimed under ss 28(1)(b) and 34(4)(a)(ii) of the **Freedom of Information Act 1982** ('FOI Act'). The VCAT found that the Executive Summary was exempt under s 28(1)(b) of the FOI Act but that the exemptions were otherwise not made out in respect of the remainder of the Document.

Section 28(1)(b) exempts a document from disclosure if it is a document that has been prepared by a Minister or on his or her behalf or by an agency for the purpose of submission for consideration by the Cabinet. Section 28(7)(a) of the FOI Act provides that 'Cabinet' includes a committee of Cabinet.

Section 34(4)(a)(ii) exempts a document from disclosure if, in the case of an agency engaged in trade or commerce, it contains information of a business, commercial or financial nature that would, if disclosed, be likely to expose the agency unreasonably to disadvantage.

For the reasons set out in this statement, the public interest is served by the agency appealing from the Order of the VCAT.

As the decision was made by a Senior Member, as opposed to the President or a Vice President, of the VCAT, section 148(1) of the **Victorian Civil and Administrative Tribunal Act 1998** ('VCAT Act') requires that any appeal on questions of law be made to the Trial Division of the Supreme Court of Victoria with the leave of that Court.

On 15 July 2010, I caused to be lodged with the Supreme Court a summons seeking leave to appeal from the Order of the VCAT made on 10 June 2010.

This statement sets out a brief statement of reasons for seeking leave to appeal and is provided in accordance with section 65AB(2) of the FOI Act.

Statement of Reasons for Seeking Leave to Appeal

Leave to appeal the Order of the VCAT has been sought as the Tribunal has made errors of law regarding the proper construction and application of ss 28(1)(b) and 34(4)(a)(ii) of the FOI Act.

The public interest is served by ensuring that the VCAT correctly applies ss 28(1)(b) and 34(4)(a)(ii) of the FOI Act.

1. The VCAT misconstrued and misapplied s 28(1)(b) of the FOI Act by failing to find that the Document was exempt under s 28(1)(b) of the FOI Act when it found that the Executive Summary of the Document was exempt under that provision. This is contrary to the approach previously taken by the VCAT.
2. The VCAT misconstrued and misapplied s 34(4)(a)(ii) of the FOI Act by concluding that it must approach the exemption under s 34(4)(a)(ii) of the FOI Act by asking whether, at the time when the request for access under the FOI Act was made, the agency was an agency engaged in trade or commerce. Instead, it must approach the exemption by asking whether, at the time of its decision on the application of the exemption fell to be made, the agency was an agency engaged in trade or commerce.

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The determination of the above questions of law raised in this appeal would clarify the proper construction and application of ss 28(1)(b) and 34(4)(a)(ii) of the FOI Act and therefore ensure that the confidentiality of documents that have been prepared for the purpose of submission for consideration by the Cabinet is appropriately maintained, and that agencies engaged in trade or commerce would not be unreasonably disadvantaged by the inappropriate disclosure of information of a business, commercial or financial nature.

The public interest is also served by ensuring that the VCAT acts according to law when making decisions and, in doing so, properly applies the exemptions in ss 28(1)(b) and 34(4)(a)(ii) of the FOI Act to the Document.

1. The VCAT, in making the Order, has acted contrary to s 98(1)(a) of the VCAT Act in that it has breached the hearing rule of natural justice by failing to:
 - a. provide the parties with an opportunity to make submissions or lead evidence on whether the VCAT should conclude that, while the Executive Summary was prepared for the purpose of submission to the Cabinet Committee for consideration, the Document itself was not prepared for that purpose; and
 - b. consider the case put forward by the agency as to the disadvantage it would suffer if the business, commercial or financial information in the Document were disclosed.
2. On the evidence and other material before the VCAT, it was not open to the VCAT to find, as a fact, that:
 - a. the Document was not submitted or given to the Cabinet Committee;
 - b. none of the substantial purposes for which the Document was prepared was the purpose of submission to the Cabinet Committee for its consideration; and
 - c. there was no evidence that disclosure of the business, commercial or financial information in the Document would expose the agency to disadvantage.

The determination of the above questions of law raised in this appeal would ensure that the information contained in the Document is appropriately exempt, thus maintaining the confidentiality of the Document, and ensuring that the agency is not exposed unreasonably to disadvantage by the disclosure of the business, commercial or financial information in the Document.

Dated 20 July 2010

MURRAY SMITH
Chief Executive Officer
Northern Victoria Irrigation Renewal Project

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