

CHAPTER 14

PRIVILEGE, BUSINESS INFORMATION, CONFIDENCE AND CONTEMPT

Section 42: legal professional privilege

14.1 Section 42 provides for exemption by reference to the general law rules governing legal professional privilege. The Australian Taxation Office drew the Committee's attention to the possibility that these rules would not extend to documents prepared in the context of litigation where the author was a non-lawyer employed by the agency.¹

14.2 The Committee takes the view that, if there is any deficiency in the law in this regard, it lies in the scope of the rules governing legal professional privilege. It would not be appropriate for these rules to be varied only in the context of the FOI Act. To do so would lead to an undesirable divergence in the meaning of legal professional privilege as between the FOI Act and the general law.

Section 43: business information

14.3 The Committee received considerable evidence from the commercial sector that it lacks confidence in the various protections afforded by the FOI Act against the disclosure of

1. Evidence, pp. 672-73 and 686-87.

commercially sensitive information.² This concern was echoed in some agency submissions.³

14.4 Requests for business-related documents have proven particularly expensive to process. The IDC estimates the salary and legal costs to the Commonwealth of administering the Act in relation to access to business information was about \$2.8m in 1984-85.⁴ Making broad assumptions, the IDC estimates that just over \$1.0m of this amount could be saved if section 7 was amended to exempt an agency in relation to documents concerning the competitive commercial activities of a business, insofar as the documents contain information which originated with or was received from the business.⁵ Savings to business would also result.

14.5 In addition to the costs of processing requests for business documents, some cost falls upon the Commonwealth as a result of actual or threatened reduction in information flow to it because of business concern that information supplied will be disclosed. The IDC found it impossible to estimate this cost.⁶

14.6 The Committee does not regard it as desirable to deal with this lack of confidence by recommending complete exemption for documents supplied by business and documents relating to

2. Submissions from Mr Paul Martin, p. 1 and attachment, p. 15; the Business Council of Australia, p. 1 (Evidence, p. 771); the Confederation of Australian Industry, p. 1 (Evidence, p. 416); the Australian Chemical Industry Council, p. 1; the Agricultural & Veterinary Chemicals Association, p. 1; CRA Ltd, pp. 1-2 (Evidence, pp. 799-800); the Institute of Patent Attorneys of Australia, p. 2; the Australian British Chamber of Commerce, pp. 1-2; and Alcoa of Australia, Ltd, p. 5 (Evidence, p. 834).

3. Submissions from the Prices Surveillance Authority, p. 1; The Department of the Treasury, p. 10 (Evidence, p. 624); the Australian Taxation Office, p. 5 (Evidence, p. 655); the Australian Broadcasting Tribunal, pp. 3-4 (Evidence, pp. 1012-13); the Department of Trade, pp. 1-2; the Department of Local Government and Administrative Services, pp. 8-9; the Australian Customs Service, p. 34; and the Australian Patent, Trade Marks and Designs Offices, p. 22.

4. IDC Report, p. C1.

5. Ibid., p. 38 (Option B3).

6. Ibid., p. C6.

business. Such an exemption would be too broad. It would, for example, deny access to documents which disclosed failure by a business to comply with product safety or testing procedures.⁷ However, some degree of protection is warranted.

14.7 No cases have been brought to the Committee's notice in which sections 43 and 45 have proven ineffective.⁸ The Attorney-General's Department advised the Committee that the Administrative Appeals Tribunal and the Federal Court have interpreted sections 43 and 45 of the FOI Act so as to give adequate weight to business concerns.⁹

14.8 Mr Robert Gardini of the Confederation of Australian Industry stated to the Committee that:

CAI notes that the courts have provided adequate protection for sensitive commercial information but such protection has been at a cost to industry.¹⁰

14.9 The Committee considers that implementation of the recommendations in respect of reverse-FOI procedures made in chapter 8 above will go some way to reducing the burden upon industry.

14.10 The cost was in part attributed to what was said to be the uncertain operation of the criteria contained in sections 43 and 45.¹¹ The IDC noted that the need to apply these criteria

7. Cf. Submission from the Attorney-General's Department, p. 30 (Evidence, p. 35); second supplementary submission from the Department of Local Government and Administrative Services, p. 4.

8. Evidence, p. 450 (Confederation of Australian Industry), p. 777 (Business Council of Australia).

9. Submission from the Attorney-General's Department, p. 25 (Evidence, p. 30).

10. Evidence, p. 445. See also submissions from Political Reference Service, p. 15 (Evidence, p. 965); the Department of Health, p. 22 (Evidence, p. 1242); and the Australian Customs Service, p. 34.

11. Submissions from the Confederation of Australian Industry, p. 1 (Evidence, p. 416); the Business Council of Australia, p. 2 (Evidence, p. 772); CRA Ltd, p. 6 (Evidence, p. 804).

tended to increase the cost of agency decision-making time and to render decisions prone to costly challenge.¹²

Shifting the onus

14.11 The Business Council of Australia put to the Committee that one way of overcoming the alleged uncertainty was to give prima facie effect to an assertion by a business that it would be unreasonably affected in the relevant sense by disclosure.¹³ The IDC canvassed a similar proposal in relation to section 45.¹⁴ The IDC estimated savings of almost \$1.0m would result from implementation of the proposal. This suggestion was canvassed at a public hearing.¹⁵ The suggestion, if implemented, would place the onus upon the applicant to rebut the assertion by the business. Accordingly, the Committee does not endorse the suggestion.

Exempting specific classes of documents

14.12 Another approach to increasing the effectiveness of the protection given business-related documents is to extend the classes of documents in respect of which agencies are exempt.¹⁶ A number of submissions identified classes which might be added to those presently listed in Schedule 2, Part II of the Act.¹⁷

12. IDC Report, p. C7.

13. Submission from the Business Council of Australia, p. 2 (Evidence, p. 772). See also submission from CRA Ltd, p. 7 (Evidence, p. 805).

14. IDC Report, pp. C9-C11.

15. Evidence, pp. 779-90.

16. Compare IDC Report, p. 42 (Option B9): 'Exemption of specified categories of documents (e.g. of confidential Royal Commissions) by regulation for a period of years'.

17. E.g. submissions from the Department of Trade, p. 10 (documents submitted to the Minister and/or the Department of Trade in regard to export control matters); the Department of Local Government and Administrative Services, p. 9 (all tenders received and contracts executed by or on behalf of an agency); Alcoa of Australia Ltd, p. 5 (Evidence, p. 834) (documents submitted to Department of Trade in respect of the Customs (Prohibited Exports) Regulations); and the Institute of Patent Attorneys in Australia, p. 3 (documents provided by parties to proceedings under the Trade Marks Act).

14.13 The Committee has not examined any of the specific classes proposed. However, the Committee does not object to the general approach provided it is adopted in such a way as not to increase significantly the range of documents exempt. For example, a line-by-line examination of documents within a particular class may regularly result in, say, 99% of the documents being found to be exempt. Exemption of the class would increase the exemption to 100%. But it would eliminate the cost of line-by-line examination to the agency (and to the applicant to the extent that access charges enable cost-recovery). It would also give assurance to business that documents in that class would not be accessible under freedom of information. The 1% increase in exemption is a small price to pay for these advantages.

14.14 The Committee would only endorse this approach if its operation were to be subjected to a further proviso: total exemption should not attach to a class of documents longer than necessary. This reflects the fact that much business-related information loses its commercial sensitivity quickly. In addition, the Committee notes that it is difficult in many areas to define a class of documents with precision. Failure to do so will result in the creation of a fresh area of uncertainty and so defeat the object of the approach.

14.15 The Committee makes no formal recommendation in respect of this approach. Agencies and businesses are free to propose to the Attorney-General's Department particular classes of documents which meet the conditions identified above. The Committee expects that difficulties of definition and in meeting the provisos will result in this approach making no more than a modest contribution to easing agency workloads and business concerns about uncertainty.

Ambit of 'business or professional affairs'

14.16 In a supplementary submission, the Queensland Government drew the Committee's attention to the 1986 Federal Court decision of Justice Beaumont in Young v Wicks.¹⁸ The plaintiff in the case was the senior pilot of the Ministerial Air Unit of the Queensland Government. Freedom of information access was sought to Department of Aviation records in relation to the plaintiff's pilot licence and flying career. One of the grounds on which the plaintiff sought to prevent access was that the documents related to her 'professional affairs' and were therefore exempt by virtue of paragraph 43(1)(c).

14.17 Justice Beaumont referred to the dictionary definition of 'profession' as 'a vocation requiring knowledge of some department of learning or science, esp. one of the three vocations of theology, law and medicine ...'.¹⁹ He recognised that the word 'profession' is not rigid or static in its signification, and concluded that it should be accorded the ordinary meaning applied in 'community usage'.²⁰

14.18 The Queensland Government submitted that the Act should be amended, first to give an extended meaning to the types of occupation falling within the term 'profession' and, secondly to ensure that professionals who are salaried employees (e.g. doctors) are within the scope of section 43.²¹ Because it was unnecessary to do so, Justice Beaumont did not clarify whether the claim failed because the occupation of pilot was not a 'profession' or because an employee was not carrying on a 'profession' in the context of section 43.²²

18. (1986) 11 ALN 176.

19. *Ibid.*, p. 178.

20. *Ibid.*

21. Supplementary submission from the Queensland Government, p. 2.

22. The latter point arose but did not need to be resolved in Harris v Australian Broadcasting Corporation (1983) 5 ALD 545, p. 557.

14.19 The Committee does not consider any amendment is required with regard to self-employed persons because the precise limits of 'profession' are not significant. For example, the work-related affairs of a self-employed real estate agent would fall within the scope of 'business' in the phrase 'business or professional affairs'. It would be unnecessary to decide if the occupation of real estate agent was a 'profession'.

14.20 The issue with respect to employed professionals is less easily resolved because matters relating to their status as professionals may be closely entwined with their status as employees. For example, documents relating to the work of a salaried doctor may relate both to the employer's affairs and to whether the doctor is a fit person to retain a right to practice (and hence arguably to the employee's professional affairs).

14.21 The Committee takes the view that the expression 'professional affairs' should be confined to activities analogous to business. The emphasis should be on the running of a medical, legal etc. practice, not an individual's membership of a professional body or entitlement to practise as a member of the profession.

14.22 In reaching this conclusion, the Committee notes the wording of sub-paragraph 43(1)(c)(i): disclosure which might 'unreasonably affect that person adversely in respect of his lawful business or professional affairs ...' (emphasis added). It is difficult to contemplate situations in which documents contain information which adversely affect the continuing professional status of an individual yet reveal only lawful conduct or conduct which it would be unreasonable to disclose.

14.23 To avoid possible doubts, the Committee recommends that the Act be amended to make clear that 'professional affairs' relates to the running of a professional practice, not the status of an individual as a member of a profession.

'Business affairs' of agencies

14.24 In Harris v Australian Broadcasting Corporation, Beaumont J. held that section 43 was not available to protect the business affairs of the agency receiving the freedom of information request: section 43 applies to protect the business affairs of third parties only.²³ Telecom argued that this interpretation of section 43, combined with what Telecom considered to be deficiencies in other exemption provisions, resulted in an unacceptable gap in the protection afforded to it by the Act.²⁴

14.25 Under the Act, the Australian Telecommunications Commission is given a Schedule 2, Part II, exemption 'in relation to documents in respect of its competitive commercial activities'. However, legal advice to Telecom was that this only exempts from disclosure those documents which relate to commercial activities carried out on a competitive basis at the time the access request is made.²⁵ In the current deregulatory climate, Telecom is concerned that a party could obtain Telecom business plans relating to what is presently a monopoly activity of Telecom and use those plans to assist it to set up in competition with Telecom.

14.26 The Committee agrees that this gap in protection is undesirable.

14.27 The Committee recommends that the Act be amended to ensure that, for agencies engaged in commercial activities, exemption is available for documents relating to non-competitive aspects of those activities where disclosure would be likely to affect adversely the future commercial interests of the agency.

23. (1983) 5 ALD 545, p. 557.

24. Evidence, p. 754.

25. Submission from Telecom Australia, p. 1 (Evidence, p. 749).

Conditional access

14.28 As was noted earlier in the context of section 41, the reason why FOI applicants seek access to information is, in some circumstances, sufficient to render an otherwise 'unreasonable' disclosure reasonable. Accordingly, it may be that the disclosure of a document will not 'unreasonably affect' adversely business or professional affairs if the applicant is simultaneously subjected to restrictions, by way of undertakings, as to the use to which that information may be put. Again, for the reasons which were discussed in the context of section 41, the capacity under section 43 to disclose documents subject to undertakings should be reserved to the Administrative Appeals Tribunal and courts, and be dependent upon the agency having decided to refuse access on the basis of sub-paragraph 43(1)(c)(i).

Section 45: breach of confidence

14.29 Sub-section 45(1) provides that 'a document is an exempt document if its disclosure under this Act would constitute a breach of confidence'. Sub-section 45(2) provides that sub-section 45(1) does not apply to internal working documents of agencies unless the duty of confidence is owed to someone other than the Commonwealth or its employees. The section 45 exemption overlaps with a number of other exemptions. It does, however, provide the sole source of protection for some categories of document.²⁶ Section 45 was relied upon to refuse access in whole 156 times and in part 248 times in 1985-86.²⁷

 26. E.g. Re Baueris and Commonwealth Schools Commission (1986) 10 ALD 77 (documents containing financial data relating to a church school and parishes that support it).

27. FOI Annual Report 1985-86, pp. 282-84.

14.30 The uncertainty said to surround the scope of section 45 was criticised in submissions.²⁸ The uncertainty arises in part because section 45 operates by reference to the difficult and developing general law relating to the protection of confidential information.²⁹ More significantly, interpretations by the Tribunal have expanded the ambit of section 45 so as to protect some confidences that the general law does not protect.³⁰ The extent of the expansion is uncertain,³¹ and the question whether the Act permits such expansion is not beyond doubt.³² Further uncertainty has arisen on whether it is permissible to apply public interest considerations so as to deny, on the facts of a particular case, the protection which would otherwise be conferred by the expanded interpretation given to section 45.³³

14.31 In its 1979 Report, the Committee recommended that what has since become section 45 should be deleted.³⁴ This recommendation was rejected. The then Government considered that it would not be proper for an agency to be required to disclose a document under the FOI Act where that disclosure would breach a confidence protected by the general law.³⁵

28. Submissions from the New South Wales Law Society, p. 4; 'The Age', p. 35 (Evidence, p. 220); CRA Ltd, p. 7 (Evidence, p. 805); the Law Institute Victoria, p. 5 (Evidence, p. 378); and Alcoa of Australia Ltd, p. 7 (Evidence, p. 836).

29. On this general law see Gurry, F., 'Breach of Confidence' in Finn, P.D. (ed), Essays in Equity [Law Book Co. Sydney. 1984] Chapter 6, especially pp. 110-11; Meagher, R.P., and others, Equity: Doctrine and Remedies [2nd edn. Law Book Co. Sydney. 1984] Chapter 41, especially pp. 820-21.

30. The relevant cases are surveyed in Re Baueris and Commonwealth Schools Commission (1986) 10 ALD 77, pp. 83-84.

31. Corrs Pavey Whiting & Byrne v Collector of Customs (13 August 1987) p. 27 (Gummow J).

32. Compare for example both the comment of Beaumont J in Baueris v Commonwealth of Australia (9 June 1987) p. 4, and the decision of the majority in Corrs Pavey Whiting & Byrne v Collector of Customs (13 August 1987) pp. 2-3 (Sweeney J) and p. 6 (Jenkinson J), with the cogent dissent in the latter case, pp. 25-29 (Gummow J).

33. E.g. see Re Baueris and Commonwealth Schools Commission (1986) 10 ALD 77, pp. 83-87.

34. 1979 Report, para. 25.19.

35. Senate, Hansard, 11 September 1980, p. 804.

14.32 The Committee accepts this view. The Committee recognises that the general law is undergoing judicial development, and is, in some respects, uncertain. Therefore the only practical way to ensure that FOI Act protection is at least as wide as the protection given by the general law is by means of an exemption provision that operates by incorporating that general law.

14.33 The Committee does not consider, however, that any wider protection should be conferred by section 45.³⁶

14.34 Accordingly, the Committee recommends that sub-section 45(1) be amended to make clear that it provides exemption where, and only where, the person who provided the confidential information would be able to prevent disclosure under the general law relating to breach of confidence.

Section 46: contempt of parliament and contempt of court

14.35 'The Age' urged the Committee to recommend the abolition of section 46 because it operates by reference to 'the highly uncertain doctrines of contempt of court and contempt of parliament'.³⁷ The Committee notes that the section is rarely relied upon to refuse access,³⁸ and apparently causes no problem in practice.

14.36 The Committee notes that the Parliamentary Privileges Act 1987 clarifies the law on contempt of the Parliament. Further, the Law Reform Commission has completed its review of the law on contempt of court.³⁹ Implementation of its report can

36. Cf. Corrs Pavey Whiting & Byrne v Collector of Customs (13 August 1987) p. 24 (Gummow J): general law is adequate to protect confidences reposed by citizens in government.

37. Submission from 'The Age', p. 36 (Evidence, p. 221).

38. FOI Annual Report 1985-86, p. 32: the section was relied upon six times in 1984-85 and 11 times in 1985-86.

39. Australian Law Reform Commission, Contempt [ALRC35. AGPS. Canberra. 1987].

be expected to clarify the law on contempt of court. In view of this, the Committee does not recommend that section 46 should be amended or repealed.⁴⁰

40. See also 1979 Report, para. 23.12.