

VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

ADMINISTRATIVE DIVISION

GENERAL LIST

VCAT REFERENCE NO. G479/2010

CATCHWORDS

Freedom of Information Act 1982 – section 29(a) – contrary to public interest – prejudice to State relations with Commonwealth

APPLICANT

Royce Millar

RESPONDENT

Department of Premier and Cabinet

WHERE HELD

Melbourne

BEFORE

Vice President Judge Lacava

HEARING TYPE

Hearing

DATE OF HEARING

5 November 2010

DATE OF ORDER

30 June 2011

CITATION

Millar v Department of Premier and Cabinet
(General) [2011] VCAT 1230

ORDER

The decision of the respondent is affirmed.

Judge P. Lacava
VICE PRESIDENT

APPEARANCES:

For the Applicant

Mr R. Millar, in person

For the Respondents

Ms. E Latiff of counsel instructed by
Victorian Government Solicitor

REASONS

- 1 I have decided that for the reasons which follow hereafter, the decision of Mark Follett, Freedom of Information Officer of the Legal Branch of the respondent, dated 13 April 2010 refusing the applicant access to documents he requested is affirmed.
- 2 On 25 May, 2010 the applicant applied to the tribunal to review a decision of the respondent to refuse him access to documents he had sought under provisions of the *Freedom of Information Act 1982* ('the Act'). The application for review is made pursuant to section 50(2)(a) of the Act.
- 3 The original application for access was varied by agreement with the respondent. When the request for access was finally decided by the decision maker there were some 17 documents held by the respondent to which the applicant was refused access. Of those some six (6) documents (numbers 1-3, 5&6, 14) have since been released by the respondent, leaving eleven (11) documents the subject of this review (documents 4, 7-13, 15-17) ('the documents').
- 4 A revised schedule of the documents dated 3 November 2010, together with a copy of the documents, has been filed in the tribunal. The documents are described in that schedule as follows:

Doc No.	Description of Document	Date of Document	Exemption Claimed	No of Pages
4	Letter from Premier to Prime Minister-'COAG agenda item-National Reform around climate change'	30 March 2009	s 29(a)	2
7	Letter from Premier to Prime Minister-'Broadening reform on climate change', attaching document 'Collaboration, transition and transformation: Broadening national reform around climate change', dated April 2009	27 April 2009	s 29(a)	31

8	Letter from Premier to Prime Minister- ‘Melbourne: The optimal location for the Australian Climate Change Regulatory Authority’, attaching booklet ‘Melbourne: The optimal location for the Australian Climate Change Regulatory Authority’	28 April 2009	s 29(a)	25
9	Email chain between Secretary, Department of Premier & Cabinet and Secretary Department of Prime Minister & Cabinet – ‘VRET outstanding issues prior to COAG’, attaching investment implications for VRET to RET transition- (Attached file: Do9-49383) and letter to Senator Wong from the Premier (undated/unsigned)(Attached file: 20090428184250280)	28-29 April 2009	s 29(a), 29(b)	7
10	Letter from Secretary, Department of Premier & Cabinet to Secretary Department of Prime Minister & Cabinet- ‘Victoria’s transition to the Expanded Renewable Energy Target’, attaching letter from Premier to Senator Penny Wong dated 7 may 2009 with Attachment 1-‘Projects to fast-track investment in clean energy jobs growth in Victoria’	15 May 2009	s 29(a)	3

11	Letter from Premier to Prime Minister – ‘Transitional Assistance to Victoria’s coal fired electricity generators in the context of the global financial crisis’, attaching document titled ‘Market sounding on CPRS implications to brown coal fired generators dated 26 April 2009	19 May 2009	ss 29(a), 30 & 34(1)(b)	32
12	Letter from Premier to Prime Minister – ‘Potential adverse impacts of the CPRS on the State Electricity Commission of Victoria’	30 July 2009	ss 29(a) & 32 & 34(4)(a)(ii) & Alcoa Act s 14	2
13	Email from Acting Secretary, Department of Premier & Cabinet to Acting Secretary Department of Prime Minister & Cabinet – ‘Commercial in confidence’	Early October 2009	ss.29(a) & 32	1
15	Letter from Premier to Prime Minister – ‘Impact of the CPRS on Victoria’s electricity generation sector’	17 November 2009	ss 29(a), 30 & 34(1)(b)	2
16	Letter from Premier to Prime Minister – ‘Implications of the Carbon Pollution Reduction Scheme on the State Electricity Commission of Victoria’	26 November 2009	ss29(a) & 34(4)(a)(ii) & Alcoa Act s 14	2
17	Paragraphs 3 to 5 of a letter from Premier to Prime Minister – ‘Implications of the proposed	2 December 2009	ss29(a) & 34(4)(a)(ii) & Alcoa	2

	amendments to the Carbon Pollution Reduction Scheme'		Act s 14	
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- 5 As can be seen from the schedule, the respondent claims an exemption under section 29(a) of the Act in respect of each document. In addition the respondent contends documents 11 to 13 and 15 to 17 are exempt on the basis of exemptions raised by other sections of the Act. Further at the hearing I gave leave to the respondent to argue the exemption contained in section 30 of the Act extended to exempt the attachment to document 11 entitled 'Market sounding on CPRS implications to brown coal fired generators' and the letter from the Premier to Prime Minister, dated 19 May 2006 forming part of document 11 and document 15 insofar as it summarised a report.
- 6 The primary contention of the respondent is that each document is exempt within section 29(a) of the Act. It is convenient to deal with the arguments by which the respondent seeks to make out the exemption provided for in that section first. In the event I uphold the respondent's arguments that the exemption in section 29(a) applies, it is then not necessary for me to deal with the arguments based on exemptions contained in other sections of the Act.
- 7 The applicant is a journalist at the Age newspaper. His original request for access to documents is found at Tab 1 of the section 49 documents. By letter dated 17 December 2009 on the letterhead of the Age newspaper he sought documents in the possession of the respondent in the following terms:
- Communications between Premier John Brumby and/or his department and Prime Minister Kevin Rudd and/or his department including department secretary Terry Moran, relating to the Federal Government's Carbon Pollution Reduction Scheme and/or Renewable Emissions Target. Communications should be for the period 01/01/2009 to 17/12/2009.
 - Communications between Premier John Brumby and/or his department and Prime Minister Kevin Rudd and/or his department secretary Terry Moran, relating to assistance to Victoria's electricity generation companies under the Federal Government's Carbon Pollution Reduction Scheme. Communications should be for the period 01/01/2009 to 17/12/2009.
- 8 The FOI officer of the respondent emailed the applicant on 30 December 2009 advising he proposed to interpret his request by treating a reference to 'Renewable Emissions Target' as meaning 'Renewable Energy Target'. He also advised the request would be interpreted as only including

communications which took place at Victorian Deputy Secretary level and their Commonwealth equivalents or higher and references to 'Premier John Brumby' and 'Prime Minister Kevin Rudd' would include communications to or from any person acting in either position. The applicant advised the respondent by email he accepted these interpretations.

- 9 The respondent filed a great deal of material from which it sought to evidence the basis for its claim for exemption under section 29(a) and the other exemptions claimed.
- 10 Firstly, on 14 October 2010 it filed a Statement of Public Interests Grounds which it relied upon. I return to this document later.
- 11 Secondly, it filed two witness statements of Rebecca Falkingham the director of the Climate Change Branch, Department of Premier & Cabinet. The first of those was dated 15 October 2011 which I marked as exhibit A and the second dated 5 November 2010 which I marked as exhibit B. Ms. Falkingham was also called to give evidence and was cross examined by the applicant.
- 12 The second statement of Ms Falkingham (exhibit 'B') deals in the main with the attachment to document 11 which is a report commissioned on behalf of the Department of Primary Industries of the Victorian Government entitled 'Market Sounding on CPRS Implications to Brown Coal Fired Generators'. According to the second statement of Ms Falkingham, that report was commissioned to advise the Victorian Government about claims made that concerned the extent to which the Carbon Pollution Reduction Scheme would affect brown coal fired generators.¹
- 13 A number of parties provided confidential information of a commercial kind to enable the preparation of the report for the respondent. Those parties all object to the release of the attachment to document 11 on the basis that release of that information would damage their respective commercial interests. Attached to exhibit 'B' are letters from, the State Electricity Commission of Victoria, TRU Energy, Loy Yang Power Management Pty Ltd and HRL Limited. I also received into evidence a letter opposing disclosure of this document from International Power (Australia) Pty Ltd.
- 14 Thirdly, the respondent filed a witness statement of Marie Taylor the Assistant Secretary, Climate Change, Energy and Industry Branch, Department of Prime Minister & Cabinet which I marked as exhibit C. Ms. Taylor was also called to give evidence and was cross examined by the applicant.
- 15 As the applicant's request and the schedule of documents in dispute reveal, this application is about access to documents which emanate from the office of the Premier of this state and relate to a Carbon Pollution Reduction

¹ Paragraph 4 of Exhibit B

Scheme ('CPRS') proposed to be introduced in the later part of 2009 by the Commonwealth Labor Government then headed by former Prime Minister Kevin Rudd.

- 16 It is necessary to consider the policy context in which the documents were brought into existence. In 2006 the Victorian Government announced part of its climate change policy which is set out in attachment 1 to Rebecca Falkingham's first statement². The document was concerned with the effects of climate change on Victoria and was titled 'Our Environment Our Future'. It contained the Victorian Government's sustainability action statement and reflected the Victorian Government's policy on climate change that existed at the time. The policy was in place in Victoria in 2009 and I was told was working well. That policy included renewable energy targets.
- 17 The applicant's request sought documents within a certain time frame that related to renewable energy targets and related to the CPRS.
- 18 In 2007 the Commonwealth Government announced an intention to introduce a Commonwealth plan that also included a scheme with emissions targets. The Commonwealth announcement required the State to transition into the Commonwealth scheme. That transition from a state scheme that was in operation and working well to a federal scheme was controversial.
- 19 The Commonwealth was promulgating its Federal scheme and was doing so in an international context. To that end in 2007 it signed the Kyoto Protocol. As the Commonwealth sought to push ahead with its scheme a number of different voices were seeking to be accommodated within the Commonwealth scheme in particular the different state governments each with different issues arising in their own state consequent upon the implementation of the federal scheme. There were also significant implications for commercial operators in electricity industries in Australia, and many of those operators had an international context as well.
- 20 Victoria publicly supported the development and implementation of a Federal Scheme which is apparent from attachment 3 to the witness statement of Ms. Falkingham. However, because of its reliance on electricity generated by mining brown coal, Victoria argued that it had a special case to be considered by the Commonwealth and that Victoria ought not be disadvantaged in the transition into the Commonwealth Scheme.
- 21 The documents are about the transition from the State Scheme then operating in Victoria to the then proposed Federal Scheme (which included a CPRS) and the implications for Victoria arising from that transition. With the exception of part of document 9, each of the documents emanates from the State of Victoria to the Commonwealth.

² Exhibit A paragraph 14

- 22 The documents contain information directly related to the implications for Victoria of implementing the then proposed Commonwealth Scheme. As well as the issues advanced in the documents, there was at the same time on going dialogue between the State and the Commonwealth. Also, the Commonwealth was receiving submissions in documents and engaged in dialogue with representatives of the other states on the same issue. The documents deal with the detail of the transition. It is in that background that the documents, and the exemptions claimed, fall for consideration.
- 23 As I indicated earlier the respondent claims each document is exempt within section 29(a) of the Act. That section provides as follows:

29. Documents containing matter communicated by any other State

A document is an exempt document if disclosure under this Act would be contrary to the public interest and disclosure-

- (a) would prejudice relations between the State and the Commonwealth or any other State or Territory; or
- (b) would divulge any information or matter communicated in confidence by or on behalf of the government of another country or of the Commonwealth or of any other State or Territory to the government of the State or Territory or a person receiving a communication on behalf of that government.

- 24 Before a document can be an exempt document within section 29(a) of the Act, disclosure of it must be both contrary to the public interest and prejudice relations between the State and the Commonwealth.
- 25 In order to make out the exemption claimed the respondent filed a list of grounds upon which it sought to make out that disclosure would be contrary to the public interest within the section. Those grounds were as follows:
- 26 The respondent argues that in the circumstances as exists here, the public interest is in:
- (a) protecting uninhibited exchanges between the governments of Australia³ on questions of policy and resource allocation: *Re Steel and Environment Protection Authority* (1991) 5 VAR 208.
 - (b) encouraging cooperative Federalism within Australia.
 - (c) protecting processes that contribute to high quality policy development by the governments of Australia.

³ That is, communications between any of the governments of the Australian Commonwealth, Territories and States.

- (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy;
- (e) protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision—making process: see e.g. Della—Riva MLC v Department of Justice [2007] VCAT 660, Clark v Department of Treasury and Finance [2002] VCAT 1040 (“Clark”).
- (f) assisting the administration of justice by facilitating the representation of clients by legal advisers by maintaining the confidentiality of their communications and thereby inducing the client to retain a solicitor and seek advice and encouraging the client to make full and frank disclosures: compare Grant v Downs (1976) 135 CLR 674 at 685 per Stephen, Mason and Murphy JJ.
- (g) ensuring that the Victorian government remains able to meet private undertakings’ legitimate expectations of confidentiality.
- (h) ensuring that private undertakings remain willing to share information with the State.
- (i) protecting the State of Victoria’s negotiating position in relation to present and future proposals concerning climate change: compare Clark.

27 The evidence called by the respondent was directed to making out these asserted public interest grounds and, to make out the second limb of the section, namely that disclosure of the documents would prejudice relations between the State and the Commonwealth.

28 The applicant on the other hand argues there is great public interest in knowing what the Commonwealth and State governments are doing about climate change. He also filed a statement of grounds upon which he relies to argue disclosure of the documents is in the public interest. He contends as a journalist who writes in the area, it is in the public interest that the public is fully informed about what governments are doing in the area of climate change. He contends that disclosure of the documents would promote ‘transparency in government’ and relies upon the principles set out at paragraph 123 of the judgment of Justice Kirby in *Osland v. Secretary to the Department of Justice* [2008] HCA 37.

29 In his statement of public interest grounds, the applicant stated his argument succinctly as follows:

- Victoria is unique in Australia because of its heavy reliance for energy on emissions-intensive brown coal, and its disproportionate contribution to Australia's greenhouse gas emissions.
- The Victorian government is in an especially difficult position in relation to these matters given its commitment to action on global

warming the one hand, but its concerns about energy security and the potential downside to the state economy, on the other.

- Insight in to how the government has represented its view on such matters to the Commonwealth, and the Commonwealth response, are unquestionably matters in the public interest.
- There are also major financial implications out of action on global warming and Victoria's role. Last year billions of taxpayer dollars were earmarked for assistance to heavy polluting industries. Such concessions were/are controversial and viewed by many as being at odds with the essential philosophy of emissions trading.
- This after all is public money that could be spent elsewhere. It is unquestionably in the public interest therefore that the Victorian Government's views on matters such (sic) how much assistance should be given to industry, be made public.
- Release of this information is also in the public interest because global warming and government responses may well be a major contributing factor in shaping the natural, economic and social environments we occupy into the future.
- In a policy area dogged by complexity and a lack of transparency and public understanding, the release of such information is likely to shed light on what our elected representatives are saying to one another about our environment, our money, and our future
- Communications between politicians and bureaucrats is an appropriate target for FOI requests because such communications are, more so than carefully crafted media releases, likely to provide an accurate reflection of their real views.
- The debate and discussion on global warming is one of the key issues confronting the broader Australian community. Given Victorians' reliance on brown coal for the bulk of their electricity, better information is required if the Victorian community is to participate effectively in the broader national debate.
- Access to such information is likely to help people make decisions about how they vote at election time.
- If an elected representative seeks to influence or benefit in such debates by reference to communications between himself and other government elected officials, then to a degree any absolute right to, or assumption of confidentiality is thereby removed or reduced.

30 Although both of the parties presented their written arguments and contentions with clarity a difficulty arose in the hearing of the matter. The applicant was unrepresented. As I have said he is a journalist with the Age newspaper and his intention in applying for access to the documents is to

write about their content. In order to make out the exemption under section 29(a) of the Act the respondent needed to adduce evidence from the witness Falkingham that exposed the content of some of the documents. This was to explain how both the public interest arguments and the prejudice arguments arose. To enable this to occur I reluctantly had to rule that evidence be given in the absence of the applicant.⁴

- 31 In her first witness statement Ms Falkingham said communications of the kind contained in the documents are presumed to be in confidence as they disclose deliberations in relation to issues of strategic importance to the State. She said the documents are kept confidential within government and access to them is restricted. She said the documents record frank communications which differs significantly to what might be said in the public arena. She said release of the documents would hamper intergovernmental communications and could lead to the loss of, or reduced use of, communicating by letter. Further, she said the frankness of communications could be eroded by release of such documents and could lead to difficulty in developing sound government policy.⁵
- 32 In evidence Ms Falkingham confirmed her two witness statements. Ms. Latiff, who appeared as counsel for the respondent on review, lead evidence from her in which, by reference to the content of each document, the witness was able to say how the State's relationship with the Commonwealth would be prejudiced by a disclosure of the documents. It is necessary that I deal with that evidence.
- 33 Ms Falkingham has dealt with document 7 at paragraphs 27 to 30 of exhibit A. In her statement she said release of the document would be premature because the Commonwealth Government had set up a Multi Party Climate Change Committee to analyse and assess the implications of introducing a price on carbon. In so far as the document outlines a proposed new approach to the development of climate change policies, the approach had not been adopted or publicised.
- 34 In evidence in the tribunal Ms Falkingham said document 7 'goes to the heart of how the Victorian government would like to change the relationship around climate change policy between the Commonwealth and the States⁶. Ms. Falkingham said that in highlighting gaps in the Commonwealth Government's policy, the document is critical of the Commonwealth. In doing so the Premier was being both frank and direct. Ms Falkingham said disclosure of document 7 would prejudice the relationship between the State and Commonwealth governments because such frank and direct exchanges which currently exists through letters such as this would be unlikely to occur. She said disclosure of such a letter 'would limit our ability to be frank in the way we suggest new policies, in

⁴ Ruling Transcript pages 32-34

⁵ See paragraphs 22 to 25 of Exhibit A

⁶ Transcript page 28

the way we suggest amendments to current policies of the Commonwealth Government⁷.

- 35 Paragraphs 31 to 34 of exhibit A deal with document 8 which concerns the Australian Climate Change Regulatory Authority and Victoria's position on that issue. In evidence she said document 8 consists of a letter from the Victorian Premier to the Prime Minister with an attachment, she said the proposal outlined in the letter and the attachment, is not a matter of public knowledge. She said there was anecdotal evidence another state, namely New South Wales, was mounting a similar proposal, so that competition exists between states as to the proposal being dealt with in the letter and attachment. She said if document 8 were to be released, Victoria's competitiveness that it was seeking from discussions with the Commonwealth on the issue, would be undermined and might minimise Victoria's ability to put forward its best case.
- 36 Ms Falkingham gave evidence concerning document 9 at paragraphs 35 to 38 of exhibit A. In evidence about document 9 she said it was a chain of emails passing between the Secretary of the Department of Premier and Cabinet and the Secretary of the Department of Prime Minister and Cabinet dealing with the transition from the Victorian renewable energy targets to the Federal Government's expanded renewable energy targets. There was also an attachment that identified implications for Victoria arising from the transition. Ms Falkingham said these implications have not been made public because they were matters under negotiation and monitoring. She said there was possible prejudice for Victoria should document 9 and attachment be released because such disclosure could damage investment in Victoria and disclosure could lead to government officials being less frank and open about the modelling Victoria does with the Commonwealth into the future⁸. In the absence of the applicant, she explained why the transition from the Victorian Scheme to the Commonwealth Scheme could reduce investment in Victoria in the early years of implementation of the Commonwealth Scheme noting this was contrary to the State Government's public statements, which were that Victoria would not be disadvantaged by the change⁹.
- 37 MS Falkingham gave evidence about document 10 at paragraphs 35 to 38 of exhibit A. In evidence before the tribunal she said document 10 is a letter from the Secretary of the Department of Premier and Cabinet to the Secretary of the Department of Prime Minister and Cabinet, with two attachments and deals substantially with the same issue as document 9.¹⁰ The first attachment is a letter from the Victorian Premier to the Commonwealth Minister for Climate Change, Senator Penny Wong. The second attachment contains a brief costing of some named projects

⁷ Transcript page 37

⁸ Transcript page 40

⁹ Transcript page 41

¹⁰ Transcript page 42

proposed to be commenced in Victoria. The purpose of writing document 10 she said was to highlight to the Commonwealth Victoria's ongoing concern with the transition from the Victorian scheme to the Commonwealth scheme. She said it was not an issue that has been explored on the public record. She said in evidence that the contents of the letter and attachments have not been made known to other States in Australia who would have a position opposing such projects should they become known. She said competition exists between States for such projects and Victoria's position would be prejudiced should the contents of document 10 become known¹¹.

- 38 Document 11 consists of a letter from the Premier to the Prime Minister, and it attaches a document. Ms. Falkingham gave evidence about document 11 and the attachment at paragraphs 39 to 45 of exhibit 'A'. In her witness statement (exhibit 'A') Ms Falkingham says the issues raised in the letter and attachment are 'live' policy issues. She says release of the information would be premature because the attachment contains modelling which the Victorian Government does not necessarily agree with and release may give a misleading view of Victoria's position in relation to the CPRS. In addition she makes the point that the attachment was prepared in confidence and contains a great deal of information commercially sensitive to the companies generating brown coal fired electricity in Victoria. As all of the brown coal generators are privately owned in Victoria, the maintenance of confidence between the Victorian Government and those companies operating the generators is paramount in the regulation of the industry. The Victorian Government relies upon the generators to provide it with up to date information which will be unlikely to continue if the Government cannot maintain its confidentiality.
- 39 The document attached to document 11, which I described earlier, is an advice provided by an accounting firm to the Victorian Government on a 'commercial in confidence' basis. It provides advice about financial matters concerning companies that operate brown coal generators in Victoria and implications, financial and otherwise, for the State as a result of the transition to the Commonwealth Scheme. The attachment was commissioned by the Victorian Department of Primary Industries and presented to individuals within the Department of Treasury and Finance, the Department of Premier and Cabinet, and the Department of Primary Industries.¹²
- 40 Ms Falkingham said the attachment was sent to the Commonwealth to help inform it about some of the views of existing Victorian industry about the implications for it in transitioning into the Commonwealth scheme.¹³ She also said the Victorian Government does not share all of the views expressed by the accounting firm that produced the document and was

¹¹ Transcript page 43

¹² Transcript page 44

¹³ Transcript page 45

concerned that should the document become public it could lead to some public confusion about whether the attachment is the Victorian government's position or whether it's the author's position.¹⁴ Ms Falkingham made it very clear that a number of parties had provided a great deal of material on a 'commercial in confidence' basis to enable the attachment to be produced by the accounting firm.

- 41 She also said that were document 11 to be released there would be damage to the relationship between the Commonwealth and the State because the conclusions reached in the attachment as to the likely affect on Victoria of transitioning into the Commonwealth Scheme differed from those of the Commonwealth.¹⁵ Asked to explain that, she said there was a distinction to be drawn between the public statements of the Victorian Government on the transition issue and dialogue members and representatives of the State Government had in one on one discussion with members of the Commonwealth. She said the Victorian Government had been at pains to be full and frank in the information it provided to the Commonwealth on the transition issue whilst at the same time publicly supporting the Commonwealth's proposals even though some of the information provided was contrary to the Commonwealth proposals. She said should that become public knowledge the State in future might be reluctant to be full and frank in its discussions and the information it provided.¹⁶
- 42 Document 12 is another a letter from the Premier to the Prime Minister concerning the potential impact of the CPRS on the State Electricity Commission of Victoria ('SECV'). The letter in part is concerned with legal advice received by the SECV communicated to Department of premier & Cabinet in confidence.
- 43 The purpose of document 12 is clear from the content of the letter. It concerns short and long term financial consequences for Victoria consequent upon implementing the Commonwealth's proposals which is not in the public domain. Ms Falkingham said release of the document into the public domain would potentially place confidential information relating to the operation of the Alcoa aluminium refinery into the public domain. As to the impact on the relationship between the State and the Commonwealth should the document be released, she said the State might have to be less frank and open in what is disclosed in letters passing between the Commonwealth and the State. She said if correspondence was less frank the Commonwealth might not see the true picture or have a full understanding of the implications faced in the state. Another consequence for the relationship was that the State might also have to engage in more verbal dialogue with its Commonwealth counterparts resulting in more meetings and the time and expense of travel that involves.¹⁷

¹⁴ Transcript page 45

¹⁵ Transcript page 48

¹⁶ Transcript pages 47 to 49

¹⁷ Transcript page 51 and exhibit A paragraphs 46 to 49

44 Further, Ms Falkingham confirmed in her witness statement the SECV objects to the legal advice being released, a matter confirmed by letter received into evidence from the SECV. She also said the State objected to document 12 being released because release would:

- (a) reveal commercial information which has always been kept confidential where relevant parties wish to maintain its confidentiality;
- (b) reveal a hypothetical situation the State is negotiating with the Commonwealth to resolve. Release of the documents ahead of finalised policy at a federal level would be premature and could mislead the public; and
- (c) reveal confidential legal advice in circumstances where the State has consistently acted to maintain privilege.

45 Ms Falkingham confirmed document 13 as being an email from the Acting Secretary of the Department of Premier and Cabinet to the Secretary of the Department of Prime Minister and Cabinet. The document is also concerned with the potential impact of the CPRS on the SECV.¹⁸ The document also refers to legal advice received by the Department of Treasury & Finance and communicated to Department of Premier & Cabinet in Confidence.

46 Document 13 raises aspects of the CPRS for discussion and specific aspects of it of concern to Victoria which have not been made known publicly. In her witness statement Ms Falkingham said the information contained in the email is information of a business, commercial or financial nature related to potential contractual liabilities of the SECV and its profitability. She said release of the document may prejudice SECV's negotiations directed at resolving the issue discussed in the email.

47 Addressing the document Ms Falkingham said there would be implications for the public confidence in the Commonwealth scheme if it were revealed at this stage ahead of finalised policy being released that addressed the issue raised by the letter.¹⁹ She said were the contents of the document to be revealed it would prejudice the relationship between Commonwealth and State leading to State representatives being less frank in providing exchanges of correspondence in writing in the result that such issues would, and could, only be raised in one on one discussions.²⁰ Asked what the benefit of negotiation by exchange of correspondence was, Ms Falkingham said:

What's the benefit, in your opinion, if any, in conducting this aspect of the negotiation by way of correspondence? --- There were many many issues floating around round the CPRS. This was a critical

¹⁸ Exhibit A paragraph 50

¹⁹ Transcript page 54

²⁰ Transcript page 54

issue for the State of Victoria. With so many issues on the go, it was important that Victoria documented and reported this as an issue to the Commonwealth so that they actually really crisply understood what that issue was and that it actually precipitated further dialogue with the Commonwealth and the state.²¹

- 48 Document 15 is another letter from the Premier to the Prime Minister and deals with the same matters as documents 11 and 13, namely potential impairment to Victoria's brown coal fired generators consequent upon the introduction of a CPRS.²² She said the issue discussed in the document has been dealt with between the government and operators of power stations on a confidential basis at all times and is not in the public domain and there could be commercial consequences for those affected by the document were it to be released. She described the issue dealt with in the document as one that has 'serious implications for the energy sector in Victoria'.²³
- 49 Looking at document 16, Ms Falkingham confirmed it as a letter from the Premier to the Prime Minister addressing the same issue dealt with in document 12. She said the issue has been kept confidential between State and Commonwealth and the prejudice to the relationship between State and Commonwealth should the document be disclosed was the same as in document 12.²⁴
- 50 Finally, Ms Falkingham confirmed document 17 as another letter from the Victorian Premier to the Prime Minister addressing the same issue as documents 12 and 16. She said the letter relates to an amendment that the Commonwealth made when it introduced amendments to the CPRS legislation proposed in November 2009 which had serious implications for the State of Victoria. The issue was negotiated by way of correspondence. She said at the time, Victoria would not have obtained the access to the Prime Minister it needed to discuss the issue, given the amending legislation was imminent to go through the Federal Parliament and Victoria required a change to the amending legislation quite quickly.²⁵ She said that ability might be lost were such documents to be released.
- 51 Further, in her witness statement Ms Falkingham made the point that documents 16 and 17 contain information of a financial nature being a significant contract between SECV and Alcoa the detail of which is confidential. She said release of the information would expose the respondent unreasonably to disadvantage in a business, commercial or financial sense because disclosure might hinder SECV's negotiations.

²¹ Transcript page 54

²² Transcript 55 and exhibit A paragraph 60

²³ Transcript page 55 and exhibit A paragraphs 61 & 62

²⁴ Transcript page 55 and exhibit A paragraph 63

²⁵ Transcript page 56

- 52 The applicant cross examined Ms Falkingham who was challenged on the question of whether or not there was really a need for frankness in communications between heads of government on such matters. This is what she said:

This comes after 30 years of Freedom of Information, decades of political public debate, scandal, leaked documents and so on. I'm wondering what, whether you really believe that the release of this, of these particular documents at this particular time could really change, dramatically change, the culture of government. Is it really that substantial?---I believe it would fundamentally change the way the Commonwealth and states relate to each other. I think that climate change policy in particular is a particularly complex policy area where there is different levels of knowledge across different departments and different heads of departments. We need that level of frankness within our correspondence so that the right people are considering information. From our perspective if the Victorian interest is actually being considered and acknowledged at a national level.²⁶

- 53 Ms Falkingham was also cross examined in relation to other aspects of her evidence but in my view there was no real or effective challenge to the substance of her evidence given in her witness statements (exhibits A & B) or her evidence in chief before me. In making this decision I therefore accept the evidence of Ms Falkingham in its entirety.
- 54 Marie Taylor also gave evidence on behalf of the respondent.²⁷ In her witness statement she explained the Commonwealth's CPRS and the role played by the Council of Australian Governments ('COAG') in the development of the Commonwealth's policy. She said the documents contain an exchange of views between governments communicated on a confidential basis which are of a deliberative nature. She said confidentiality of the communications is of great importance in the context of development of policy and the documents act as a record of deliberative material that is not fully considered. She said the release of such material and consequent loss of confidentiality would be likely to prejudice the ability of the Commonwealth to communicate with the states and territories in a frank and robust way and to receive equally frank and robust communications. She said this is particularly so in an area such as climate change where policy is developing quickly and there are many competing interests to consider. She said development of policy in this context relies upon preparedness to make written communications that are frank and which may not be fully informed. If, by release of such documents, confidentiality cannot be assured then the Commonwealth and those

²⁶ Transcript page 60

²⁷ See witness statement exhibit C.

contributing to the development of policy will be less likely to commit deliberative matters to writing.²⁸

- 55 Ms Taylor went on to say in her witness statement that release of the documents could impact negatively on the Commonwealth's relationships with the States and Territories. She said the documents in question contain detailed and sensitive information about preliminary options and stakeholder input between the Commonwealth and Victoria.²⁹ She said release of the documents would be likely to prejudice the confidentiality necessary for the proper functioning of the ordinary business of government, in particular, the ability of staff to deliberate as part of the process of advising on a decision by Government, with an expectation of confidentiality of those deliberations.³⁰
- 56 Ms Taylor said the release of the documents could reasonably be expected to cause damage to relations between the Commonwealth and Victoria by the release of confidential communications that reveal frank and deliberative negotiations and discussions between them. That she said would be contrary to the public interest because it would prejudice the flow of information from Victoria to the Commonwealth and would make negotiations between the two more difficult in the future and impair the administration of joint projects and programs in the future.³¹
- 57 Ms Taylor was cross examined by the applicant. At the end of that cross examination this question was put and the answer given by the witness, which effectively I think summarises her evidence:

My understanding of the act was that it was a little bit more black and white than that, but the case law may well have altered the way we read it, I suppose, because my question to the witness was going to be, "Do you really believe that the release of these documents might damage the relationship between the Commonwealth and state governments"?--- You're putting that question to me? Yes?---Yes, I do. In particular because a relationship is built on trust and the ability to have open communication. Of course the relationship between the Commonwealth of Australia and Victoria will continue, but the relationships between officials within that government can be impaired. The day to day ability to trust one another and to communicate openly can be impaired. In that regard, particularly because we're talking about communications between the two most senior public servants in both of those jurisdictions, yes, I do believe that there could be some impairment of that relationship. No more questions, Your Honour.³²

²⁸ See exhibit C paragraph 25 & 29-30

²⁹ See exhibit C paragraph 26

³⁰ See exhibit C paragraph 27

³¹ Exhibit C paragraphs 29 & 30.

³² Transcript pages 80-81

- 58 As was the case with Ms Falkingham, Ms Taylor was also cross examined in relation to other aspects of her evidence but in my view there was no real or effective challenge to the substance of her evidence given in her witness statement (exhibits C). In making this decision I therefore accept the evidence of Ms Taylor in its entirety.
- 59 I allowed the applicant to tender copies of newspaper reports from the Australian Financial Review dated 15th and 22nd October 2009 and a report from the Australian dated 23rd November 2009 which I marked collectively as exhibit 1. Those reports in the main deal with the general issue of the impact of a proposed CPRS to be implemented by the Commonwealth on the operators of coal fired power stations. They serve to highlight the fact that the question of climate change is well and truly in the public domain as is the question of what compensation (if any) will be offered by governments to the operators of coal fired power stations. I accept that evidence shows that such matters are of public interest. That is to be distinguished from what is in the public interest.
- 60 As I indicated earlier in my decision, the respondent founds its claim for exemption in respect of each document (with the exception of part of the email chain being document 9) primarily upon section 29(a) of the Act. It contends that part of document 9 that emanated from the Commonwealth attracts exemption within section 29(b) of the Act. It is thus necessary to determine in respect of each of the documents whether its release would be contrary to the public interest and would prejudice relationships between the State and the Commonwealth or any other State or Territory.
- 61 I have had the opportunity of reading each of the documents. Accepting as I do the evidence of Ms Falkingham and Ms Taylor, I am satisfied the evidence of each demonstrates that release of the documents may hinder the ability of the Premier of Victoria or department heads to negotiate with the Commonwealth in the future, especially about matters concerning Federal policy development. Further, the evidence shows written communications between senior members of government in Victoria or department heads with their Commonwealth counterparts may be less frank and this will be to the detriment of important government activities in the area of policy development and reform. I accept the evidence that each of the documents is a snap-shot of policy development in time, the release of these documents in circumstances where negotiations are ongoing and Federal policy is yet to be determined may mislead the public. I also accept the documents exist in the context of state and territory competition for funding and resource allocation. To release the documents which will reveal to all confidential details of Victoria's strategy in dealing with the Commonwealth would be to the detriment of Victoria's negotiating position.
- 62 I accept the respondent's contentions that there is a public interest that can be identified under a number of different headings, as follows:

- (a) protecting uninhibited exchanges between the governments of Australia; and
- (b) encouraging cooperative Federalism within Australia; and
- (c) protecting processes that contribute to high quality policy development by the governments of Australia; and
- (d) ensuring the public have access to accurate and reliable information that gives a true indication of the basis for government policy; and
- (e) protecting against unnecessary confusion and debate by avoiding the premature release of documents that represent a stage in the decision—making process; and
- (f) ensuring that the Victorian government remains able to meet private undertakings' legitimate expectations of confidentiality; and
- (g) ensuring that private undertakings remain willing to share information with the State; and
- (h) protecting the State of Victoria's negotiating position in relation to present and future proposals concerning climate change.

63 These headings are the grounds contained in paragraph 3(a) to (e) and (g) to (i) of the Statement of Public Interest Grounds filed and relied upon by the Respondent. In summary form those grounds are concerned with protecting the ability of the state, in a Federal setting, enabling it to have sufficient access and, the most appropriate and resource efficient mode of access, to the Commonwealth in order to lobby and perform one-on-one negotiations relating to the detail of relevant federal policy. I consider that to be an important public interest that needs to be protected. That is why the section 29 exemption is in the Act. In my view it would be contrary to the public interest were each of these documents to be released because release would harm the public interest under one or other of the heads of public interest that I have set out above.

64 In his written submissions the applicant contends that climate change and the government's response to it are arguably the most pressing public policy questions facing Australia. In support of that contention the applicant relies upon statements of the former Prime Minister Rudd of the importance of addressing climate change. He also relies upon the fact that because these matters are reported extensively in the press (including his newspaper) there is a demonstrated public interest in the subject of climate change and attempts to address it by government (including the fact that those attempts may result in the spending of large amounts of tax payers money). None of this is, nor can it be, denied. The subject of climate change is very much of interest to the public and doubtless large amounts of tax payer money will be spent by government addressing the subject. There is public interest as such in these subjects.

- 65 However, those factors do not in my view outweigh the need for government to be able to correspond with the Commonwealth in a manner that will remain confidential where policy is being developed, especially in a Federal system where one state's interest may be pitted against the interest of another. In my view there is a greater public interest in ensuring that the Victorian government can properly put its case to the Commonwealth in negotiating such policy. Government leaders need to be able to communicate in writing and not be restricted to face to face or telephone communications. In such matters written communications need to be kept confidential in my view. The public interest in ensuring that politicians are able to negotiate and develop policy by a frank exchange of views and information on a confidential basis in my opinion outweighs the fact there exists an interested public.
- 66 Much of the evidence from the witnesses here was directed to the question of prejudice. I am satisfied on the evidence the release of each of the documents would prejudice relations between the State of Victoria and the Commonwealth and between the State of Victoria and other states. I accept the evidence from Ms Falkingham the release of the documents would result in frank exchanges in the course of negotiating undetermined policy and intergovernmental positions being revealed to the public prematurely. Further, I accept the ability of the State of Victoria to convey information to the Commonwealth and to seek to be heard is liable to be reduced by release of the otherwise confidential documents. I accept this could damage Victoria's position in negotiating with the Commonwealth on future climate change policy. It is well known that at the time of publication of this decision, the Commonwealth is still deciding its policy. I accept that in the context of the states and territories competing for resources and seeking to be accommodated in the development of climate change policy, revealing Victoria's individual position would impact on its relations with other states. For these reasons I am satisfied release of each of the documents would prejudice relations between the State of Victoria and the Commonwealth and between the State of Victoria and other states.
- 67 Document 9 is an email chain. Part of document 9 is claimed to be exempt from disclosure within section 29(b) of the Act. The part of the document claimed to be exempt within section 29(b) is the part of the email chain sent from the Commonwealth. I am satisfied that part of the document was sent in confidence as is evident from an examination of the whole of the email chain. Further, I accept Ms Taylor's evidence that although that part of the email chain is not specifically marked as being sent 'in confidence' nonetheless a presumption of confidentiality arises from the fact the email chain relates to a policy in development.³³
- 68 I am satisfied that the documents are all exempt within section 29(a) of the Act. I am further satisfied the part of the email chain sent from the

³³ Exhibit C paragraph 23

Commonwealth forming part of document 9 is exempt within section 29(b) of the Act.

69 The exemption claimed having been made out there remains the question as to whether the documents should nonetheless be released pursuant to the power contained in section 50(4) of the Act. That section provides as follows:

(4) On the hearing of an application for review the Tribunal shall have, in addition to any other power, the same powers as an agency or a Minister in respect of a request, including power to decide that access should be granted to an exempt document (not being a document referred to in section 28, section 29A, section 31(3), or in section 33) where the Tribunal is of opinion that the public interest requires that access to the document should be granted under this Act.

70 The question for me arising from the section is whether I am of the opinion that the public interest requires that access to the documents be granted. The operation of section 50(4) of the Act was considered by the High Court of Australia in *Osland v. The Secretary of the department of Justice* 267 ALR 231. At page 237 in the joint judgment of Chief Justice French and Justices Gummow and Bell there Honours said, inter alia:

71 “Having said that, it must be accepted that the word “requires” which appears in s 50(4) directs the decision maker to identify a high threshold public interest before the power can be exercised. It is not enough that access to the documents could be justified in the public interest. The terminology of the subsection does not define a rule so much as an evaluative standard requiring restraint in the exercise of the power. It is, like many common law standards, ‘predicated on fact-value complexes, not on mere facts, to be applied by the decision maker.’”

72 As I have said, whilst I accept the public has an interest in general terms in the matters dealt with in the content of the documents, that interest cannot of itself be elevated to that of a public interest. If it is, I am of the opinion such public interest is here outweighed by the higher public interest in enabling the government to represent Victoria in negotiations with the Commonwealth on matters associated with climate change and the transition into a Commonwealth scheme that provides for a CPRS, in confidence and in a frank way so as to achieve the best possible outcomes for this state. For these reasons I am not satisfied there is a public interest arising here such that the exempt documents should nonetheless be released using the power in section 50(4) of the Act.

73 For these reasons the decision of Mark Follett, Freedom of Information Officer of the Legal Branch of the respondent dated 13 April 2010 is affirmed.

Judge J. Lacava
VICE PRESIDENT