

PART C
EXCEPTIONS AND EXEMPTIONS

Exemptions of agencies and classes of documents (clauses 4 and 5)

The principle of exemption by regulation

12.1 The Freedom of Information Bill enables regulations to be made excluding specified bodies or specified documents of an agency from the operation of the legislation. Clause 5 states:

The regulations may provide that—

- (a) a specified body is to be deemed not to be a prescribed authority for the purposes of this Act;
- (b) a body specified in accordance with paragraph (a) is, or is not, to be taken to be included in a specified agency; or
- (c) a specified agency is to be exempt from the operation of this Act in respect of documents relating to specified functions or activities of the agency or in respect of documents of any other prescribed description.

12.2 This is one of the 'hidden' exemptions of the Bill in that its ultimate scope cannot be assessed until after the regulations are prepared. And when they are prepared there will not be adequate opportunity for either public or parliamentary scrutiny of those regulations. Whereas all other exemptions in the Bill will have been examined in detail by the public, this Committee and the Parliament as a whole, the ultimate scope and effect of the power of exemption conferred by clause 5 will not be subject to any detailed public or parliamentary scrutiny.

12.3 It might at first glance be thought that the Senate Standing Committee on Regulations and Ordinances would be in a position to examine critically any regulations coming before it which provided for the exemption of specified agencies or specified documents of an agency. But the criteria under which that Committee operates would not permit the wide-ranging inquiry involving policy considerations which necessarily arise in determining whether particular agencies should be exempt from disclosure requirements. The criteria by which regulations are scrutinised by the Regulations and Ordinances Committee are limited to matters such as whether or not the regulations trespass unduly on personal rights and liberties, or unduly delegate parliamentary authority. Within the limits imposed by these criteria, the Committee has performed its review function effectively and in a non-partisan manner. Broadening its criteria to enable it to undertake the examination of the kind of policy issues, which would be involved in weighing arguments for and against the exemption of particular agencies or documents, would detract from the non-partisan character of its proceedings and prejudice its effective operation.

12.4 Clearly, what is required is that any claim for exemption of any agency or a class of document should come before the Parliament as a whole in this or some future Bill rather than in regulations. It would be appropriate for all agencies which are proposed to be exempted from the Bill to be set out in a schedule to the Bill. While the necessity to determine all such claims before the Bill is enacted might be thought to delay the passage of the Bill, it would not in any way delay the operation of the Bill. Even if agencies were to be exempted by

regulation it could be expected that proclamation of the Bill would be postponed until those regulations were ready as has been the case with the *Administrative Decisions (Judicial Review) Act* 1977. Furthermore, agencies have already had ample time in which to consider whether or not to press their particular claims for exemption. Many agencies have outlined these arguments to the Committee and we consider them later in this chapter.

12.5 While there is thus no impediment to setting out in a schedule to the Bill those agencies as to which it is clear at the time of enactment that valid claims for exemption exist, problems can be expected to arise in promptly resolving future claims for exemption. The difficulty of finding time in the busy legislative timetable for amendments to Acts is well known. It would clearly be a cumbersome and time-consuming procedure to require that every decision to add a new agency to the schedule or to remove one from it, should be by an amending Act of Parliament. We believe that a solution which enables adequate parliamentary scrutiny of any proposed amendments to the schedule without requiring subsequent amending Acts lies in a combination of amendment of the schedule by regulation and affirmative resolution of both Houses of the Parliament before the regulations can take effect.

12.6 The device of amending a schedule to an Act by regulation is used in section 26 (3) of the *Administrative Appeals Tribunal Act* 1975. This has the advantage of avoiding the necessity for amending legislation yet still complies with the important principle that any legislative alteration in people's rights and obligations should be readily ascertainable. In the case of regulations this is achieved by the requirement of section 5 (1) of the *Rules Publication Act* 1903 that regulations be printed and sold by the Government Printer.

12.7 The further provision that the regulations should not take effect until affirmed by a resolution of both Houses of the Parliament provides adequate opportunity for parliamentary scrutiny of any proposed amendment. This is a device which has not been as frequently used in the Australian Parliament as in some others, such as the British Parliament. But it has been used here to advantage, and we believe that the exemption of agencies from the Freedom of Information Bill is an appropriate case for its further use. An example of a similar use of the affirmative resolution is to be found in section 24 of the *Commonwealth Electoral Act* 1918 which provides that distributions of the States into electoral divisions do not have effect until approved by resolution of both Houses.

12.8 It may be necessary to draft into the relevant provisions further provision to the effect that the resolutions of each House will have effect notwithstanding a prorogation of the Parliament, a dissolution of the House of Representatives or a simultaneous dissolution of both Houses. We draw attention to the need for this precaution because a resolution binds the Senate only for the current parliamentary session,¹ and there should be no doubt that regulations affirmed by resolution will remain in effect unless amended by the same process.

12.9 The provision we propose differs from the usual situation with regard to regulations. Under section 48 of the *Acts Interpretation Act* 1901, regulations generally take effect from the date of their notification in the *Gazette*. They must also be tabled in both Houses within fifteen sitting days of being made and are subject to disallowance by a motion of disallowance of which notice has been given within a further fifteen sitting days of their tabling. Unless and until disallowed,

¹ J. R. Odgers, *Australian Senate Practice*, 5th edn, A.G.P.S., Canberra, 1976, p. 236.

however, they take effect from the date of notification in the *Gazette*. What we propose is that regulations amending the schedule listing exempt agencies should not take effect until after both Houses have passed affirmative resolutions. Such a variation from the usual case appears to be contemplated within the terms of section 48 (1) of the Acts Interpretation Act which provides in part:

48. (1) Where an Act confers power to make regulations, then, unless the contrary intention appears, all regulations made accordingly—

(a) shall be notified in the *Gazette*;

(b) shall, subject to this section, take effect from the date of notification or where another date is specified in the regulations from the date specified;

We see no difficulty in providing that regulations amending the schedule of exempt agencies shall take effect from the date on which both Houses have passed affirmative resolutions.

12.10 We propose amendment in the same way—by regulation, taking effect only after affirmative resolution of both Houses—to two other provisions of the legislation. In Chapter 8 we recommended that the Bill should be amended to provide for specified reductions over time in the number of days allowed to agencies to respond to requests. Nevertheless, we recognise that circumstances may develop which prevent such reductions and we recommended that the necessary amendment should be achieved by means of regulation and affirmative resolution along the lines discussed in this chapter.

12.11 Similarly, in Chapter 21, we recommend the inclusion of those secrecy provisions prescribed under the Act for purposes of clause 28 in a schedule to the Bill. Amendment of this schedule would also, in our view, be most satisfactorily achieved by the device discussed above.

12.12 Turning from exemptions of specified bodies to exemptions of specified documents of agencies, we regard it as desirable that exemption of an agency 'in respect of documents relating to specified functions or activities of the agency or in respect of documents of any other prescribed description' should also be achieved by listing in a schedule to the Bill with amendment thereof occurring by regulation taking effect only after affirmative resolution of both Houses. Had the exemption related simply to 'specified classes of documents' there would be no justification for such an exemption at all since the existing Part IV exemptions more than adequately cater for all conceivable categories of exemption of documents by description. However, the exemption is not this broad. It is limited to documents of a prescribed description *of a specified agency*. It provides for a more limited exemption than total exemption of an agency. Without such a provision the more draconian step of complete exemption of an agency might be called for in situations where not all of the agency's documents really require to be exempt. We envisage, however, that the circumstances would be rare in which it would be appropriate to exempt documents under this section rather than under one of the other grounds of exemption in Part IV. One such case might well be documents which relate to Aboriginal tribal and ceremonial secrets. We refer to this particular example again in our discussion of the question of breach of confidence in Chapter 25.

12.13 Perhaps the best example of a legitimate use of the power to exempt particular classes of records of an agency is to be found in evidence given to us by representatives of the Australian Broadcasting Commission.² In their submission

² Submission no. 131, incorporated in *Transcript of Evidence*, pp. 1244–1303.

the ABC made out a persuasive case for exemption of their program material from the provisions of the Bill. On the one hand it is clear that certainly not all, and perhaps very little, of the program material presented on radio and television throughout Australia would fit squarely within the four corners of any of the Part IV exemptions. But it is equally clear that this is not the type of material with which the Bill is concerned. The ABC would also face a problem in determining its copyright obligations for purchased programs, a matter which is discussed in Chapter 10. By the same token, the public has a right to examine the administrative operation of the Commission to ensure that it is efficiently and properly conducted at public expense. It would thus not be appropriate to exempt the agency entirely from the operation of the Act. Nor could all conceivable 'documents' of this kind be adequately excluded from the definition of document in clause 3. The only practical solution is to exempt the program material of the ABC from the provisions of the Act. So that Parliament can be satisfied that only that which should be exempted, is exempted, the exemption should be by way of inclusion in a schedule to the Bill rather than by regulation.

12.14 Recommendation: The exemption of any agencies or classes of documents of an agency and the determination of whether a body is part of a specified agency should be achieved by listing them in a schedule to the Freedom of Information Bill with subsequent amendment to that schedule occurring by means of regulation taking effect only upon affirmative resolution of both Houses.

Individual claims to exemption by regulation

12.15 In the course of its inquiry the Committee has received submissions from a number of departments and agencies indicating that they will be seeking partial or total exemption from the operation of the Bill when enacted. These included the Australian Broadcasting Commission (in relation to which reference has already been made in paragraph 12.13); the Australia Council;³ the Department of Transport⁴ (in respect of Qantas, Trans Australia Airlines,⁵ Australian National Railways, Australian National Line,⁶ aircraft accident and incident investigation records, reports of preliminary investigations into marine casualties, and examination papers used in the regulation of the aviation industry); the Commonwealth Employees' Compensation Tribunal;⁷ the National Committee on Discrimination in Employment and Occupation;⁸ the Confederation of Australian Industry⁹ (in respect of a number of consultative and other bodies in the industrial relations arena); and ASIO.¹⁰ Undoubtedly, we have not received submissions from all agencies proposing to seek such exemption. In these circumstances we do not purport to give a list of final recommendations as to those agencies which should be exempted. We do, however, wish to discuss the matters of principle which have been put forward in support of particular claims.

12.16 *Commercial undertakings.* Perhaps one of the most difficult issues to be resolved in this area is in relation to those statutory authorities which are to all intents and purposes on equal footing with private commercial enterprises.

³ Submission no. 73, incorporated in *Transcript of Evidence*, pp. 636-740.

⁴ Submission no. 125.

⁵ Submission no. 166.

⁶ Submission no. 168.

⁷ Submission no. 55.

⁸ Submission no. 145.

⁹ Submission no. 96, incorporated in *Transcript of Evidence*, pp. 1145-1188.

¹⁰ In camera evidence given by Director-General of ASIO on 27 March 1979.

Should their competitive position be impaired by the necessity to comply with the requirements of the Bill which imposes no obligations on their competitors? A number of irreconcilable basic principles interact here: for example, that Australia is committed to a mixed economy with government-funded commercial organisations whose cost-efficiency cannot be prejudiced in relation to other competitors without detracting from the reason for their existence; and that any agency which is created by government and/or funded by public money should be accountable to the public. To grant an automatic exemption to any statutory authority which is competing in the marketplace against another commercial organisation would be to deny the public a valuable means of ensuring accountability of a publicly funded organisation. To deny all claims for exemption would be to pay no regard to the element of competition between publicly and privately funded organisations which is part of the established fabric.

12.17 One of the principal means of ensuring accountability of corporate decision makers to company shareholders and investors is through the accounting and audit requirements of the various Companies Acts and Ordinances. This might suggest, at first glance, that publicly funded commercial enterprises which are subject to these same accounting and audit provisions might justifiably claim exemption from the accountability provided by freedom of information legislation. Conversely, public enterprises not subject to those corporate reporting requirements could be made subject to freedom of information legislation.

12.18 This test does not, however, provide a satisfactory delineation. In the first place, apart from Qantas, there is only a handful of relatively minor publicly-funded commercial enterprises which are incorporated under Companies Acts or Ordinances. In the second place, some authorities, though not subject to the accounting and audit requirements of the companies legislation, may be required to have their form of accounts approved by the Minister for Finance. Because these accounts will vary to suit the particular needs of individual authorities and to take account of government policies in respect of different authorities, they may in one case be quite detailed and in another case fall far short of normal commercial accounts. Some authorities may be subject to neither companies legislation nor the approval of the Minister for Finance. We do not consider that the present accounting procedures of public enterprises afford an appropriate basis on which to assess whether a particular public enterprise should be subject to freedom of information legislation or not.

12.19 We believe that the question of accountability of commercial statutory authorities ought to be approached from the presumption that all statutory authorities are subject to the Bill but that many of the documents of such authorities may be exempt under particular Part IV exemptions. In view of the width of the exemptions in Part IV which could be called in aid, we consider that the presumption would be displaced on relatively few occasions so as to call for the total exemption of an agency. In this connection, the protections afforded by clauses 29 and 32 of the Bill should be noted. Clause 29 enables documents to be exempted if their disclosure would have a 'substantial adverse effect on the financial . . . interests of . . . an agency'. Clause 32 enables documents to be exempted if they disclose information concerning a business, commercial or financial undertaking which:

- (i) relates to trade secrets;
- (ii) relates to other matter the disclosure of which would be reasonably likely to expose the undertaking unreasonably to disadvantage; or

(iii) would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

We discuss clauses 29 and 32 in detail in Chapters 22 and 25 respectively. It will be there seen that we do not propose any changes in substance which would detract from the protection they afford to commercial statutory authorities.

12.20 Several submissions have expressed concern that agencies may not claim exemption in respect of all documents which would meet the criteria set out in clause 32. However, so long as adequate steps are taken to assuage these fears (which we believe our recommendations in Chapter 25 will accomplish), it is clear that clauses 29 and 32 provide sufficient protection to ensure that non-government commercial enterprises will not profit directly from disclosure of information about the activities of their publicly-funded competitors. The more likely advantage would be an indirect one resulting from the fact that the private entities do not need to devote staff to complying with freedom of information requests and are thereby in a position of relative advantage in cost-efficiency terms. However, this would only be a significant consideration if the number of requests made of publicly-funded commercial entities was of such magnitude as to involve deployment of significant resources from other profit-making tasks. We doubt that this would be a frequent occurrence. Furthermore, the existence of information sections of some size in a number of private businesses will lessen the extent of the relative disadvantage which might otherwise exist. Before a claim for exemption from the provisions of the Bill on the part of a commercial statutory authority is accepted, the authority should give details of the extent to which it is in direct competition with non-government entities and establish the extent to which its own resources need to be diverted from other tasks.

12.21 Recommendation: The fact that an agency is engaged in competition with other non-government commercial enterprises should not of itself be a ground for exemption of the agency or a class of its documents under clause 5 of the Bill. Exemptions of entire commercial agencies or classes of documents should be made only after individual agencies have demonstrated, after experience of the operation of the Bill, that deployment of financial or staff resources made necessary by the Bill would significantly weaken their competitive position.

12.22 ASIO. Those in favour of exempting ASIO from the operation of the Bill argue on the basis that internal security arrangements must be entirely secret if they are to be at all effective.¹¹ They also argue that helpers, not just agents, would be deterred from assisting officers of ASIO with their investigations, and that the organisation would be subject to excessive demands orchestrated by extreme groups for the purpose of disrupting ASIO operations. The opposing view is that some parts of ASIO's operations, if not all, should be made subject to the Freedom of Information Bill and be considered for exemption on a document by document basis for the purpose of ensuring a degree of accountability and deterring, to some extent, the use of illegal methods and procedures. The Committee was not unanimous as to the extent, if at all, that ASIO should be exempt under clause 5 of the Bill, but was firmly of the view that any such exemption should be by way of a schedule to the Bill and subject to parliamentary debate like any other legislative measure.

12.23 Inhibiting effect on the supply of future information. In paragraph 12.33 below we recognise that in the case of the conciliatory bodies set out in paragraph 4 (c) of the Bill there may well be grounds for exempting non-administrative

¹¹ *ibid.*

functions on the basis of the potential loss of sources of information if the prospect exists of that information being disclosed. However, we do not accept that this will always provide a legitimate ground for exemption. The Department of Transport, in its submission to the Committee, argued that exemption should be granted in respect of aircraft accident and incident investigation records so as not to inhibit the free exchange of information which would enable a full investigation to be made.¹² The submission expressed similar fears about inhibition of the free flow of information which might be occasioned by release of the reports of preliminary investigations into marine casualties. While acknowledging the basis of these fears, we do not believe that they warrant the exemption sought. Indeed, this is precisely the sort of information to which the public is entitled. Persons wishing to pursue legal remedies arising out of such accidents are entitled to have made available to them whatever information is known about such accidents by the agency concerned.

12.24 It does not require much imagination to realise how broadly this subjective ground could be interpreted by those who were averse to increased access to information held by government agencies. We note that this is a recognised ground of exemption in relation to information supplied by a person in respect of his business or professional affairs, or by a business, commercial or financial undertaking (clause 32). But we believe that it would be unwise to extend this exemption any further.

12.25 Recommendation: **The fact that disclosure of particular information may be reasonably likely to impair the ability of an agency to obtain similar information in the future should not invariably give rise to an exemption of the relevant class of documents. But this is a factor, which in all the circumstances of a particular agency, may warrant exemption of some classes of documents.**

12.26 Personnel assessments. A special class of documents in respect of which the Department of Transport indicated that it would be seeking exemption was that of examination papers it uses to test applicants for aircraft maintenance engineer's licences and for flight crew licences and ratings.¹³ The fear was expressed that, given the limited range of examination papers used for such purposes, disclosure of them could lead to falling standards in the maintenance and operation of aircraft. Undoubtedly this is but one example of a problem which other agencies could be expected to experience.

12.27 A similar difficulty arises when experts are required to submit reports on applicants for government grants for artistic or research purposes. The Australia Council, for example, sought exemption under clause 5 for all or part of its operations so that these reports which are, in large part, subjective opinions of artistic merit, would not be released under freedom of information legislation.¹⁴ The Council wishes to avoid hurting or discouraging unsuccessful applicants; exposing the experts concerned to possible defamation actions; increasing the flow of appeals to Council; and prejudicing Council's access to impartial and extensive commentary from experts in the future. The Victorian Government, concerned to protect the position of officers of the Victorian Ministry for the Arts who are consulted by, and provide comments to, the Australia Council on art awards, supported the Council's arguments for exemption under clause 5.¹⁵

¹² Submission no. 125.

¹³ *ibid.*

¹⁴ Submission no. 73, incorporated in *Transcript of Evidence*, p. 642-3, pp. 692-705.

¹⁵ Letter to Chairman from Premier of Victoria, 18 April 1979, Committee Document no. 82.

12.28 We consider that the reports for artistic purposes which are of concern to the Australia Council will be protected by clause 26 of the Bill. The examination papers, however, cannot be protected in this way. We believe that the protection of documents such as the examination papers of the Department of Transport can best be achieved by an amendment to clause 29, which protects *the Commonwealth's financial, property and staff management interests*. This matter is considered further in Chapter 22.

Exclusion of the courts, the Parliament and certain industrial bodies

12.29 *The courts.* The courts are excluded from the operation of the Freedom of Information Bill by virtue of clause 4. This clause provides, in part, that:

For the purposes of this Act—

- (a) a court, or the holder of a judicial office or other office pertaining to a court in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department;
- (b) a registry or other office of a court, and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department;

We have reservations about a total exclusion for the courts. There is obviously very good reason for governments not imposing requirements which would interfere with the independence of the judiciary and the proper administration of justice. It would not be appropriate for freedom of information legislation to be the vehicle for obtaining access, where this was otherwise unavailable, to court documents filed by parties to litigation. Nor would it be appropriate for this legislation to operate in any way as a substitute or supplement for discovery procedures presently administered by the courts. However, there are other documents of a more clearly administrative character associated with the functioning of registries and collection of statistics on a host of matters associated with judicial administration which, equally clearly, should be opened up to public gaze. These would include such matters as the number of sitting days, the number of cases determined, the number of cases withdrawn, the cases which were subsequently appealed and the occasions on which bail was awarded. The very existence within the Commonwealth Attorney-General's Department of a Division of Judicial Administration is testimony to the ability to distinguish between the judicial and administrative aspects of the operation of the courts. We therefore propose that the exemption in paragraph (a) and (b) of clause 4 should be limited to the non-administrative functions of the courts.

12.30 Recommendation: Clause 4 of the Freedom of Information Bill should be amended so as to limit the exemption in respect of courts to documents of a non-administrative character.

12.31 *Parliamentary departments.* Clause 3 defines 'agency' to exclude the Departments of Parliament from the operation of the Freedom of Information Bill. The relevant part of clause 3 provides:

In this Act, unless the contrary intention appears—"agency" means a Department or a prescribed authority; "Department" means a Department or the Australian Public Service other than the Department of the Senate, the Department of the House of Representatives, the Department of the Parliamentary Library, the Department of the Parliamentary Reporting Staff and the Joint House Department.

The total exemption for parliamentary departments conferred by clause 3 of the Bill appears even less justified than in respect of the courts. The only official justification given is that the Freedom of Information Bill is concerned with

granting access to the documents of the Executive.¹⁶ Seen as an exercise in ensuring accountability of governmental decision making, there clearly is a difference between the executive and parliamentary departments. But that is not to say that there is not a corresponding need to open up for public inspection the activities of the parliamentary departments. The public has a legitimate interest in ensuring, first, that its parliamentary representatives are properly going about their tasks of representation and executive scrutiny, and secondly, that its parliamentary representatives are properly assisted to fulfil those functions. On the other hand, it is arguable that members of the Parliament, if they are effectively to perform their elective representative function, should not be in any way inhibited in the exercise of their parliamentary and political duties—as they might be, to take one clear example, if the nature of their research requests to the Department of the Parliamentary Library ceased to be confidential.

12.32 While there would appear to be, on balance, a case for giving the parliamentary departments the somewhat less than total blanket exemption from the Act, we have found it difficult to distinguish clearly or systematically those activities of the parliamentary departments disclosure of which might be thought to have a detrimental effect on the position of members of parliament. We have not found it possible to agree on any formula which would provide a satisfactory general basis for making the distinctions in question. In the event, in the absence of any submission to us from any source, recommending that the parliamentary departments be subject in whole or part to the Bill, we do not at this stage recommend any amendments to the Bill in this respect. We do, however, believe that the parliamentary departments should be encouraged to act as if the legislation were applicable to them in the same way as the executive departments have been instructed to treat requests before the introduction of the legislation as if it were in force.

12.33 *Certain industrial bodies.* Paragraphs (c) and (d) of clause 4 exempt specific industrial bodies: namely, the Australian Conciliation and Arbitration Commission, the Industrial Registrar, the Flight Crew Officers Industrial Tribunal, the Public Service Arbitrator and the Coal Industry Tribunal. These provisions are in the following terms:

- (c) a tribunal, authority or body specified in this paragraph, or the holder of an office pertaining to such a tribunal, authority or body in his capacity as the holder of that office, is not to be taken to be a prescribed authority or to be included in a Department, namely:
 - (i) the Australian Conciliation and Arbitration Commission;
 - (ii) the Industrial Registrar or a Deputy Industrial Registrar;
 - (iii) the Flight Crew Officers Industrial Tribunal;
 - (iv) the Public Service Arbitrator or a Deputy Public Service Arbitrator; and
 - (v) the Coal Industry Tribunal or any other Tribunal, authority or body appointed in accordance with Part V of the *Coal Industry Act 1946*; and
- (d) a registry or other office of, or under the charge of, a tribunal, authority or body referred to in paragraph (c), and the staff of such a registry or other office in their capacity as members of that staff, shall not be taken to be part of a Department.

As with the courts, we are not satisfied that all aspects of the working of these industrial bodies demand total exemption from public gaze. We do recognise that in conciliatory bodies such as these it is imperative that the persons involved be able, apart from hearings on the public record, to engage in full and frank discussion aimed at resolving particular matters in dispute.

¹⁶ Australia, Attorney-General's Department, *Freedom of Information Bill 1978: Background Notes*, A.G.P.S., Canberra, 1978, (Explanatory Memorandum, p. 1).

Any decision to make these negotiations public can be expected to inhibit the necessary frank exchanges. We believe, however, that even if this is the basis upon which the Government has determined that these bodies should be accorded exempt status, these arguments should be articulated along with those in respect of any other agency for which exemption is to be sought. Even assuming that this ground of exemption is generally regarded as being proper, we do not consider that the inhibiting effect on conciliation warrants total exemption of these industrial bodies. As with the courts, we see no reason why the administrative functions of these conciliatory bodies should be exempt.

12.34 Recommendation: Paragraph (c) of clause 4 of the Bill should be deleted and any exemption of the conciliatory bodies listed therein be achieved in a schedule to the Bill in respect of their non-administrative functions only.

Individual claims to exemption by inclusion in clause 4

12.35 The Committee received a number of submissions urging that as particular agencies were similar in nature to those set out in clause 4, the agencies should receive similar exempt status. For example, the thrust of one of the arguments put by the Commonwealth Employees' Compensation Tribunal was that the Tribunal is more like a court than the arbitral bodies listed in paragraph (c) of clause 4 and hence should be exempt.¹⁷ Similarly, the Confederation of Australian Industry sought exemption for various bodies on the basis that they were also industrial bodies and hence should be accorded the same exemption as those listed in clause 4.¹⁸ They were: the National Labour Consultative Council; the Central and Local Trades Committee; the Employment Discrimination Committees; the National Employee Participation Steering Committee; Ministers; Heads of Departments of State or agencies of the Commonwealth which recommend the taking of action in industrial relations or staff matters involving the Commonwealth and its employees; the Industrial Relations Bureau involving matters subject to the provisions of the *Conciliation and Arbitration Act* 1904; and the Commonwealth Reporting Service, in so far as it holds transcript of proceedings which are restricted to the court or tribunal and the parties in dispute.

12.36 None of these bodies, with the possible exception of the National and State Committees on Employment and Occupation, should qualify for exemption under clause 4. The Commonwealth Employees' Compensation Tribunal is a quasi-judicial tribunal, the proceedings of which are normally conducted in public. It neither qualifies for exemption as a court nor as an industrial body before which, in closed session, parties engage in full and frank discussion for the purposes of conciliation. The National Employee Participation Steering Committee, the National Labour Consultative Committee and the Central and Local Trades Committees can be characterised as consultative rather than conciliatory bodies. As such, their proceedings, to the extent that they should be accorded protection, will be protected under clause 26 of the Bill. In contrast, the National and State Committees on Employment and Occupation are essentially conciliatory bodies and in accordance with our views expressed in paragraph 12.33 they should be considered for exemption in a schedule to the Bill in respect of their non-administrative functions only. The whole tenor of the Freedom of Information Bill is directed, in one way or another, to ministers and departmental heads and their involvement in industrial relations is no reason, by itself, why particular ministers or departmental heads

¹⁷ Submission no. 55.

¹⁸ Submission no. 96, and see *Transcript of Evidence*, pp. 1147-50, pp. 1161 ff.

should be removed from the purview of the Bill. The Industrial Relations Bureau is primarily concerned with the enforcement of awards and for this reason the documents in its possession would be protected, if at all, under clause 27, the law enforcement provision. Finally, the transcripts of the Commonwealth Reporting Service including first draft transcripts would, we envisage, enjoy the same exemption, if any, as the respective bodies which they service, whether it be a Commonwealth court or tribunal. Transcripts of public hearings would ordinarily come within clause 10 (1) (c) as documents that are 'available for purchase by the public in accordance with arrangements made by an agency' and for this reason would not be accessible under the Freedom of Information Bill.