

Commercially sensitive and other confidential information (clauses 32 and 34)

25.1 In this chapter we deal with the need to balance the interests of commercial undertakings which have supplied material to government agencies and the interests of members of the public in gaining access to that information. There are two key provisions of the Bill relevant to this issue: namely, clause 32 concerning documents relating to trade secrets and clause 34 concerning material obtained in confidence. The relevant provisions in clause 32 provide:

32. (1) A document is an exempt document if its disclosure under this Act would disclose information concerning a person in respect of his business or professional affairs or concerning a business, commercial or financial undertaking, and—
- (a) the information relates to trade secrets or relates to other matter the disclosure of which under this Act would be reasonably likely to expose the person or undertaking unreasonably to disadvantage; or
 - (b) the disclosure of the information under this Act would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future.

25.2 The overwhelming flavour of the submissions received as regards both these clauses has been one of concern on the part of the business organisations that, irrespective of how broadly these provisions are drafted and subsequently interpreted, they will not necessarily be invoked by public servants responding to requests for access to such material. Thus the Committee was told in a submission by one corporate witness:

We have some concern however as to the possibility that data supplied by us in confidence or otherwise to a Government agency will be disclosed by that agency under the provisions of the proposed Act without consultation with us about the repercussions such disclosure may have on our business activities. . . . Our concern relates to the potential use by trade competitors as distinct from legitimate use by the Agency involved.¹

We were advised by the Attorney-General's Department that clause 32 was intended to protect not only information obtained by a government agency from outside sources but also information concerning the agency itself in respect of any business, commercial or financial undertaking in which it might be engaged. The Department has admitted, however, that clause 32 does not clearly have that effect, a view which the Committee shares.

25.3 In this matter we have some sympathy with the view expressed by the Australian National Airlines Commission in a submission to us:

Information required to be disclosed under the Act or by order of the Tribunal would often be information not only of the Commission but also information supplied by customers, suppliers, business associates, partners in joint ventures or companies in which the shareholding is not totally owned by the Commission. Although Clauses 29, 32 and 34 on a superficial examination appear to afford some relief in this area, any decisions made by the Commission to withhold access to information on the grounds specified in

¹ Submission no. 123 by Dow Chemical (Australia) Limited incorporated in *Transcript of Evidence*, p. 1190.

these Clauses would be reviewable by the Tribunal. This would have a serious impact on the Commission's business relationships, as companies and individuals would be loath to enter into arrangements or deal with us.²

This concern arises from the provision in clause 12 that nothing in the Bill is intended to prevent or discourage agencies from giving access even to exempt documents where they can properly do so. As a result, material which may include a trade secret or, which, if disclosed, may expose a person or undertaking unreasonably to disadvantage or impair the ability of the Commonwealth or of an agency to obtain similar information in the future might still be lawfully disclosed notwithstanding any harm which could result.

25.4 We readily concede that these concerns have some validity. We note that there is strong evidence that the United States legislation has been used for purposes of industrial espionage. Figures published by the United States Food and Drug Administration (FDA) indicated the receipt of some 20 000 requests under the Freedom of Information Act in 1975. Of these, 86% were from industry and private attorneys, while only 14% were from the general public, consumers, press, health professionals and scientists. The FDA suggested that the large bulk of these requests were associated with industrial espionage in which many commercial firms engage.³

25.5 Nevertheless, these legitimate fears do not justify granting a complete veto over the release of commercial information to the supplier of that information, a course which was urged upon us by some witnesses. The Committee takes the view that there is no right to total corporate privacy. Business corporations are created under Federal and State laws and are properly subject to regulation by governments for the common good. A corollary of this is the public's right to know how well that regulation is being carried out on its behalf. In the words of Theodore Roosevelt, corporations 'exist only because they are created and safeguarded by our institutions; and it is therefore our right and our duty to see that they work in harmony with those institutions'.⁴ It would be totally unacceptable to allow a situation in which a corporation could prevent the public disclosure, for an indefinite period, of information provided by it to a government agency (in many cases with a view to receiving some benefit) simply by marking the documents in question as confidential. Yet this is a view which was put to us by a number of corporate witnesses.

25.6 The Committee does not doubt, however, that the suppliers of commercially sensitive information should be afforded some protection against disclosure of material which falls within the categories listed in clause 32. The difficulty lies, of course, in determining the extent of protection to be afforded so as not to negate the legitimate interests of other members of the public in gaining access to some material supplied by business organisations which the latter might prefer not to be disclosed. The conferral of a right on the suppliers of information to limit or deny access by others to that information, or at least to be a party to the access decision, is generally referred to by the title of 'Reverse-FOI' signifying that the right is the antithesis of a right to freedom of information. In the remainder of this chapter we discuss in turn, Breach of Confidence (clause 34), Trade Secrets (clause 32) and 'Reverse-FOI'.

² Submission no. 166, p. 3.

³ Submission no. 123 incorporated in *Transcript of Evidence*, pp. 1195-96.

⁴ First message to Congress (1901) quoted in M. V. Nadel, 'Corporate Secrecy and Political Accountability', *Public Administration Review* 35, Jan.-Feb. 1975, pp. 14-23.

Breach of confidence

25.7 Clause 34 provides:

A document is an exempt document if its disclosure under this Act would constitute a breach of confidence.

The Committee has had some difficulty in determining the meaning of this clause. The difficulty arises from the fact that 'breach of confidence' is the name given to an equitable doctrine which enables people to sue in the courts in respect of the disclosure of confidential information supplied by them. It is by no means clear, on the face of it, whether or not clause 34 is intended to be confined to this actionable breach of confidence or whether it is intended to enable exemption to be claimed in respect of every document held by agencies as to which the author sought that it be treated in confidence.

25.8 The Explanatory Memorandum⁵ does not resolve the ambiguity as to what was intended. On the one hand it states that this exemption 'extends to protect confidential information that might not be covered by [the trade secrets and personal privacy exemptions] if it can be shown that disclosure of the information would amount to a breach of confidence'.⁶ This suggests that actionable breach of confidence is intended. On the other hand the Explanatory Memorandum relies on the recommendation of the 1976 Interdepartmental Committee Report which argued for the recommendation on the basis that 'an understanding that information is being supplied on a confidential basis ought to be respected'.⁷ Whatever else might be uncertain about actionable breach of confidence it is at least clear that it does not encompass every understanding of confidentiality on the part of the submitter. The wide view put forward in the 1976 Interdepartmental Committee Report was, however, rejected as the basis of clause 34 by Mr L. Curtis of the Attorney-General's Department who appeared before us. On the subject of clause 34 he put the following view:

Clause 34 was intended to operate only in those cases where the law would now restrain disclosure as a breach of confidence. That is, the information must be inherently of a confidential nature, it must have been given and received either in an express or implied undertaking of confidentiality, and the disclosure of the information must result in some detriment, not necessarily a financial detriment, but some detriment to the party who disclosed the information. That is, it must continue to remain information inherently of a confidential character. That was what those words 'breach of confidence' in clause 34 were intended to mean and those conditions would not be satisfied simply by a department saying to somebody who was providing information from outside or providing a document from outside: 'We will treat this in confidence'.⁸

25.9 As regards actionable breach of confidence, the elements of which are stated in the above quotation, the Committee notes that confidential information in this context is confined to facts, schemes or theories which the law regards as of sufficient value or importance to afford protection against use of them by the defendant otherwise than in accordance with the plaintiff's wishes. In its present state of development, the law of confidential information has been limited almost entirely to the category of trade secrets. It has been suggested that actions in the courts to enforce this type of confidence have resulted from the delays, inconveniences and uncertainties of the patent system in both Australia and Britain.⁹

⁵ Australia, *Freedom of Information Bill 1978: Explanatory Memorandum*, Canberra, 1978.

⁶ *ibid.*, para. 127.

⁷ Australia, Report of the Interdepartmental Committee on Policy Proposals for Freedom of Information Legislation, *Parliamentary Paper* no. 400/1976, Canberra, 1977, para. 12.16.

⁸ *Transcript of Evidence*, pp. 82-83.

⁹ See R. P. Meagher, W. M. C. Gummow and G. R. F. Lehane, *Equity: Doctrines and Remedies*, Butterworths, Sydney, 1975, p. 713.

The other type of confidence protected by the equitable doctrine is private domestic secrets. The best-known recent example of this type is recorded in *Argyll v. Argyll*,¹⁰ where the plaintiff obtained an injunction restraining publication of newspaper articles by her divorced husband dealing with secrets of the plaintiff's private life communicated to her spouse during their marriage.

25.10 We are concerned that the existence of a clause open to such potentially wide interpretation as clause 34 could lead to abuses such as the covering up of acts of malfeasance or the denial of access to material held by government and indicating malfeasance in either the public or private sector. Against this it might be argued that the law of breach of confidence does in fact make allowances for such a situation in that it does not protect conduct of this kind.

25.11 In a document provided to the Committee by the Attorney-General¹¹ there is a helpful discussion of the law relating to confidentiality, in which it is suggested that the courts have made it clear that the law of confidentiality does not protect misconduct. Thus in *Gartside v. Ouram*, Wood V.C. said: 'There is no confidence as to the disclosure of iniquity.'¹² The English Court of Appeal applied this principle in *Initial Services Ltd v. Putterill*¹³ a case where an employee disclosed an alleged breach of the Restrictive Trade Practices Act by his employer. Lord Denning, M.R. rejected a suggestion that the public interest in disclosure of confidential information was limited to cases where the person whose confidence has been breached has been 'guilty of a crime or fraud'. He said that 'it extends to any misconduct of such a nature that it ought in the public interest to be disclosed to others'.¹⁴ While we find these judicial pronouncements reassuring as far as they go, they are not of sufficient number, precision, weight or authority in Australia to persuade us of themselves that a breach of confidence exemption in all conceivable cases would not be open to abuse by governments anxious to avoid embarrassing disclosures.

25.12 The Explanatory Memorandum is instructive in demonstrating the lack of any clearly perceived category of information for which it is necessary to have a separate breach of confidence exemption. It states in paragraph 12.8:

This clause therefore overlaps with clause 30, relating to personal privacy, and clause 32, relating to business privacy, but extends to protect confidential information that might not be covered by those clauses if it can be shown that disclosure of the information would amount to a breach of confidence.

The document from the Attorney-General's Department referred to in paragraph 25.11 also makes it clear that most grounds that would serve as the basis for an action for breach of confidence would be covered by clauses 30 and 32. The document points out that confidential material of the kind protected by the Court in the *Argyll* case would clearly be covered by clause 30. It also states that business or commercial information of the kind protected by the courts in breach of confidence actions would be capable of protection from mandatory disclosure under clause 32 of the Bill.

¹⁰ [1967] Ch. 302.

¹¹ Paper prepared by the Attorney-General's Department dated 9 May 1979. The paper covers clauses 23, 26, 27, 32 and 34, together with a detailed paper on breach of confidence. (Committee Document no. 88).

¹² (1856) 26 L.J. Ch. 113, at p. 114.

¹³ [1968] 1 Q.B. 396.

¹⁴ *ibid.*, p. 405.

25.13 In our view there are no areas of necessary confidentiality which would require the existence of this clause. Confidential matter referred to the Commonwealth by the States would be covered by the exemption in paragraph 23 (1)(b) which is discussed in Chapter 17 of our Report. Examples of other areas of confidentiality were raised in the document provided to us by the Attorney-General. These were the protection of Aboriginal tribal secrets; artistic assessments by experts of works of art under consideration for purchase; confidential reports of referees on applicants for appointment; confidential reports on applicants for government grants for artistic purposes; and information of a technical kind produced by a non-commercial research organisation such as a university. We are satisfied that each of these could be protected under some other provision in the Bill and are not of themselves sufficient to warrant the retention of clause 34.

25.14 Thus, Aboriginal tribal secrets¹⁵ are sufficiently important to warrant exemption by inclusion in the schedule which we recommend should be included in the Bill to list those matters exempted under clause 5. We have discussed the protection from disclosure of assessments of works of art which the Government is considering purchasing, elsewhere in our Report (see Chapter 22), and it is our view that such assessments could be protected from disclosure under clause 26 which exempts matter in the nature of opinion or advice prepared or recorded in the course of, or for the purposes of the deliberative processes involved in the functions of an agency or minister, the disclosure of which would be contrary to the public interest. Such assessments could also, if necessary, be protected under clause 29 insofar as they pertain to the Commonwealth's property interests (see also Chapter 22). Reports of referees on applicants for appointment, or on applicants for government grants for artistic purposes, given in confidence would also fall within the terms of clause 26, or alternatively, would be exempted under clause 29, which we have recommended (see Chapter 22) should be amended to cover the disclosure of matters affecting personnel assessment.

25.15 There may be some such assessments which would not fall within any of the exemption provisions. In that case, the possibility of defamation would arise. We discuss that issue in Chapter 9.

25.16 The final example put forward in the Attorney-General's paper was information of a technical kind produced by a non-commercial research organisation such as a university. Such information could be protected in a number of ways; for example, by applying for a patent thereby invoking the protection of the patent legislation. In some cases the secrecy provisions of the Australian Research Grants Council legislation would operate to protect such information. Some such bodies, for example, the Australian National University, could come within the definition of 'prescribed authority' in clause 3 (1), thus bringing them within the definition of 'agency'. If the body in question were an agency, it could claim exemption from disclosure of the information under clause 29. In the last resort we are of the view that it would be possible to specify a class of documents to cover such information for inclusion in the schedule under clause 5.

25.17 In summary, we reject as totally inappropriate any provision which could enable exemption to be claimed for any document which the author wished to be treated in confidence. To vest such a veto power in individuals supplying information to government agencies, whether voluntarily or by force of statute, would be inimical to the interests of the wider community. Moreover, one

¹⁵ Protected under the law relating to breach of confidence in *Foster v. Mountford and Rigby Ltd* (1977) 14 ALR 71.

of the necessary conditions to be satisfied when applying the law relating to confidentiality is that the matter is inherently confidential. That is, it is not sufficient that the matter be treated as confidential by the person conveying it; an objective test must also be applied to determine whether the information should be treated as confidential. In this context we note the view of the Attorney-General's Department that a 'unilateral declaration of confidentiality, for example by a person marking any document he forwards to a Government agency 'Confidential' regardless of its contents, would not, therefore, by itself be sufficient to invoke clause 34.'¹⁶ But we would go further and assert that, as the matters currently covered by the law of breach of confidence are narrower in scope than clauses 30 and 32, the need for a separate breach of confidence exemption has not been made out.

25.18 Our decision to recommend the deletion of clause 34 is reinforced by the view of the Department of Business and Consumer Affairs which stated in a submission to us that 'the analysis required to assess the law of breach of confidence (clause 34) is complex and resources will certainly not enable it to be undertaken in other than a few cases'.¹⁷ If, in the future, it becomes apparent that there are specific kinds of confidences deserving of protection and which are not protected within the legislation then amendments should be made at that time to cover such confidences.

25.19 Recommendation: Clause 34 of the Bill, exempting documents the disclosure of which would constitute a breach of confidence, should be deleted.

Trade secrets

25.20 While the marginal note to clause 32 of the Bill refers to 'trade secrets, etc.', the exemption is considerably broader than the common law definition of trade secrets. It relates also to other matter the disclosure of which would be reasonably likely to expose unreasonably to disadvantage, a business, commercial or financial undertaking or a person in respect of his business or professional affairs. It also encompasses the disclosure of information 'which would be contrary to the public interest by reason that the disclosure would be reasonably likely to impair the ability of the Commonwealth or of an agency to obtain similar information in the future'. Both these elements of clause 32 are of potentially wide ambit. Not surprisingly, the business sector has not expressed any concern that the clause is drafted too narrowly so as not to include certain information which should be exempted. Rather, their fears in respect of clause 32 have focused solely on whether or not public servants making the decisions on access requests will in fact invoke the exemption. This is further discussed later.

25.21 In Chapter 12 we recommend that the inhibiting effect of disclosure on the supply of similar information in the future should not be regarded in all cases as a valid reason for exempting an agency or class of documents from the operation of the Bill. We noted that the subjective judgments involved in making such decisions provided scope for excessive use of an exemption of that nature. By contrast, we consider that the danger of excessive invocation of this exemption is considerably less for the more limited category of documents concerning business, commercial or financial undertakings. Furthermore, it is to be expected that public servants might not have the same vested interest in claiming exemption for documents submitted from outside an agency as they would have for documents prepared by their colleagues. This factor may give some comfort to those persons

¹⁶ Paper by Attorney-General's Department, cited footnote 11, 'Breach of Confidence' paper, p. 8.

¹⁷ Submission no. 165, p. 2.

seeking access to such documents, but may be a cause of concern to those supplying the information. We believe that the interests of the two groups should be reconciled by ensuring that decisions as to whether or not disclosure of a document would, for example, expose a commercial undertaking unreasonably to disadvantage should be made only after the suppliers of information and those seeking access have both had the opportunity to put their view. The method of consultation which we propose is the subject of the next section on Reverse-FOI. So long as these rights are guaranteed, we believe that the wording of clause 32 is appropriate as it stands.

Reverse-FOI

25.22 Reverse-FOI is the term used to describe the process whereby the supplier of information to an agency seeks to limit or deny access to that information to others, or at least to be a party to the access decision. In the United States a type of law-suit has grown up known as a 'Reverse-FOIA' action because the supplier sues to prohibit the disclosure of information it had provided to the government. There is no provision in the United States for this type of action and its development has depended upon the willingness of United States courts to find jurisdiction for entertaining a Reverse-FOIA lawsuit. However, a recent decision of the United States Supreme Court, *Chrysler Corporation v. Brown*¹⁸ discussed further below, has held against Reverse-FOIA actions in that country.

25.23 In terms of the history of the United States legislation, Reverse-FOIA suits are a relatively recent development. The United States Freedom of Information Act came into operation in 1967, yet it was not until 1973 that the first Reverse-FOI decision was given. Some figures from recent years are significant indicators of the development of the action. The United States Department of Justice has reported that some 76 cases were instituted in 1976, 63 in 1977 with an estimated 111 in 1978.¹⁹ The United States experience has been that the overwhelming majority of these cases is concerned with release of business information.

25.24 An obvious prerequisite to the institution of a Reverse-FOI suit is notice to the supplier from the agency which has received a request for information. In the United States there is no legislative requirement that a supplier be given notice that disclosure of information supplied by it is under consideration by an agency. Nor has any court held that notice is required by due process.

25.25 Nevertheless, as the 25th Report by the Committee on Government Operations of the United States House of Representatives points out, notice serves an important and useful purpose, as it allows suppliers of information an opportunity to object to the unwarranted disclosure of information by agencies and to take action to prevent it.²⁰ At the same time notice can be of considerable advantage to the agency faced with the disclosure decision. Frequently the issues raised by a request for a business document will be complex and the agency's consideration of the factors leading to a disclosure decision can be assisted by hearing the views of the supplier. An example could be where one piece of information in isolation may seem innocuous, yet the supplier may be able to show that when several such isolated items are collected and put into context they have a significant and detrimental impact on the affairs of the supplier.

¹⁸ (1979) 47 Law Week 4434 (U.S. Court of Appeals).

¹⁹ United States, Twenty-fifth Report by the (House) Committee on Government Operations, *Freedom of Information Act Requests for Business Data and Reverse-FOIA Lawsuits*, Washington, 1978, p. 54.

²⁰ *ibid.*, p. 27.

25.26 In fact, despite the absence of any legal requirement in the United States, it has become almost universal practice among agencies to give notice to suppliers of business information before a disclosure decision is made. In our view, there are sound reasons for including in the Australian Bill a requirement that agencies should give notice of a request for access and the opportunity for consultation to suppliers of confidential business information and also, in the case of information supplied by the States, to State governments and their authorities (see Chapter 17).

25.27 At the beginning of this chapter, we referred to the legitimate concern of business organisations to protect from disclosure some of the information they supply to government, whether in fulfilment of some statutory obligation or in seeking some government benefit. It is because we accept the legitimacy of the concern that we are convinced of the need for a formalised system of notice, with the opportunity of appeal by the supplier against an agency decision to disclose in the form of a Reverse-FOI mechanism. This appeal would be to the Administrative Appeals Tribunal.

25.28 Leaving aside the area of Commonwealth-State relations, this obligation on agencies to notify suppliers of the receipt of a request for access to information supplied by them, to provide them with the opportunity for consultation and (if the supplier opposes the intended release by the agency) to notify them of the intended release of the document only arises for documents for which confidential treatment is sought by a person in respect of his/her business or professional affairs or by a business, commercial or financial undertaking. Upon notification, these persons, if they wish to maintain their claim for confidentiality either in consultation with the agency or in subsequent appeal procedures, must seek exemption under clause 32. That is, they must allege that at the time of the request the document contains information which is a trade secret or whose disclosure would be reasonably likely to expose them unreasonably to disadvantage.

25.29 Our views are reinforced by our consideration of developments in the United States. The United States Act has no provision for notice of intended disclosure to be given to the supplier and no provision for Reverse-FOI. Yet experience of the operation of the United States legislation has led to the development of both. The recent decision of the United States Supreme Court in *Chrysler Corporation v. Brown*, is further evidence, in our view, of the need to give statutory sanction to Reverse-FOI. In that case, the Supreme Court rejected the existence of a Reverse-FOIA procedure in the United States, holding that the United States Act is exclusively a disclosure statute and gives suppliers of information no private right of action to prevent disclosure. The concern of Congress had been with the agency's need or preference for confidentiality; the Act by itself protects the interest in confidentiality of private entities submitting information only to the extent that this interest is endorsed by the agency collecting the information.

25.30 We note that in the paper from the Attorney-General's Department there is support in principle, although with some reservations, for consultations between government agencies and individuals or business agencies for the purpose of deciding questions of access.²¹ The principal reservation expressed is the possibility that a supplier consulted over a disclosure relating to business information could in the course of consultation indicate that it could not supply similar information

²¹ Paper by Attorney-General's Department, cited footnote 11, pp. 10-11.

in the future if its documents were disclosed, thereby bringing the situation within the scope of paragraph 32 (1)(b). The Committee acknowledges this as a possibility. However, it is our view that paragraph 32 (1)(b) should be interpreted to cover such situations as industry surveys where an agency seeks information from a number of organisations on a basis of confidence with the understanding that it is for survey purposes only and will not otherwise be revealed. Generally, we would not see paragraph 32 (1)(b) applying to individual organisations. Rather the tests to be applied in the case of individual organisations would be whether the information related to trade secrets or to other matter whose disclosure would be reasonably likely to expose the organisation unreasonably to disadvantage. Certainly we would not expect the test of future availability of similar information laid down in paragraph 32 (1)(b) to be invoked in cases where the information sought to be disclosed had been provided in pursuit of some statutory obligation or in the expectation of receiving some government benefit or assistance.

25.31 Another matter which needs to be referred to is the cost of Reverse-FOI procedures. The evidence in the United States indicates that the cost of Reverse-FOI can be very high. In our view, the United States experience is not an accurate guide in the area of costs and should not be used to preclude any attempt at institution of notice and Reverse-FOI procedures here. This view is based on a number of factors. First, the much greater scale and complexity of the United States corporate world compared to our own means that costs are proportionately greater even before other factors are taken into consideration. This scale and complexity means that the process of deciding whether disclosure will reveal trade secrets has been longer and consequently more costly than would be the case in Australia. As well, the costs of litigation in the United States are greater than in Australia. In addition, the Reverse-FOI process in the United States has grown within the established court system, with all the attendant legal formalities and delays of the adversary process. Our recommendations envisage referral of Reverse-FOI matters to the Administrative Appeals Tribunal, a more informal administrative review body used to dealing expeditiously with such matters. This should be a significant factor in reducing costs.

25.32 Recommendation: The Bill should be amended to include provision for:

- (a) notification by an agency to the supplier of documents which come within the terms of clause 32 that the agency has received a request for access to those documents and seeks the supplier's view as to whether disclosure should occur;**
- (b) further notification to the supplier where the agency after consultation has decided to go ahead with disclosure; and**
- (c) a recognised right of Reverse-FOI by means of an appeal to the Administrative Appeals Tribunal by the supplier against intended disclosure.**