

CHAPTER 3

CONFIDENTIALITY OF CONTRACTS

3.1 The Committee noted earlier that it did not believe it was reasonable simply to request the amount of Ms Doogue's fee from the ABC at an 'in camera' hearing. Knowledge of the amount paid to Ms Doogue would be an inadequate basis from which to draw any conclusion as to whether it was desirable that such information should reasonably be regarded as commercially confidential. In order to reach a conclusion, the Committee sought from the ABC, relevant ministers and relevant unions their views on the the confidentiality of ABC contracts.

3.2 The Committee asked initially whether the terms and conditions of contracts should be kept confidential during negotiations. Replies to this question indicated that, in general, it was considered important that confidentiality be maintained during the negotiation of all employment contracts. The ABC's submission on the matter reflects the general replies:

In almost all negotiations, the parties explore possibilities and examine propositions which they may not wish to be held to once terms and conditions are finally agreed upon. Public knowledge of pre-contract negotiations could cause embarrassment and could be detrimental to the financial position of one party or the other - or both.¹

3.3 The Committee accepts that disclosure of terms and conditions of contracts of employment or for services during the course of negotiations is undesirable, due to the possible

effect on the personal privacy of individuals or the commercial interests of prospective contractors. The Committee accordingly makes no further comment on this matter.

3.4 A second question asked by the Committee was whether details of contracts should remain confidential after the contract has been finalised and whether this confidentiality should extend to ministers and/or parliamentary committees.

3.5 The ABC told the Committee that details of contracts involving employment should remain confidential after agreement, particularly when the contract was for the employment of 'personalities':

To protect their "image" and to retain their bargaining position for the future, many artists insist upon confidentiality as to their earnings under a contract. Further, in the competition amongst broadcasters for individuals with rare talent, the disclosure of the price of an individual's contract could result in the ABC being outbid by commercial operators seeking similar talent. The principle should be that confidentiality is always observed by the employer.²

3.6 Ms McKenzie of the ABC told the Committee:

There has been a general practice within the ABC that particular contents of contracts are not discussed and are not disclosed. Obviously, that is not an absolute statement that they will never be disclosed but it has certainly been the practice that those things are consciously restricted to the particular people who need to know the contents and they do not go further than that. It is applied to all aspects of the contract, just as a general practice.³

3.7 In the case of parliamentary committees, the ABC told the Committee that any claim that contractual details were commercially confidential 'must, of course, be reconciled with the ABC's accountability to Parliament'. However, the ABC said that it found it difficult to reconcile its obligations to keep certain commercial information confidential and its obligations of accountability to the Parliament when giving evidence before Estimates Committees, as the Senate Standing Orders did not allow Estimates Committees to receive information in confidence. The ABC was concerned that there was a perception that it was reluctant to account fully to the Parliament.⁴

3.8 At the Committee's second hearing, the ABC was questioned further on its view of the rights of parliamentary committees to insist on the provision of commercially confidential information by statutory authorities.

Senator VANSTONE - While the ABC at Estimates Committee hearing obviously had the view that it was entitled to not provide information on the basis of market confidentiality, from your point of view do you now understand the ABC's position to be that it understands that there is no area into which an Estimates Committee cannot inquire?

Ms Ercole - Yes, I think that it was only the public nature of the disclosure that we were concerned about because we always had an understanding and said that we were prepared to disclose in committee. There was never any conflict about that in any of our minds. It was just the public nature of the disclosure, and I guess at that stage, too, we were particularly sensitive because the ABC seemed to be on the front pages of the paper with very damaging publicity and we just did not want anything else but we were always prepared to disclose that to the Committee.

Senator VANSTONE - Does the ABC now accept that it is not the ABC's decision as to whether information, as a consequence of a parliamentary inquiry, will be publicly released?

Ms Ercole - Yes.

Senator VANSTONE - It would not happen again that the ABC would say: "You can have it in camera but unless we have an undertaking that it is in camera, we will not provide it". That is not going to happen again?

Ms Ercole - No, obviously we accept that Parliament is entitled to do as it sees fit. We would hope that we would not be in this sort of situation again, and that we would be always able to----

Senator VANSTONE - I raise that question because I know a number of people raise with me the prospect of a statutory body telling Parliament on what terms it will give Parliament information, and presumably the ABC cannot override the responsibility of a committee to decide whether it will release the information or not.

Ms Ercole - We accept totally----5

The Committee has quoted this section of evidence at length to illustrate the ABC's clear acceptance that it should co-operate fully with the Parliament and its committees on the provision of information, and will do so in the future.

3.9 The views of the ABC staff unions on this question varied. The Australian Journalists' Association, the ABC Staff Union, the Musicians' Union and the ABC Senior Executives' Association accepted that, where the Budget was the sole source of monies available to an authority which entered into contracts of this type, details of contracts should be publicly available, and should certainly be made available to the Parliament.⁶ This view was not shared by Actors' Equity which asserted that an inherent traditional aspect of contracts between actors and their employers was confidentiality. However, Equity conceded that whether this tradition was desirable in the case of contracts funded with public money was a matter for the Committee.⁷

3.10 As with the questions dealt with in Chapter 2, the Committee asked relevant ministers their views on the question. The Minister for Communications told the Committee that contracts of employment 'by and large, should remain confidential after the contract has been finalised'.⁸

3.11 The Minister went on to say that 'the confidentiality of the details in a contract should not necessarily deny the information from a Minister or a Parliamentary Committee'. However, the Minister stated that it was incumbent upon both to respect the confidentiality of any information which may be personal, may have a value to the contractor's competitors, or be detrimental to the activities of a statutory authority such as the ABC.⁹

3.12 A preliminary view put to the Committee by the Minister for Employment and Industrial Relations was that:

In general, whether final details of the terms and conditions of a contract should be disclosed will depend on the balance of privacy and commercial in confidence considerations, the reporting requirements applying to a particular body and the public interest in the accountability of public enterprises.¹⁰

When he conveyed this preliminary view to the Committee, the Minister advised that he had requested a detailed opinion from the Attorney-General's Department on the Committee's questions about confidentiality. This opinion was subsequently provided to the Minister, who forwarded it to the Committee in May 1986, and is reproduced in the Evidence of the inquiry.¹¹

3.13 In the opinion, the Attorney-General's Department observed that, in the absence of any statutory requirement relating to reporting or disclosure, the Committee's question raised questions of public policy rather than of law.¹²

3.14 The opinion also dealt extensively with the matter of material being kept confidential from a minister or a parliamentary committee. Having discussed the power of the Parliament and its committees to insist on answers to questions put to witnesses regarding contracts which may be generally regarded as commercially confidential, the Department said:

In deciding whether to press for information about commercial contracts, a House or a committee would no doubt balance considerations of commercial confidentiality (including any claims that disclosure would prejudice private or commercial interests) against the public interest in having access to the information (including, for example, the need for that information for the purposes of parliamentary scrutiny of expenditure).¹³

3.15 The Department also drew the Minister's attention to the resolution of the Senate (reproduced in paragraph 1.6 of this Report) which clearly affirmed the Senate's belief that there were no areas of expenditure of public funds where statutory authorities, such as the ABC, had a discretion to withhold details from the Parliament or its committees, unless the Parliament had expressly provided otherwise in the legislation establishing the authority.¹⁴

3.16 A final question asked by the Committee relating to confidentiality sought views on the principles that should be applied to determine whether contracts are commercially confidential.

3.17 The ABC told the Committee that the principle underlying commercial confidentiality was:

... whether any of the parties [to the contract] would suffer damage as a result of the terms and conditions of a contract being made public.

However, the ABC also stated:

On the other hand, the ABC is keenly aware that it must be, and must be seen to be, accountable to Parliament.¹⁵

3.18 The ABC staff unions (again with the exception of Actors' Equity) reiterated the view noted earlier in this Chapter [paragraph 3.9] that, as public monies were used in funding the ABC and therefore in providing funds for contracts, information on the allocation and disbursement of public funds should as a rule be available to the Parliament on request.

3.19 The Minister for Communications told the Committee he believed that such a question could not be answered as a matter of principle; rather it was a matter of judgement whether there was a good reason in the public interest for the information published to be regarded as commercially confidential.¹⁶

3.20 The Attorney-General's Department's opinion suggested that the basic issue to be addressed by the question was how a balance between a proper and desirable level of commercial confidentiality of material which may come before a minister, an authority - or the Parliament - may be achieved given the the competing requirement of achieving a proper and acceptable level of financial accountability. The opinion also drew attention to the requirements for bringing an action for breach of confidence at law, and to certain provisions of the Freedom of Information Act 1982, which limit disclosure of business and commercial documents in the possession of agencies (which do not include the ABC) that are the subject of the Act.¹⁷

Conclusions

3.21 Whether the terms of contracts involving Commonwealth authorities should be kept confidential has always been a matter of considerable importance to the Parliament. The situation of particular concern is where an authority receives all, or practically all, its funding from the Budget such as is the case with the ABC. The Committee believes strongly that the provision of powers to enter contracts in an authority's enabling legislation does not imply that the authority can presume that the Parliament or its committees will not insist on disclosure of details of such contracts.

3.22 In the Committee's view, as a basic matter of accountability, it is desirable that details of contracts not be confidential. Claims of confidentiality which do not discriminate as to the material that is to be regarded as secret, raises suspicions of extravagance or incompetence in the expenditure of public monies.

3.23 The Committee emphasises that when the Parliament seeks information concerning contracts which are claimed to be commercially confidential, proper regard should be had for genuine personal and commercial interests (such as privacy or competitiveness) that may be affected by publication.

3.24 It is the Committee's opinion, however, that it is an important principle that the actual remuneration for providing services to an authority (whether as employee or contractor) should be available to the Parliament when requested. Whether a person is paid under the terms of a Remuneration Tribunal determination or an applicable industrial award, or is a contractor, does not appear relevant to the Committee. Estimates Committees were established for the specific purpose of examining the expenditure programs undertaken by departments of

the Commonwealth and statutory authorities. Accordingly, authorities must be prepared to account to Estimates Committees for all aspects of their financial management and administration, even when the information sought may be regarded as private or commercially confidential. This aspect of statutory authority accountability should be made clear at the time an authority enters into negotiations for any type of contract and should be made clear in the terms of contracts entered into.

ENDNOTES

1. Evidence, p. 4.
2. Evidence, p. 5.
3. Evidence, pp. 248-49.
4. Evidence, p. 5.
5. Evidence, pp. 235-36.
6. Evidence, pp. 9, 89 and 92.
7. Evidence, p. 14.
8. Evidence, p. 18.
9. Evidence, p. 18.
10. Evidence, p. 23.
11. Evidence, pp. 268-73.
12. Evidence, p. 269.
13. Evidence, p. 271.
14. Evidence, p. 271.
15. Evidence, p. 5.
16. Evidence, p. 18.
17. Evidence, pp. 271-72.

