



## ***Internode Pty Ltd and NBN Co Ltd [2012] AICmr 4 (20 January 2012)***

### **Decision and reasons for decision of Freedom of Information Commissioner, Dr James Popple**

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<b>Applicant:</b>	<b>Internode Pty Ltd</b>
<b>Respondent:</b>	<b>NBN Co Limited</b>
<b>Decision date:</b>	<b>20 January 2012</b>
<b>Application number:</b>	<b>MR11/00234</b>
<b>Catchwords:</b>	<b>Freedom of Information — Commercial activities — Whether documents are in respect of commercial activities of NBN Co — (CTH) <i>Freedom of Information Act 1982</i> ss 7(2), (3A), (4); Schedule 2, Part II</b>

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### **Summary**

1. I affirm the decision of NBN Co Limited (**NBN Co**) of 25 July 2011 to refuse access to the documents requested under the *Freedom of Information Act 1982* (the **FOI Act**). NBN Co is exempt from the operation of the FOI Act in relation to each of the documents requested.

## Background

2. On 23 June 2011, Internode Pty Ltd (**Internode**) applied to NBN Co requesting access to four agreements made between NBN Co and Telstra Corporation Limited (**Telstra**).
3. On 25 July 2011, NBN Co refused Internode's application, claiming that it was exempt from the operation of the FOI Act in relation to each of the documents requested because of s 7(3A) of the Act and Part II of Schedule 2 to the Act.<sup>1</sup> NBN Co also claimed that the requested documents, if they were not exempt from the operation of the FOI Act, would be exempt under s 45 (documents containing material obtained in confidence) and s 47 (documents disclosing trade secrets or commercially valuable information).
4. By email dated 18 August 2011, Internode sought IC review of this decision under s 54L of the FOI Act.

## Decision under review

5. The decision under review is the decision of NBN Co on 25 July 2011 to refuse Internode's request.

## NBN Co and its commercial activities

6. NBN Co is subject to the FOI Act, because it is included in the definition of 'prescribed authority' in s 4(1) of the Act.<sup>2</sup> But s 7(2) of the Act provides that '[t]he persons, bodies and Departments specified in Part II of Schedule 2 are exempt from the operation of this Act in relation to the documents referred to in that Schedule in relation to them.' Part II of Schedule 2 to the Act includes 'NBN Co, in relation to documents in respect of its commercial activities'. And s 7(4) of the Act relevantly provides that:

In ... Part II of Schedule 2, a reference to documents in respect of particular activities shall be read as a reference to documents received or brought into existence in the course of, or for the purposes of, the carrying on of those activities.

7. So, NBN Co is subject to the FOI Act, but exempt from its operation in relation to documents received or brought into existence in the course of, or for the purposes of, the carrying on of its commercial activities.

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<sup>1</sup> As explained below, the source of the exemption is s 7(2)—not s 7(3A)—of the Act. Section 7(3A) explains the meaning of 'commercial activities' when used in Part II of Schedule 2 in relation to NBN Co. The entities listed in Part II of Schedule 2 are exempt from the operation of the FOI Act, in relation to the documents referred to in that schedule, because of s 7(2).

<sup>2</sup> On 25 January 2011, in *Crowe and NBN Co Ltd* [2011] AICmr 1, I affirmed NBN Co's decision of 16 December 2010 that it was not subject to the FOI Act. On 11 June 2011, the *Telecommunications Legislation Amendment (National Broadband Network Measures—Access Arrangements) Act 2011* (Schedule 1, item 117) changed the definition of 'prescribed authority' in s 4(1) of the FOI Act to include NBN Co.

8. Section 7(3A) of the Act provides that:

In Part II of Schedule 2, **commercial activities**, when used in relation to NBN Co, means:

- (a) activities carried on by NBN Co on a commercial basis; or
- (b) activities, carried on by NBN Co, that may reasonably be expected in the foreseeable future to be carried on by NBN Co on a commercial basis.

### The dominant purpose of the document

9. Internode argues that:

The [FOI] Act does not specify how the exemption is to be applied when particular documents are received or brought into existence in the course of more than one type of activity or for more than one purpose. We submit that it is the dominant purpose of a document that should determine whether that document falls within the exemption under Part II of Schedule 2.

10. Internode asserts that the dominant purpose of the documents that it requested from NBN Co is not commercial, but to 'fulfil the Australian government's agenda' in relation to Telstra and the Australian telecommunications market. Internode provided copies of two ministerial media releases<sup>3</sup> that, it says:

... make it clear that the Federal Government considers that the deal between NBN Co and Telstra is a political matter and of nation building importance, as opposed to a mere commercial agreement.

Internode says that:

[The documents] are predominantly an exercise of political mandate, and as such, they should not be exempt from disclosure under Part II of Schedule 2 [to] the Act. Access to [the documents] should be granted with reasonable redactions to protect legitimately confidential information.

11. I can see no reason to read a 'dominant purpose' requirement into the exemption in s 7(2). I note that the exemption in s 34 (Cabinet documents) expressly involves a 'dominant purpose' requirement.

12. In *Bell v Commonwealth Scientific and Industrial Research Organisation* [2008] FCAFC 40, the Full Court of the Federal Court considered the meaning of 'commercial activities' in ss 7(2AA) and (3) of the FOI Act. Those provisions are analogous to the provisions relevant to this IC review: ss 7(2) and (3A).<sup>4</sup> The Court said that 'activities are conducted on a commercial basis if they are

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<sup>3</sup> The Hon Julia Gillard MP, Senator the Hon Stephen Conroy, Senator the Hon Penny Wong, 'Government - Telstra - NBN Co deal Delivers Historical Telecommunications Reform' (Media Release, 23 June 2011); Senator the Hon Stephen Conroy, 'Major step forward for Government - Telstra - NBN Co agreement' (Media Release, 10 February 2011).

<sup>4</sup> Section 7(3) applies to entities other than NBN Co. Section 7(3A), which is quoted at [8] above, applies only to NBN Co. These two provisions otherwise differ only in that the definition of 'commercial activities' in s 7(3) is limited to 'competition with persons other than governments or authorities of governments'.

related to, engaged in or used for commerce' and referred to 'the importance of the whole of the circumstances including the commercial goal (profit making or the generation of income or return) in determining whether particular activities are sufficiently related to commerce to be characterised as commercial activities'.<sup>5</sup>

13. In *Johnston and Australian Postal Corporation* [2006] AATA 144, the Administrative Appeals Tribunal considered various dictionary definitions and concluded that commercial activity 'can be regarded as a business venture with a profit-making objective and, strictly speaking, will involve activity to generate trade and sales with a view to profit. This is particularly so when the volume of activity is on a large scale'.<sup>6</sup>

## Findings

14. The four documents requested by Internode are agreements made between NBN Co and Telstra. I have not examined the documents in question, but it is clear from the material provided by both Internode and NBN Co that these agreements:
  - translate financial heads of agreement signed in June 2010 into legally binding agreements
  - provide for the use by NBN Co of Telstra's infrastructure, and the decommissioning of some of Telstra's network capability during the rollout of the national broadband network, and
  - have been valued at \$9 billion.

Furthermore, NBN Co asserts—and I can accept—that these agreements are financially beneficial to it.

15. The activities to which these documents relate are carried on—and can be expected to be carried on in the future—by NBN Co on a commercial basis. Those activities are 'commercial activities' for the purposes of the reference to NBN Co in Part II of Schedule 2 (s 7(3A)). The documents have been brought into existence in the course of, or for the purposes of, the carrying on of NBN Co's commercial activities (s 7(4)). NBN Co is exempt from the operation of the FOI Act in relation to those documents (s 7(2)).
16. Those documents may be, as Internode asserts, 'an exercise of political mandate'. But they are also documents in respect of NBN Co's commercial activities. For s 7(2) to apply, it is not necessary that the dominant purpose of a document be the carrying on of those activities.

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<sup>5</sup> [2008] FCAFC 40, [28].

<sup>6</sup> [2006] AATA 144, [30].

17. As NBN Co is exempt from the operation of the FOI Act in relation to each of the documents requested, there is no need for me to consider other exemptions relied upon by NBN Co.

## **Decision**

18. Under s 55K of the FOI Act, I affirm NBN Co's decision of 25 July 2011 to refuse Internode's request.

Dr James Popple  
Freedom of Information Commissioner

20 January 2012

### **Review rights**

If a party to an IC review is unsatisfied with an IC review decision, they may apply under s 57A of the FOI Act to have the decision reviewed by the Administrative Appeals Tribunal. The AAT provides independent merits review of administrative decisions and has power to set aside, vary, or affirm an IC review decision.

An application to the AAT must be made within 28 days of the day on which the applicant is given the IC review decision (s 29(2) of the *Administrative Appeals Tribunal Act 1975*). An application fee may be payable when lodging an application for review to the AAT. The current application fee is \$777, which may be reduced or may not apply in certain circumstances. Further information is available on the AAT's website ([www.aat.gov.au](http://www.aat.gov.au)) or by telephoning 1300 366 700.