



**PUBLIC ACCOUNTS AND
ESTIMATES COMMITTEE**
THIRTY-FIFTH REPORT TO PARLIAMENT
**INQUIRY INTO COMMERCIAL IN
CONFIDENCE MATERIAL AND THE
PUBLIC INTEREST**

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These Members were appointed to the Public Accounts and Estimates Committee prior to the tabling of this report and took no active part in the Inquiry, which was conducted during the 53rd Parliament.

¹ Members were appointed to the Public Accounts and Estimates Committee on 14 December 1999

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The Members of the Public Accounts and Estimates Committee during the term of this Inquiry were:

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² The Parliament was prorogued on 24 August 1999

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⁴ Appointed 3 September 1998 in place of Hon. A Sheehan

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⁷ Discharged from attendance as a Member of the Committee on 21 April 1999

DUTIES OF THE COMMITTEE

The Public Accounts and Estimates Committee is a joint parliamentary committee constituted under the *Parliamentary Committees Act 1968*, as amended.

The Committee comprises ten Members of Parliament drawn from both Houses of Parliament and all political parties and includes an Independent Member.

The Committee carries out investigations and reports to Parliament on matters associated with State financial management. Its functions under the Act are to inquire into, consider and report to the Parliament on:

- (a) any proposal, matter or thing connected with public administration or public sector finances;
- (b) the annual estimates or receipts and payments and other budget papers and supplementary estimates of receipts and payments presented to the Assembly and the Council.

In consultation with the Auditor-General, the Committee determines the objectives of performance audits and identifies any particular issues that need to be addressed during these audits.

GLOSSARY

- Common Law** Derived from custom and judicial precedent rather than legislation.
- Competitive tendering** A term used to describe the process of selecting the most preferred provider or supplier from a range of potential contractors by seeking offers (tenders) and evaluating those offers on the basis of one or more selection criteria.
- Compulsory competitive tendering occurs where managers are required to put services out to tender rather than having a discretion to do so, for example, a requirement (which may be statutory) that certain services will be tendered out, or as in Victoria, where local government authorities were required to subject a certain proportion of their total expenditure to competitive tendering.
- Contempt of Parliament** An offence against the authority or dignity of a House of Parliament or of its members. A breach of parliamentary privilege is a contempt. Parliament has the power to punish for contempt.
- Contract** In this report, the term “contract” is used to describe a legally binding agreement entered into by a government department, government agency or government business enterprise for the supply to it, or on its behalf to others, by a third party (including a government department, government agency or government business enterprise) of goods and/or services. Where relevant, a reference to a contract includes any ancillary documents relating to that contract.

Contracting out	An arrangement whereby an agency enters into a contract with an external supplier for the delivery of services which have previously been provided internally. Contracting out does not necessarily involve seeking competitive bids.
Corporatisation	A process which seeks to establish for a government business enterprise a structure that approximates that which exists for private sector firms and thereby to provide the enterprise with a more commercial focus. Key elements of corporatisation include the establishment of an independent board of directors, the specification of explicit performance targets, explicit funding by the government of community service obligations, the introduction of tax equivalent payments, and a requirement to comply with the provisions of the Corporations Law.
Government Business Enterprise (GBE)	A publicly owned entity providing goods or services on commercial terms with the objective of recovering its costs of production and, in most cases, of providing some financial return to the Government.
Private Companies	In this report private companies is used to describe listed companies in the private sector.
Purchaser/ Provider split	A distinction between the purchaser of a service (agency) and the service provider (supplier). The purchaser, in the context of this report, generally is a public sector agency, while the provider may come from the public, private or not-for-profit sectors. In some cases the purchaser/provider split may be established within an agency, where the head office or policy areas of the department purchases services from divisions or regions. Such an arrangement applies within the Department of Human Services.
Third party information	Information supplied to the Government by third parties, individuals, groups, business etc - about personal and commercial affairs.

ABBREVIATIONS AND EXPLANATIONS

- GBEs - Government Business Enterprises
VCAT - Victorian Civil and Administrative Tribunal

CHAIRMAN'S INTRODUCTION

During the past two decades a wave of public sector reform has swept through the Victorian public sector in the name of improved efficiency, effectiveness, responsiveness and accountability. This report deals with one of the unintended consequences of the growing commercial orientation of the public sector.

The Committee's Inquiry initially arose because the Auditor-General was concerned about the practice of some government agencies in classifying as commercial in confidence, information that he wanted to include in his reports. At that time there was also considerable disquiet in the community that, as the Government increasingly contracted out or commercialised its services, there was potential for less information to be made available to the Parliament and to interested community groups and individuals.

As our Inquiry has highlighted, the use of claims of commercial in confidence to prevent the disclosure of information is one of the greatest challenges to public administration today. It has significant implications for accountability and good governance.

While the Committee acknowledges that there has always been considerable tension between the two principles, the executive government's right to treat sensitive commercial information as confidential and the Parliament's right to know, much of politics and good administration is about achieving the right balance between conflicting interests.

Public acceptance of government, government agencies and the role of public officials depends on trust and confidence; and this in turn depends on the administration being completely transparent whenever possible. Transparency is therefore an essential precondition not only for accountability but also for public confidence in the integrity of government.

The more the government can encourage and develop a culture of openness, the less the Public Accounts and Estimates Committee, the Auditor-General, the courts, Ministers and even officers of the public service will be called upon to exercise the

judgement required in striking the balance between the factors for and against disclosure of information.

This report contains 41 recommendations and a set of guidelines that will assist the government, Ministers, public officials, and the private sector in formulating and assessing claims for commercial in confidence. The Committee believes that it is essential that there should be a strong statement of principles and an unequivocal commitment by the government to a consistent and workable implementation of those principles.

The Committee notes that the government has been elected on a mandate of openness and greater accountability. The implementation of the recommendations contained in this report will go a long way towards achieving these important objectives.

Victoria has attracted attention in recent years for the broad extent of its commercialisation of government activities. It is therefore appropriate that it should be the first of the Australian jurisdictions to adopt a wide-ranging regime of public law reform which specifically deals with the impact of commercialisation on the processes of government accountability.

It is a tribute to the value of the parliamentary committee system that this is a unanimous report. I thank Members of the former Public Accounts and Estimates Committee for their work on this important Inquiry.

The Committee would like to thank the PAEC secretariat, in particular Ms Michele Cornwell and Ms Frances Essaber, for the high quality of its assistance and support throughout the Inquiry and in the preparation of this report.

Finally, on the Committee's behalf, I also thank our legal advisers Ms Moira Paterson and Mr Bruce Dyer for their valuable legal advice.

**PETER LONEY, MP
CHAIRMAN**

EXECUTIVE SUMMARY

Chapter 1 Introduction

In recent years there have been widespread changes to the structure and operations of the Victorian public sector, including significant reforms in the way government services are delivered.

The momentum of the National Competition Policy reforms and the Kennett Government's policy of contestability (including outsourcing) of government services and activities in the delivery of public services, has meant that the Victorian Public Sector has been steadily evolving towards a more private sector orientation.

The effect of these reforms has been a blurring of the boundaries between the private and public sectors and an increased level of interaction between private and public organisations.

These developments have important implications for accountability with the increased reliance on claims of commercial confidentiality which prevented disclosure of government information.

Like other Australian jurisdictions, Victoria has introduced a number of parliamentary, legal and economic measures to ensure there is transparency and openness in the way government operates. These measures play a major role in ensuring that there is an appropriate balance between government accountability, the public interest and the rights of individuals and businesses to claim confidentiality for information provided by them to the government.

This Inquiry arose because the Auditor-General brought to the attention of the Parliament that commercial confidentiality had become an issue of some contention between government agencies and his office. Agencies claimed that some information which the Auditor-General wished to include in his reports to the Parliament, was commercial in confidence and therefore could not be published. This presented a number of difficulties for the Auditor-General because he then had to decide whether these claims were legitimate and, more importantly, whether or not disclosure of such material was in the public interest.

In practice, while there have been delays in making information available to the Auditor-General, access to commercially confidential material has generally not been denied to him. The Committee is, however, aware of at least one occasion when the Auditor-General was denied access to material that was deemed by the Department of Premier and Cabinet to be commercial in confidence.

This report examines these issues and the Auditor-General's concerns about the routine insertion of confidentiality clauses in contracts between government agencies and private sector service providers. The report also considers the implications of these practices for government accountability to the Parliament and the community.

The scope of the report is broad, reflecting the terms of reference, which were to:

- (1) ascertain the legal or other frameworks applying to the concept of commercial confidentiality in the public and private sectors;
- (2) establish the major constructs underpinning the notion of government accountability and the public interest, and outline existing mechanisms and systems that are designed to ensure that the Victorian Government is held accountable for its activities;
- (3) establish what type of information over and above that provided to shareholders of private companies⁸ is considered to be in the public interest or required to be made available to ensure public accountability; and
- (4) establish what principles should guide the application of commercial confidentiality within the public sector in relation to the Auditor-General and the Parliament.

To ensure that the Committee received a wide cross-section of advice on these matters, an issues paper was prepared and widely distributed to government agencies, academia, community interest groups, industry and business groups and interested persons.

The Committee received 94 submissions and written responses to issues raised at the hearings.

⁸ In this report, this term 'private companies' is used to describe listed companies in the private sector.

The vast majority of submissions and most evidence presented at public hearings overwhelmingly supported the views that:

- the Auditor-General should have unrestricted access to commercial in confidence material;
- the changing mechanisms of government service delivery should not have the consequence of decreasing the information available about those services; and
- claims based on commercial confidentiality were now being used too broadly by the public sector as a means of preventing the disclosure of a wide range of information.

Chapter 2 Concept of Commercial in Confidence

This chapter examines the first term of reference which relates to the legal or other frameworks applying to the concept of commercial confidentiality in the public and private sectors.

The Committee's research revealed that the expression 'commercial in confidence' is commonly used as a loose description for information of a commercial nature that would be protected by the common law action for breach of confidence.

The Committee noted that the courts apply a number of public interest qualifications in defining the extent of the duty to treat information as confidential and the ability of persons to sue for breaches of that duty.

Furthermore, actions brought by government agencies to protect governmental information have the additional requirement to establish that disclosure will be contrary to the public interest. This involves balancing the harm to the public interest from disclosing the relevant information, against the public interest in keeping the community informed and in promoting discussion of public affairs.

Although there is a perception by some government agencies that all commercial information concerning the private sector should be considered confidential, the law and practice distinguishes between commercial information that should be protected and information that may be released for reasons of public interest or because it either lacks the necessary quality of confidentiality or was not imparted in circumstances which required it to be treated as confidential.

The distinction reflects several factors:

- the economic cost to the owner of the commercial information if it is released, versus community costs if it is not;
- the extent to which it sheds light on activities for which the government should be accountable and the public interest in the community being informed about the activities of the government;
- the context in which the information has been generated, including whether or not it was supplied on a voluntary basis; and
- the extent to which the information has been kept secret.

The Committee found that the wide interpretation and common usage of the term commercial in confidence throughout the public sector has resulted in a broadening of the scope of commercial confidentiality beyond that which is legally warranted.

The Committee believes that the resolution of what reasonably should be viewed as commercial in confidence material can not be undertaken in an administrative or legal vacuum. In deciding this issue, the government should be guided by the principles of law and community expectations about the conduct of responsible government in Victoria.

Chapter 3 Confidential Commercial Material and Accountability

This chapter examines the second term of reference and outlines the major constructs underpinning the notion of governmental accountability and public interest. It also examines the various political and parliamentary, legal and economic mechanisms that are designed to ensure that the Victorian Government is held accountable for its activities.

The Committee believes that accountability and transparency are fundamental to good government. They are necessary to ensure that public funds are expended for the purpose for which they are appropriated and that government administration is efficient and operates in accordance with law.

Access to information permits the electorate to assess the performance of the government and to participate more effectively in its policy and decision making processes. As pointed out by various witnesses, information plays a vital role in ensuring accountability.

The level of disclosure which is required to enable the Parliament to provide effective oversight of the government may, from time to time, bring to public attention activity which is inefficient, ineffective or otherwise improper. However, the fact that such disclosure may be embarrassing or unwelcome should not provide a justification for its non-disclosure. In fact, it is arguable that access to such information is vital to enable the Parliament to discharge its duty to hold the government to account.

The Committee noted that there have been occasions when governments have not provided information to individual Members of Parliament or to the Public Accounts and Estimates Committee on the basis that it is commercial in confidence. It also noted that in the majority of these cases no explanation was provided as to why disclosure would be harmful to the commercial interests of the state or to third parties or why it would be contrary to the public interest. The Committee views this development with some concern because it has the capacity to undermine and jeopardise accountability and erode confidence in the government.

The *Freedom of Information Act 1982* (Vic) promotes public accountability by requiring agencies to publish and make available specified information and by providing rights of access

to documents in the possession of Ministers and government agencies.

An important feature of the legislation is that it provides for a universal right of access to documentary information in the possession of government departments and agencies and that access is a right, irrespective of any special interest or need.

Documents that contain commercially sensitive information may be exempt from disclosure under several provisions. The most commonly used are s. 34(1), which protects the trade secrets and business affairs of third parties, and s. 34(4), which protects the trade secrets and business affairs of the agency that received the request.

Parliamentary Committees are a key part of the accountability process. While Committees are able to take commercial in confidence evidence *in camera*, they cannot disclose or publish that information. This is contrary to the situation in all other State, Territory and Commonwealth Parliaments.

The Auditor-General is the external auditor of the Victorian Public Sector. His role has been described as ‘the crucial link in the process of accountability to the taxpayer on the utilisation of funding’. The reports of the Auditor-General on performance and financial issues are an essential element in the operation of democratic government.

The Ombudsman also has an important role in shedding light on matters of maladministration and has broad powers to gather evidence, including access to commercially sensitive material if necessary.

The Office of the Regulator-General has broad powers to obtain information and is subject to the operation of the Freedom of Information Act. However, the Regulator-General is specifically precluded from disclosing documents that fall within one or more of the exemption provisions contained in the Act.

Rights to appeal from administrative decisions have become an increasingly important accountability mechanism. In Victoria, most rights of appeal involve a full appeal on the merits to the Victorian Civil and Administrative Tribunal.

The Victorian Civil and Administrative Tribunal has quite broad powers to allow it to gain access to commercially sensitive material that may be relevant to the performance of its functions.

Judicial review of administrative action is the most basic and fundamental of the legal mechanisms by which government is held accountable. The powers of a court engaging in judicial review, to access and use relevant commercially sensitive material are limited, in theory, only to the extent that privilege can be established. However, in practical terms, there is an inevitable link between the treatment of commercial confidentiality mechanisms and the availability of judicial review.

Increasingly, Australian governments have sought to expose the public sector to 'economic' accountability mechanisms. Various policies and developments in Victoria have contributed to the introduction of these mechanisms. The Committee believes that the treatment of commercial confidence claims may have the potential to undermine the effectiveness of these mechanisms and that there is a degree of tension or conflict between these newly developed mechanisms and traditional legal and political mechanisms.

The Committee found that if the use of commercial in confidence is permitted to operate too broadly and, in particular, if it is allowed to restrict the supply of adequate information to the Auditor-General; individual parliamentarians and parliamentary committees, it will reduce the level of political accountability and the community's confidence in the activities of government. In these instances, government could be vulnerable to claims which it is prevented from refuting.

The increasingly complex arrangements for government service delivery and the devolution of responsibility to deliver services, present major challenges for accountability. These new arrangements highlight the need for the Parliament to adopt new procedures for dealing with commercial in confidence material.

The Committee noted that the possible options for treating material as commercially sensitive are more varied than the simple alternatives of permitting unrestricted public access or requiring complete confidentiality.

Chapter 4 Comparison with information provided to Shareholders

The third term of reference required the Committee to give consideration to what type of information over and above that provided to shareholders of private companies, should be

considered to be in the public interest, or required to be made available, to ensure public accountability.

The position of a small shareholder of a large listed company is probably the closest private sector analogy of the relationship between voter and government.

The information rights of shareholders usually oblige the company or its directors to disclose information publicly or communicate information to shareholders. A number of requirements such as the Corporations Law and the continuous disclosure requirements of the Australian Stock Exchange Listing Rules can operate to require disclosure of confidential material to shareholders.

It is possible for decision makers in the public sector to be subjected to personal, civil or criminal liability, but that is far less likely to occur than it is for directors of private sector companies. Directors are subject to a number of disclosure obligations; breach of such obligations can lead to personal, civil and even criminal liability.

The Committee has highlighted the strengths of the information rights of shareholders to counter the suggestion that Corporations Law mechanisms are able to ensure accountability without providing substantial rights of access to information. While the information rights of listed company shareholders are not insubstantial, they are more narrowly focused than those in the public sector.

The narrow focus of these rights is not a concern to the vast majority of shareholders, because it coincides with what they consider important.

However, public concerns for the performance of government are necessarily broader than shareholders' concerns. Additionally, the goals of government are broader than those of an ordinary commercial company and the legitimate interests of the community are broader than those of shareholders. This suggests that the range of information that is publicly available must also be broader for government activities. Financial accountability alone will not suffice.

The management of private sector companies is held accountable by several important mechanisms that have no real equivalent in the public sector. This means that the shareholder analogy is of limited use as a guide to necessary public sector information disclosure requirements.

The Committee believes that, in relation to government business enterprises, the government is not acting on its own behalf, but rather on behalf of the public. Consequently, there needs to be mechanisms to ensure that:

- the government is in fact exercising its rights as shareholder to obtain the necessary information; and
- enough information is made available to ensure that the relevant Ministers (or other persons) are held accountable for the way in which they exercise their powers as shareholders of the corporatised body and oversee the use of public resources.

Chapter 5 Confidential Commercial Material in the Victorian Public Sector

The fourth term of reference required the Committee to establish what principles should guide the application of commercial confidentiality within the Victorian Public Sector in relation to the Auditor-General and the Parliament.

This chapter examines the widespread use of commercial in confidence claims in the public sector and the potential this has to undermine accountability mechanisms.

The Committee believes that it is necessary, in considering how to deal with confidential commercial material, to distinguish material that has been generated by or for government from material that has been provided to government by third parties.

Private sector enterprises resist disclosure of commercially sensitive material either because it may be used by competitors to compete more effectively, or it may prevent the full exploitation of some profit making opportunity. However, profit maximisation is not a significant goal of government. The function of government is to serve the public interest.

The Committee considers that the Auditor-General and the Ombudsman must have unrestricted powers to access commercially sensitive material for the purpose of performing their functions. It seems unlikely that such access, without any further dissemination, would ever cause any harm to the commercial interests of those holding such information.

Several submissions suggested that the principle of competitive neutrality reform require GBEs that operate in a competitive

environment to not be subject to disclosure requirements that exceed those imposed on their private sector competitors. The Committee believes this argument must be rejected.

The Committee considers that it is desirable to develop some general criteria for what can be properly accepted as establishing a claim of commercial confidentiality. These are discussed in detail in Chapter 6.

The Committee considers that the question of how to deal with commercial confidentiality within contracting out and competitive tendering is of the utmost importance. There is a strong possibility that accountability could be seriously undermined by a convergence of vested interests of administrators (as purchasers) and contractors (as providers).

The greatest unfairness resulting from disclosure of commercially sensitive material arises where the material has been provided to the government in the expectation that it will be treated as confidential. If it is made clear from the outset that the material will belong to the government, then the contractor has the opportunity to tender at a price that allows for the cost of complying with such requirements, or decide not to tender.

The Committee believes that the use of confidentiality clauses should be kept to an absolute minimum and that contracts should instead contain specific terms stating that their contents are *prima facie* public.

Chapter 6 Tendering and Contracting Out

This chapter examines the government tendering and contracting out arrangements and their implications for commercial in confidence issues.

Various witnesses pointed out to the Committee that in all cases it is important to differentiate between disclosure before the selection of the successful tender or completion of a contract, and disclosure after the event.

The Committee noted broad acceptance that the identity of the successful tenderer and the overall price of the tender should be disclosed after the completion of the tender process. In this context, the Committee also noted that an unsuccessful tenderer at the Commonwealth level is entitled to seek information about who was the successful tenderer and what price was accepted.

The Committee found that there is support for the publication of information about contracts that have been finalised, although there are concerns about possible harm to the competitive position of the contractor, especially in relation to material that could appropriately be classified as ‘trade secrets’.

Access to information about the selection process generally only arises in the context of applications under the Freedom of Information Act, and such information may fall within one or more of the exemption provisions in that Act. The Committee believes that decisions concerning access to the full range of tender documents are most appropriately resolved within the framework of that legislation, but that the relevant decision maker should be required to provide a summary of the reasons for selecting the winning tender.

The question of access to information about the performance of the contract is also most appropriately dealt with under the Freedom of Information regime.

The Committee believes documents that should be brought within the ambit of the Freedom of Information Act include:

- **those documents that directly relate to the performance of the contractors’ obligations under the contract; and**
- **those documents that either directly or indirectly relate to contractor services provided to government in circumstances where the contractor does not supply substantially similar services to the private sector.**

It is the Committee’s view that there should be a specific requirement for contracting parties to identify those parts of a contract that are claimed to be confidential and to specify their reasons for making such claims. There should also be some external monitoring of confidentiality claims in contracts.

The Committee believes that legislative changes are needed to protect the integrity of governmental accountability and the access rights of the Auditor-General.

Chapter 7 Freedom of Information

This chapter examines the role of the Freedom of Information Act in ensuring accountability while seeking to strike an appropriate balance between the public interest in transparency

and the need to protect the legitimate interests of the government and its agencies and of third parties.

Decisions concerning the disclosure of commercially sensitive material produced by government agencies require the balancing of two competing sets of public interests. These are the public interest in ensuring Victorian government agencies are able to operate as effectively as possible, and the public interest in ensuring political and financial accountability.

Refusing disclosure (which is otherwise required for accountability purposes) should not be justifiable solely on the basis that the profitability of a government enterprise will be adversely affected. Rather, it must be established that disclosure will interfere with the proper and efficient performance of government functions to such an extent as to outweigh the benefits that would flow from public release of the information and improving accountability.

The exemption provisions most frequently relied upon to protect commercial information, ss. 34 (1) and 34(4), have both recently been amended to minimise their potential to undermine proper accountability on the part of the agencies and third parties which engage in commercial transactions with the government.

However, the Committee believes that the continuing blanket protection for information that relates to trade secrets is unnecessarily wide and that clear guidelines are needed as to which factors should be taken into account in assessing the reasonableness of disclosure.

The Committee believes that information generated in the context of competitive tendering and contracting out warrants specific attention due to the potential for corruption and the problems arising from a convergence of interests in maintaining secrecy.

Chapter 8 Conclusions

On the basis of its deliberations, the Committee reached a number of important conclusions outlined below.

The Committee believes that open and accountable government can be undermined by the overuse of commercial confidentiality reasons to deny the Parliament and the public access to information.

The Committee is concerned that the previously broad exemption provisions under the Freedom of Information Act created an environment in which agencies regularly claimed blanket exemptions for any information relating to their commercial dealings. It is also concerned that agencies have sought to rely on claims of commercial confidentiality to restrict effective oversight of the government's financial and administrative functions by the Parliament and its Public Accounts and Estimates Committee.

The Committee believes that the Auditor-General and the Ombudsman should have unrestricted rights of access to commercial information and should be able to publish that material whenever it is in the public interest to do so.

The Committee is particularly concerned about the indiscriminate use of confidentiality provisions in government contracts and the potential for such provision to preclude proper scrutiny both of the government's role as contractor and the performance of the contractual duties of contractors.

The Committee believes that key information about tenders and contracts should be made publicly available. While some provisions in contracts may be legitimately confidential, confidentiality should not be permitted where it creates a misleading impression or where it impedes the Parliament in the discharge of its constitutional role of scrutiny of the Executive Government.

The Committee believes that it is important, both for the guidance of public officers and for ensuring fairness to tenderers and contractors that the Committee's draft guidelines for assessing claims for commercial confidentiality be adopted.

The Committee supports the view that the decision as to whether or not to disclose commercially sensitive information should be made according to the general principle that information should be made public unless there is a justifiable reason for withholding access to it.

The Committee is concerned that although transparency and government accountability in public administration and service provision have been enhanced over the past decade by the Freedom of Information Act, the contracting process has the potential to undermine existing accountability mechanisms and systems.

The Committee is of the view that if the contracting out of government services becomes more widespread, these practices

could close off large areas of service provision from public scrutiny and accountability without any public debate or parliamentary scrutiny.

Where confidentiality clauses do exist, they must not override legislative provisions that require information to be included, for instance in tabled financial statements or annual reports. They also must not limit the capacity of the Auditor-General to report to the Parliament.

The Committee believes that the Parliament has the right, as well as the obligation, to examine commercial documents where that examination is necessary to properly acquit its functions.

The Committee found that the impetus for classifying information about commercial dealings as commercial in confidence has come from within government rather than from the private sector. The Committee is of the opinion that this practice is totally unacceptable and contrary to the spirit of the Westminster system of governance.

KEY FINDING AND RECOMMENDATIONS

KEY FINDINGS:

Chapter 1 - Introduction

1. In order to effectively perform the audit role, the Auditor-General must have access to all information relating to the cost of providing publicly funded services. This includes information that may have been considered by a government agency to be commercial in confidence.
Page 1
2. It is important to ensure that the changing mechanisms of government service delivery do not have the effect of decreasing the information about government services which is available to the Auditor-General, the Parliament or the community.
Page 1
3. It is becoming routine practice for confidentiality clauses to be inserted in contracts between government agencies and private sector service providers.
Page 1
4. Claims based on commercial confidentiality are now being used too broadly by the public sector as a means of preventing disclosure of a wide range of information.
Page 1

Chapter 2 – Concept of Commercial in Confidence

5. The wide interpretation and common usage of the term commercial in confidence has resulted in a broadening of the scope of commercial confidentiality beyond that which is legally warranted.
Page 15

6. The determination of what should be reasonably viewed as commercial in confidence material should be guided by the principles of law, but also by community expectations about the conduct of responsible government in Victoria.

Page 15

Chapter 3 – Confidential Commercial Material and Accountability

7. Publicly available information on the operations of the public sector enhances government accountability and ensures impartial and ethical public administration and transparency in the operations of government.

Page 21

8. If permitted to operate too broadly and to prevent the supply of adequate information, commercial confidentiality could reduce the level of political accountability. In these instances, government could be vulnerable to claims which it is prevented from refuting.

Page 21

9. The increasingly complex arrangements for government service delivery, particularly the contracting out of public services to private enterprises and the devolution of financial management to line managers, are challenges to public accountability. This highlights the need to adopt new procedures for dealing with commercial in confidence material.

Page 21

10. The possible options for treating commercially sensitive material are more varied than the simple alternative of permitting unrestricted public access or requiring complete confidentiality.

Page 21

Chapter 4 – Comparison with Information provided to Shareholders

11. There is a suite of laws and standards that set out minimum disclosure requirements in the private sector. Because of past abuse (real or perceived) by management in being accountable to shareholders, there has been a growth in the volume, frequency and quality of information that publicly listed companies are obliged to provide to their shareholders, notwithstanding any arguments about the commercial sensitivity of that information.
Page 57
12. Disclosure requirements in the private and public sectors have in common the need for management/governments to account for their use of delegated powers to shareholders/Parliament.
Page 57
13. Since the goals of government are broader than those of an ordinary commercial company (in the same way that the legitimate interests of the community are broader than those of shareholders), the range of information that is publicly available must also be broader for government activities. Financial accountability alone will not suffice.
Page 58
14. The existence of important accountability mechanisms in the private sector that have no real equivalent in the public sector means that the shareholder analogy is of limited use as a guide to necessary public sector information disclosure requirements.
Page 58

Chapter 5 – Confidential Commercial Material in the Public Sector

15. Government agencies have used commercial confidentiality exemptions to prevent the disclosure of information to individual parliamentarians, to the Public Accounts and Estimates Committee, to the Auditor-General and to the community.
Page 71
16. It is unlikely that much of the material for which such exemptions have been claimed, would stand up to serious scrutiny as being legitimately commercially confidential.
Page 71

17. On occasions, government agencies are using the pretext of commercial confidentiality as a shield against the disclosure of information which is commercially embarrassing to the government or which raises issues of probity.
Page 71
18. Parliamentary Committees, the Auditor-General and the Ombudsman must have unrestricted powers to access commercially sensitive material held by government agencies and third parties for the purpose of performing their functions.
Page 72
19. Parliamentary Committees, the Auditor-General and the Ombudsman should have the legislative authority to report commercial in confidence material when it is in the public interest for the information to be revealed.
Page 72
20. Information generated within government should not be classified as commercial in confidence, unless it can be demonstrated that disclosure will interfere with the proper and efficient performance of government functions to an extent that would outweigh the benefits of improved accountability.
Page 72
21. Information generated in the context of contracting out requires particular attention because of the convergence of vested interests (of public officials, as purchasers, and contractors, as providers) in restricting access to information and the potential for confidentiality clauses to undermine accountability mechanisms.
Page 72
22. The use of confidentiality clauses should be kept to an absolute minimum and contracts should instead contain specific terms stating that their contents are *prima facie* public.
Page 72

RECOMMENDATIONS:

The Committee recommends that:

Recommendation 5.1:

The resolution of confidentiality matters in the public sector should be guided by principles that accord with the rules of law and the values that

form the basis for responsible government in Victoria.

Page 77

Recommendation 5.2

When considering the withholding of information on the grounds of confidentiality, government should observe the general principle that information should be made public unless there is a justifiable reason not to do so.

Page 77

Recommendation 5.3

Decision makers should recognise that commercial in confidence provisions reduce the scrutiny available to Parliament and the community over government decision making and use of public funds, and that their use as a tool in managing the government's relationship with service providers should be avoided.

Page 77

Recommendation 5.4

Where information about the government's management of expenditure is limited by confidentiality provisions, the government should provide an explanation to the individual or organisation requesting the information as to the public benefit achieved by agreeing to withhold the terms of the commercial arrangements from scrutiny.

Page 78

Recommendation 5.5

The Auditor-General and the Ombudsman should have unrestricted powers to access information considered to be commercially sensitive for the purpose of performing their functions.

Recommendation 5.6

Commercial in confidence considerations should not prevent the Auditor-General or the Ombudsman from disclosing information where they assess its disclosure to be genuinely in the public interest.

Page 78

Recommendation 5.7

The Parliamentary Committees Act should be amended to provide that a joint standing parliamentary committee can order the publication of commercial in confidence evidence taken *in camera*, when it determines that it is genuinely in the public interest for the information to be disclosed.

Page 78

Recommendation 5.8:

Before a joint standing parliamentary committee authorises the disclosure of evidence taken *in camera*, the witness who provided the evidence should be given reasonable prior opportunity to object to the disclosure and to ask that particular parts of the evidence should not be disclosed.

Page 78

Recommendation 5.9:

- (a) Where information is withheld from a joint standing parliamentary committee established under the Parliamentary Committees Act, on confidentiality grounds, the reasoning behind the decision must be provided in writing by the relevant Minister to the committee.**
- (b) A procedure should be put in place with the Ombudsman so that where a parliamentary committee finds the Minister's**

reasoning inadequate, it may refer the matter to the Ombudsman who shall provide independent advice.

Page 79

Recommendation 5.10:

To ensure transparency in the operations of government, Ministers must remain accountable for all aspects of their agencies' operations and financial management, including services contracted out and GBEs, in order to provide information and explanations to the Parliament.

Page 79

Recommendation 5.11

All government contracts should contain a standard clause which states that the contents of contracts are subject to legal requirements concerning disclosure and are *prima facie* public.

Page 89

KEY FINDINGS:

Chapter 6 – Tendering and Contracting Out

23. The sensitivity of commercial information is not indefinitely uniform. Commercial information is particularly valuable when it relates to the future (to plans not yet implemented or tenders not yet awarded).

Page 91

24. After the potential benefits have been secured by contracts, deeds or agreements, the sensitivity or value of commercial information used to secure those agreements is significantly reduced.

Page 91

25. The distinction between 'ex-ante' and 'ex-post' commercial information is evident in a wide range of laws and practices concerning the release of commercial information.

Page 91

26. From a public accountability perspective, the present rules and guidelines concerning the disclosure of information about tenders and contracts are inadequate. Page 91
27. While there may be good reasons for protecting confidentiality prior to the completion of the contractual process, there has been inadequate disclosure of information, both about tenders and contracts after contracts have been awarded. Page 92
28. Issues of fairness raised by disclosure of such information can be resolved by developing procedures to ensure that tenderers are aware of the necessary disclosure requirements prior to submitting commercially valuable information. Page 92
29. The Auditor-General and agencies have not had full access to the records and premises of contractors that are providing services on behalf of the government. Page 92

RECOMMENDATIONS:

The Committee recommends that:

Recommendation 6.1:

Legislation should be enacted to require specified information about all tender documents and the resulting contract to be made publicly available⁹ once the tender has been awarded (overriding any confidentiality clauses), unless application is made at that time to restrict publication.

Page 115

Recommendation 6.2:

Public information about tenders should include:

⁹ The most cost effective way to do so would be by means of a free public database made available via the Internet

- (a) the identity of the tenderer; and**
- (b) the tender price.**

In the case of major contracts it should also include sufficient information about the relevant performance criteria to allow for an assessment of the integrity of the tender process.

Page 115

Recommendation 6.3

Public information about contracts should include:

- **the full identity of the contractor, including details of cross ownership of relevant companies;**
- **the duration of the contract;**
- **details of any transfer of assets under the contract;**
- **all maintenance provisions in the contract;**
- **the price payable by the government agency and the basis for changes in this price;**
- **any renegotiation and renewal right;**
- **the results of any cost benefit analysis;**
- **details of any risk sharing in the developmental and operational stages of the contract;**
- **details of any sanctions for non-performance;**
- **any significant guarantees or undertakings, including any loans, agreed to or entered into; and**
- **any other information required by statute to be disclosed to the Australian Securities Commission and made available to the public.**

Recommendation 6.4

The principles and guidelines contained in Attachment 1 of this Report (*see page Iv*), should be adopted by the government as the basis for the treatment of commercial information held by Victorian Government Departments and Agencies.

Page 116

Recommendation 6.5

Applicants should be advised in the tender documents that, as a precondition of doing business with government, they must be prepared for certain details contained in any tender and contract to be made public.

Page 117

Recommendation 6.6

Prior to tenders being submitted, agencies should ensure that applicants are made aware of the limits of what will and what will not be considered as commercial in confidence. The information which is non-confidential must include all information listed in Recommendations 6.2 and 6.3 unless specific exemptions are approved by the Ombudsman.

Page 117

Recommendation 6.7

Before the closing date of tenders, applicants should notify the relevant agency of their intention to seek exemption of information which would otherwise be required to be made public. Any claims for commercial in confidence must be justified on the basis of the specific harm that will result from the disclosure of information.

Page 117

Recommendation 6.8

A tenderer who applies for information to be classified as commercial in confidence should have the opportunity to withdraw that tender, before the closing date, if the application to restrict disclosure of information is rejected, or to change the terms of the tender to take account of disclosure.

In the event that a tender is withdrawn, before the closing date, all information relating to its content should be treated as confidential with the exception of the name of the tenderer, the tender price and the date of withdrawal of the tender.

Page 118

Recommendation 6.9

Before an agency can include in a contract a confidentiality clause, in respect of information generated by or for the government, it must be able to demonstrate that the relevant Minister has agreed that disclosure will interfere with the proper and efficient performance of government or commercial functions to such an extent as to outweigh the benefits that would flow from placing the information in question in the public domain.

Page 118

Recommendation 6.10

Protocols should be developed for government departments and agencies to follow before the classification of commercial in confidence is applied to material and that these protocols be signed off at ministerial level.

Page 118

Recommendation 6.11

A contract which includes a confidentiality clause in respect of any of the material detailed in Recommendation 6.3 must be submitted to the Ombudsman for approval prior to being signed off by the relevant agency.

Page 118

Recommendation 6.12

In determining whether a claim for commercial confidentiality is justified, the onus of proof should be with the tenderer, who should be required to substantiate that disclosure would be harmful to their commercial interests.

Page 119

Recommendation 6.13

Where information is approved by the Ombudsman as warranting protection by a confidentiality clause, it should be withheld only for the minimum time necessary to protect justifiable commercial sensitivities. At the time of approving the application, the Ombudsman should specify a maximum time limit for non-disclosure.

Page 119

Recommendation 6.14

Departments and agencies should include provisions in contracts which require contractors to provide all necessary information to enable the Auditor-General to fulfil his role as the external auditor of all government agencies.

Page 119

Recommendation 6.15

Contracts should specify the appropriate standard of record keeping that contractors must maintain to ensure accountability and access to information.

Page 119

Recommendation 6.16

- (a) The *Ombudsman Act* 1973 should be amended to provide for the Ombudsman to assume the additional function provided for in Recommendation 6.11;**
- (b) The government should provide the Ombudsman with such additional resources as are necessary to deal with the functions outlined in this report.**

Page 120

Recommendation 6.17

Agencies should include standard provisions in their contracts that require contractors to keep and provide all necessary information to allow for proper parliamentary scrutiny of the contract and its management.

(Note: The information required to meet this need will vary from contract to contract according to a number of factors including the value of the contract, the nature of the service to be delivered under the contract and the characteristics of the service recipients.)

Page 120

Recommendation 6.18

A new sub-section 12(4) should be included in the Audit Act:

“Without prejudice to the powers conferred by any other provision of this Act, the Auditor-General or an authorised person is entitled to full and free access at all reasonable times to any documents or other property in the possession of, or under the control of, any body or person which relate to any services provided by that body or person to a government department or agency”.

Page 120

Recommendation 6.19

A new sub-section 12(5) should be included in the Audit Act:

“When the Auditor-General seeks access to records held by a government agency or a contractor, the agency or contractor must comply within a period specified by the Auditor-General”.

Page 121

Recommendation 6.20

That all government contracts include model access clauses that ensure access to contractors premises and to contractors records by agencies and the Auditor-

General (see Attachment 2 of this Report, page lxvii).

Page 121

Recommendation 6.21

Prospective applicants for government tenders should be supplied with an information sheet that explains all these new procedures.

Page 121

Recommendation 6.22

There should be a clear distinction drawn between the disclosure of information before and after the signing of a contract. Information about tenders and contractual terms should be classified as commercial in confidence until the signing off of a contract.

Page 121

Recommendation 6.23

All departments and agencies should regularly provide training to staff:

- (a) on the principles of transparency and openness reflected in the proposed guidelines for the treatment of commercial information held by Victorian agencies and, in particular, the meaning and application of the exemption provisions; and**
- (b) to emphasise that information should not automatically be treated as commercial in confidence purely because it is of a commercial nature or even of a sensitive commercial nature.**

Page 121

Recommendation 6.24

The performance agreements of all senior officers in the public sector should include a provision that requires them to uphold the principles enshrined in the Freedom of Information Act.

Page 122

KEY FINDING:

Chapter 7 – Freedom of Information

30. The continuing blanket protection for trade secrets is unnecessarily wide and clear guidelines are needed as to which factors should be taken into account in assessing the reasonableness of disclosure.

Page 123

RECOMMENDATIONS:

The Committee recommends that:

Recommendation 7.1

Section 34 of the Freedom of Information Act should be amended by inserting a new subsection after s. 34(4). This should provide:

In deciding whether disclosure of information would expose an agency unreasonably to disadvantage for the purposes of sub-section (4), an agency or Minister must satisfy one or more of the following considerations –

- (a) there is a real risk that disclosure would prejudice contractual negotiations or the agency's ability to attract, select or retain suitably qualified employees;**
- (b) the information is likely to be exploited in a way that does not benefit the general public due to the market power of the enterprise by which it will be exploited; for example, where there is a lack of contestability due to the existence of barriers to entry into that specific market;**
- (c) the disclosure may impair important governmental or regulatory functions;**

- (d) there is the potential to use the information to realise substantial profits in other jurisdictions;**
- (e) there are no considerations in the public interest in favour of disclosure which outweigh considerations of damage to the competitive position of the agency, for instance, the public interest in revealing evidence of some wrongdoing or in shedding light on some matter that has been the subject of ongoing controversy.**

Page 125

Recommendation 7.2

Section 34(1) of the Freedom of Information Act should be amended to read:

A document is an exempt document if its disclosure under this Act would disclose

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trade secrets belonging to a business, commercial or financial undertaking; or

information of a business, commercial or financial nature acquired by an agency or a Minister from a business, commercial or financial undertaking-

that would, if disclosed, be likely to expose the undertaking unreasonably to disadvantage.

Page 129

Recommendation 7.3

Section 34(3) of the Freedom of Information Act should be amended to require agencies to consult with undertakings in relation to decisions under s. 34(1)(a) as well as those under s. 34(1)(b).

Recommendation 7.4

Sub-section 34(2) of the Freedom of Information Act should be amended by inserting additional paragraphs that refer to:

- **the question as to whether the documents reveal any unethical or dishonest behaviours or practices;**
- **the question as to whether the information sheds any light on the activities of the government; and**
- **the question of the appropriateness of any undertakings relied upon to argue against disclosure of commercial in confidence information.**

Recommendation 7.5

Section 34(3) of the Freedom of Information Act should be amended to make it clear that there is no requirement to consult in respect of information which is required to be disclosed under other legislation.

Recommendation 7.6

Section 34 of the Freedom of Information Act should be amended to include an additional subsection which excludes from the operation of s. 34(1) any material in a contract which has not been previously identified and approved as requiring confidential treatment for a period which extends beyond the date of the request. This amendment should be restricted to information relating to contracts which were concluded after the date of introduction of the screening requirements.

ATTACHMENT 1

Draft Principles for the Treatment of Commercial Information Provided to Victorian Government Agencies by Individuals and Organisations

INTRODUCTION

This paper provides a set of key principles or guidelines to assist Victorian government agencies in their handling of commercial information provided by persons and bodies outside the public sector. These principles are designed to complement existing obligations under the *Freedom of Information Act 1982 (Vic)* in relation to the disclosure of documentary information held by government agencies.

To ensure government accountability to Parliament and to the people of Victoria, agencies may be required to disclose to Parliamentary Committees, the Auditor-General, the Ombudsman and members of the public, information of a commercial nature supplied to them by third parties. All agencies are required to adhere to the principles of transparency and openness specified in the Freedom of Information Act by providing as full a disclosure as possible. Agencies should note that there may be circumstances in which it is not appropriate to give an undertaking to treat information as confidential.

In the case of information supplied voluntarily (for example, in the context of a tender or contractual negotiations), ordinary principles of fairness require that information providers be informed in advance about whether all or any of their information will be treated as confidential and, if so, for how long. They should also be informed about legislation which requires the publication of information concerning tender and contracts and which outlines procedures for the certification of commercial in confidence claims.

Information providers also need to be made aware of the government's obligations to ensure transparency in its reporting to Parliament of the full costs of providing services. This means that a cost of doing business with government is that information can be treated as confidential only if its disclosure is likely to result in a loss of valuable intellectual property or some other commercial harm.

Where an agency has given an undertaking of confidentiality, it is under an obligation to ensure that the relevant information is adequately protected. Care must be taken to ensure that it is not disclosed to persons who fall outside the terms of the undertaking, except where such disclosure is required by law.

In the case of applications for access under the Freedom of Information Act, it is important that information providers, individuals or organisations, be consulted prior to any decision being made concerning disclosure.

In many cases, information concerning commercial dealings between an agency and a third party will also shed light on the operations of the agency and the third party. It is not appropriate for agencies to encourage third parties to request confidentiality with a view to protecting their own information from disclosure. It is not appropriate for agencies to seek to protect their own information by relying on arguments based on the need to protect the commercial affairs of third parties.

In general, it will be appropriate for agencies to withhold information on the basis that its disclosure will harm their own affairs (as opposed to those of third parties) only where the information falls within the scope of section 34(4) of the Freedom of Information Act. This section requires that agencies must be able to demonstrate that the information contains:

- some trade secret; or
- in the case of an agency engaged in trade and commerce information of a business, commercial or financial nature that would, if disclosed, expose it unreasonably to commercial disadvantage.

Alternatively, the information will not be required to be disclosed if it contains the results of scientific or technical research undertaken by an agency officer which could lead to a patentable invention; and that the disclosure of the information would be likely to expose the agency to disadvantage.

Another provision which may be relevant is section 36(b) of the Freedom of Information Act, which exempts from disclosure documents containing instructions issued to, or provided for the use or guidance of, officers of an agency on the procedures to be followed in various processes including:

- negotiation;
- the execution of contracts; and

- other similar activities relating to the financial, property or personnel management and assessment interests of the Crown or agency.

With a view to achieving greater accountability and transparency in government reporting, the Committee has developed the following set of principles. They are designed to assist agencies, including government business enterprises and other statutory authorities (excluding bodies that have been fully privatised), to identify the limited circumstances in which information provided to them by individuals and organisations should be considered as commercial in confidence.

KEY PRINCIPLES

Agencies should apply the following principles in dealing with commercial information provided by third parties:

- **Victoria's system of government requires that government agencies are responsible to Parliament, and that they should provide Parliament with the information that is necessary to ensure the proper oversight of their activities;**
- **the democratic objectives that are reflected in the Freedom of Information Act, section 3, require that, subject to a number of specified exemptions, members of the public should have access to documents in the possession of government agencies;**
- **the fact that information is of a commercial nature or even of a sensitive commercial nature, does not mean that they should automatically agree to treat it as commercial in confidence;**
- **confidentiality should be agreed to only in circumstances where it is justified by the nature of the information, the circumstances in which it is imparted and the likelihood of actual harm to the commercial interests of the individuals or organisations which provide the information, and only after having regard to any countervailing interests in favour of disclosure;**
- **in assessing whether or not there is a public interest in disclosure, agencies should bear in mind that both the Parliament and the public have rights of access to information which enhances understanding of the activities of government agencies and which is necessary to monitor the use of public funds and the probity and integrity of the processes used;**

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while a classification of confidentiality may be helpful in terms of ensuring that documents are accorded appropriate security within an agency they are not of themselves, determinative. For example, such an undertaking will not necessarily preclude disclosure under the Freedom of Information Act. It is therefore essential that any such classification be determined on the basis of these guiding principles; and

- **where information falls within s. 33 or s. 34(1) of the Freedom of Information Act (the exemption provisions that are intended to protect the personal privacy and business affairs of third parties) such information should not be disclosed, except to the Auditor-General and other persons or bodies that have the legal power to require its disclosure, without reasonable steps being taken to consult the person or business that provided it. (This duty to consult does not apply in respect of legislation that requires the publication of information concerning tenders and contracts.)**

ARRANGEMENTS CONCERNING FUTURE DEALINGS

- **In any future dealings with third parties who propose to provide information on a voluntary basis (for example, in the context of contractual negotiations) government agencies should inform them (wherever possible in writing) that:**
- **government agencies are required to act in accordance with a policy that favours disclosure to the public of information concerning their commercial dealings;**
- **government agencies have a duty to disclose information to the Auditor-General, the Ombudsman, Parliamentary Committees, the responsible government Minister or the courts as well as to the public under the Freedom of Information Act or under other legislation which requires the publication of information concerning tenders and contracts;**
- **confidentiality will be afforded only in accordance with these guidelines and, in the case of tenders and contracts, in accordance with any procedures set out in specific legislation;**

- individuals or organisations bear responsibility for identifying clearly, in writing, any information they believe is confidential and for justifying any claim for confidentiality; and
- agencies must, in consultation with individuals or organisations, or in accordance with any procedures established under legislation requiring the disclosure of information about tenders and contracts, resolve which information will be considered as confidential before the information is formally submitted.

When an agency agrees that information should be treated as confidential, the information provider should be advised in writing that any undertaking as to confidentiality may be subject to exceptions. These can occur where the information is required or authorised to be disclosed by law and such circumstances may include the following:

- where disclosure is requested by the courts, the agency's legal advisers, auditors, insurers or the Victorian Ombudsman or Regulator-General;
- where the Auditor-General decides that it is in the public interest to disclose it in a report to the Victorian Parliament; or
- where information is required to be disclosed to a joint standing parliamentary committee of the Victorian Parliament, established under the Parliamentary Committees Act.

DECISIONS CONCERNING CLAIMS FOR CONFIDENTIALITY

In those limited circumstances where it is appropriate for an agency to treat information as confidential, the following procedures should be followed.

Where confidentiality is claimed by any person or body on the basis that disclosure will be commercially harmful (for example, where it contains trade secrets or its disclosure will lead to financial detriment) those making the claim must provide detailed reasons for seeking confidentiality. This requires agencies to consider all relevant issues when assessing claims. It also means that any later claim for access, such as a request for access under the Freedom of Information Act, can properly be assessed.

Matters, which are relevant in assessing a claim for commercial confidentiality, include the following:

- 1. Does the information contain trade secrets or is it information with commercial value that would be diminished or destroyed by disclosure?**

While 'trade secrets' should normally be treated as confidential, an assertion that a document contains or reveals trade secrets should be closely examined. In order to qualify as a trade secret the information should be unknown to persons outside the relevant business and should be of a business, trade or technical nature.

Information within this category may include secret procedures, client lists, pricing data, market projections, internal financial information or proposals and business methodologies having an inventive element not generally available or known in an industry.

Information that does not include trade secrets may also require protection if it has a commercial value that would be destroyed or diminished if disclosed. This may be the case, for example, where it is important to the profitability or viability of a continuing business activity.

In either case, an undertaking to treat information as confidential should be limited to the specific trade secret or commercially valuable information. It should not extend to the

general commercial or contractual specifics of a commercial arrangement.

2. Would disclosure have an adverse affect on the business affairs of a third party?

The relevant adverse effects are those which will disadvantage that business in its competitive activities where information about the business, commercial or financial affairs of a person or business is disclosed.

3. Would disclosure of this information be unreasonable having regard to countervailing arguments in favour of disclosure?

To determine the reasonableness of disclosure, the interests of the person or body seeking protection of its information and those of the agency in preserving the confidence must be weighed against the public interest by the designated FOI Officer. Clearly, the community must have the means to assess how well policies, programs and services are being delivered and information that enhances understanding of the operations of government and on its expenditure of public money should be provided to the Parliament. Consideration should also be given to the likely impact of disclosure on the future provision of such information, although conclusions as to possible adverse effects should be based on hard evidence rather than mere speculation.

4. Would an agency be inappropriately restricted in the management and use of its assets by an obligation to treat information as confidential?

The management or use of assets of the Victorian Government or its agencies should generally not be inhibited by confidentiality agreements that may limit either the range of persons with whom agencies may deal or the use the State makes of its own property.

5.

Is the information public knowledge?

Information should not be regarded as confidential if it is known to others who have not given any undertakings to treat it as confidential. This is also the case if the information is provided to an agency from another source without restriction as to its disclosure.

6. What time limits should be imposed on an agreement to treat information as confidential?

In most cases the commercial value of information will not be indefinite. Information should not be treated as confidential for any longer than required to fairly protect the interests of the party providing the information. For example, in the case of a tender process many issues of confidentiality may cease to exist once the process has been completed and a contract has been signed.

DISCLOSURE

Where an agency is bound by an undertaking to treat information as confidential (either due to specific contractual obligations or the circumstances in which it was imparted), care should be taken to ensure that this information is not disclosed, other than as required or permitted by law. However, an obligation to treat information as confidential may be waived by the individual or organisation to whom the duty is owed. Their views in relation to disclosure should therefore be ascertained.

Where specific undertakings of confidentiality have been given in the past in circumstances that fall outside the terms of these guidelines, these undertakings should be respected. However, this may give rise to problems where agencies are under legal obligations to disclose the information (for example, in the case of FOI requests). These difficulties will need to be resolved within the context of the specific legal regime that requires disclosure.

PARLIAMENTARY COMMITTEES

In accordance with section 4J(1) of the *Parliamentary Committees Act*, parliamentary committees have the power to send for persons, papers and records and, if special circumstances require it, to take evidence in private hearings.

Information should not be withheld from the Parliament or its committees by an agency, unless a specific provision to that effect is contained in an agency's enabling legislation.

Where parliamentary committees find that necessary information about a government's management of expenditure or the performance of a contract is limited by confidentiality provisions, the government should explain in writing to the committee the public benefit achieved by agreeing to withhold the terms of the commercial arrangements from scrutiny. The underlying principle should be that if information can be disclosed to the government on a confidential basis, it can be disclosed to a committee on the same basis. In appropriate cases of apprehended damage to commercial interests, the commercial in confidence principle should prevent the publication of information, not the provision of the information.

Any claim that information is commercial in confidence should be met by the question: what is the damage to commercial interests that may result from the publication of the information. The response to this question may then determine whether information is treated as *in camera* evidence rather than as public evidence.

Before a parliamentary committee resolves to publish evidence taken *in camera*, the witness providing the information should be advised of the Committee's intention to disclose the information and should be given an opportunity to object to the disclosure and to explain why particular parts of the evidence not be disclosed.

Unauthorised disclosure of evidence would be a breach of parliamentary privilege and could be dealt with by the Parliament as a contempt.

PARTIAL DISCLOSURE

While the terms of agency contracts are normally required to be open to public scrutiny, there may be circumstances where full disclosure is either not required or where disclosure of the entire contract to persons other than the Auditor-General or the Ombudsman is contrary to the public interest. In these instances, it may be possible to protect confidential material while still providing sufficient information about the contract to allow for appropriate scrutiny of the contractual arrangements. This may be done either by providing a copy of the contract from which the sensitive information has been deleted or by using a contract summary, as described below. Any contract summary should be clearly identified as a summary.

A contract summary should at minimum include the following information:

- the full identity of the contractor, including details of cross ownership of relevant companies;
- the duration of the contract;
- details of any transfer of assets under the contract;
- all maintenance provisions in the contract;
- the price payable by the government agency and the basis for changes in this price;
- any renegotiation and renewal right;
- the results of any cost-benefit analysis;
- details of any risk sharing in the developmental and operational stages of the contract;
- details of any sanctions for non-performance;
- any significant guarantees or undertakings, including any loans agreed to or entered into; and
- any other information required by statute to be disclosed to the Australian Securities Commission.

It is not necessary to include intellectual property or information about the business affairs of a contractor in circumstances where it can be clearly demonstrated that such disclosure would impact adversely in a way that is unreasonable.

Agencies should also be aware that existing confidentiality provisions may be legally binding outside the context of the Freedom of Information Act or other legal requirements concerning disclosure of information to authorised persons and bodies such as the Auditor-General. Where requests for access occur under the Freedom of Information Act, the decision to disclose information subject to confidentiality clauses will need to be determined having regard to the wording of specific exemption provisions.

CONSULTATION

When a request for access under the Freedom of Information Act is received for information that relates to the business affairs of an individual or business, the agency should comply with the requirements in section 34(3)(b) concerning consultation.

The person or business consulted should be given a reasonable opportunity to identify information that falls within the exemption provisions relating to business affairs and personal affairs. Where appropriate, they should also be encouraged to provide further information to support that view.

It should be noted that any decision to release information relating to personal or business affairs in the face of objection by the individual or business affected, is subject to a right of review under sections 50 and 51 of the Freedom of Information Act. Individuals and organisations should be promptly informed of any decision to grant access against their wishes and of their right to seek independent review of the decision by the Victorian Civil and Administrative Tribunal.

ATTACHMENT 2

Model Access Clauses – Agency

1. The Customer, and other persons authorised by the Customer, have the right of access to the premises of the Contractor at all reasonable times. They have the right to inspect and copy documentation and records, however

stored, in the Contractor's possession or control, for purposes associated with the Contract or any review of performance under the Contract. The Customer will also have access to any State assets located on the premises of the Contractor which come into existence as a result of the Contract.

2. The rights referred to in clause 1 are subject to:
 - (a) the provision of reasonable prior notice by the Customer;
 - (b) the Contractor's reasonable security procedures; and
 - (c) if appropriate, execution of a deed of confidentiality relating to non-disclosure of the Contractor's confidential information.
3. The requirement for access as specified in clause 1 does not in any way reduce the Contractor's responsibility to perform its obligations in accordance with the Contract.
4. In exercising the rights granted by these clauses, the Customer shall not interfere with the Contractor's performance under the Contract in any material respect. If, in the Contractor's reasonable opinion there is likely to be a significant delay in the Contractor discharging an obligation under the Contract because of a cause beyond the reasonable control of the Contractor and as a direct result of the Customer's action under this clause, the Contractor may request a reasonable extension of time.
5. The Customer shall not refuse a request for extension of time under clause 4 without reasonable grounds for doing so.
6. The Contractor must ensure that any subcontract entered into for the purpose of this Contract contains an equivalent clause permitting the Customer, and other persons authorised by the Customer, to have access as specified in these clauses.
7. These clauses apply for the term of the Contract and for a period of five years from the date of expiration or termination.

Model Access Clauses – Victorian Auditor-General’s Office

1. The Auditor-General or a delegate of the Auditor-General, for the purpose of performing the Auditor-General’s statutory functions, may, at reasonable times and on giving reasonable notice to the Contractor:
 - (a) require the provision by the Contractor, its employees, agents or subcontractors, of records and information which are directly related to the contract;
 - (b) have access to the premises of the contractor for the purposes of inspecting and copying documentation and records, however stored, in the custody or under the control of the Contractor, its employees, agents or subcontractors which are directly related to the contract; and,
 - (c) where relevant, inspect any State assets held on the premises of the Contractor.
2. The Contractor shall ensure that any subcontract entered into for the purpose of this Contract contains an equivalent clause granting the rights specified in these clauses.
3. These clauses apply for the term of the Contract and for a period of five years from the date of expiration or termination.

Model Access Clauses for Tender Conditions

1. The Auditor-General has statutory powers to obtain information. The *Auditor-General Act 1994* provides the Auditor-General or an authorised person with a right to access documents (see S 11 of the Auditor-General Act).
2. In addition to the Auditor-General’s statutory powers, and in recognition of the need for the Auditor-General’s functions to be conducted in an efficient and cooperative manner, if a tenderer is chosen to enter into a contract, that tenderer will be required to provide to the Auditor-General, or a delegate of the Auditor-General, access to

information, documents, records and State assets, including those on the tenderer's premises.

This will be required at reasonable times on giving reasonable notice, for the purpose of carrying out the Auditor-General's functions. Access will be restricted to information and assets which are in the custody or control of the tenderer, its employees, agents or subcontractors, and which is directly related to the contract. This arrangement will apply for the term of any contract entered into and for a period of five years from the date of expiration or termination.

CHAPTER 1 INTRODUCTION

*The Office of the Auditor-General provides a critical link in the accountability chain between the public sector, and the Parliament and the community. It alone subjects the conduct and operations of the public sector as a whole to regular, independent investigation and review. This function must be fully guaranteed and its discharge facilitated.*¹⁰

Key findings:

- 1.1 In order to effectively perform the audit role, the Auditor-General must have access to all information relating to the cost of providing publicly funded services. This includes information that may have been considered by a government agency to be commercial in confidence.**
- 1.2 It is important to ensure that the changing mechanisms of government service delivery do not have the effect of decreasing information about government services which is available to the Auditor-General, the Parliament or the community.**
- 1.3 It is becoming routine practice for confidentiality clauses to be inserted in contracts between government agencies and private sector service providers.**
- 1.4 Claims based on commercial confidentiality are now being used too broadly by the public sector as a means of preventing disclosure of a wide range of information.**

¹⁰ Report of the *Royal Commission into Commercial Activities of Government and Other Matters*, (WA Inc Report), Part 2 (1992) paragraph 3.10.1

1.1 Background to the Inquiry

In the Foreword to the May 1996 Report on Ministerial Portfolios, the Auditor-General expressed concern that:

In recent years, I have been increasingly confronted with claims that information I propose to include in my Reports to the Parliament was regarded as being 'commercially confidential', and I am concerned that such claims may escalate as outsourcing of activities to private service providers becomes more prevalent. In responding to such claims in the past I have followed the principle that I expressed in my Report on the 1990-91 Financial Statement:

'...the issue of commercial confidentiality and sensitivity should not override the fundamental obligation of government to be fully accountable at all times for all financial arrangements involving public moneys'.

I am required by professional auditing standards to respect the confidentiality of information acquired in the course of an audit and not to disclose such information unless there is a legal or professional requirement to do so. The current Audit Act does not provide grounds to exempt allegedly commercially sensitive information from publication. Further, no alternative machinery exists within the parliamentary arena to evaluate the merit of claims that certain material should not be publicly disclosed in reports to the Parliament. It is therefore left to my judgment to decide whether or not claims that material is commercially confidential or sensitive are legitimate and, more importantly, whether or not disclosure of such material is in the public interest.¹¹

As the principles supporting the maintenance of confidentiality and the principles requiring full disclosure of information have important constitutional and audit implications for the State, the Public Accounts and Estimates Committee sought a briefing by the then Victorian Auditor-General, Mr Ches Baragwanath, on this matter.

¹¹ Victorian Auditor-General, *Report on Ministerial Portfolios*, May 1996, p. 4 - 5

Following this meeting, the Committee resolved on 20 February 1997 to undertake an Inquiry into commercial in confidence material and the public interest.

On several occasions since the conclusion of formal evidence taken for this Inquiry in late 1998, the Auditor-General has raised publicly the problems he was encountering with the release of commercial in confidence material.

For example, in a recent report on a performance audit of the State Revenue Office the Auditor-General exercised his judgement in favour of disclosure and publication of information that had been considered by a government agency to be commercial in confidence:

One contentious issue that I have had to consider relates to whether, in the public interest, the value of a major outsourcing contract at the State Revenue Office should be disclosed in (an audit) report, or on the grounds of commercial confidentiality, this amount should be concealed from public knowledge. Under the terms of the commercial in confidence contract the service provider has not consented to such disclosure as this information is regarded as proprietary and its public release could place the contractor at a competitive disadvantage. The State Revenue Office also maintains that reporting such details may influence or dissuade some prospective outsourcing companies when the contracts due for renewal.

While I am aware of the importance of promoting practices that enable the benefits of competition to flow from the operation of a fully competitive market, it is my view that the introduction of contestability and the involvement of contractors in the provision of government services should not provide public sector agencies with an avenue for not disclosing the cost of publicly-funded services. The Parliament has the power to make these decisions and where it has seen a need to protect commercial confidentiality as in the case of the Grand Prix, it has passed legislation to this effect.

Accordingly, I have elected to disclose the value of the contract to outsource the Office's information technology services in order to enhance

accountability and preserve the public interest in the right to know how their taxes have been spent.¹²

A similar problem was highlighted in May 1999 when the Auditor-General tabled a report on the performance audit of Victoria's Prison System.¹³ In this report reference was made to advice from the Victorian Government Solicitor that the Auditor-General could not disclose any financial information relating to the government's contract with the private prison operators as it was commercial in confidence:

At a very late stage in the development of this Report, I was presented with a copy of legal advice obtained by the Department (of Justice) from the Victorian Government Solicitor. This advice indicated that the secret provisions of section 30 of the Corrections Act 1986 rendered any financial information relating to the Government's contracts with the private prison operators as subject to commercial confidentiality.

The legal advice also mentioned that section 12 of the Audit Act, which enables my total access to information deemed to be commercial-in-confidence, does not authorise me to specifically disclose in a Report to the Parliament any financial data dealing with the private operators. The section does permit me to communicate conclusions, observations or recommendations to Parliament based on the confidential data but it seems a only authorised to make general references to such data by way of percentages or use of aggregates.

It had been my intention up until the time of receipt of the legal advice to include within this Report financial details relating to:

- cost benchmarks established by the Government for assessing bids submitted by prospective tenderers during the bidding and selection process for each private prison as well as the actual cost bid submitted by each successful tenderer;*

¹² Victorian Auditor-General, Special Report No. 58 - *State Revenue Office: A customer service focus towards improving taxation collection*, p. vii, October 1998

¹³ Victorian Auditor-General, Special Report No. 60 - *Victoria's Prison System - Community Protection and Prisoner Welfare*, May 1999

- *payments made to the private operators for the periodic delivery of prison services; and*
- *amounts deducted to date from payments to operators for poor performance or non-achievement of outcomes specified in contractual conditions.*

My view was that Parliament and taxpayers had a clear right to be informed of such fundamental information. In this respect, I am comforted by the words of Justice Murray Kellam of the Victorian Civil and Administrative Tribunal who, in a very recent decision on prison contracts, stated:

“It is inherent in the democratic system that important issues of the nature of prisons and their management be publicly transparent so that there can be the best possible public understanding, awareness and, if need be, debate”.

Nevertheless, because of the Department’s legal advice, I could have been accused of acting ultra vires in terms of the audit legislation if specific disclosure was made. Accordingly, I determined to delete the relevant financial data from the Report. In some cases, I have been able to incorporate general references, but, for tabular information, the relevant tables have been left blank.

No objections to the specific disclosure of financial details have been made to me by the operators of the State’s private prisons.

In November 1998, I suggested to the Government that section 12 be strengthened to remove any doubts on the ability of the Auditor-General to fully inform the Parliament, where deemed justified in the public interest, on matters involving commercial confidentiality. The Government subsequently determined to defer consideration of the particular issue and other suggested changes to the audit legislation until later in 1999.

In view of the experience of this case, I feel it is imperative that the need for legislative change be accorded high priority. The alternative is that the Parliament and community are automatically denied

the right to be fully informed by an Auditor-General on matters inherently linked to the expenditure of taxpayers' funds.¹⁴

In May 1999 in the Report on Ministerial Portfolios the Auditor-General again expressed concerns about claims of commercial confidentiality in relation to outsourced activities:

Another significant initiative largely introduced by the current Government is the contracting out of services previously provided by the public sector. While savings may be generated and service levels may be improved by contracting-out, has, from my perspective, produced one highly undesirable and time-consuming by-product, namely, the necessity to continually counter-claim that information I intend to include in my Reports to Parliament is commercially confidential. There appears to be a widely held belief, particularly prevalent among senior bureaucrats, that financial arrangements with the private sector should be shielded from parliamentary and taxpayer gaze.

Unless Parliament is provided with appropriate information, its capacity to exercise its constitutional right to monitor the operations of the Executive will be restricted, and accountability and good governance in Victorian may be irreparably harmed.¹⁵

The Committee was particularly concerned when the Auditor-General brought to the attention of the Parliament **that he was denied access to information** on the grounds that it was commercial in confidence:

While the IMAX theatre became operational in May 1998, audit has been unable to determine whether revenue earned from the theatre has met expectations to date due to the management of Museum Victoria refusing to provide audit access to this information on account of commercial-in-confidence considerations. In my view, the position taken by management is inappropriate and should not be acceptable to the Parliament as it prevents independent assessments on behalf of Victorian

¹⁴ Ibid, p. vii to viii.

¹⁵ Victorian Auditor-General's Report on Ministerial Portfolios, May 1999, p. vii

*taxpayers of the financial status of this arrangement*¹⁶.

This report addresses the issues raised by the Auditor-General and recommends a number of legislative amendments and administrative procedures to overcome the problems experienced in the past.

1.2 Scope of the Inquiry

The terms of reference adopted by the Committee for this Inquiry require it to:

- (1) ascertain the legal or other frameworks applying to the concept of commercial confidentiality in the public and private sectors;
- (2) establish the major constructs underpinning the notion of governmental accountability and the public interest, and outline existing mechanisms and systems that are designed to ensure that the Victorian Government is held accountable;
- (3) establish what type of information over and above that provided to shareholders of private companies is considered to be in the public interest or required to be made available to ensure public accountability, and
- (4) establish what principles should guide the application of commercial confidentiality within the public sector in relation to the Auditor-General and the Parliament.

Since the Committee was keen to obtain a wide cross section of advice on the matters to be reviewed, an issues paper was released in April 1997.

The Committee sought submissions on the following issues:

- in what instances the application of the 'commercial in confidence' argument has hampered public accountability, and to what extent this has occurred;
- in what instances the disclosure of negotiated outcomes for a contract has led to a company losing trade secrets or losing the value of sensitive commercial information;

¹⁶ Ibid, Key Findings, May 1999, p. 275

- what contract information has been traditionally disclosed to the public, to the Auditor-General, and to the Parliament;
- how the disclosure of this information has improved public accountability;
- which points of information about contracts or agency operations should be disclosed to the public and to Parliament, and which should remain confidential;
- at what point should disclosures be made;
- who should make these disclosures;
- what form should disclosures take;
- whether the government should issue guidelines on disclosure of information relating to contract confidentiality;
- if so, whether these should be general guidelines applicable to all cases, or separate ones issued for individual projects;
- whether there should be an independent person or body to observe the process and ensure probity and integrity; and
- whether government agencies should be permitted to enter into agreements that contain a provision prohibiting that agency or the responsible Minister from providing to the Auditor-General or the Parliament information about its operations or the contents of that agreement.

These issues and other matters are discussed in this report.

1.3 Conduct of the Inquiry

The Committee appointed the following Sub-Committee to conduct this Inquiry:

Hon. Bill Forwood, MLC (Chairman)¹⁷

¹⁷ Membership lapsed with the prorogation of the Parliament on 24 August 1999 but reappointed as a Member of the Committee on 14 December 1999.

Mr Steve Bracks, MP¹⁸

Mr Rob Hulls, MP¹⁹

Mr Steve McArthur, MP²⁰

The terms of reference for the Inquiry were advertised on 8 March 1997 in the national and metropolitan press. Letters seeking submissions were sent to community and consumer organisations, business associations, major industry groups, the Law Society, departments and agencies, the Ombudsman, the Australasian Council of Auditors-General, the Victorian Auditor-General, academics, financial institutions and other interested persons. Over 800 copies of the issues paper were widely distributed throughout the community and to all government agencies.

The Committee continued to receive submissions throughout 1997 and 1998. In total the Committee received 95 submissions, supplementary submissions and written responses to issues raised at the hearings. A whole of government response was provided on behalf of most government agencies. A list of submissions and other written material received by the Sub-Committee is contained in Appendix 2.

Evidence was taken from 40 persons during public and private hearings in Melbourne, Sydney and Canberra. A list of individuals and organisations that gave evidence at the hearings is contained in Appendix 3.

The vast majority of submissions and most evidence presented at public hearings overwhelmingly supported the view that:

- **the Auditor-General should have unrestricted access to commercial in confidence material;**
- **the changing mechanisms of government service delivery should not have the consequence of decreasing the information available to the Auditor-General, the Parliament or the community about those services; and**
- **claims based on commercial confidentiality were being used too**

¹⁸ Discharged from attendance as a Member of the Committee 21 April 1999

¹⁹ Membership lapsed with the prorogation of the Parliament on 24 August 1999

²⁰ Membership lapsed with the prorogation of the Parliament on 24 August 1999

broadly by the public sector as a means of denying disclosure of a wide range of information.

1.4 Acknowledgments

The Committee thanks all those who made submissions or gave evidence to the Inquiry. The Committee is particularly appreciative of the considerable time and effort involved in the preparation of detailed submissions and responses to issues raised at the hearings. In preparing this report, the Committee has drawn heavily on the material and views presented through submissions and private and public hearings. The Committee is grateful for this valuable input.

Matters raised in the detailed submissions received from the then Victorian Auditor-General, Mr Ches Baragwanath, and Mr Des Pearson, then Convenor of the Australasian Council of Auditors-General, were the subject of detailed discussions with these public officials. The Committee also obtained the views of Mr Tony Harris, then Auditor-General of NSW, and Mr Harry Evans, Clerk of the Senate. The Committee places on record its appreciation for the assistance so readily given by these officials.

The Committee has also drawn heavily on the submission and evidence from Professor Arie Freiberg, Professor of Criminology at the University of Melbourne.

In preparing this report, the Committee has sought advice from a number of persons with expertise in relevant fields of law. The Committee records our indebtedness, in particular, to Ms Moira Paterson and Mr Bruce Dyer, Senior Lecturers at the Faculty of Law, Monash University, without whose advice the Committee would not have gained such a detailed appreciation of the complex legal issues involved. Their advice has been of inestimable value to our deliberations.

1.5 Subsequent developments

Since the conclusion of formal evidence taken for this Inquiry, several relevant matters have arisen:

- a number of Commonwealth parliamentary committees²¹ have reviewed and commented on aspects of government outsourcing, including access to contractors' records;
- the Administrative Review Council has presented a report to the Attorney-General on the administrative law implications of contracting out of government services,²² and
- the Victorian Civil and Administrative Tribunal has handed down a number of decisions relating to FOI applications for access to commercial in confidence documents, that have important legal and accountability implications.

Also since the preparation of the initial draft report, there has been a general election resulting in a change of government in Victoria. The Bracks Government has entered into a formal memorandum of understanding with the Independent Members for Mildura, Gippsland West and Gippsland East, to implement a range of policy reforms to promote open and accountable government. As part of this process, legislative amendments have been made to the Freedom of Information Act and the Audit Act that will address some of the issues raised in this report.

1.6 Why this matter is important

This Inquiry takes place in the context of a system of responsible government, with the premise that the Executive should be responsible to the Parliament and ultimately to the electorate. Effective operation of this system requires Parliament to have access to comprehensive information about the activities of the public sector. The Inquiry also takes place in the context of representative democracy, which requires that the community:

²¹ Such as the Senate Finance and Public Administration References Committee, Second Report: *Report on the Contracting out of Government Services*, Parliament of the Commonwealth of Australia, Canberra, May 1998

²² Administrative Review Council Report No. 42 *The Contracting out of Government Services*, Report to the Attorney General, August 1998.

*must have information to enable them to make choices about who will govern them and what policies the individuals or political parties that they choose to govern shall implement which in turn requires that the institutions of government must be examined and the subject of scrutiny, debate and unlimited accountability at the ballot box*²³

The Committee notes the High Court's approach to the constitutional consequences of the implications of responsible and representative government.²⁴ Such implications have been established through a series of case law. There is also authority that suggests that these cases limit the capacity of the Commonwealth Government to enter into binding obligations of confidence, and that this may also have implications for State Governments.²⁵ These issues are discussed in greater detail in Chapter 3.

Victoria, like other Australian jurisdictions, has implemented mechanisms to increase transparency in the public sector, with a view to enhancing accountability to both Parliament and the community. These mechanisms are all, to varying degrees, subject to rules that protect specific categories of information where the harm resulting from their disclosure outweighs any benefits. One such category is commercially sensitive information.

As well as the Auditor-General, numerous witnesses²⁶ suggested to the Committee that the practice of public sector agencies claiming commercial confidentiality for information about their activities is increasing, as evidenced by the routine insertion of confidentiality clauses in contracts between government agencies and private sector service providers.

It was also suggested that the introduction of privatised or contractual models of government might lead to the creation of a culture of secrecy and decrease the level of accountability. One

²³ *Nationwide News Pty Ltd v Wills*, (1992) 177 CLR 1, 231, *per McHugh J*

²⁴ *Nationwide News Pty Ltd v Wills*, (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 108; *Theophanous v The Herald Weekly Times Ltd* (1994) 124 ALR 1; *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80; *Cunliffe v The Commonwealth of Australia* (1994) 124 ALR 120

²⁵ These derive principally from the approach taken in the case of *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 113: see T Brennan "Undertaking of Confidence by the Commonwealth: Are There Limits?" (1998) 18 *AIAL Forum* 8

²⁶ See submissions from Professor A. Freiberg, Victorian Auditor-General, Energy Action Group, People's Committee for Melbourne and Transcripts of evidence : Federation of Community Legal Centres, p. 75 and 76, Ms P Morrison, Victorian Council of Social Service, p. 73

legal academic stated that commercial confidentiality has become 'an all-purpose shield'. Professor Freiberg argued that:

As the process of contracting out increases the dividing line between what is 'public' and what is 'private' becomes ever more blurred, and as the core activities of government diminish, the consequences of a policy of commercial secrecy will see a smaller and smaller proportion of public expenditure being subject to scrutiny.²⁷

The Committee's recommendations are intended to address the concerns of the Auditor-General and other witnesses and ensure that there is an appropriate balance struck on the nature and level of accountability of commercial in confidence material.

²⁷ Professor A Freiberg. *Commercial Confidentiality, Criminal Justice and the Public Interest*, (1997) 9(2) CICJ 125, 147

CHAPTER 2 CONCEPT OF COMMERCIAL IN CONFIDENCE

If one exaggerates confidentiality as a value in the law one can suppress the flow of information at the price of other and identifiable public interests. If one depreciates the importance of confidentiality in particular contexts one can jeopardise information supply, one can imperil that private domain in which the individual can do and express what he/she would not do or express publicly.²⁸

Key findings:

- 2.1 The wide interpretation and common usage of the term commercial in confidence has resulted in a broadening of the scope of commercial confidentiality beyond that which is legally warranted.**
- 2.2 The determination of what should be reasonably viewed as commercial in confidence material should be guided by the principles of law, but also by community expectations about the conduct of responsible government in Victoria.**

2.1 Introduction

This chapter covers the first term of reference, which relates to the legal or other frameworks applying to the concept of commercial confidentiality in the public and private sectors in Australia and overseas.

The Committee's research revealed that the expression 'commercial in confidence' is neither a technical term nor one with a recognised legal meaning. It is commonly used as a loose description for information of a commercial nature.

This information would be protected by common law action for breach of confidence. The action for breach of confidence protects the rights of individuals to restrict the use of secret

²⁸ P.D. Finn *Confidentiality and the Public Interest* (1984) 58 ALJ 497

information that they disclose to others in circumstances that give rise to an obligation of confidentiality.

2.2 The common law action for breach of confidence

Common law has long recognised that information is a valuable commodity, but the action for breach of confidence requires more than a demonstration that information is commercially sensitive. A plaintiff must establish not only that the information has the necessary quality of confidence and that circumstances give rise to an obligation of confidentiality, but also that disclosure of the information will result in some detriment to the plaintiff. Commercial confidentiality is also subject to public interest qualifications.

One legal academic advised the Committee that:

*The law does not exist merely to protect confidentiality for its own sake. Rather it is a tool in the preservation and promotion of quite diverse individual, social and public values and public interests. And it is these values, these public interests, that can provide the foundations for the transformation of confidentiality from a privacy expectation, from a matter of ethics, or whatever, into a concern of the law.*²⁹

The qualification that information must be of a confidential nature means that the information, as well as being secret to some extent, must be identified with sufficient specificity³⁰ and must not be trivial.³¹

The second qualification focuses on whether the information was disclosed confidentially and for a limited purpose. The obligation to treat information as confidential will cease if the confider places that information in the public domain.

Finally, despite differing opinion on the necessity to establish detriment,³² the plaintiff must at least demonstrate that disclosure or publication of the information constitutes a purpose other than that for which the information was given to the recipient.

²⁹ Professor A Freiberg, submission p. 9 citing P Finn “Confidentiality and the ‘Public Interest’” (1984) 58 *Australian Law Journal* 497, 498

³⁰ See *O’Brien v Komesaroff* (1982) 15 CLR 310, 327-328

³¹ See *Coco v Clark (Engineers) Ltd* [1969] 2 RPC 41, 48

³² See L Tsanakis, “The jurisdictional basis, elements, and remedies in the action for breach of confidence: uncertainty abounds” (1993) 5 *Bond Law Review* 18, 21.

Actions in relation to commercial in confidence brought by government agencies to protect governmental information have an additional requirement: the agency must establish that disclosure will be contrary to the public interest. This involves balancing the harm to the public interest from disclosing the relevant information, against the public interest in keeping the community informed and in promoting discussion of public affairs.³³ The High Court extended this principle in *Esso v Plowman*³⁴ to a situation where a confidence was owned by a third party. The court commented that:

The courts have consistently viewed governmental secrets differently from personal and commercial secrets. As ... stated in John Fairfax, the judiciary must view the disclosure of governmental information 'through different spectacles'. This involves a reversal of the onus of proof: the government must prove that the public interest demands non disclosure ...

The approach outlined in John Fairfax should be adopted when the information relates to statutory authorities or public utilities because ... in the public sector 'the need is for compelled openness, not for burgeoning secrecy'.³⁵

Actions by non-governmental plaintiffs are not subject to this additional requirement. Nevertheless they may require the consideration of public interest issues where the defendant submits evidence that disclosure will reveal some unfairness.

The authority excusing breach of confidence in the public interest originates in the general principle that there is no confidence in the disclosure of iniquity.³⁶ This principle was subsequently extended to 'matters carried out or contemplated, in breach of the country's security, or in breach of law, including statutory duty, fraud, or otherwise destructive of the country or its people, including matters medically dangerous to the public; and doubtless other misdeeds of similar gravity'.³⁷ This was approved in *Castrol Australia Pty Ltd v Emtech Associates Pty*

³³ See *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39; *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86

³⁴ (1995) 128 ALR 391

³⁵ *Ibid* 402-3 per Mason CJ with Dawson and McHugh agreeing

³⁶ *Gartside v Outram* (1857) 26 LJ Ch 113

³⁷ *Beloff v Pressdram* [1973] 1 All ER 241. In *Fraser v Evans* [1969] 1 QB 349 Lord Denning went further suggesting that it extended to matters "of such public concern that the newspapers, the Press, and indeed, everyone is entitled to know the truth and to make their comment on it"

Ltd,³⁸ where Justice Rath commented that this formulation was particularly important for its emphasis on the gravity of the conduct that might give rise to the defence.

However, in *Corrs Pavey*³⁹ Justice Gummow commented that if *Gartside* inspired some principle of general application other than that a court would be unlikely to imply a contractual obligation to keep secret details of an employer's gross bad faith to his customers, then it is simply that information lacks the attribute of confidence if it is about the existence (or real likelihood of the existence) of an iniquity such as a crime, civil wrong or serious misdeed of public importance. In these cases, the court would be unlikely to uphold a confidence being used to prevent disclosure to a third party with a real or direct interest in redressing such a crime, wrong or misdeed.⁴⁰

It is uncertain whether there is a specific public interest defence to the action for breach of confidence, or whether these matters are only relevant to the court's discretion in granting equitable relief. However, it is clear that evidence of wrongdoing will affect the ability of the plaintiff to obtain the relief sought. Nevertheless, relief is usually denied only in cases where the confidential information relates to some crime, serious wrongdoing or threat to public health and safety.⁴¹

2.3 The common law evidentiary rules on public interest immunity

The recognition that the law does not exist to merely protect confidentiality for its own sake but also to preserve and promote individual, social and public values and public interest⁴² is not unique to the action of breach of confidence. It is also a noteworthy feature of the judicial approach to the doctrine of public interest immunity, another area of the common law that requires an evaluation of confidentiality of information.

The courts have developed a similar public interest balancing test in this context. The doctrine is generally used to justify the withholding of evidence where this would potentially harm

³⁸ (1980) 33 ALR 31

³⁹ *Corrs, Pavey, Whiting and Byrne v Collector of Customs* [1987] 13ALD 254

⁴⁰ For a useful discussion of these issues see R Dean, *The Law of Trade Secrets* (Law Book Co. 1990) 104-137, Ch 6; D A Butler, "Is there a public interest defence to a breach of confidence" (1990) 20 *Queensland Law Society Journal* 363

⁴¹ See, eg, *Castrol Australia v Emtech Associates* (1980) 33 ALR 352

⁴² P Finn "Confidentiality and the 'Public Interest'" (1984) 58 *Australian Law Journal* p. 497, 498

some governmental interest such as Cabinet confidentiality or national defence, but it has also been used to justify the non-disclosure of commercially sensitive information.⁴³ The main difference here is that the harm to public interest that is likely to result from disclosure has to be balanced against another public interest, the public interest in the administration of the state.

2.4 Commercial in confidence tests in statutory regimes

The High Court's development of public interest balancing tests in *Commonwealth v. John Fairfax and Sons Ltd* and *Sankey v Whitlam* paved the way for the enactment of Freedom of Information legislation. This legislation provides for universal rights of access to documentary information held by government departments and agencies, subject to exemptions that embody public interest balancing tests. The legislation also provides for written reasons to be provided when decisions are taken not to provide information.

2.5 Conclusion

The wide interpretation presently applied to commercial in confidence by private and public sectors has resulted in the expansion of the scope of commercial confidentiality further than the legal concept warrants.

The resolution of what is commercial in confidence material can not be undertaken in an administrative or legal vacuum. Decision making on such matters must be guided by principles that accord with the settled rules of law and the governmental values that form the basis for responsible government in this State.

Claims that specific information should be treated as commercial in confidence may be well founded in certain circumstances, but the withholding of access to information on the basis of commercial in confidence should not be automatically permitted in the public sector.

The Committee believes that there is a need for the application of consistent principles in relation to commercial in confidence in order to ensure that an appropriate balance is achieved.

⁴³ See, eg, *Rundle v Tweed Shire Council* (Bignold J, Land & Environment Court NSW, 20.12.98 unreported)

CHAPTER 3 CONFIDENTIAL COMMERCIAL MATERIAL AND ACCOUNTABILITY

Effective democratic government demands that the community have at its disposal as many instruments of accountability as are necessary to maintain confidence in government.⁴⁴

Key findings:

- 3.1 Publicly available information on the operations of the public sector enhances government accountability and ensures impartial and ethical public administration and transparency in the operations of government.**
- 3.2 If permitted to operate too broadly and to prevent the supply of adequate information, commercial confidentiality could reduce the level of political accountability. In these instances, government could be vulnerable to claims which it is prevented from refuting.**
- 3.3 The increasingly complex arrangements for government service delivery, particularly the contracting out of public services to private enterprises and the devolution of financial management to line managers, are challenges to public accountability. This highlights the need to adopt new procedures for dealing with commercial in confidence material.**
- 3.4 The possible options for treating commercially sensitive material are more varied than the simple alternative of permitting unrestricted public access or requiring complete confidentiality.**

⁴⁴ Uhr, J. 'Institution of Integrity - Balancing Values and Verification in Democratic Governance'. (1999) *Public Integrity*, Winter, 98

3.1 Introduction

The second of the Committee's term of reference requires the Committee to establish the major constructs underpinning the notion of government accountability and public interest, and outline existing mechanisms and systems that are designed to ensure that the Victorian Government is held accountable for its activities.

Accountability is fundamental to good government. It is necessary to ensure that public moneys are expended for the purposes for which they are appropriated and that government administration is transparent, efficient and in accordance with law. Public acceptance of government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions. The expectation that government should be accountable is a product of the electorate's grant of power to government.

Access to information permits the electorate to assess the government and to participate more effectively in the policy and decision making processes of government. Without information, people cannot adequately exercise their rights and responsibilities as citizens or make informed choices.

Information is the currency that we all require to participate in the life and governance of our society. The greater the access we have to information, the greater will be the responsiveness of our governments to community needs, wants, ideas and creativity. Alternatively, the greater the restrictions that are placed on access, the greater the feeling of 'powerlessness' and alienation.⁴⁵

As pointed out by various witnesses, information enhances the accountability of government. It ensures that there is impartial and ethical public administration and transparency in the operations of government.

⁴⁵ Cth Ombudsman Annual Report 1994-95 AGPS Canberra 1995, p. 33

3.2 The High Court's approach to representative democracy

The Committee is aware of the High Court's approach in the 'free speech cases' which demonstrate the constitutional implications of responsible and representative government.⁴⁶ The court determined that freedom of public discussion of government (including the institutions and agencies of government) is not merely a desirable political privilege, but inherent in the idea of a representative democracy. It held that the Constitution contains an implied freedom of political speech and communications. The High Court did not suggest that a right of access to government information is constitutionally guaranteed, but its view indirectly supports Freedom of Information objectives.

3.3 Government Accountability and the Public Interest

The terms 'government accountability' and 'public interest' can have a number of meanings, and tend to be used in quite different ways in different disciplines. The Committee will not attempt to describe the various academic debates that may be relevant to the meaning of these concepts. Rather, this report seeks to describe the 'lowest common denominator' of what is uncontroversial about government accountability and the pursuit of the public interest. Such a definition is necessary to identify the appropriate treatment of commercial confidentiality claims in order to protect and preserve the effective operation of Victoria's system of government.

The Committee uses 'government accountability' to refer to the various ways in which government administration is required to 'account' to various persons and institutions.⁴⁷ This notion of 'giving account' implies the provision of explanations or relevant information. Consequently, there is potential for conflict between mechanisms that ensure accountability and claims of 'commercial in confidence' that seek to justify the withholding of information.

The notion of 'public interest' is generally used to describe that which benefits the public as a whole. Such a claim inevitably involves some balancing of competing claims and criteria.

⁴⁶ *Nationwide News Pty Ltd v Wills*, (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 108; *Theophanous v The Herald & Weekly Times Ltd* (1994) 124 ALR 1; *Stephens v West Australian Newspapers Ltd* (1994) 124 ALR 80; *Cunliffe v The Commonwealth of Australia* (1994) 124 ALR 120

⁴⁷ Drawing on the approach of Thynne & Goldring, *Accountability and Control – Government Officials and the Exercise of Power* (Law Book Co 1987) p. 8

Discussed below are some criteria particularly important in assessing the competing claims of commercial confidence and the demands of accountability.

There is no dispute that government administration must be accountable. This follows from the fact that government is given special governmental powers (including statutory powers) and resources (including moneys raised by taxation) and is elected to use those powers and resources to further the public interest. As pointed out by various witnesses,⁴⁸ the importance of maintaining adequate and appropriate government accountability mechanisms cannot be overemphasised.

In this chapter the Committee outlines the main mechanisms that ensure accountability on the part of government administration. The Committee also briefly describes the possible implications of commercial confidentiality claims for the operation of these mechanisms.

3.4 Forms of government accountability

The government administration is held accountable by a range of interconnected political, legal and economic mechanisms.

3.4.1 Ministerial and political mechanisms

Under the system of responsible government as applied in Victoria, the public sector is under the control of Ministers who are accountable to Parliament and, through the political system, to the electorate. This accountability is reinforced by parliamentary procedures for scrutinising the legality, integrity and efficiency of government, for example: through parliamentary question time; debates, parliamentary committees and inquiries; tabling of annual reports in the Parliament; the provision of detailed information for the budget estimates hearings; and through the ballot box.

The effectiveness of political accountability is linked to the availability of adequate information to allow the electorate to make an informed judgement on the performance of government.

⁴⁸ See, for example, submissions from the Victorian Auditor-General, Australasian Council of Auditors-General, Mr Iain Stewart, Rural Finance Corporation, Maribyrnong City Council, Victorian Employers' Chamber of Commerce and Industry, Public Sector Research Centre; University of New South Wales

Many witnesses⁴⁹ pointed out to the Committee that commercial confidentiality, if permitted to operate too broadly and prevent the supply of adequate information, could reduce the level of political accountability. It is also possible, to the extent that third party claims of confidentiality are allowed to prevent the release of information, that the government could be vulnerable to claims which it is prevented from refuting.

As several witnesses pointed out, too much 'secrecy' creates a climate in which critics of the government can readily imply that confidentiality claims are being used to hide incompetence and corruption, even if there is no truth in those claims.⁵⁰

3.4.2 Legal mechanisms

(a) Freedom of Information Legislation

The *Freedom of Information Act 1982* (Cwlth) plays a central role in ensuring the transparency of the public sector, by providing a mechanism whereby members of the public, the media and parliamentarians are able to access documentary information in the possession of Ministers and government agencies.

The *Freedom of Information Act 1982* (Vic) was the first Freedom of Information legislation to be enacted in an Australian State or Territory. It came into operation six months after the Commonwealth legislation. As stated in s. 3:

- (1) *The object of this Act is to extend as far as possible the right of the community to access to information in the possession of the Government of Victoria and other bodies constituted under the law of Victoria for certain public purposes by*
 - (a) *making available to the public information about the operations of agencies and, in particular, ensuring that rules and practices affecting members of the public in their dealings with agencies are readily available to persons affected by those rules and practices; and*
 - (b) *creating a general right of access to information in documentary form in the*

⁴⁹ See for example, submissions from State Swimming Centre, East Gippsland Shire Council, Overseas Projects Corporation, Victorian Institute of Sport and Lower Murray Water Authority

⁵⁰ See for example submissions from Lindsay Associates, East Gippsland Shire Council and Lower Murray Region Water Authority

possession of Ministers and agencies limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by agencies.

The Act promotes public accountability by requiring agencies to publish and make available specified information and by providing rights of access to documents in the possession of Ministers and government agencies. It also enhances personal privacy by providing rights to amend personal records.

The publication provisions in part II of the Act require agencies to publish and annually update information about their organisations, functions and powers as they affect members of the public and the documents held by the agencies. Such information includes: documents available for purchase or free; any arrangements for public input on advisory, consultative or administrative bodies; facilities for providing public access to documents; procedures for responding to requests for documents and various specified reports in their possession.⁵¹

Agencies are also required to make available for inspection and purchase any documents used in making decisions, such as manuals, guidelines and recommendations that affect the rights, privileges, benefits, obligations, penalties or detriments of any person.⁵² The Act provides that a person who has taken or omitted to take some action shall not be prejudiced by ignorance of material if the agency was legally required to publish that material by that relevant time and had not done so.⁵³ It also contains a procedure whereby persons can challenge a failure by an agency to specify a document in a statement published in accordance with the above. After such a challenge, persons can apply for review of any decision not to publish the document concerned.

An important feature of the legislation is that it provides for a universal right of access to documentary information in the possession of government departments and agencies (including local government). This right is subject to a number of limitations including exemption provisions contained in part V.

⁵¹ *Freedom of Information Act 1982 (Vic)*, s7

⁵² *Freedom of Information Act 1982 (Vic)*, s8. The Premier is also required to publish a continuing register of Cabinet decisions made after 5 July 1983

⁵³ *Freedom of Information Act 1982 (Vic)*, s9

The Act does not preclude disclosure of exempt documents,⁵⁴ but the provisions that protect agency officials from criminal and civil liability in respect of disclosure are confined to disclosure made in the belief that documents are required to be disclosed under the Act. On the other hand, the Victorian Civil and Administrative Tribunal, which has assumed the external review function previously exercised by the Administrative Appeals Tribunal, has an overriding discretion to grant access to most categories of exempt documents⁵⁵ if it concludes that the public interest requires such disclosure.⁵⁶

It is a fundamental feature of the legislation that access is a right, irrespective of any special interest or need. However, motive and need to know may be relevant in the context of fees charged and also in the balancing of public interest in the context of specific exemption provisions. They will also be relevant where an applicant is seeking access to his or her personal records.

Decisions on requests must be made as soon as practicable but, in any case, within 45 days.⁵⁷ The time limit may be extended in cases where the agency is required to consult third parties before deciding about access. Applicants are required to pay an application fee of \$20 and additional fees for time spent in search and retrieval, compilation of information, computer use and photocopying.⁵⁸

Documents that contain commercially sensitive information may be exempt from disclosure under several provisions. Those most commonly used are s. 34(1), which protects the business affairs of third parties, and s. 34(4), which protects the business affairs of the agency that received the request.

Section 34(1) was substantially amended at the end of 1999. It now provides that:

A document is an exempt document if its disclosure under this Act would disclose information acquired by an agency or a Minister from a business, commercial or financial undertaking and the information relates to

⁵⁴ *Freedom of Information Act 1982* (Vic), s 16. This in effect means that an agency or Minister is free to disclose an exempt document unless its disclosure is prohibited under some other law.

⁵⁵ The only exceptions are Cabinet documents, Bureau of Criminal Investigation documents and documents relating to personal affairs

⁵⁶ *Freedom of Information Act 1982* (Vic), s50(4)

⁵⁷ *Freedom of Information Act 1982* (Vic), s21

⁵⁸ See generally *Freedom of Information Act 1982* (Vic), ss17 and 22; *Freedom of Information (Access Charges) Regulations 1993*

- (a) *trade secrets; or*
- (b) *other matters of a business, commercial or financial nature and the disclosure of the information would be likely to expose the undertaking unreasonably to disadvantage.*

Prior to January 2000 a document was exempt under s. 34(1) if its disclosure under the Act would disclose information acquired from a business, commercial or financial undertaking and the information related to trade secrets or other matters of a business, commercial or financial nature; or its disclosure under the Act was likely to expose the undertaking to disadvantage.⁵⁹

The use of the word “or” was interpreted⁶⁰ to have the effect that a document was exempt if it satisfied either part of the test. As a result, any information which related to matters of a business, commercial or financial nature was exempt even if its disclosure was unlikely to have any detrimental effect on the undertaking in question.⁶¹

The only constraint (apart from the existence of the public interest override in s. 50(4)) was that it was necessary to show that the information impinged in some way on the actual conduct or operations of the undertaking itself and related to “matters of a business nature”.⁶²

Section 34 now provides for a more limited exemption in respect of third party business information acquired from a business, commercial or financial undertaking. Section 34(1)(b), which applies to matters of a business, commercial or financial nature other than trade secrets, requires an agency to demonstrate that the disclosure of such information would be likely to expose the undertaking unreasonably to disadvantage.

Trade secrets acquired from a business, commercial or financial institution receive blanket protection under the s. 34(1)(a) which, unlike s. 34(1)(b), does not contain any requirement of unreasonableness. Factors that have been held to be of relevance in determining whether or not specific information should be categorised as a trade secret include:

⁵⁹ The Supreme Court in *Gill v Department of Industry Technology and Resources* held that paragraphs (a) and (b) were required to be read disjunctively and also rejected an argument that paragraph (a) should be read down in the light of its specific reference to ‘trade secrets’ so as to exclude ‘the more mundane information acquired by an agency’

⁶⁰ See *Gill v Department of Industry Technology and Resources* [1987] VR 681

⁶¹ See *Re Gill v Department of Industry Technology and Resources* (1985) 1 VAR 97, 105 (affirmed by the Full Court of the Supreme Court [1987] VR 681)

⁶² See *Accident Compensation Commission v Croom* [1991] 2 VR 322

- whether it is of a technical nature;
- the extent to which it is known outside the business of its owner;
- the extent to which it is known by persons engaged in its owner's business;
- any measure taken by its owners to guard its secrecy;
- its value both to the owner and his or her competitors;
- the amount of effort and money spent by its owner in developing the information; and
- the ease or difficulty with which others may acquire or develop it.⁶³

The requirement of “unreasonableness” has been interpreted in the context of the equivalent provision in the Freedom of Information Act 1982 (Cwlth) (and also in the context of the personal privacy provisions in both the Victorian and Commonwealth Freedom of Information Acts) as requiring a balancing of the interests for and against disclosure.⁶⁴

An important consideration is the likely consequence of disclosure to a business competitor which must be balanced against the public interest in furthering the democratic objective of the legislation (including the objective of enhancing government accountability for its expenditure of public revenue).

Section 34(2) contains considerations that a decision maker may take into account when deciding whether disclosure would expose an undertaking unreasonably to disadvantage for the purposes of s. 34(1)(b). These considerations include:

- whether the information is generally available to competitors;
- whether it would be exempt matter if generated by an agency or Minister;
- whether it could be disclosed without causing substantial harm to the competitive position of the undertaking; and
- whether any countervailing public interest considerations (such as the public interest in

⁶³ *Re Hulls and Victorian Casino and Gaming Authority* (1998) 12 VAR 483, 493

⁶⁴ See *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 111. This approach is consistent with that taken to the criterion of unreasonable disclosure in s. 41 by the Federal Court in *Colakovski v Australian Telecommunications Commission* (1991) 100 ALR 111

evaluating aspects of government regulation or corporate practice or environmental controls) outweigh the competitive disadvantage to the undertaking.

There is also a so-called 'reverse-Freedom of Information' procedure in s. 34(3) that requires a decision maker to first consult an undertaking about whether the disclosure of information would expose it to disadvantage. Further, following such consultation, the undertaking must be notified accordingly of any decision to disclose a document. The undertaking must also be informed of its right to apply for review of the decision. This procedure is limited to a claim for exemption under s. 34(1)(b) and does not apply in relation to s. 34(1)(a).

The other key provision is s. 34(4) which is designed to protect the business affairs of agencies. This provides for exemption of a document if:

- (a) *it contains:*
 - (i) *a trade secret of an agency; or*
 - (ii) *in the case of an agency engaged in trade and commerce - information of a business, commercial or financial nature -*
that would if disclosed under the Act be likely to expose the agency unreasonably to disadvantage; or
- (b) *the results of scientific or technical research undertaken by an officer of the agency and -*
 - (i) *the research could lead to a patentable invention;*
 - (ii) *the disclosure of the results of an incomplete state would be reasonably likely to expose the agency or an officer of the agency unreasonably to disadvantage; or*
 - (iii) *the disclosure of the result before completion would be reasonably likely to expose the agency or the officer of the agency unreasonably to disadvantage.*

The requirement of unreasonableness was inserted into this provision by recent amendments to the Act.⁶⁵ As discussed previously, this criterion requires a balancing of the interests for and against disclosure. However, there is no equivalent

⁶⁵ Act No. 57 of 1999 Freedom of Information (Miscellaneous Amendments) Act 1999 assented to on 21 December 1999.

provision to s. 34(2) setting out the considerations that a decision maker may take into account when deciding whether disclosure would expose an agency unreasonably to disadvantage.

In order to attract exemption under s. 34(4)(a)(ii) an agency must be engaged in trade or commerce. This requires something more than the mere collection of licence fees and recovery fees⁶⁶ but may encompass the activities such as project financing⁶⁷ and administration of grants scheme designed to promote widespread commercial activity.⁶⁸ It may also encompass activities that are analogous to the sale of a business or privatisation of a government body such as the granting of concession agreements in respect of Crown reserves provided that they are part of an agency's habitual activity.⁶⁹

The Supreme Court has held that the disadvantage contemplated in this provision does not encompass disadvantage of a tactical kind in the context of litigation; it means disadvantage in a 'business, commercial or financial sense'⁷⁰ or possibly simply financial damage⁷¹.

Two other provisions that may be relevant are s. 36(b) and s. 38. Section 36(b) exempts from disclosure any documents that contain instructions for the use or guidance of agency officers on various procedures, for example procedures for negotiation, the execution of contracts and other similar activities relating to the financial, property or personnel management and assessment interests of the Crown or agency. As with s. 34(1), there is no requirement to demonstrate that disclosure will have any detrimental effect.

Section 38 determines the circumstances in which secrecy provisions in other legislation override the disclosure requirements in the Freedom of Information Act. A document is exempt if another law specifically applies to information of the kind contained in the document, if that law prohibits (either absolutely or subject to exemptions) the disclosure of

⁶⁶ *Re Thwaites and Department of Premier and Cabinet* (AAT, 21 January 1994 and 23 March 1994)

⁶⁷ *Re State Bank of New South Wales and Department of Treasury* (1991) 5 VAR 78

⁶⁸ *Re Bracks v Department of State Development* (VCAT, 6 July 1998)

⁶⁹ *NAG Incorp v Department of Natural Resources and Environment* (AAT, 1 December 1997)

⁷⁰ *Ibid* 325 per Young CJ

⁷¹ *Ibid* 331 per O'Bryan J (Vincent J concurring)

information of that kind, and if the prohibition is directed at persons who are referred to in that law.^{72 73}

The legislation provides for a two-tiered system of review; a right to seek internal review must be exercised where available, before external review. There is also a right to make a complaint to the Victorian Ombudsman and to apply for review by the VCAT. Review is available in relation to:

- a decision concerning access to a document, including a refusal to provide access as requested;
- a decision deferring the provision of access;
- a decision concerning an applicant's liability to pay a charge for access;
- a decision to provide access in a form other than that required; and
- a decision refusing to amend an applicant's personal records.

The VCAT has the power to override the decision of the agency or Minister and to make a new decision. It has the power to examine any document claimed to be exempt; in making a new decision, it will apply the same tests under the Act as the original decision maker was required to apply. The onus is on the agency or the Minister to justify the original decision.

As previously noted, the Act gives the VCAT an overriding discretion to grant access to documents that it finds to be exempt where public interest requires their disclosure. This so-called "public interest override" has up until recently been especially relevant in the context of documents that are subject to commercial in confidence claims as a result of s. 34(1)(a).⁷⁴

⁷² The Federal Court in considering the federal provision, which was identically worded prior to its amendment in 1991, has held that the secrecy provision relied on must describe the information prohibited from disclosure by reference to its intrinsic or internal content (*News Corporation Ltd v NCSC* (1984) 52 ALR 277). This approach was endorsed by the Victorian Supreme Court in *Department of the Premier and Cabinet v Birrell* (Unreported, 17 February, 1989)

⁷³ One such example is the *Grand Prix Act* 1994 (Vic), s. 49 which was referred to in the submission by Save Albert Park and the submission by Mr I Stewart

⁷⁴ This is less likely to be the case in the future due to the amendments that have been made to s. 34(1) although it may still be required to be considered in the context of claims for exemption under s. 34(1)(a)

Section 50(4) received detailed consideration by the Victorian Court of Appeal in *Department of Premier and Cabinet v Hulls*.⁷⁵ In that case Phillips JA stated that:

*In each case the tribunal must determine whether considerations of “the public interest” are so strong as to outweigh, or override, those factors by which the documents are exempt documents, whether those factors derive simply from the public interest or more immediately from “the private and business affairs” of those persons from whom information was gathered in the first place.*⁷⁶

While acknowledging that considerations of the public interest would depend on the nature and strength of the factors that have accorded the document exempt status, his Honour stressed that they had to prevail before the tribunal was empowered to grant access to a document which was otherwise exempt. Furthermore, in his view, the expression “requires” in s. 50(4) meant “demands” or “necessitates”.⁷⁷

Finally his Honour considered the nature of the competing public interest which was relevant under s. 50(4) if access was to be granted. He suggested that this could be broadly expressed as:

*the right of the public to have access, to the greatest extent and limited only by that information which, if in the public domain, would injure it, to information which it requires to enable it to debate and discuss matters that concern it [the public].*⁷⁸

It is therefore the starting point for the application of the s. 50(4) override in relation to documents that are exempt under s. 34(1) that document disclosure which will result in specific harm to the commercial affairs of a person or undertaking outweighs the general public interest in disclosure as embodied in the objects of the legislation.

However, this position may differ where there was some additional public or private interest in favour of disclosure. This would be the case where the disclosure of documents is in the public interest (as distinct from being of interest to the public)

⁷⁵ [1999] VSCA 117

⁷⁶ [1999] VSCA 117, para [26]; Tadgell JA concurring

⁷⁷ Ibid, para [31]

⁷⁸ Ibid, para [53]

or where the documents reveal some impropriety or wrongdoing by a government agency.

In *City Parking Ltd and City of Melbourne*,⁷⁹ for example, Deputy President Macnamara accepted:

that if it appeared that a public instrumentality were found to have conducted itself dishonourably in a major property transaction, it would be in the public interest that the impropriety should be exposed.

An additional interest in disclosure has been recognised where the applicant demonstrates that a specific benefit will result from disclosure - for example, where disclosure would assist in 'clearing the air' in an ongoing dispute, particularly where there is some relationship analogous to those in the law that involve fiduciary relationships.

One example involved the sale of a plant branch to a company managed by previous employees of the vendor.⁸⁰ There was no evidence of any impropriety, but the Tribunal concluded that there was a public interest in 'clearing the air'.

Other criteria which may supplement the general public interest in the transparency of administration include evidence of "null administration, incompetence, corruption and the like"⁸¹ or that disclosure will provide information to assist intelligent public debate on a significant policy issue such as the assignment of nursing home beds from the public to the private sector.⁸²

The approach whereby documents that deal with essentially private matters (that is, the business affairs of individuals and entities) should be exempt because their disclosure does not serve any democratic or other public objective, is similar to the test of relevance to the affairs of government. This was included into Australian case law by Justice Heerey in *Colakovski v Australian Telecommunications Corporation*⁸³ in the context of personal privacy. It provides that there is no overriding public

⁷⁹ (1996) 10 VAR 170, 234-5

⁸⁰ *Re Mildenhall and Vic Roads* (1996) 9 VAR 362

⁸¹ See concluding comments of Judge Wood in *Bracks v Department of State Development* (VCAT, 6 July 1998)

⁸² *Re Thwaites and Department of Human Services* (VCAT, 28 and 29 September 1998)

⁸³ (1991) 29 FCR 429

interest in favour of disclosure unless the documents in issue are 'of demonstrable importance to the affairs of government'.⁸⁴

In the case of these particular provisions, it is relevant to consider whether the document is private in the sense that its subject matter is predominantly a private rather than public concern, or whether it is governmental in that it discloses information about the affairs of government (including its relationship with specific persons and/or undertakings).

In the former case, the democratic objectives are clearly of limited relevance and, in the absence of other considerations that favour disclosure, the balance will generally tilt towards exemption. On the other hand, it is clearly inappropriate to ignore arguments based on participation and accountability where the documents are essentially governmental, and it is necessary to weigh the strength of these arguments against the seriousness of the harm that is likely to result from disclosure.

This was essentially the approach taken by the federal AAT in *Re Actors' Equity and Australian Broadcasting Tribunal (No. 2)*,⁸⁵ where it indicated that it may be more prepared to find that disclosure is not unreasonable where the documents have a governmental character.⁸⁶ It is also consistent with the view taken by the Victorian AAT in *Re Thwaites and Metropolitan Ambulance Service*,⁸⁷ when it noted that documents detailing concluded agreements between agencies and commercial undertakings constitute the record of the transaction between the parties and are therefore outside the scope of s. 34.

(b) Reasons for decisions

The High Court has rejected the argument that a general common law right of access to written reasons derives from the rules of natural justice or procedural fairness.⁸⁸ However, statutory rights to obtain reasons for decisions are an important

⁸⁴ Ibid 441. A similar approach was articulated in the context of the personal privacy provision in s41 in *Re WAJ and Commonwealth Ombudsman* (Unreported, 22 June 1998) where the Commonwealth AAT held that there was no need to show any particular unfairness, embarrassment or hardship particularly where the information was of no demonstrable relevance to the affairs of the government

⁸⁵ (1985) 7 ALD 584, 594

⁸⁶ See also *Re WAJ and Commonwealth Ombudsman* (Unreported, 22 June 1998)

⁸⁷ (1996) 9 VAR 427

⁸⁸ See *Public Service Board v Osmond* (1986) 63 ALR 559 and compare with the approach taken in *R v Civil Service Appeal Board; ex parte Cunningham* [1991] 4 All ER 310 (CA) and *R v Secretary of State for the Home Department; Ex parte Doody* [1993] 3 WLR. For a critique of the Osmond decision see M. Taggart, "Osmond and the High Court of Australia: Opportunity Lost" in Taggart (ed), *Judicial Review of Administrative Action in the 1980's* (Oxford University Press, 1986) 53-69

means by which individual decision makers must account to persons directly affected by their decisions.

General statutory rights to reasons are provided in Victoria by *Administrative Law Act 1978* (Vic), s. 8⁸⁹ and *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss. 45 and 46.⁹⁰ Such rights differ from Freedom of Information in that they confer a right to require the provision of certain information, whether or not it is in documentary form. However, these rights are not conferred on the public in general, but only on persons who have interests affected by the decision.⁹¹

The Administrative Law Act applies to decisions made by a 'tribunal' which is defined as a body that is under a duty to accord natural justice other than one specifically excluded under ss. 4(3), (4), 13 and 14(2). The duty to accord natural justice is principally confined to bodies of a public nature, but the test for implication of natural justice was relaxed in *Kioa v West*.⁹² Thus the Act has acquired a broad reach.

The expression 'decision' excludes awards that operate by contract rather than law, and it may exclude decisions of a preliminary or recommendatory nature.⁹³

Under s. 8(1), a tribunal making a decision on request must furnish a statement of reasons to a person affected by the decision. However, there is no requirement to include findings of fact or to refer to the evidence on which findings of fact are based. The Act does not contain separate categories of exemption; instead, where furnishing the reasons would be against public policy, there is a general exception whereby the duty does not arise and no order can be made (s. 8(5)).

If a decision maker fails to provide a statement of reasons as required, the Supreme Court has the power to order the provision of a statement within a reasonable time. In the event of non-compliance, the court can make any order that it could have made if there had been an error of law. It can also order the furnishing of a further statement (s. 8(4)).

⁸⁹ In relation to "decisions" of "tribunals" as defined in the *Administrative Law Act 1978*, s. 2.

⁹⁰ Where a person is entitled to apply to the Tribunal for review of a decision, or to have a decision referred to the Tribunal for review *Victorian Civil and Administrative Tribunal Act 1998*, ss. 45, 46

⁹¹ See *Administrative Law Act 1978*, s 2 ("person affected"); *Victorian Civil and Administrative Tribunal Act 1998*, ss. 5, 45

⁹² (1985) 159 CLR 550

⁹³ See M Allars, *Introduction of Australian Administrative Law*(Butterworths, 1990) para 3.24

Section 45 of the Civil and Administrative Tribunal Act, provides that a person who is entitled to apply to the tribunal for review of a decision, or to refer a decision to the tribunal for review, may apply in writing (within 28 days after the day on which the decision was made) for a written statement of reasons. The Act, like the Administrative Appeals Tribunal Act which it replaces, does not define the decisions to which it applies. There must be a provision under an Act or subordinate legislation that confers the tribunal with jurisdiction to review the decision.

An official who receives a request for reasons must as soon as practical (and in any event, within 28 days or such other period as is specified in the enabling enactment) give a written statement of the reasons for the decision and also the findings that led to the decision. The findings must refer to the evidence or other material on which those findings were based.⁹⁴

It is reasonably unlikely that information having a commercial value will warrant omission (if otherwise required) from disclosure required under these statutory provisions.

Omissions are authorised, broadly speaking, on grounds similar to those necessary to establish a claim of public interest immunity before the courts. The fact that information has been communicated in confidence is not sufficient basis for exemption.

Under s. 8(5) of the Administrative Law Act, a tribunal is not bound to furnish a statement of reasons where the court believes that would be against public policy. The courts are likely to apply similar principles to those that govern public interest immunity.⁹⁵ The fact that information is 'commercially confidential' may be relevant (in some cases at least)⁹⁶ to the determination of this issue, although confidentiality alone is not sufficient to establish that disclosure would be contrary to the public interest.

Section 54 of the Civil and Administrative Tribunal Act allows the Attorney-General to certify that disclosure of information or any matter contained in a document would be contrary to the

⁹⁴ *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s46.(6) provides that para (2)(b) does not apply to a decision made by the Business Licensing Authority. A written statement of reasons for a decision by the Business Licensing Authority complies with sub-section (2)(a) if it sets out the statutory ground on which the decision is based (s 46(7))

⁹⁵ Sometimes referred to as "Crown privilege"

⁹⁶ See, eg, *Rundle v Tweed Shire Council* (Bignold J, Land & Enir. Crt NSW, 20.12.98 unreported)

public interest for a specified reason that ‘could form the basis for a claim by the State in a proceeding in the Supreme Court that the information or matter should not be disclosed’. This is clearly intended to invoke the principles governing public interest immunity.

Under s. 46 of the Civil and Administrative Tribunal Act, a statement of reasons must not include any information or matter to which a s. 54 certificate applies. However, the President of the tribunal has the power to order the inclusion of such information if the President considers that this would not be contrary to the public interest.⁹⁷

Section 46(5) requires a decision maker to inform a person requesting a statement of reasons “if a statement of reasons would be false or misleading if it did not include information or matter” covered by a s. 54 certificate. This implies that the reasons will not be false or misleading in some cases, despite the omission of information covered by a s. 54 certificate. In such cases there appears to be no obligation to inform the person requesting reasons.⁹⁸ If that is so, the President’s power to order inclusion of information may be undermined, because persons requesting reasons may be unaware of the existence of a s. 54 certificate, and may be denied the opportunity to seek an order for inclusion.

(c) *Public Records Act*

The *Public Records Act* 1973 (Vic) creates the Public Record Office as the State’s archive authority with responsibility for regulating the disposal and management of public records. It identifies records that are worthy of preservation as the archives of the State, and arranges for their preservation in perpetuity. It also takes custody of records no longer required for current administrative purposes and provides access to records that have been released for public inspection.

Most records are released for public inspection after 25 years. However, there is provision for specific categories of records to be closed for varying lengths of time. For example, records containing personal or private information are not released for 75 years after the creation of the records in the case of adults, and for 99 years in the case of children. Further, the Minister

⁹⁷ *Victorian Civil and Administrative Tribunal Act* 1998 (Vic), s47(5)(6)

⁹⁸ Contrast the approach taken under the *Administrative Appeals Act* 1984 (Vic), where s. 30(1)(e)(i) expressly required the decision maker to notify the applicant if there was any matter omitted.

may declare that any specified record or records of a specified class that are transferred from his or her department to the Public Record Office shall not be available for public inspection for a specified period not exceeding 30 years after the date of their transfer.⁹⁹

Resource limitations do not permit access to be decided or reviewed at the level of individual documents or record items, so a single decision is made for each consignment or group of documents prepared for transfer. Generally, if a consignment contains some material that should be withheld, the consignment will be closed in its entirety.

Special access to closed records will be granted only in exceptional circumstances: for example, for the purposes of research. The Minister must be satisfied that there is a countervailing public interest in making records available for the proposed research which outweighs the reasons for withholding their release. The public interest must also justify the resources required to support the investigation, preparation and supervision involved in satisfying the request.

(d) Auditor-General

The Auditor-General¹⁰⁰ is the external auditor of the Victorian public sector. He is an officer of the Parliament and provides an independent view of the performance and financial management of Victorian public sector agencies and bodies. The Auditor-General reports to the Parliament on:

- agencies' financial statements;
- resource management and accountability issues; and
- the annual financial statements of the government.

His performance audit reports, numbering about seven each year and around 540 audit opinions on financial statements of government agencies and bodies, are an important means of assisting the Parliament to fulfil its accountability role on behalf of the Victorian community.

⁹⁹ *Public Records Act 1973* (Vic), s10(1)

¹⁰⁰ Section 4A(6) of the *Audit Act 1994* provides that the Auditor-General has complete discretion in the performance or exercise of his or her functions of powers and, in particular, is not subject to direction from anyone in relation to –

- a) whether or not a particular audit is to be conducted;
- b) the way in which a particular audit is to be conducted; and
- c) the priority to be given to any particular matter

The Auditor-General's role has been described as 'the crucial link in the process of accountability to the taxpayer on the utilisation of funding'. The reports of the Auditor-General are considered to be an essential element in the operation of democratic government.¹⁰¹

Under s.12 (1) of the *Audit Act 1994*, the Auditor-General has unrestricted access to information held by government agencies:

no obligation to maintain secrecy or other restriction on the disclosure of information obtained by or furnished to persons employed in the public service or by an authority, where imposed by an enactment or rule of law or Cabinet confidentiality, applies to the disclosure of information required by the Auditor-General or an authorised person for the purposes of anything done under this Act.

The Committee noted that disclosure of information does not apply to private sector contractors and the difficulties that this has presented for the Auditor-General have been raised in various reports to the Parliament.¹⁰²

The Committee is strongly of the view that the Auditor-General should have complete access authority, covering both government agencies and contractors, and unfettered discretionary power in determining what should be reported to Parliament from matters addressed during audits. This is discussed in greater detail in Chapter 6.

Section 16 (6) of the Act provides that a person conducting a performance audit on behalf of the Auditor-General or the Auditor-General, cannot question the merits of government policy objectives. This represents the sole restriction on the powers of the Auditor-General. However, the section does not preclude audit examination of policy documentation as a means of obtaining an increased understanding of government programs or initiatives, performance measures and outcomes.

Until recently, there was no provision in the *Audit Act* to exempt allegedly commercially sensitive information from publication in audit reports to the Parliament.

¹⁰¹ The Hon. Daryl Williams, AM QC MP, House of Representatives, Hansard, 2 February 1995, quoted in Barnett, P, *Some thoughts about the Roles Responsibilities and Future Scope of Auditors-General* (1996) 55 ASPA 137

¹⁰² See for example Special Report No. 53 *Victoria's multi-agency approach to emergency services: A focus on public safety*, December 1997, p.60

The difficulties that this presented were outlined in the original submission from the Auditor-General:

The current Audit Act does not provide grounds to exempt allegedly commercially sensitive information from publication. Further, no alternative machinery exists within the parliamentary arena to evaluate the merits of such claims for exemption of information from disclosure in reports to the Parliament.

I have therefore been required to exercise my judgement in deciding whether or not claims that material is commercially confidential or sensitive are in fact legitimate and, more importantly whether or not disclosure of such material is in the public interest.

From a public accountability viewpoint, it is crucial that consideration be given by Parliament to determining the nature of information that may be regarded as “commercially confidential” or “sensitive” and when exclusion of such information from publication in an Auditor-General’s Report to Parliament may legitimately be deemed to be fair and reasonable and in the interest of the public.

Since the conclusion of formal evidence taking for this inquiry, the Bracks Government has been elected with a mandate to promote open and accountable government.¹⁰³ Part of this commitment involved amending the Audit Act¹⁰⁴ to give more discretion to the Auditor-General to include in a report, information gathered in the course of an audit if the information meets the test of being relevant to the subject matter of the report and is in the public interest.

The Committee strongly supports this legislative change. However this amendment still does not address what information may be regarded as ‘commercially confidential’ or ‘sensitive’ and in what circumstances exclusion of such information from publication in an Auditor-General’s report to Parliament, may legitimately be deemed to be fair and reasonable and in the interests of the public.

These matters are discussed in greater detail in Chapter 6, see page 91.

¹⁰³ Quoted in the Governor's speech at the opening of the First Session of the Fifty-fourth Parliament, 3 November 1999, p.1

¹⁰⁴ Act No. 53 of 1999, section 12(3)

(e) Ombudsman

The Ombudsman is empowered to undertake enquires into or investigate administrative action either on his own initiative or in response to a complaint.¹⁰⁵ This provides a means by which government decision makers must account to an independent statutory officer and, through that officer, to the community. A complaint can be made to the Ombudsman without any formality, and it is investigated without cost to the complainant. Consequently, the Ombudsman provides the most readily accessible of all the accountability mechanisms. The Ombudsman has broad powers to gather evidence, including access to commercially sensitive material, if necessary.¹⁰⁶

The Ombudsman under the provision of the *Evidence Act 1958* has the coercive powers of a Royal Commissioner to summons any person to give evidence and to provide specified documentation. Also the provisions of the Ombudsman Act override obligations on the part of authorities to maintain secrecy and any other restrictions on the disclosure of sensitive information.¹⁰⁷

The Committee noted the views expressed by the Ombudsman in his 1997-98 Annual Report:

*The Public Accounts and Estimates Committee raised with me the question of the effect which a claim to commercial confidentiality has on the ability of my Office to gather evidence. My response was to the effect that the term 'commercial confidential' was not a term which is known to the Ombudsman. I said that commercial confidentiality was not a legitimate restriction on the powers of the Ombudsman. It has never been a problem for this Office in respect to gathering information. The simple fact of the matter is that if the Ombudsman has jurisdiction to investigate a complaint against a particular body, then that body cannot claim commercial confidentiality to prevent my Office obtaining that information.*¹⁰⁸

(f) Regulator-General

¹⁰⁵ *Ombudsman Act 1973 (Vic)*, ss 13, 13A, 14

¹⁰⁶ *Ombudsman Act 1973 (Vic)*, s 18, *Evidence Act 1958 (Vic)*, ss17, 18, 19, 20 and 20A

¹⁰⁷ Dr B W Perry, Victorian Ombudsman submission p.1

¹⁰⁸ *25 Years of the Ombudsman Victoria*, Ombudsman Report 30 June 1998, p.12

The Office of the Regulator-General, which commenced operations on 1 July 1994, oversees Victoria's restructured government business enterprises with a view to promoting competition and efficiency.¹⁰⁹ It was established as an independent regulator with the objectives of promoting competitive market conduct; preventing misuse of monopoly or market power; facilitating entry into the relevant market; facilitating efficiency in regulated industries; and ensuring that users and consumers benefit from competition and efficiency.¹¹⁰ In effect the Regulator-General is responsible for policing the 'economic' accountability mechanisms. As privatisation progresses, this role increasingly involves the regulation of private sector enterprises.

The Office has broad powers to obtain information, including confidential and commercially sensitive information relating to various regulated industries such as Victoria's electricity industry, the Melbourne metropolitan water industry, export grain handling and certain ports and rail services.¹¹¹ However, in the case where a person states at the time of giving information that it is 'of a confidential or commercially sensitive nature', the Act restricts the ability of the Office to disclose that information.¹¹² When the Regulator-General holds an inquiry, a report must be submitted to the responsible Minister, tabled in Parliament and made publicly available. However, the report can be divided into two parts: a document containing commercially confidential information and a document containing the rest of the report. The former is not required to be tabled in Parliament or to be made publicly available.¹¹³

The Office is subject to the operation of the Freedom of Information Act but is specifically precluded from disclosing documents that fall within one or more of the exemption provisions in that Act.¹¹⁴

(g) Scrutiny by parliamentary committees

One of the most important functions of a House in a legislature under the Westminster system is ..to obtain information as to the state of affairs in their

¹⁰⁹ See *Office of the Regulator-General Act 1994*

¹¹⁰ *Office of the Regulator-General Act 1994*, ss1(b), 7(1), 7(2)

¹¹¹ *Office of the Regulator-General Act 1994*, ss 27A, 32

¹¹² This is subject to exceptions that allow limited disclosure within government, but otherwise, generally require observance of a procedure providing opportunity for the disclosure to be challenged: *Office of the Regulator-General Act 1994*, ss 27C, 27D

¹¹³ *Regulator-General Act 1994*, s33

¹¹⁴ *Regulator-General Act 1994*, s 27E

*jurisdiction so that they can, where necessary, criticise the ways in which public affairs are being administered and public money is being spent.*¹¹⁵

The parliamentary committee system is an important accountability mechanism. The role of the committees is to conduct inquiries into matters of public interest and into the conduct of government. These inquiries assist the Parliament to obtain information which is necessary to enable it to legislate effectively and to inform the public of the manner in which government is conducted, so that the electors will be capable of making informed decisions.

Inquiries are conducted principally by seeking information and opinions from persons who possess the information and whose views are likely to be significant. In order that this information gathering process may be effective, the committees have the power¹¹⁶ to require persons to attend and give evidence and to produce documents and any default may be in contempt of Parliament.

Most committees are empowered to hear evidence in public or in private. It is open to a committee to decide not to pursue a matter because it would be contrary to the public interest for reasons including possible prejudice to court proceedings, national security or individual privacy.

In making such decisions, however, most committees have an option, not in practice available to the Parliament itself, to take evidence in private. One response to a claim of commercial confidentiality is for the committee to offer to take such evidence *in camera*. Although the committee can hear the evidence in private, s.4R(3) of the *Parliamentary Committees Act 1968* provides that the Committees shall not disclose or publish any evidence given to it in private. With this procedure, a committee may inform itself fully on an issue but be unable to use the information. While this arrangement minimises any risk arising from the publication of evidence, it is a restriction on the power of the Committee. This is contrary to the situation that applies in all other Australian parliaments.

Whether receiving evidence *in camera* is an adequate means of handling an accountability issue is questionable. In his submission the Clerk of the Senate, Mr Harry Evans, expressed the view:

¹¹⁵ High Court Justice McHugh quoted in an article "The great government cover-up" *The Australian Financial Review* 17 January 2000, p. 14

¹¹⁶ *Parliamentary Committees Act 1968*, s.4J(i)

*The underlying principle should be that if information can be disclosed to the government on a confidential basis there is no reason for its not being disclosed to a parliamentary committee also on a confidential basis. The commercial-in-confidence principle militates, in appropriate cases of apprehended damage to commercial interests, against the publication of information, not against the provision of such of the information. Any claim that information is commercial-in-confidence should therefore be met by the question: what is the damage to commercial interests that may result from the publication of the information, and the purpose of this question should be to determine whether information is treated as *in camera* evidence rather than as public evidence.¹¹⁷*

In considering the provision of information to parliamentary committees on a confidential basis, the question of its remaining confidential is often an underlying and generally unspoken concern of Ministers and agencies. If confidential information is revealed, Members run the risk of incurring opprobrium and reducing the likelihood that future confidential information would be provided.

A perceived problem is that parliamentary committees, while representing the Parliament, also have a political element. It is feared that with the restriction on publication of *in camera* evidence, some Members may place the political imperative in front of the parliamentary convention and information may be 'leaked'.

In an attempt to avoid this, the Senate and every other State and Territory Parliament in Australia have adopted a procedure that permits committees and their Parliament to publish evidence, which has been taken *in camera*. Normally such evidence is not published but it could be, if the evidence is needed to support conclusions and recommendations. A committee may also decide to publish the *in camera* evidence at a later date when the risk of harm has passed, or may decide on partial publication in order to balance competing concerns.

The Committee is also aware that the Senate has a standing order that provides for the disclosure, by the President, of unpublished evidence and documents which have been in the custody of the Senate for 10 years, and *in camera* evidence and

¹¹⁷ Mr H. Evans, Clerk of the Senate, submission p.2

documents which have been in the custody of the Senate for 30 years. This provides access to material for the purposes of historical research.

During the life of the 53rd Parliament the only parliamentary committee not provided with information on the grounds of commercial confidentiality, was the Public Accounts and Estimates Committee which has the primary role of scrutinising the government's budget and all aspects of public sector administration.¹¹⁸

The then Auditor-General referred to this issue in his submission:

The key accountability mechanism is, of course, the Parliamentary mechanisms of inquiry and, if necessary, censure. These mechanisms include, question time, answers to questions on notice, debates and matters of public importance and the activities of the parliamentary committees established by Parliament to help its purpose.

If these parliamentary mechanisms are to be effective there can be no general rule proscribing against parliamentary access to commercial documents to which the government is a party. Indeed, in many circumstances, Committees of Parliament which have been granted the right to call for papers and persons also have the duty to examine these commercial documents in order to meet Parliament's requirements. As a practical matter, unless these Committees do carefully consider commercial documents relevant to the terms of their inquiry, they are capable of being misled, of misleading Parliament and of causing Parliament to fail its oversighting and legislative role.¹¹⁹

These problems are further exacerbated for the Public Accounts and Estimates Committee because it has the responsibility of following up issues raised in the Auditor-General's Report. This is an important accountability function because the Auditor-General has no power to ensure that the audited agencies implement his recommendations.

¹¹⁸ See for example PAEC Hansard transcripts of estimates hearings, 16 June 1997, p. 183 and 15 June 1999, p. 104

¹¹⁹ Victorian Auditor-General' Submission p. 7

*The Auditor-General is the Parliament's principal informant on the performance of the administrative system. The Parliament therefore has a special responsibility to ensure ... that its own investigative procedures (particularly through committees) are such that it fully utilises the information about government supplied to it in the Auditor-General's reports.*¹²⁰

While this report contains recommendations to overcome the problems experienced by the Auditor-General in relation to commercial in confidence documents, that is not the end of the story. There is a broader underlying issue of the effectiveness of the present parliamentary mechanisms for dealing with information classified as commercial in confidence.

The Committee believes that the increasingly complex arrangements for government service delivery, particularly contracting out of public services to private enterprise, are challenges to public accountability and highlight the need for the Parliament to adopt new procedures for dealing with commercial in confidence material.

(h) Rights of appeal to tribunals and courts

Rights to appeal from administrative decisions have become an increasingly important accountability mechanism. Such rights must be conferred by statute, and some decisions are not subject to appeal. For example the Victorian Casino and Gaming Authority is not required to give reasons for its decision on an application to hold an interactive gaming license.¹²¹ The nature and scope of an appeal is determined by the terms of the legislation that confers the right.

In Victoria most rights of appeal involve a full appeal on the merits to the VCAT.¹²² The government is required to account for decisions, whereby an independent tribunal reviews the decision and establishes the correctness of the original result.

It is unlikely that a claim of commercial confidence would prevent the tribunal from accessing information required to

¹²⁰ *Report of the Royal Commission into Commercial Activities of Government and other Matters* (1992) Part 2, paragraph 3.10.1

¹²¹ This is discussed in *Scrutiny of Acts and Regulations Committee Alert Digest* No. 5 of 1999, p. 27

¹²² *Victorian Civil and Administrative Tribunal Act 1998* (Vic), *Tribunals and Licensing Authorities (Miscellaneous Amendments) Act 1998* (Vic)

decide an appeal. Information can be withheld in certain cases, but this will generally require reasons equivalent to those necessary for a claim of public interest immunity.

Quite broad powers allow the VCAT to gain access to commercially sensitive material. It appears that the rules of law relating to public interest immunity have no application to the Tribunal, as far as parties are concerned, unless the Attorney-General has issued a s. 54 certificate. This follows from the exclusion in (s. 56) of the general rules of public interest, except to the extent set out in the Act. Section 80(3) ensures that the tribunal's power to require a party to produce a document or provide information prevails over the rules of public interest immunity. However, it appears that public interest immunity can still apply where information or documents are sought from a person who is not a party.

Section 106 excuses a person from answering a question or producing a document in a proceeding if they could not be compelled to do so in Supreme Court proceedings.¹²³ This section is subject to s. 80(3) (allowing the tribunal's directions concerning parties to prevail), but not s. 81 (obtaining information from third parties). The policy of the legislation would appear to be to require the government to use s. 54 certificates to make public interest immunity claims concerning information or documents in its possession.

Where a s. 54 certificate has been issued, a person giving evidence before the tribunal is not required to answer a question involving disclosure of information to which the certificate applies. The exception is when the President considers that answering would not be contrary to the public interest and thus orders the person to answer the question.¹²⁴ The certificate does not affect the obligation of the decision maker to lodge relevant documents with the tribunal where decision review is sought.¹²⁵ The tribunal has power to allow a party to have access to documents to which the certificate applies.¹²⁶ However, the tribunal must not disclose such documents to any other person, and is required to return such documents when no longer

¹²³ Note, however, that the Tribunal can still require production of a document for the purpose of determining whether public interest immunity applies: s106(2)

¹²⁴ *Victorian Civil and Administrative Tribunal Act 1998*, s55. This is a question of law. Note that the tribunal has power to order that a hearing be held in private (s101(2)) and to restrict publication of confidential information (s101(4))

¹²⁵ *Victorian Civil and Administrative Tribunal Act 1998*, s49. Nor is this affected by public interest immunity: s49(5)

¹²⁶ *Victorian Civil and Administrative Tribunal Act 1998*, s54(3). The consent of the President is required

required.¹²⁷ It appears that the tribunal does not have power to disclose information or documents covered by a s. 54 certificate in its reasons for a decision.¹²⁸

(i) *Judicial Review*

Judicial review provides a means by which an individual decision maker can be required to account for the lawfulness¹²⁹ of her or his decision to a fully independent judicial officer. The officer reviews the decision at the instigation of a person or persons directly affected by the decision.

Judicial review of administrative action is the most basic and fundamental of the legal mechanisms by which government is held accountable. It is also, in many respects, the most limited. It is the means by which the courts ensure that administrators act within the limits of their powers, and it is fundamental in defining the relationship between the courts, Parliament and the administration. Judicial review is also an essential accountability mechanism because it is almost always available¹³⁰ (at least in theory) if an applicant with standing can establish one or more grounds of review. However, the expense of seeking judicial review, along with the limited nature of the remedies it provides, ensures that it is usually a remedy of last resort.

The powers of a court engaging in judicial review to access and use relevant commercially sensitive material are limited, in theory, only to the extent that privilege can be established. There may be rare cases where commercial confidentiality in combination with other factors justifies a claim of public interest immunity. However, in practical terms, there is an inevitable link between the treatment of commercial confidentiality under other accountability mechanisms (most notably, Freedom of Information) and the availability of judicial review.

¹²⁷ *Victorian Civil and Administrative Tribunal Act 1998*, s54(2)

¹²⁸ This assumes that s. 54 prevails over s. 117

¹²⁹ As opposed to “correctness” in the case of appeals on the merits

¹³⁰ Except in cases where the matter is not “justiciable” or where there is an effective privative clause

3.4.3 Economic Mechanisms

Increasingly, Australian governments have sought to expose the public sector to 'economic' accountability mechanisms. In particular, many governments have sought to introduce the discipline of competitive forces, where possible, as a means of promoting accountability in the efficiency of some areas of governmental activity.

Various policies and developments in Victoria have contributed to the introduction of these mechanisms, but three deserve particular mention.

- *Corporatisation and the separation of purchaser and provider function*¹³¹

Corporatisation has been used in an attempt to introduce private sector organisational structures and strategies, and to increase the potential for comparisons between public sector and private sector performance.

- *Competitive neutrality*

This has been used to increase the validity of public-private sector comparisons, and to pave the way for competitive tendering.

- *Outsourcing and competitive tendering*

This has been used in an attempt to ensure that services provided to and on behalf of government are provided in the most efficient and competitive manner possible, and to expose government owned service providers to competitive forces.

These policies combine to create a situation in which many activities traditionally performed by governments are now 'purchased' from corporatised providers, private providers, or a combination of the two.

¹³¹ Facilitated in Victoria by the *State Owned Enterprises Act 1992* (Vic)

The significance of these economic mechanisms for this report is twofold:

- the treatment of commercial confidence claims may have the potential to undermine the effectiveness of these mechanisms; and
- there is a degree of tension or conflict between these newly developed economic mechanisms and the traditional legal and political mechanisms.

These two issues are further discussed in Chapter six of this report.

3.5 Conclusion

The factors that govern the treatment of commercially sensitive material will vary from one accountability mechanism to another. In the case of Freedom of Information, the issue will be whether the material is exempt from access under one or more of the exemptions specified in the Act. The Auditor-General, on the other hand, only has access to material within the public sector for the purpose of performing his role. While he may be able to refer to commercially sensitive material in any report to the Parliament, he must ensure that it is in the public interest for that information to be disclosed. Whether that is the case will depend on different (but related) criteria.

While parliamentary committees are able to take evidence in private about commercial in confidence matters, they are unable to disclose the information. This restriction means that Committees can not release information or documentation even though it may be in the public interest.

The possible options for treating commercially sensitive material are more varied than the simple alternatives of permitting unrestricted public access or requiring complete confidentiality. Intermediate positions include allowing access to specified office holders (such as parliamentary committees or the Auditor-General) with limited powers to make the information public in certain circumstances.

Restricting access to commercially sensitive material for the purpose of one accountability mechanism may undermine the effectiveness of others. The fact that material is not available under Freedom of Information, for example, means that judicial review is unlikely to correct unlawful action.

CHAPTER 4 COMPARISON WITH INFORMATION PROVIDED TO SHAREHOLDERS

... while the public sector is becoming more private sector oriented through the greater use of competitive tendering and contracting, it is important to realise that there will always remain clear distinctions between the two sectors. The public sector operates within a 'political environment' and is accountable simultaneously to the Executive (ie Ministers), the legislature (ie the Parliament) and the judiciary (ie the Courts). That is, there are a number of accountabilities and 'balances' that have to be struck as part of the 'bottom line' of performance.¹³²

Key findings

- 4.1 There is a suite of laws and standards that set out minimum disclosure requirements in the private sector. Because of past abuse (real or perceived) by management in being accountable to shareholders, there has been a growth in the volume, frequency and quality of information that publicly listed companies are obliged to provide to their shareholders, notwithstanding any arguments about the commercial sensitivity of that information.**
- 4.2 Disclosure requirements in the private and public sectors have in common the need for management/governments to account for their use of delegated powers to shareholders/Parliament.**

4.3

¹³² Quoted in a speech by Mr Pat Barrett, AM Commonwealth Auditor-General on 'Risk Management as part of the initiatives for greater public sector accountability', p. 26

Since the goals of government are broader than those of an ordinary commercial company (in the same way that the legitimate interests of the community are broader than those of shareholders), the range of information that is publicly available must also be broader for government activities. Financial accountability alone will not suffice.

4.4 The existence of important accountability mechanisms in the private sector that have no real equivalent in the public sector means that the shareholder analogy is of limited use as a guide to necessary public sector information disclosure requirements.

4.1 Introduction

The Committee's third term of reference requires consideration of 'what type of information over and above that provided to shareholders of private companies is considered to be in the public interest or required to be made available to ensure public accountability'.

This invites comparison of accountability mechanisms in the public sector with those for publicly listed companies, the predominant organisational form in the private sector. There is some potential for such comparison.

When a private sector company is not managed by its owners, there exists what is often called an 'agency problem' that is, the problem of how to ensure that managers act in the interests of the owners. This 'agency problem' and the attempts by the Federal Government to address this issue through amendments to the corporations law are not entirely dissimilar to the issue of ensuring that governments are accountable to the public.

In recent years, there has been a growing tendency to look to private sector models of management and accountability for inspiration in the public sector, as is apparent in the growth of outsourcing and the former government's Management Reform Program.¹³³ However, the Committee believes it is also important to note the differences between companies and governments.

4.2 Shareholders' rights to information

It is beyond the scope of this Inquiry to attempt a comprehensive description of shareholders' rights to information.¹³⁴ Such rights arise from a number of different sources, including:

- the Corporations Law;
- equitable duties;
- the company's constitution; and
- (where applicable) the Australian Stock Exchange listing rules.

The extent of these rights varies considerably according to whether the company is a small proprietary company, a large proprietary company, a public company that is not a disclosing entity, an unlisted disclosing entity, or a listed company.¹³⁵ For the purposes of this report, the most appropriate comparison is with listed companies. The position of a small shareholder in a large, widely held, listed company is probably the closest private sector analogy to the relationship between voter and government.¹³⁶

Most small shareholders of listed companies regard their shares as an investment. Their main concern is that the performance of the company provides an adequate return on their investment. The rights of such shareholders to receive information on the financial 'performance' of their shares – are reasonably extensive.

In view of the following factors, the rights of shareholders may be even stronger (in certain respects) than equivalent rights of the public to access such information in the public sector:

¹³³ See, eg, Department of Treasury and Finance, *Reform of the Budget Sector – Elements of Financial Management* (1997)

¹³⁴ For a detailed account see: Ford, Austin & Ramsay, *Ford's Principles of Corporations Law* (Butterworths, 1999) Chapter 10

¹³⁵ See submission by Transport Accident Commission, p. 1-3

¹³⁶ See submission by Transport Accident Commission, p. 2 para 3.5; Submission by Colac Otway Shire Council

- there is a greater tendency to mandate disclosure rather than confer rights of access to information;
- disclosure requirements prevail over the demands of confidentiality, in some cases at least; and
- duties of disclosure are supported by the threat of personal, civil and criminal liability.

Examples of these features of the information rights of shareholders of listed companies, are provided below.

4.2.1 Mandating disclosure or provision of information

The information rights of shareholders usually oblige the company or its directors to disclose information publicly or communicate information to shareholders. The duty is usually an active duty,¹³⁷ not simply a passive duty to provide information if requested.¹³⁸

The continuous disclosure requirements of the Australian Stock Exchange Listing Rules, for example, provide that a listed company must immediately inform the Australian Stock Exchange of any information that a reasonable person would expect to have that may materially effect the price or value of its securities.¹³⁹ There is also a wide range of information that companies are required to either record in company registers¹⁴⁰ or provide to the ASIC for recording in its registers.¹⁴¹

When convening meetings, directors are under an equitable duty to provide members with full and fair information on matters that they propose to put to the meeting.¹⁴² The Corporations Law¹⁴³ and the Listing Rules¹⁴⁴ require the

¹³⁷ An exception to this is the right to apply to the court for an order to inspect books of the company: *Corporations Law*, s. 247A (prior to 1.7.98, s319)

¹³⁸ As is the case under Pt III of the *Freedom of Information Act 1982* (Vic) and the duties to give reasons imposed by *Administrative Law Act 1978* (Vic), s. 8 and *Victorian Civil and Administrative Tribunal Act 1998* (Vic), ss. 45, 46

¹³⁹ ASX Listing Rule 3.1

¹⁴⁰ *Corporations Law* Chapter 2C (formerly Part 2.5)

¹⁴¹ See Ford, Austin & Ramsay, *Ford's Principles of Corporations Law* (Butterworths) [10.390]-[10.400]

¹⁴² *Ibid* [7.460]

¹⁴³ Eg., s. 260B and Part 2J.3 generally (shareholder approval of financial assistance); s. 243V (shareholder approval of a transaction conferring a financial benefit on a "related party"). When the remaining provisions of the Corporate Law Economic Reform Program Act 1999 (Cwlt) (CLERP Act) commence (which is expected to be 13 March 2000), s. 243V will be replaced with comparable obligations in s. 219.

¹⁴⁴ Eg, ASX Listing Rule 10.10.2 (independent report on transaction with related party involving acquisition or disposal of substantial asset)

provision of additional information to shareholders where certain types of transactions require consideration.

4.2.2 Prevalence of disclosure over confidentiality

A number of requirements can operate to require disclosure of confidential material to shareholders.

Under the requirements of listing rule 3.1 (concerning continuous disclosure),¹⁴⁵ confidential information can be exempted from the requirement to disclose, but only if a reasonable person would not expect the information to be disclosed¹⁴⁶ and if one or more of the following applies:

- (a) it would be a breach of a law to disclose the information;
- (b) the information concerns an incomplete proposal or negotiation;
- (c) the information comprises matters of supposition or is insufficiently definite to warrant disclosure;
- (d) the information is generated for the internal management purposes of the entity;
- (e) the information is a trade secret.¹⁴⁷

Ms D Hambleton, Legal Counsel of the Australian Stock Exchange, advised the Committee that:

*[W]hen we were reviewing listing rule 3.1 and what it should say we made a deliberate decision that commercial in confidence was not good enough.*¹⁴⁸

In a guidance note on the rule, the Australian Stock Exchange cautions that:

*Entities should note that they are not entitled to rely on the exemption just by entering into confidentiality arrangements (i.e. without the other two requirements being satisfied).*¹⁴⁹

¹⁴⁵ These requirements are supported by *Corporations Law*, s1001A. Unlisted disclosing entities are subject to different continuous disclosure obligations under *Corporations Law* s1001B

¹⁴⁶ Clause 3.1.1

¹⁴⁷ Clause 3.1.3

¹⁴⁸ Transcript of evidence 6 October 1997, p. 118

¹⁴⁹ *ASX Guidance Note: Continuous Disclosure*: (Issued 01/JUL/1996)

This approach was affirmed by the Companies and Securities Advisory Committee in its review of continuous disclosure.¹⁵⁰ That Advisory Committee rejected a submission that there should be a specific exemption for agreements containing confidentiality clauses, noting that such an exemption:

*could fundamentally undermine continuous disclosure by permitting parties to enter into private agreements to withhold information.*¹⁵¹

‘Confidential’ in rule 3.1 ‘has the sense of secret, and generally implies control by the entity of the use that can be made of the information’.¹⁵²

The Committee was informed that if the Australian Stock Exchange hears about the matter from a third party, that would normally indicate that the matter is no longer confidential.¹⁵³

It follows that disclosure might well be required of information that has been ‘leaked’ to a third party in circumstances where the company still considers that broader dissemination could harm its commercial interests.

The power of the courts under s. 247A of the Corporations Law¹⁵⁴ to authorise a member (or another person acting on the applicant’s behalf) to inspect the books of the company can also prevail over claims of confidentiality.¹⁵⁵ It has been held under the predecessor of this section that if the applicant acts in good faith and the inspection is to be made for a proper purpose, then the confidential nature of the material will not preclude an order for inspection.¹⁵⁶ However, in such circumstances the court may make an order that limits the use of the information obtained.¹⁵⁷

Disclosure of confidential information may also be mandated where a company is required to seek shareholder approval for a transaction, such as where a public company wishes to provide a

¹⁵⁰ CASAC, *Report on Continuous Disclosure* (1996)

¹⁵¹ *Ibid* 26

¹⁵² *ASX Guidance Note: Continuous Disclosure*: (Issued 1 September 1999)

¹⁵³ Mr S Crosby, Manager, Companies, Australian Stock Exchange Ltd, transcript of evidence 6 October 1997, p. 119-120

¹⁵⁴ Inserted by No 61 of 1998. This is broader in several respects than the section it replaced - old *Corporations Law* s319

¹⁵⁵ This statutory right extends a more limited right at common law for a member with a “special interest” to apply to the court to inspect documents in relation to a specific dispute: E Boros, *Minority Shareholder Remedies* (Clarendon, 1995) 246

¹⁵⁶ See: E Boros, *Minority Shareholder Remedies* (Clarendon, 1995) 248-9, referring to *Tinios v French Caledonia Travel Service Pty Ltd* (1994) 13 ACSR 658; 12 ACLC 622

¹⁵⁷ *Corporations Law*, s247B

financial benefit to a related party.¹⁵⁸

4.2.3 Personal civil and criminal liability for breach

It is possible for decision makers in the public sector to be affixed with personal, civil or criminal liability, but this is far less likely to occur than it is for directors of private sector companies. Directors are subject to a number of disclosure obligations; breach of these obligations can lead to personal civil liability and in extreme cases, even criminal liability. Examples include the following:

- *Requirements as to the content of prospectuses*

The Corporations Law prescribes the content of prospectuses in broad terms, referring to what 'investors and their professional advisers would reasonably require, and reasonably expect to find in the prospectus'.¹⁵⁹ Directors risk personal, civil¹⁶⁰ and criminal¹⁶¹ liability (subject to defences) if they issue a prospectus that contains a material statement that is false or misleading or a material omission.

- *Requirements concerning information to be provided to members of a public company before they vote to approve giving financial benefits to a related party*¹⁶²

Unless a declaration of substantial compliance is obtained, a failure to satisfy the requirements will result in a breach of s. 243ZE¹⁶³ and the possible imposition of civil or criminal liability under part 9.4B.

- *Fiduciary duties requiring directors to disclose conflicts of interest for authorisation by the general meeting.*

¹⁵⁸ *Corporations Law*, Pt 2E.5. Section 243V requires an explanatory memorandum which sets out information on a number of specified matters (including the nature of the financial benefit and the interest of each director in the outcome of the proposed resolution), as well as all other information known to the company or any of its directors that is "reasonably required" by the members in order to decide how to vote. Part 2E and s. 219 will contain comparable provisions once the CLERP Act commences

¹⁵⁹ *Corporations Law*, ss. 1022, 1022AA. ss. 710 and 716 will contain comparable provisions once the CLERP Act commences.

¹⁶⁰ *Corporations Law* ss 1005, 1006. ss. 1005, 729 and 733 will contain comparable provisions once the CLERP Act commences

¹⁶¹ *Corporations Law*, s996 s. 728 will contain comparable provisions once the CLERP Act commences.

¹⁶² *Corporations Law*, 2E.5. Part 2E, especially s. 219 will contain comparable provisions once the CLERP Act commences.

¹⁶³ This will be renumbered as s. 227 after the CLERP Act commences

- *Directors who do not make full disclosure (where required) can be made to account for profits or pay equitable compensation.*¹⁶⁴

4.3 Comparison with public sector information rights

The Committee has highlighted the strengths of the information rights of shareholders to counter the suggestion that Corporations Law mechanisms are able to ensure accountability without providing substantial rights to information.¹⁶⁵ While listed company shareholders have substantial information rights they are more narrowly focused than those in the public sector. However, the narrow focus of these rights is not a concern to the vast majority of shareholders, because it coincides with what they consider to be important.

This is implicit in the evidence given to the Committee by Mr J Stock, Chairman of the Australian Shareholders' Association. Mr Stock acknowledged that claims of commercial confidentiality are sometimes used to deny shareholders material to which they are entitled. However, Mr Stock expressed the view that broader rights of access to such material might well work against the financial interests of most shareholders:

*In general, shareholders do not expect a company to disclose commercially sensitive information; in fact, the disclosure of such information could place a company at a competitive disadvantage.*¹⁶⁶

In the final analysis there are occasions when we feel we are not getting information to which we are entitled. But if it were generalised and a lot more information that may be commercially sensitive was provided – in other words, to give the shareholders the legal right to obtain that information – that could

¹⁶⁴ See Ford, Austin & Ramsay, *Ford's Principles of Corporations Law* (Butterworths) Ch 9. Such a breach may also involve a breach of *Corporations Law* s. 232, leading to civil, and in serious cases, criminal, liability under Pt 9.4B. Section 181-184 will contain comparable obligations to s. 232 once the CLERP Act commences

¹⁶⁵ To the contrary, it is widely accepted that the Australian approach to securities regulation in particular endorses a strong "disclosure philosophy": Ford, Austin & Ramsay, *Ford's Principles of Corporations Law* (Butterworths) [10.010]. The link between this "disclosure philosophy" and accountability is summed up in the often quoted metaphor of Brandeis J in *Other People's Money* (1914) p62: "Sunlight is said to be the best of disinfectants: electric light the most efficient policeman."

¹⁶⁶ Mr J Stock, transcript of evidence, p. 108

*rebound on the shareholders. Such disclosure may be useful to the company's competitors.*¹⁶⁷

However, public concerns about the performance of government are necessarily much broader than shareholders concerns.¹⁶⁸ Most people would accept, at the very least, that the government must:

- maintain law and order, and to do so, uphold the rule of law and always seek to act according to law; and
- pursue the policies it believes to be in the best interests of the public as a whole.

It would also be widely accepted that, in contrast to private sector companies, profit maximisation is not something that government should pursue as an end in itself. While government should seek to be efficient and ensure that taxpayers' money is not wasted they have a broader mandate, to maintain and develop the social and political fabric of the state.

This broader agenda was highlighted in the Governor's address at the opening of the 54th Parliament:

The Government is committed to a substantial four year program of reform to reinvigorate the State and restore pride and public confidence in Victoria's school and hospital systems and the quality of services.

*The Government will deliver better health, education and community services, and help to build a proud and inclusive community of citizens founded on decency, openness and fairness.*¹⁶⁹

It is fundamental that government must be held to account for the manner in which it pursues these goals and for its use of public expenditure and resources. Financial accountability alone is clearly not enough.¹⁷⁰

These goals are much broader than those of an ordinary commercial company. The legitimate interests of the community

¹⁶⁷ Ibid, p. 109

¹⁶⁸ Catholic Social Services, submission pp. 1-2

¹⁶⁹ Address by the Governor of Victoria at the opening of the First Session of the 54th Parliament, 3 November 1999, p. 4

¹⁷⁰ Submission by Australian Council of Auditors-General p. 5 refers to "the complexity of Government activity which cannot adequately be captured by the "bottom line" or financial position and operating result"

are much broader than those of shareholders. This leads to the conclusion that the range of information that is publicly available must also be broader for government activities.¹⁷¹

4.4 Limitations of the shareholder analogy

Apart from the relatively narrow interests of shareholders, the shareholder analogy suffers other limitations that reduce its usefulness in determining what information needs to be made available in the public sector. The management of private sector companies is held accountable by several important mechanisms that have no real equivalent in the public sector. These are that:

¹⁷¹ See submission by Australian Council of Auditors-General, pp. 9-11; Submission by Transport Accident Commission, p. 3 para 3.9

- shareholders of listed companies have the very important protection of usually being able to sell their shares if they disapprove of the direction of management.¹⁷² Also, in widely held companies the possibility of a takeover should (at least in theory) limit the extent to which the price of shares can fall below its 'real' value; and
- directors are subject to many statutory and common law duties, breach of which can lead to personal civil liability and in some cases, criminal liability. However, it is rare for personal liability or criminal liability to be imposed on governmental decision-makers.

4.5 Relevance for government business enterprises (GBE's)

Given the Committee's observations on the strength of some information rights of shareholders, it could be assumed that the information rights provided by the Corporations Law will ensure adequate accountability where a public sector agency is corporatised using a Corporations Law company. However that will not necessarily be the case. The Corporations Law¹⁷³ will normally ensure that the government has the ability to obtain all the information it requires in relation to the activities of the corporatised body. However, the government as shareholder is not acting on its own behalf, but rather on behalf of the public. Consequently, there need to be mechanisms to ensure that:

- the government is in fact exercising its rights as shareholder to obtain the necessary information; and
-

¹⁷² The Australian Council of Auditors-General expressed this another way in its submission. The investment of shareholders in a company is "voluntary" (since they can sell their shares) whereas the interest of the taxpayer in public sector activity is "involuntary", and thus "there is an expectation that the accountability for Government activities will be more acute": Submission, p. 3. See also submission by Templestowe Cemetery Trust, p. 2

¹⁷³ Supplemented, in this case, by the provisions of the *State Owned Enterprises Act 1992* (Vic)

enough information is made available for the accountability mechanisms to ensure that the relevant Ministers (or other persons) are held accountable for the way in which they exercise their powers as shareholders of the corporatised body and oversee the use of public resources.¹⁷⁴

Thus the Committee considers that broader mechanisms are necessary.

A further complication arises where a GBE is expected to compete on an equal footing with private sector bodies, as will often be required by the principles of competitive neutrality.¹⁷⁵ It has been suggested that a GBE should be exempted from public sector accountability mechanisms in order to achieve a 'level playing field'. However, a GBE can only be placed on the same footing as private sector competitors if it is privatised. Competitive neutrality merely attempts to simulate that result by making adjustments to avoid any net competitive advantage or disadvantage. Government ownership gives rise to the need for adjustments because:

- a government 'owner' will not act in the same manner as an owner who acts on their own behalf. Government may have regard to political considerations in determining how to exercise its powers as a shareholder; and
- an 'agency problem' arises from the fact that the government, as 'owner' is not acting on its own behalf and thus adequate accountability mechanisms are required to address this problem.

4.6 Conclusion

A comparison of the accountability mechanisms in the public sector and those for publicly listed companies suggests that shareholders' rights of access to financial information of the type in which they are specifically interested, compare quite favourably with those available to the community in respect of public information. There are substantial sanctions for failure to comply with the disclosure requirements.

However, an important difference is that the legitimate interests of the community are much broader than those of shareholders

¹⁷⁴ Even if the corporatised body receives no budget allocation it will still be using government resources (in the form of capital) which could otherwise be used for other purposes.

¹⁷⁵ See *Competitive Neutrality: A Statement of Victorian Government Policy*

and cannot be satisfied by financial accountability alone. In addition, there are important accountability mechanisms that have no real equivalent in the public sector.

The Committee therefore doubts the usefulness of the shareholder analogy as a guide to informational disclosure requirements, particularly in relation to corporatised bodies that have not been fully privatised.

CHAPTER 5 CONFIDENTIAL COMMERCIAL MATERIAL IN THE PUBLIC SECTOR

This defence (that papers were commercially sensitive and should not be released) is over-used by governments trying to avoid scrutiny and embarrassment and often represents arrogance of the first order; a democracy elects its representatives to act on behalf of the electorate as a whole, not of vested interests. The system requires the utmost transparency and direct accountability from its parliamentary representatives. Lack of transparency and limiting the capacity of Parliament to review government decisions weakens our democracy.¹⁷⁶

Key findings:

- 5.1 Government agencies have used commercial confidentiality exemptions to prevent the disclosure of information to individual parliamentarians, to the Public Accounts and Estimates Committee, to the Auditor-General and to the community.**
- 5.2 It is unlikely that much of the material for which such exemptions have been claimed, would stand up to serious scrutiny as being legitimately commercially confidential.**
- 5.3 On occasions, government agencies are using the pretext of commercial confidentiality as a shield against the disclosure of information which is commercially embarrassing to the government or which raises issues of probity.¹⁷⁷**

- 5.4 Parliamentary Committees, the Auditor-General and the Ombudsman must have unrestricted powers to access**

¹⁷⁶ Editorial. *The Australian* newspaper, 20 November 1998

¹⁷⁷ Australasian Council of Auditors-General, submission p. 6

commercially sensitive material held by government agencies and third parties for the purpose of performing their functions.

- 5.5 Parliamentary Committees, the Auditor-General and the Ombudsman should have the legislative authority to report commercial in confidence material when it is in the public interest for the information to be revealed.**
- 5.6 Information generated within government should not be classified as commercial in confidence, unless it can be demonstrated that disclosure will interfere with the proper and efficient performance of government functions to an extent that would outweigh the benefits of improved accountability.**
- 5.7 Information generated in the context of contracting out requires particular attention because of the convergence of vested interests (of public officials, as purchasers, and contractors, as providers) in restricting access to information and the potential for confidentiality clauses to undermine accountability mechanisms.**
- 5.8 The use of confidentiality clauses should be kept to an absolute minimum and contracts should instead contain specific terms stating that their contents are *prima facie* public.**

5.1 Introduction

The fourth term of reference required the Committee to establish what principles should guide the application of commercial confidentiality within the Public Sector in relation to the Auditor-General and the Parliament.

This chapter examines the widespread use of commercial in confidence claims in the public sector and the potential this has to undermine accountability mechanisms.

5.2 Examples of commercial in confidence claims

During its hearings and in various submissions, the Committee was provided with numerous examples where information had been denied to individual parliamentarians, parliamentary committees, community organisations and members of the public on the basis that it was commercial in confidence. In

some cases, the denial of these initial requests for information and documents resulted in appeals to the VCAT.

Many of the requests for information involved details about contracts, the tender process and performance information, for example:

- specifications for how tenders would be awarded for the Women's Prison;¹⁷⁸
- valuation of assets prior to sale;^{179 180}
- tender costs for a publication;¹⁸¹
- rental details for the use of Crown land;¹⁸²
- financial details and performance information contained in the contract for the outsourcing of an agency's information technology;¹⁸³
- release of the contract relating to the La Trobe Hospital;¹⁸⁴
- the sale of crown land, release of Valuer-General's valuation;¹⁸⁵
- the sale price of the La Trobe Hospital;¹⁸⁶
- the amount payable when phase 1 of the Onelink ticketing system was signed off;¹⁸⁷
- number of attempted suicides and self-harms in prisons.¹⁸⁸

The Committee is also aware that the Hon. B.T. Pullen placed a series of questions on notice to several Ministers seeking details about the proportion of contracts considered to be commercial in confidence and what proportion were publicly available.

¹⁷⁸ Joint submission by the Federation of Community Legal Centres and VCOSS, submission p. 17

¹⁷⁹ Question on notice to Minister for Finance, Hansard Autumn 1998 p. 1102

¹⁸⁰ Answer to Question on Notice, Minister for Education, Hansard 6 October 1998, p. 28

¹⁸¹ Question on notice to Minister for Industry, Science and Technology, Hansard Autumn 1998, p. 484

¹⁸² Question on notice to Minister for Conservation and Land Management, Hansard Autumn 1998, p. 1638

¹⁸³ Question on notice to Minister for Transport, Hansard Spring 1996 Book 4, p. 677

¹⁸⁴ PAEC Hansard transcript of estimates hearing, 15 June 1999, p. 104

¹⁸⁵ Answer to question on notice to the Treasurer, Hansard 23 November 1995, p. 1638

¹⁸⁶ Referred to by the Minister for Health and Aged Care Hansard CS Book 7, p. 1188

¹⁸⁷ PAEC Hansard transcript of estimates hearing, 16 June 1997, p. 183

¹⁸⁸ Representatives of the Federation of Community Legal Centres, transcript of evidence, p.75

One Minister responded in relation to the minerals and energy portfolio:

*All commercial contracts are considered to be confidential. In some instances, contracts can be made available to the public but only if the supplier/company agrees to release the information in line with the Freedom of Information Act 1982 requirements.*¹⁸⁹

The Minister for Police and Emergency Services advised:

*Across Department of Justice and Victoria Police there are 44 outsourced services costing \$20.289m of which 87% of the contracts are commercial in confidence.*¹⁹⁰

The Minister for Aged Care advised:

*The standard health and community services contract contains a confidentiality condition and therefore no contracts are publicly available.*¹⁹¹

The Auditor-General gave a number of cases where information that he proposed to include in reports to Parliament were regarded as being commercially confidential and/or sensitive. These include the:

- *World Congress Centre, financing arrangements - (1990-91 Report on the Finance Statement), (May 1992);*
- *Bayside Development - (Special Report No 18);*
- *Hudson Conway/Gleem - legal action re old Commonwealth site, Spring Street;*
- *Urban Land Authority joint venture;*
- *National Tennis Centre - (1992 Report on Ministerial Portfolios);*
- *Assistance to Industry - (Special Report No 37), (October 1995);*
- *Yallourn Energy Sale - nature of indemnities provided by the State to purchaser;*
- *Port Sales - business valuations;*

¹⁸⁹ Response to question on notice 290 Legislative Council Hansard Autumn 1996 Book 5Q, p. 1176

¹⁹⁰ Legislative Council Hansard 3 October 1995, p. 1168

¹⁹¹ Legislative Council Hansard, 3 October 1995, p. 1180

- *Additional financing costs resulting from tax rulings on the annuity and gold loan financing arrangements; and*
- *WorldCongress Centre - termination of arrangements.*¹⁹²

The submission by the Education Union outlined a number of examples where requests for information had been denied on the basis of commercial in confidence:

These included details of the tender process and contract relating to:

- *the hire of a management consultancy to reorganise the administration of schools education in Victoria;*
- *the implementation of the guidelines for the Schools of the Future initiative;*
- *triennial reviews of school performance;*
- *centres for teacher accreditation; and*
- *the development of the Learning Assessment Project, the Victorian Student Achievement Monitor and the computer-based reporting process known as Kidmap.*¹⁹³

¹⁹² Victorian Auditor-General, submission p. 4

¹⁹³ Australian Education Union (Vic Branch), submission p. 3

The Committee was surprised at the extent to which commercial confidentiality exemptions have been applied in the public sector and doubts whether every aspect of all of the above examples would stand up to serious scrutiny as being legitimately commercially confidential.

5.3 The “degree” of confidentiality claimed

The options for treating claims of commercial in confidence allow more latitude than the alternatives of full access or no access whatsoever. The Committee considers that the real questions are which accountability mechanisms should apply and on what basis. These matters are examined in greater detail below, but the Committee believes that several broad propositions should be stated.

The Committee considers that the Auditor-General and the Ombudsman should have unrestricted powers to access commercially sensitive material held by government agencies and third parties for the purpose of performing their functions.

The Committee believes that there are valid reasons for the Auditor-General and the Ombudsman to have access, at all times, to all relevant records and information, including Cabinet and legal documents:

- to ensure that an agency is following the policy laid down by the government and that an agency's expenditure is directed, within the scope permitted by law, to the purposes set by government;
- to assist in the conduct of performance audits by outlining and confirming government (Cabinet) expectation of programs (goals);
- to ensure that administrative processes have been correctly followed; and
- to provide an understanding of the broad direction and context of government actions.

The Committee strongly supports the view that the Auditor-General should have the right to report on all findings and that arguments in favour of confidentiality do not automatically take precedence over the right of the public to know.

The Committee recommends that:

Recommendation 5.1:

The resolution of confidentiality matters in the public sector should be guided by principles that accord with the rules of law and the values that form the basis for responsible government in Victoria.

Recommendation 5.2

When considering the withholding of information on the grounds of confidentiality, government should observe the general principle that information should be made public unless there is a justifiable reason not to do so.

Recommendation 5.3

Decision makers should recognise that commercial in confidence provisions reduce the scrutiny available to Parliament and the community over government decision making and use of public funds, and that their use as a tool in managing the government's relationship with service providers should be avoided.

Recommendation 5.4

Where information about the government's management of expenditure is limited by confidentiality provisions, the government should provide an explanation to the individual or organisation requesting the information as to the public benefit achieved by agreeing to withhold the terms of the commercial arrangements from scrutiny.

Recommendation 5.5

The Auditor-General and the Ombudsman should have unrestricted powers to access information considered to be commercially sensitive for the purpose of performing their functions.

Recommendation 5.6

Commercial in confidence considerations should not prevent the Auditor-General or the Ombudsman from disclosing information where they assess its disclosure to be genuinely in the public interest.

Recommendation 5.7

The Parliamentary Committees Act should be amended to provide that a joint standing parliamentary committee can order the publication of commercial in confidence evidence taken *in camera*, when it determines that it is genuinely in the public interest for the information to be disclosed.

Recommendation 5.8:

Before a joint standing parliamentary committee authorises the disclosure of evidence taken *in camera*, the witness who provided the evidence should be given reasonable prior opportunity to object to the disclosure and to ask that particular parts of the evidence should not be disclosed.

Recommendation 5.9:

Where information is withheld from a joint standing parliamentary committee established under the Parliamentary Committees Act, on confidentiality grounds, the reasoning behind the decision must be provided in writing by the relevant Minister to the committee.

A procedure should be put in place with the Ombudsman so that where a parliamentary committee finds the Minister's reasoning inadequate, it may refer the matter to the Ombudsman who shall provide independent advice.

Recommendation 5.10:

To ensure transparency in the operations of government, Ministers must remain accountable for all aspects of their agencies' operations and financial management, including services contracted out and GBEs, in order to provide information and explanations to the Parliament.

5.4 Source of the material

In considering how to deal with confidential commercial material, the Committee believes that it is necessary to distinguish between material that has been generated by or for government and material that has been provided to government by third parties.¹⁹⁴

5.4.1 Material generated by or for government

A claim of commercial confidence of material that has been generated by or for government is made to protect the commercial interests of the government. For example, a department may develop commercially valuable processes and fear losing that value if the information is released.¹⁹⁵ In that case, there may be competition between the public interest in open government and accountability and the public interest in maintaining the value of the processes for the benefit of the public.

Two factors may justify distinguishing this situation from one involving a claim to access material provided to government by a private person:

- the material ‘belongs’ to the government, so there is no sense of a breach of another person’s confidence; and
- perhaps more controversially, the concept of ‘commercial’ sensitivity or interest - which is central to claims of commercial in confidence in the private sector - may not have the same standing in government.

This second point requires elaboration. Commercial sensitivity is closely connected to the ability of a business or organisation to maximise its profitability. Private sector enterprises resist disclosure of commercially sensitive material, either because it may be used by competitors to compete more effectively, or because it may prevent the full exploitation of some profit making opportunity.

¹⁹⁴ Drawing on the approach of Paul Finn, mentioned in the submission by Professor A Freiberg, p. 14

¹⁹⁵ This assumes that the “value” in question is not adequately protected by intellectual property rights. If, for example, the law governing copyright or patents is adequate to protect the commercial interest of government there is no need for a claim of commercial confidentiality

However, the function of government is to act in the interests of the whole community.¹⁹⁶ While government must seek to operate efficiently in promoting the public interest, the provision of public services should not simply be undertaken at the lowest price, but should be designed to maximise overall value for money for the taxpayer. Issues other than production costs, such as community satisfaction, the public interest, privacy and equity must be considered.

Release of information may deny the government a possible financial benefit, but promote the public interest by enabling the community to be aware of the criteria for particular decisions. Even if the private sector uses the information to realise profits that might otherwise have been earned by government, that may not be a loss for the public. If the exploitation of the information occurs in a competitive market, a significant part of the benefits should ultimately be passed on to consumers and the public. This could even be a more efficient means, in some cases, for government to pass on the benefit of commercially valuable information to the public.

The Committee believes that for government information to be classified as commercial in confidence, it must be demonstrated that disclosure will interfere with the proper and efficient performance of governmental functions to such an extent as to outweigh the benefits that would flow from putting the information into the public domain and upholding the accountability regime. Possible examples include cases where:

- those who are likely to exploit the information are not operating in a competitive market, or where, for any other reason, the benefits to be realised are not likely to be passed on to the public at large;
- disclosure may impair important governmental or regulatory functions;¹⁹⁷ and
- the information could be used to realise substantial profits in other jurisdictions,¹⁹⁸ such that it may be appropriate for the government to seek to exploit the information on behalf of the Victorian public.

¹⁹⁶ There is, of course, much debate as to what the public interest requires

¹⁹⁷ Possible examples: VicHealth (eg, tobacco replacement program); Overseas Projects Corporation Victoria (joint ventures)

¹⁹⁸ The EPA reported that it uses the intellectual property it develops to compete internationally: submission . See also: submission by Overseas Projects Corporation Victoria. The University of Melbourne reported that it makes use of “commercial-in-confidence” clauses where patents are yet to issue so as to protect Australia’s intellectual property: submission, p. 2

The closest analogy is probably the approach adopted by the courts in determining claims of public interest immunity.

The category of 'material generated by or for government' is likely to become less important as policies of contracting out and privatising service provision are further implemented. It may be that temporary maintenance of confidentiality is justified in the lead up to privatisation to ensure that the government obtains the best price on behalf of the public. However, the short-term gain (in the increased price for the privatised operation) may be at the expense of a possible long term gain which may result if disclosure leads to increase competition in the relevant industry.

It is questionable whether this approach can be applied where commercially sensitive material is generated by a government business enterprise (GBE) that is expected to compete with private sector bodies.

Several submissions suggested that GBEs that operate in a competitive environment, should not be subject to disclosure requirements that exceed those imposed on their private sector competitors. The Committee believes that this argument must be rejected.

The need for additional accountability flows from the fact that the GBE is publicly owned and therefore uses public resources, and from the need to ensure accountability on the part of the government as owner/shareholder for the way in which the GBE operates. The Committee is concerned that the aims of competitive neutrality may be undermined without additional disclosure requirements, to ensure that adequate information is provided not just to the government shareholder, but also to the public as the ultimate 'beneficial' owner.

Competitive forces will only be brought to bear on GBEs to the extent that the government, as owner, insists on those bodies and their personnel bearing the consequences that the market imposes on uncompetitive performance. Without adequate mechanisms to ensure transparency there will be insufficient accountability to the community.

However, the principles of competitive neutrality do not require that GBEs must be subject to the same disclosure requirements as apply in the private sector. As explained already, additional disclosure is necessary to ensure that government is accountable in terms of its overriding obligation to act in the public interest. The requirement for such disclosure and accountability can be regarded as a 'community service obligation' and, if necessary,

funded as such. It would even be possible to estimate the value of the information disclosed on an annual basis - having regard to the amount and nature of the material placed in the public domain - and to fund this accordingly. Such an approach would have the advantage of providing GBEs with an incentive to continue to produce such material.

5.4.2 Material provided by private persons

Generally, a claim of commercial confidence will relate to material that a private person has generated and provided to the government, either voluntarily or under compulsion. The case for respecting commercial confidence in this case is inevitably stronger than in the case of information generated by government, because a failure to do so may have a serious impact on the interests of the person concerned.

If government generated the material, it is unlikely to support a claim of commercial confidence on behalf of a private person. Professor Freiberg argued that contracts with private persons that have been drawn up by the government, and do not contain information or trade secrets belonging to the other party, do not fall within this category.¹⁹⁹

Professor Freiberg also advised that a distinction should be drawn between information that has been compulsorily obtained from a person and that which has been volunteered, with the former being afforded more protection:

*to preserve the framework of trust which the reciprocal relationship between the state and the citizen requires.*²⁰⁰

Whether volunteered information deserves any less protection must depend on the basis on which the information was provided. Nevertheless, the Committee considers that the distinction suggested by Professor Freiberg is an important one, for two reasons at least:

- where information is provided to government under compulsion, there will often be restrictions imposed by statute on its use and disclosure; and
- where information is volunteered to government, there is at least the possibility that the person providing it has waived any claim to confidentiality.

¹⁹⁹ Professor A Freiberg, submission p. 15

²⁰⁰ Ibid pp. 14-15

The Committee considers that it is desirable to develop some general criteria for what can properly be accepted as establishing a claim of commercial confidentiality²⁰¹ These are outlined in the recommendations.

5.4.3. Contracting out

The treatment of these issues where government is contracting out some functions requires special consideration. One reason is that the government will usually have the ability to control²⁰² whether information generated by the contractor falls within the first or second of the categories discussed above.

²⁰¹ Australian Council of Auditors-General, submission p. 4

²⁰² Through the terms of its contracts

The government can choose to include in contracts that any information generated must be generated on behalf of the government and must therefore be made available to the extent required to ensure adequate accountability. At the other extreme, the government may choose to allow the contractor broad rights to claim confidentiality, and could even insist on clauses that restrict the ability of contractors to release information or publicly comment on aspects of government activity.²⁰³

The Committee considers that the question of how to deal with commercial confidentiality (and access to information in general) in contracting out and competitive tendering is of the utmost importance, for several reasons.

First, contracting out has the potential to undermine government accountability if it is not properly handled.²⁰⁴

There is a possibility that accountability could be undermined by a convergence of the vested interests of public officials (as purchasers) and contractors (as providers). It could be to the advantage of the contractor to resist any obligations to make information available, whether or not it is truly commercially sensitive. The contractor can minimise the likelihood that information will be sought (and that costs will need to be incurred in providing it), avoid the need to determine precisely what information is sensitive, and also make it more difficult for a competitor to make a viable competing bid when the contract comes up for renewal. The administrator/purchaser may also have an interest in minimising the amount of information required of the contractor. The less information provided, the more difficult it will be to subject the official's performance as purchaser to scrutiny.

The Committee heard evidence from several witnesses that indicated that this convergence of vested interests is a real and significant problem. In particular there is a perception that often

²⁰³ An example relating to Victoria is quoted in the submission "Keeping sight of the goal" from the Australian Council of Social Service and the Federation of Community Legal Centres which involved the Department of Human Services redrafted funding and service agreement which included a confidentiality clause which prevented a funded agency from communicating in any form, the date or information acquired for the purpose of, or in connection with, the funding agreement. Linked to this, community agencies were expected to get a signed agreement from all personnel to honour the confidentiality of this information. This new provision was resisted by the community sector, pp. 51 and 52

²⁰⁴ These issues are discussed in detail in Industry Commission Report on *Competitive Tendering and Contracting by Public Sector Agencies*, (1996) pp. 81 to 103 and Administrative Review Council, Report No. 42, *The Contracting Out of Government Services*, pp. 49 to 73

agencies rather than contractors insist on confidentiality clauses.²⁰⁵

It is often the agencies that insist on the clauses being inserted rather than the service providers. ...the agencies have often been the ones that have insisted, because they know what will be coming up in say, FOI questions in the future.

It just makes their operations less open to scrutiny. It is less bothersome to deal with those requests. They know what the requirements are for, say, FOI requests, and if it is already written into the contracts, it is much easier to prove.²⁰⁶

The Committee strongly rejects this approach that commercial in confidence clauses may legitimately be used as a defence against a possible FOI request.

Secondly, it has also been suggested that claims for commercial confidentiality are often used to prevent embarrassment to public officials rather than to protect service providers²⁰⁷. It has also been suggested that the insertion of confidentiality clauses has been used as a 'gag' to prevent service providers from criticising the relevant agency.²⁰⁸ Further, it is the view of the Australasian Council of Auditors-General, various academics and several interest groups that risks posed by release of commercially sensitive material are overstated, and that many claims for non-disclosure on this ground are difficult to substantiate.²⁰⁹

For example, the Victorian Council of Social Service and the Federation of Community Legal Centres stated:

It would appear that the Department of Justice is applying commercial confidentiality exemptions in a

²⁰⁵ See examples: Mr R. Snell, transcript of evidence, p. 145: Civil Contractors Federation; submission and Professor M. Neave, transcript of evidence, p. 110

²⁰⁶ Mr R. Snell, transcript of evidence, p. 146. See also Mr Singh, transcript of evidence p. 75; "In the past 12 months former employees have been reported in the media indicating that instant reports have gone missing or have been downgraded so they do not impact of the performance of the organisations and thus the profit. On 16 June 1997, Mr Justice Vincent commented on the motives of private contractors in hiding or secreting that type of information because of the possible relationship to profits. There have been ongoing concerns in the short time that private prisons have been operating in Victoria and interstate about possible collusion with the government. There seems to be a culture and structural problem that ensure it is in the interests of the government to protect what occurs in private prisons because of the political nature of the privatisation policy".

²⁰⁷ Mr T Sykes submission.

²⁰⁸ Ms P Morrison, Executive Director of VCOSS, transcript of evidence, pp. 73-4

²⁰⁹ For example see submission by Australian Council of Auditors-General, page 4; submission by Professor A. Craswell, University of Sydney, p. 2

*blanket fashion. There does not appear to be any examination of the merits of applications for public access based on merit or 'Public Interest' grounds. It would appear that documents are simply not released because of the commercial confidentiality of the original contracts and as such all other documents pursuant to this agreement are interpreted as falling with the breadth of commercial confidentiality.*²¹⁰

Again the Committee strongly rejects the view that embarrassment should be the basis for classifying material as commercial in confidence.

This issue was discussed in some detail in the Industry Commission's Report on Competitive Tendering and Contracting by Public Sector Agencies.

In evidence to the Committee, Professor Neave, former President of the Administrative Review Council, advised that during the Council inquiry into the administrative law aspects of contracting out of government services:

*One thing that we have been consistently told in the context of the access to information is that the demand for confidentiality is coming more from the government than from the contractors, and we have been told that by people in both the Commonwealth and State spheres.*²¹¹

Securing adequate information flows may well be of critical importance if competitive tendering and contracting is to realise the gains it promises. Professor Mark Aronson observed that:

The effectiveness of outsourcing often requires greater transparency than currently stipulated. Agencies need information to enable them to bargain effectively. Information sharing between agencies, and between governments within a federal system, can therefore help them get better value for the taxpayers' dollar. It should be added that it is not just agencies that can be assisted in this regard. In an environment of truly competitive tendering, the losing bidders should be able to have a broad idea of how they must lift their game, if they are to be successful in any further or

²¹⁰ Federation of Community Legal Centres and the Victorian Council of Social Service, joint submission, Appendix 1, p. 4

²¹¹ Professor M. Neave, transcript of evidence, *Public Accounts and Estimates Committee Inquiry into Outsourcing of Government Services*, p. 110

*comparable tendering. The danger is otherwise that they might repeat the same mistakes, or eventually give up hope, thereby leaving the field that much less competitive.*²¹²

Contracting out is likely to produce a situation in which the conflict between the legitimate concerns of commercial confidentiality and government accountability is at its strongest. The terms of the contract would appear to provide the best opportunity to address this conflict and minimise the potential for unfairness. The greatest unfairness resulting from disclosure of commercially sensitive material arises where the material has been provided to the government in the expectation that it will be treated as confidential. If it is made clear from the outset that the material will belong to the government, then the contractor has the opportunity to tender at a price that allows for the cost of complying with such requirements, or to decide not to tender.

5.5 Conclusion

Democratic principles require that information about government decisions and processes, including information about the expenditure of public money should be made public unless there are good reasons why it should be withheld.

The Committee believes that this should be the starting point for decisions concerning disclosure. While there may be a legitimate role for commercial in confidence provisions in protecting the government's relationship with commercial enterprises, these should not be permitted to reduce effective scrutiny by the Parliament or accountability to the public.

The context in which confidential commercial material is generated determines the factors that need to be taken into account in assessing the competing interests for and against disclosure. Information generated in the context of contracting out requires particular attention because of the convergence of vested interests in restricting access and the potential for confidentiality clauses in contracts to undermine accountability mechanisms. The Committee believes that the use of such clauses should be kept to an absolute minimum and that contracts should instead contain specific terms stating that their contents are *prima facie* public.

The Committee recommends

²¹² M Aronson, "A Public Lawyer's Response to Privatisation and Outsourcing" in M Taggart (ed), *The Province of Administrative Law* (Hart, Oxford 1997) p. 59

Recommendation 5.11

All government contracts should contain a standard clause which states that the contents of contracts are subject to legal requirements concerning disclosure and are *prima facie* public.

CHAPTER 6 TENDERING AND CONTRACTING OUT

Contract has assumed a great importance in Government. It is not just the vehicle for ordinary day-to-day purchases and sales of government assets and services. It is the means by which a substantial transformation of our public institutions is taking place. Contracting out - the devolving of formerly government responsibilities and tasks to non-government or semi-government bodies - is an article of faith by government no matter what their political persuasion.²¹³

Key Findings:

- 6.1 The sensitivity of commercial information is not indefinitely uniform. Commercial information is particularly valuable when it relates to the future (to plans not yet implemented or tenders not yet awarded).**
- 6.2 After the potential benefits have been secured by contracts, deeds or agreements, the sensitivity or value of commercial information used to secure those agreements is significantly reduced.**
- 6.3 The distinction between 'ex-ante' and 'ex-post' commercial information is evident in a wide range of laws and practices concerning the release of commercial information.**
- 6.4 From a public accountability perspective, the present rules and guidelines concerning the disclosure of information about tenders and contracts are inadequate.**

²¹³ N. Seddon *Government Contracts - Federal State and Local Federation Press* (1995), p. 6

- 6.5 While there may be good reasons for protecting confidentiality prior to the completion of the contractual process, there has been inadequate disclosure of information, both about tenders and contracts after contracts have been awarded.**
- 6.6 Issues of fairness raised by disclosure of such information can be resolved by developing procedures to ensure that tenderers are aware of the necessary disclosure requirements prior to submitting commercially valuable information.**
- 6.7 The Auditor-General and agencies have not had full access to the records and premises of contractors that are providing services on behalf of the government.**

6.1 General principles

6.1.1 Timing

A number of different documents may be generated in the course of the contracting out process. These include the tender documents, documents relating to the selection of the successful tenderer, the contract, which results from that process, and documents relating to performance by the contractor.

During this Inquiry, it was pointed out by various witnesses that in all cases it is important to differentiate between disclosure before the selection of the successful tender or completion of a contract, and disclosure after the event.

As noted by the then NSW Auditor-General:

There would be a very clear demarcation between commercial information which is ex ante, before a decision is made relevant to that information, and commercial information which is ex post - that is, after decisions have been made. Tender documents provided before the tender decision is made are a particularly commercially sensitive ... because the benefits and rights attaching to that information can be usurped by others should that information be given out. After the

*decision is made ... the information is of very little value in a commercially confidential sense.*²¹⁴

This approach was endorsed by an academic who pointed out that:

*The University of New South Wales Public Sector Research Centre has suggested that confidentiality should be maintained during the tender process, but that once a contract is signed, cost of its provisions should be made public, with the onus being on the contractor to argue for exclusion of provisions on grounds of commercial disadvantage.*²¹⁵

A submission by the Gippsland Water Authority conceded that it would seem reasonable that commercial in confidence documents should be released for public access when there is no longer a need for that confidentiality. However, it stressed that the time frame may vary greatly from contract to contract. Some companies may lift the confidentiality on the contract being awarded, while others may require a two to seven year period.²¹⁶

*In the case of large contracts, the provisions are known by hundreds of lawyers, advisers, financial consultants and it is arguable whether such information has much commercial value.*²¹⁷

The Committee supports the view that there is a strong argument for releasing details of such contracts as soon as the contracts have been awarded.

6.1.2 Criteria affecting confidentiality

The underlying claims for confidentiality are usefully summarised in a submission by the Institute of Chartered Accountants in the following terms:

A major concern is the loss of competitive advantage arising from breaches of confidentiality:

- (1) *In submitting tenders companies put together detailed and innovative solutions;*

²¹⁴ Mr T Harris, then NSW Auditor-General, in evidence to the Senate Finance and Public Administration References Committee *Inquiry into the Contracting out of Government Services*, Hansard, p. 381

²¹⁵ University of New South Wales, Public Research Centre, submission p. 257

²¹⁶ Gippsland Water Authority, submission p. 2

²¹⁷ Ibid.

- (2) *If the company is unsuccessful in its application it wishes to safeguard against the customer using its ideas thereby securing free consultancy services;*
- (3) *Pricing is most confidential. As dealings with any authority is likely to involve a re-tender after a period to time and as the type of contract could well be let in other parts of Australia, pricing strategies should not fall into competitors' hands.*²¹⁸

A witness who gave evidence before the Committee stated that:

There has to be some sort of protection of intellectual property when professional knowledge is being imparted.

When you are supplying intellectual property as opposed to goods, services or things of a capital works nature, sometimes this contains professional secrets. It is necessary to disclose professional secrets to the public service in order to convey to it that what you have on offer is of value to it, but you do not want your competitor to know what you are doing.

*The methodology is where professional secrets are contained. The methodology is used to convince the public service that I can produce the goods.*²¹⁹

A submission by Victoria University noted that:

*Decisions on the scope of disclosure about contracts or other agency commercial information should be made on the basis of judgments about how the agency will be damaged by such disclosure; will it be giving away commercially valuable material of its own or of contractual partners, will it jeopardise its commercial standing, will it be exposed to litigation for damages or will it be compromising employees by the disclosure.*²²⁰

It was suggested by Mr G Lindsay:

Contract information which has been provided by a supplier and either, through price, technology, patent or other similar commercial factor that enables that

²¹⁸ Institute of Chartered Accountants, submission p. 2.

²¹⁹ Mr Wells, transcript of evidence, pp. 131-132.

²²⁰ Victoria University, submission p. 2

*supplier to maintain his market position or differentiation, should not be disclosed.*²²¹

Another view was put by AUSDOC:

It is suggested that disclosure requirement will vary with respect to:

- *the social impact of the contract or agency agreement*
- *the reliance of the Public Sector upon a single contractor.*²²²

An interesting variation was outlined in a submission from Manningham City Council:

In general terms it is submitted that, in the case of the service providers in the industry and this included individual service units with a Council, price information about their INPUTS to service delivery contract bids should remain confidential whilst that relating to OUTPUTS should be available to the public.

*In the case of the Council the information which should be made available to the public will depend upon the context in which it is being considered. Many Councils have dual roles in the new Competitive Service delivery environment, one role as the representative of and custodian for the community - that is as a CLIENT and one as a BUSINESS OWNER of one or more wholly owned subsidiaries - those being its service units. It is important to understand the differences in these roles and the need for budget documents to be prepared in ways to reflect these roles.*²²³

The Committee agrees with the evidence of the Australasian Auditors-General that some private and public sector agencies are instinctively apprehensive and protective about the disclosure of any commercial information²²⁴. It is obvious from the Committee's examination of developments overseas that these views

²²¹ Lindsay Associates, submission p. 4

²²² AUSDOC Group Ltd, submission p. 4

²²³ Manningham City Council, submission p. 5

²²⁴ Australasian Council of Auditors-General, submission p.4

often overstate the implied risks to an agency that might be occasioned by the release of commercial data.

6.1.3 Need for accountability

As noted in the submission by the Australasian Council of Auditors-General, the accountability relationship between the individual and the State must affect accountability for commercial dealings between government and private entities.

*The private sector must expect that, when it deals with the State, the disclosure requirements cannot merely be those that pertain to commercial transactions between two private sector entities. If the accountability arrangements are the same, insufficient weight will have been given to the need for the State to be accountable to the citizen.*²²⁵

*Those in the private sector who wish to gain commercial advantage from dealings with the government cannot seek to escape the level of scrutiny that prevails in the public sector. Such scrutiny is required because of the non-commercial nature of much Government activity, the non-voluntary relationship between individuals and their Government and the different rule of law which applies in the public sector to the private sector.*²²⁶

This view was supported by Templestowe Trust:

If 'commercial confidentiality' is requested or demanded, then the request needs to be tested against what a 'reasonable person' might expect.

*The requirement to call tenders for works (or services) is supposed to encourage competition and, presumably, achieve lower costs for the taxpayer. If the facts of a particular matter are concealed, because of 'commercial confidentiality', then true and fair competition will fail and the way will be opened for manipulation and even corruption.*²²⁷

²²⁵ Ibid, p. 3

²²⁶ Ibid, 92, p. 8

²²⁷ Templestowe Cemetery Trust, submission p. 3

Furthermore, as noted by Professor Freiberg:

It would [be surprising] given the cut throat nature of the competitive market environment that somebody would give up a fairly major contract on the basis that that kind of information will be made available and if everybody knew that information was available'.²²⁸

Moreover, as pointed out in evidence given to the Committee:

consumer confidence is an important market principle, and consumers need information to have confidence in a service or product.²²⁹

6.1.4 Special position of Local Councils

A submission by City of Kingston outlined their tender process to illustrate their approach to commercial in confidence material:

Kingston City Council has adopted the Victorian Local Government Code of Tendering. Within this document, reference is made to the Australian Standard Code of Tendering AS4120-1994 and the Victorian Code of Practice for the Building and Construction Industry.

The current requirements; ie: the disclosure of the winning bid, maintenance of a publicly accessible contracts register, public accessibility to specifications during the life of the contract and audit process are considered to strike an appropriate balance between accountability and confidentiality.²³⁰

The Committee was impressed with the amount of information disclosed by Councils and believes that such practices provide a good model for state agencies.

6.2 Relevant documents and stages

The Committee sought advice from a number of witnesses about what contract information should be released and at what stage.

²²⁸ Professor A Freiberg, transcript of evidence, p. 48

²²⁹ Ms Morrison, transcript of evidence, p. 74

²³⁰ City of Kingston, submission p. 1

AUSDOC informed the Committee:

The timing of disclosures should be appropriate to the nature of the contracted service. For contracts which have a high social impact or are of significant value, then quarterly reporting in addition to reporting at major decisions points would be appropriate.

Typical major decision points would be:

- *Expressions of Interest stage - participant identification;*
- *Short list of tender candidates;*
- *Winner of tender;*
- *Performance criteria of contract as negotiated with contract winner; and*
- *Performance against that criteria - to be published after contract tender ended/terminated or after a period of non-compliance.*²³¹

6.2.1 Tender documents

The Committee notes the broad acceptance by witnesses that the identity of the successful tenderer and the overall price of the tender should be disclosed after the completion of the tender process. On the other hand, the submission by the Civil Contractors Federation drew attention to the fact that:

*A minority of Municipalities refuse to divulge any information at all until tender award, treat all tender evaluation reports at committee level and advise anyone questioning their process that all information and reports are not available under commercial confidentiality requirements. In these instances the value of the winning bid is not disclosed.*²³²

The Committee noted that there is more resistance to the concept of providing information about unsuccessful tenders.

A submission of the Victorian Government Purchasing Board in the attachment to the submission by Department of Premier and Cabinet outlines a list of documents generated by the procurement/contracting cycle together with their level of sensitivity and the board's view on public availability. Those

²³¹ AUSDOC Group Ltd, submission p. 7

²³² Civil Contractors Federation, submission pp. 1-2

documents classified as being of a high level of sensitivity included successful and unsuccessful quotations or tenders and the contract.²³³

Similarly, the Maroondah City Council submitted that:

If tenderers are not confident that Council will preserve the confidentiality of the information they provide then it is very likely that they will not submit a tender. If there is no competition to Council's in-house teams to provide the services being tendered then it is very difficult for Council to demonstrate to its ratepayers and the wider community that it is receiving the best value for money it possibly can when paying for services. It is Council's experience that the greatest efficiencies, service improvements and cost savings have been generated in

²³³ Department of Premier and Cabinet, submission p. 8

*those tenders where the competition from the private and charitable sectors is at its keenest.*²³⁴

A number of submissions outlined the arrangements for providing details about tenders:

*In the Civil Sector, VicRoads adopts a policy of listing tenders received in apparent order from lowest to highest within 24 hours of tender closure. This process is followed by some Municipalities - some others adopt a policy of public opening of tenders (City of Bendigo).*²³⁵

*A list of tenders received by the closing time shall be published on the authority's notice board ... publicly within two days of opening of tenders, listing all tenderers ranked in order of price from the cheapest down. This list shall not include the price.*²³⁶

On the other hand, this information may legitimately be sought to investigate concerns about the probity of the tendering process (particularly in relation to the awarding of large contracts) to ensure that external tenders have been treated fairly *vis-a-vis* in-house teams and to determine whether a government agency has obtained the best possible value for money.

A submission by the Commonwealth Ombudsman contained a number of suggestions to improve the process:

- *there needs to be transparency in the tendering process. Therefore government agencies need to provide details of the selection process and reasons for the choice of contractor;*
- *contractors should be required to report regularly to agencies on their performance against the contract specifications and outcomes;*
- *agencies should report publicly on contract performance at least on an annual basis, and on completion of contracts;*
- *public accountability requirements, including disclosure of information, should form part of the tender information and specification, so that contractors submitting tenders have a full knowledge*

²³⁴ Maroondah City Council, submission p. 3

²³⁵ Civil Contractors Federation submission pp. 1-2

²³⁶ Dr Ken Coghill, submission p. 3

of their obligations to disclose commercial information.

- *a set of general guidelines should be developed for inclusion in the tender information for contractors, and should apply in all government contracting.*²³⁷

The Committee also notes that an unsuccessful tenderer at the Commonwealth level, is entitled to seek information about who was the successful tenderer and what price was accepted.²³⁸ Similarly at the local government level, the Local Government (Competitive Tendering) Regulations 1994 require a public register to be kept of certain information relating to the tendering process.²³⁹ This includes:

- *the names of all tenderers;*
- *who the successful tenderer was;*
- *the annual value of the contract or in house agreement*
- *the reasons for not awarding the tender to the lowest priced tender; and*
- *a copy of all the documents made available to tenderers during the tendering process.*²⁴⁰

The Committee believes that in the case of minor projects it may be sufficient to disclose the identity of each bidder and the tender price offered. However, there may be several stages to the process for major contracts, and many key aspects will be negotiated with those bidders who make it to the final round. In cases where information about price and identity may be insufficient to judge the integrity of the process, it would be necessary to include information about performance criteria.

6.2.2 Contract documents

The Committee notes that there is broad support for the publication of information about contracts²⁴¹ that have been finalised, although again there are concerns about possible harm to the competitive position of the contractor, especially in

²³⁷ Commonwealth Ombudsman, submission pp. 3-4

²³⁸ The Commonwealth Finance Regulation 43B requires that details of supplier, supplies and price of successful contract for item costing more than \$2000 must be published in the Gazette: see Freiberg submission p20-21 citing N Seddon, *Government Contracts: Federal State and Local* (1995) p. 261

²³⁹ Ibid.

²⁴⁰ Maroondah City Council, submission p. 5

²⁴¹ For example, the submission by City West Water at p. 2 identified information about the successful bidder, the description of goods or services to be supplied and the term of the contract as information which should be disclosed

relation to material that could appropriately be classified as 'trade secrets'. The range of information about contracts that may legitimately be required is arguably much broader than that for tender documents.

As observed by an academic commentator:

*Members of the public are entitled to know, as an aspect of assessing the economic and social management of the government of the day, what contracts are entered into on their behalf, and what terms and conditions. They are entitled to know what public moneys are expended, both directly and indirectly, and precisely what is to be delivered under the terms of the contract. They are equally entitled to know how legal and financial risks are allocated between the contracting parties. They are entitled to know what monitoring and enforcement procedures exist in the event of contractual default.*²⁴²

The Committee agrees with the views of the Victorian Auditor-General that:

*The various checks and balances in the public accountability process may be costly to administer and may, as some would argue, be a bureaucratic hindrance in the effective management of a function such as purchasing, but they are designed to protect a government's reputation and the interest of the public at large.*²⁴³

²⁴² C Finn, "Getting the Good Oil: FOI and Contracting Out" (1998) 5 *Australian Journal of Administrative Law* p. 113, 122

²⁴³ Victorian Auditor-General, *Purchasing Practices*, Special Report No. 31, 1994

Many of the submissions which argued against the disclosure of information about completed contracts sought to define criteria for distinguishing between what information should be disclosed and that which should be treated as confidential.

A representative of a council drew a distinction between input information (methodology of tender – salary rates, classifications of staff, job descriptions, workload indicators) and outputs.

*The output side is fair game; anybody can see that – the performance measures, how we are going to judge the performance of the contractor, what is the basis of payment for the work done – that is, the deliverables. But all the input costs was where they had concerns, because there are as many ways as you can think of to deliver a service and they wanted their trade secrets, their approach to doing that, kept confidential.*²⁴⁴

Likewise, another council submitted that:

*In Council's experience the only areas where a degree of confidentiality should be maintained relates to the financial composition of tender proposals relevant to unit rates and costs associated with pricing policies and the 'internal working' of the bidder/contractor such as organisational structure and staffing details.*²⁴⁵

An academic commentator noted that the Industry Commission's 1996 report on tendering and contracting out in the public sector effectively highlighted three types of information as requiring release in any circumstances:

- the specifications for the service;
- the criteria for the tender evaluation; and
- the criteria for the measurement of the performance of the service provider against those criteria.

He also suggested that there are other types of information - including claims for intellectual property, trade secrets, and probably the detailed financing required to carry out the tendering - which probably ought not be released and which have a high threshold attached to them.²⁴⁶

Professor Freiberg in his evidence to the Committee drew a distinction between two categories of information. The first

²⁴⁴ Mr Douglas and Ms Lanyon, City of Manningham, transcript of evidence, p.138-9

²⁴⁵ Geelong City Council, submission p. 2.

²⁴⁶ Mr R Snell, transcript of evidence, p. 147

comprised information about how a business may put its contract or bid together – that is, the mix of staff, the level of staff, how to use the surveillance cameras (using the private prisons as an example). He described these items as ‘the things that make your businesses what they are’, and argued that they should not be required to be made public.

On the other hand, he stated that:

*I cannot see any commercial confidentiality knowing about time limits or insurances. Then you have performance standards which I think ought to be public so people can test whether the standards there are adequate, whether they are being met and how we meet them. Then you have the price issues. I am a strong believer ... that it is like going into Coles-Myer and finding they are not putting the prices on items in case David Jones undercuts them.*²⁴⁷

It has also been pointed out to the Committee that distinctions are sometimes drawn between the total amount of the contract and its constituent elements. It is argued that the former should be made public, yet such matters as hourly rates, expenses and various other costs have the nature of a business secret.²⁴⁸ Further, although claims for commercial confidentiality of fees and costs are frequently made, the inconsistent application of the commercial confidentiality rule has undermined its commercial or ethical basis.²⁴⁹

²⁴⁷ Professor A Freiberg, transcript of evidence, p. 47

²⁴⁸ Submission by Professor A Freiberg, p. 21 citing *Re Ventura Motors and Metropolitan Transit Authority* (1988) 2 VAR 277, 284

²⁴⁹ *Ibid.* Professor Freiberg pointed out that the inconsistency in the approach by various levels of government in different jurisdictions to the disclosure of commercial sensitive information has been noted by the Industry Commission (1996: 93)

Professor Craswell from the University of Sydney pointed out that while there is little doubt that competitors can gain an advantage from information disclosed by competitors, the expected costs may often be illusory. He further noted that his research into public disclosure by corporations suggested that many of the claims are difficult to substantiate.²⁵⁰

The Committee also notes that the Senate Finance and Public Administration References Committee in its First Report on Contracting Out of Government Services - Information Technology accepted as a general rule the 'reverse onus of proof position, namely that contract information should be public unless there is a good reason for it not to be'²⁵¹. This is a proposition that is strongly supported by this Committee.

The report also stated that:

*In any event, the provisions of signed contract should always be publicly available except in the most limited of circumstances. Such circumstances might include intellectual property and other industrial property trade secrets and pricing structures. Mr Alan Rose gave an example of just such a situation: the Attorney-General's Legal Practice agreed to confidentiality clauses concerning the software billing systems created from it, because it got the package at a lower price by permitting the contractor to exploit the product commercially at a later stage.*²⁵²

The Committee noted that the Senate Committee in its final report on Contracting Out of Government Services concluded:

Only relatively small parts of contractual arrangements will be genuinely commercially confidential and the onus should be on the person claiming confidentiality to argue the case for it. A great deal of heat could be taken out of the issue if agencies entering into contracts adopted the practice of making contracts available with any genuinely sensitive parts blacked out. The committee accepts that some matters are legitimately commercially confidential. If Parliament insists on a 'right to know'

²⁵⁰ Professor A Craswell, University of Sydney, submission pp. 1-2

²⁵¹ Senate Finance and Administration References Committee, *First Report on Contracting out of Government Services - Information Technology*, November 1997

²⁵² Senate Finance and Public Administration References Committee, Senate Hansard, 20 May 1997, pp 474-5

*such legitimately commercially confidential matters, the most appropriate course to achieve this would be the appointment of an independent arbiter such as the Auditor-General to look on its behalf and, as a corollary, to ensure that he has the staff and resources to do it properly.*²⁵³

Again, the Committee strongly supports this view.

6.2.3 Other information

In the case of the tender process, information about the criteria for selection is required as an aspect of fairness to the tenderers. It should be made available to all interested parties during the course of the tender process.²⁵⁴ Access to information about the selection process generally only arises in the context of applications under the Freedom of Information Act, and such information may fall within one or more of the exemption provisions in that Act.

The Committee believes that decisions concerning access to the full range of documents are most appropriately resolved within the framework of that legislation, but that the relevant decision-maker should be required to provide a summary of the reasons for its decision to select the winning tender. If the decision was not entirely based on the price of the tender, the decision maker should briefly explain the factors considered in reaching the decision.

The City of Monash suggested that:

*To satisfy probity considerations, public sector organisations must be able to clearly show the outcome reflects good value and impartiality. The reasons for the action taken should be fully documented and available to be scrutinised by independent audit.*²⁵⁵

The question of access to information about the performance of the contract is also most appropriately dealt with under the Freedom of Information regime. This is subject to a proviso that the Act should be amended so that documents in the possession of contractors are deemed to be documents in the possession of the contracting government agency and therefore subject to the operation of access provisions in the Act.

²⁵³ Quoted in the Administrative Review Council's Report *The Contracting Out of Government Services*, Report No.42, p. 10

²⁵⁴ See *Hughes Aircraft Systems International v Airservices Australia* (1997) 146 ALR 1

²⁵⁵ City of Monash, submission p. 4

It is in the nature of outsourcing that the consumer has no further say in the formation or terms of the contract than in the pre-outsourcing days when government directly provided the service.²⁵⁶ It therefore follows that it is important that the consumer should have direct access to information via freedom of information legislation.

Documents that should be brought within the ambit of the Freedom of Information Act include: those documents that directly relate to the performance of the contractor obligations under the contract, and those that either directly or indirectly relate to contractor services provided to government in circumstances where the contractor does not supply substantially similar services to the private sector (excluding other governments).

This approach is consistent with that taken by the Administrative Review Council and Australian Law Reform Commission in their joint Report on Freedom of Information which recommended that:

99. If an agency contracts with a private sector body to provide a service or perform a function on behalf of the government, the agency should ensure that suitable arrangements are made for the provision of public access information rights.

100. Where a statutory scheme provides for private sector bodies to be contracted to provide services or functions to the public on behalf of the government, information access rights should generally be provided by applying the FOI Act to those private sector bodies, but only in respect of documents that related to the provision of those services or functions.

101A (ALRC) Where there is no statutory scheme, the contracting agency should determine the most suitable way to provide relevant information access rights, bearing in mind the guidelines issued by the FOI Commissioner.

101B (ARC) Where there is no statutory scheme, the contracting agency should generally preserve information access rights by ensuring that documents in the possession

²⁵⁶ M Aronson "A Public Lawyer's Responses to Privatisation and Outsourcing" p. 2

*of the private sector body are deemed to be in the possession of the contracting agency.*²⁵⁷

There have been several reported cases concerning Freedom of Information requests for access to details of contractual arrangements between government agencies and private bodies. Some of these contracts have been the subject of controversy and media scrutiny, and they highlight the tensions that can exist between agencies and private businesses to avoid unwelcome media scrutiny and the legitimate public interest in knowing what use has been made of public funds.

The VCAT has evolved a broad test of public interest that attaches significance to the role of transparency in promoting public debate and participation. The test also upholds the need to ensure proper standards of public administration by facilitating the disclosure of documents that reveal evidence of iniquity or wrongdoing.

In the light of the strong policy reasons that favour the transparency of such information, it is the Committee's view that there should be a specific requirement for contracting parties to identify those parts that are claimed to be confidential and to specify their reasons for making such claims. The Committee also believes that there should be some external monitoring of confidentiality claims in contracts.

6.3 Auditor-General - Access to records and premises of contractors

While section 12 of the Audit Act provides the Auditor-General with the power of access to information held within the public sector, the Act does not assign to the Auditor-General specific power of access to documents and other property held by private sector contractors or to access contractors' premises.

The then Auditor-General advised the Committee:

This matter is also assuming increasing significance as a consequence of the emerging prominence given to outsourcing arrangements in the public sector. Without a specific access provision, it can often be difficult for audit to obtain important operational

²⁵⁷ Denis O'Brien has also recommended that there should be a deeming mechanism which operates in case where services are provided by private sector bodies otherwise than under a legislative scheme. He suggests that:[A] further provision could be included in the FOI Act to the effect that documents held by a private sector body that relate to services provided by that body under a government contract are deemed to be in the possession of the contracting agency: D O'Brien, "Can administrative law come to grips with tendering and contracting by public sector agencies?" in L Pearson (ed), *Administrative Law: Setting the pace of being left behind?* (AIAL, 1997).

*information relating to contractual arrangements held outside the public sector agency.*²⁵⁸

While the primary responsibility for ensuring sufficient access to relevant records and information relating to a contract lies with agency heads, from an accountability viewpoint, the Committee believes that it is critical that agencies closely examine the nature and level of information to be supplied under the contract and ensure that access to contractors records and premises is provided for so that the performance of the contract can be adequately monitored.

As part of his statutory duty to the Parliament, the Victorian Auditor-General may require access to records and information relating to contractor performance. The Auditor-General's powers to access contract related records and information should be equivalent to that which should reasonably be specified by the contracting agency in order to fulfil its responsibility for competent performance management and administration of the contract. The inclusion of access provisions within the contract for performance and financial auditing is also very important in maintaining the thread of accountability. From this perspective the Committee considers it is imperative for contracting agencies to ensure that the contract includes a notice of the Auditor-General's powers in this respect and makes suitable arrangements for:

- sufficient access to records, information and premises of the contracting parties to allow them to ensure their own, and ultimately their Ministers', accountability expectations are met; and
- the Auditor-General to have sufficient access to ensure the accountability requirements of the Parliament are met.

In the Committee's view access to relevant records is best met by standard or model contract clauses supplemented as necessary by particular clauses that reflect individual circumstances of each agency. The use of mainly standard contract clauses would enable all parties contracting to the Victorian Government to be aware of the government's expectations and their obligations in this regard for all contracts with third party service providers. This should include matters which could be classified as commercial in confidence.

²⁵⁸ Letter, dated 23 December 1998, from the Victorian Auditor-General to the PAEC.

The Committee believes that the Audit Act should be amended to provide a new sub-section 12(4) that would give the Auditor-General access to the records of external service providers.

In a recent audit it was put to the then Auditor-General that s.12(2) of the Audit Act precluded him from disclosing in the report to Parliament material defined as confidential information within a contract involving the auditee and a private sector service provider.

The then Auditor-General advised the Committee:

The initial view of the Victorian Government Solicitor (VGS) was that nothing in Section 12(3) of the Act enabled the Auditor-General to override the restriction on disclosure residing in 12(2) where agencies or external parties had genuinely submitted to the Auditor-General that the information in question fell directly under the category of commercial in confidence. The VGS recognised the wide-ranging authority given to the Auditor-General in 12(3) to communicate to Parliament conclusions, observations or recommendations based on information gathered under 12(2) but doubted whether the Auditor-General was able to simply inform the Parliament by including such information in toto within a report.²⁵⁹

The Committee notes that recent amendments to s. 12(2) of the Act, which received assent on 14 December 1999, have overcome this restriction²⁶⁰.

6.4 Guidelines concerning procedures to be followed

In view of the convergence of vested interests noted above, the Committee considers that this matter can not be left to the discretion of individual administrators in drafting tender specifications and contract terms. The Committee believes that a stronger mechanism is needed to protect the integrity of governmental accountability.

As pointed out by a witness:

Those who contract with the government for the performance of government duties should be aware that their interests as corporate citizens extend beyond the bottom line. Further, it should not be necessary for

²⁵⁹ Ibid, p. 2

²⁶⁰ Act No. 53 of 1999 (Victoria)

*those who wish to obtain such information to resort to action in tribunals or courts, actions which are both expensive and time consuming.*²⁶¹

The Committee notes that information about government contracts and tenders is available in the United States. For example, as noted by the Senate Finance and Public Administration Reference Committee, in the United States, 'it is widely accepted that once a contract is finalised, its provisions are a matter of public record'.²⁶²

Likewise most contracts in California are open for public inspection, as are bids for government contracts. Such documents are only available under Freedom of Information legislation once the agreements have been executed.²⁶³ Appendix 1 contains further information on the arrangements that apply in a number of overseas countries.

A submission by a former Speaker of the Legislative Assembly, Dr Ken Coghill provided further details:

In the United States of America, public record legislation is based on a presumption of total disclosure of information held by government at all levels, (eg., paragraph 6250 of this chapter of the Californian public code, known as the California Public Records Act, states:

In enacting this chapter, the legislature, mindful of the rights of individuals to privacy, finds and declares that access to information concerning the conduct of the people's business is a fundamental and necessary right of every person in this state.

The total contents of contractual arrangements between the public sector and private (or other) contractors is open to public examination, including financial information (in a tiny proportion of cases, the actual rates of remuneration are subject to temporary, short-term non-disclosure, and limited classes of manufacturing processes disclosed to environmental protection agencies are not available).

Information collected by US Government agencies such as the SEC is deliberately released into the public

²⁶¹ Professor A Freiberg, submission p. 4

²⁶² Senate Finance and Public Administration Reference Committee, *Contracting out of Government Services First Report, Information Technology* (1997) Appendix A

²⁶³ See Appendix 1

*domain, to the extent that information not released in Australia by Australian and foreign companies which also operate in the USA, is readily available from sources in that county.*²⁶⁴

The Committee gave strong consideration to this view, noting the absurdity of a situation where information about Victorian public administration is available in other jurisdictions but subject to total non-disclosure in Victoria. However, on balance the Committee favours an approach outlined in a submission by AUSDOC²⁶⁵, which suggested that points of information that should be disclosed to the public for all contracts and agency agreements would include the following:

- the names of all parties involved in the contract and any related contracts;
- the ultimate ownership structure of parties concerned;
- the price at which the contract is awarded;
- the terms of contracted performance;
- requirements to report on contracted performance;
- the due diligence process of the contract being awarded and its execution;
- the terms of the contract; and
- commissions and any consultant payments made relating to the assessment and/or awarding of the contract.

The Committee is concerned that extensive use of claims of commercial in confidence have been made by government agencies and external contractors to prevent the disclosure of documents or particular information. The Committee believes that it is essential that a consistent approach is applied across the whole of government. The best way to achieve this would be to adopt a formal set of protocols which all agencies must follow. These protocols must be signed off at ministerial level before the classification of commercial in confidence can be applied to any material either generated by or for government.

²⁶⁴ Dr Ken Coghill submission p 2

²⁶⁵ AUSDOC Group Ltd submission p. 3

6.5 Training

The Committee appreciates that developing guidelines for the principles of providing a general right of access to government information will not, of itself, overcome any culture of secrecy. To coincide with the implementation of the guidelines, senior staff whose attitudes have a significant influence on agency culture, should attend a training course which outlines the philosophy of the principles. The better their understanding of the purpose of the guidelines, the more likely it is that they will assess and apply the classification of commercial in confidence in a consistent manner.

6.6 Conclusion

The development of appropriate rules and guidelines concerning the disclosure of information about tenders and contracts is fundamental to ensuring proper accountability on the part of the government. While there may be good reasons for protecting confidentiality prior to the completion of the contractual process, the Committee believes that there should be more extensive disclosure of information, both about tenders and contracts, after contracts have been awarded. This is necessary to enable adequate scrutiny of the integrity of the tendering process and in the case of contracts, the accountability of the government for the discharge of its responsibilities and of contractors for the discharge of their contractual duties.

The Committee also notes that the disclosure of such information raises issues of fairness. However, the Committee believes that these issues can be resolved by developing procedures to ensure that tenderers are aware of the necessary disclosure requirements prior to submitting commercially valuable information. Prior to making a decision as to whether to proceed to contract, tenderers must be given an opportunity to apply for and obtain a decision in relation to applications to include confidentiality provisions in respect of important categories of information.

The Committee recommends that:

Recommendation 6.1

Legislation should be enacted to require specified information about all tender documents and the resulting contract to be made publicly available once the tender has been awarded (overriding any confidentiality clauses), unless application is made at that time to restrict publication²⁶⁶.

Recommendation 6.2

Public information about tenders should include:

- (a) the identity of the tenderer; and**
- (b) the tender price.**

In the case of major contracts it should also include sufficient information about the relevant performance criteria to allow for an assessment of the integrity of the tender process.

Recommendation 6.3

Public information about contracts should include:

- the full identity of the contractor, including details of cross ownership of relevant companies;**
- the duration of the contract;**
- details of any transfer of assets under the contract;**
- all maintenance provisions in the contract;**
- the price payable by the government agency and the basis for changes in this price;**
- any renegotiation and renewal right;**

²⁶⁶ The most cost effective way to do so would be by means of a free public database made available via the Internet

- **the results of any cost-benefit analysis;**
- **details of any risk sharing in the developmental and operational stages of the contract;**
- **details of any sanctions for non-performance;**
- **any significant guarantees or undertakings, including any loans, agreed to or entered into; and**
- **any other information required by statute to be disclosed to the Australian Securities Commission and made available to the public.**

Recommendation 6.4:

The principles and guidelines contained in Attachment 1 of this Report (see page *lv*), should be adopted by the government as the basis for the treatment of commercial information held by Victorian government departments and agencies.

Recommendation 6.5:

Applicants should be advised in the tender documents that as a precondition of doing business with government, they must be prepared for certain details contained in any tender and contract to be made public.

Recommendation 6.6

Prior to tenders being submitted, agencies should ensure that applicants are made aware of the limits of what will and what will not be considered as commercial in confidence. The information which is non-confidential must include all information listed in Recommendations 6.2 and 6.3 unless specific exemptions are approved by the Ombudsman.

Recommendation 6.7

Before the closing date of tenders, applicants should notify the relevant agency of their intention to seek exemption of information which would otherwise be required to be made public. Any claims for commercial in confidence must be justified on the basis of the specific harm that will result from the disclosure of information.

Recommendation 6.8

A tenderer who applies for information to be classified as commercial in confidence should have the opportunity to withdraw that tender, before the closing date, if the application to restrict disclosure of information is rejected, or to change the terms of the tender to take account of disclosure.

In the event that a tender is withdrawn, before the closing date, all

information relating to its content should be treated as confidential with the exception of the name of the tenderer, the tender price and the date of withdrawal of the tender.

Recommendation 6.9

Before an agency can include in a contract a confidentiality clause, in respect of information generated by or for the government, it must be able to demonstrate that the relevant Minister has agreed that disclosure will interfere with the proper and efficient performance of government or commercial functions to such an extent as to outweigh the benefits that would flow from placing the information in question in the public domain.

Recommendation 6.10

Protocols should be developed for government departments and agencies to follow before the classification of commercial in confidence is applied to material and that these protocols be signed off at ministerial level.

Recommendation 6.11

A contract which includes a confidentiality clause in respect of any of the material detailed in Recommendation 6.3 must be submitted to the Ombudsman for approval prior to being signed off by the relevant agency.

Recommendation 6.12

In determining whether a claim for commercial confidentiality is justified, the onus of proof should be with the tenderer, who should be required to substantiate that disclosure would be harmful to their commercial interests.

Recommendation 6.13

Where information is approved by the Ombudsman as warranting protection by a confidentiality clause, it should be withheld only for the minimum time necessary to protect justifiable commercial sensitivities. At the time of approving the application, the Ombudsman should specify a maximum time limit for non-disclosure.

Recommendation 6.14

Departments and agencies should include provisions in contracts which require contractors to provide all necessary information to enable the Auditor-General to fulfil his role as the external auditor of all government agencies.

Recommendation 6.15

Contracts should specify the appropriate standard of record keeping that contractors must maintain to ensure accountability and access to information.

Recommendation 6.16

- (a) The *Ombudsman Act 1973* should be amended to provide for the Ombudsman to assume the additional function provided for in Recommendation 6.11;**

- (b) The government should provide the Ombudsman with such additional resources as are necessary to deal with the functions outlined in this report.**

Recommendation 6.17

Agencies should include standard provisions in their contracts that require contractors to keep and provide all necessary information to allow for proper parliamentary scrutiny of the contract and its management.

(Note: The information required to meet this need will vary from contract to contract according to a number of factors including the value of the contract, the nature of the service to be delivered under the contract and the characteristics of the service recipients.)

Recommendation 6.18

A new sub-section 12(4) should be included in the Audit Act:

“Without prejudice to the powers conferred by any other provision of this Act, the Auditor-General or an authorised person is entitled to full and free access at all reasonable times to any documents or other property in the possession of, or under the control of, any body or person which relate to any services provided by that body or person to a government department or agency”.

Recommendation 6.19

A new sub-section 12(5) should be included in the Audit Act:

“When the Auditor-General seeks access to records held by a government agency or a contractor, the agency or contractor must comply within the period specified by the Auditor-General”.

Recommendation 6.20

That all government contracts include model access clauses that ensure access to contractors premises and to contractors records by agencies and the Auditor-General (*see Attachment 2 of this Report, page lxvii*)

Recommendation 6.21

Prospective applicants for government tenders should be supplied with an information sheet that explains all these new procedures.

Recommendation 6.22

There should be a clear distinction drawn between the disclosure of information before and after the signing of a contract. Information about tenders and contractual terms should be classified as commercial in confidence until the signing off of a contract.

Recommendation 6.23

All government departments and agencies should regularly provide training to staff:

- (a) on the principles of transparency and openness reflected in the proposed guidelines for the treatment of commercial information held by Victorian agencies and, in particular, the meaning and application of the exemption provisions; and**

- (b) to emphasise that information should not automatically be treated as commercial in confidence purely because it is of a commercial nature or even of a sensitive commercial nature.**

Recommendation 6.24

That the performance agreements of all senior officers in the public sector should include a provision that requires them to uphold the principles enshrined in the Freedom of Information Act.

CHAPTER 7 FREEDOM OF INFORMATION LEGISLATION

As a policy, freedom of information is grounded in the following fundamental principles of a democratic society:

- *the individual's right to know what information is contained in government records about him or herself;*
- *that a government open to public scrutiny is more accountable to the electors; and*
- *where people are more informed about government policies, they are more likely to be involved in both policy making and government itself.²⁶⁷*

Key Finding

7.1 The continuing blanket protection for trade secrets is unnecessarily wide and clear guidelines are needed as to which factors should be taken into account in assessing the reasonableness of disclosure.

7.1 Introduction

If it is accepted that access to information is central to concepts of accountability then freedom of information laws are central to the question of that access.²⁶⁸

As noted by Professor Freiberg, the provisions relating to commercially sensitive material contained in the Freedom of Information Act (Vic) 1982 are problematic for a number of reasons including the ambit of the term “agency” (in particular whether it should extend to government business enterprises)

²⁶⁷ Second reading speech of Hon. R. Cameron, for the Freedom of Information (Miscellaneous Amendments) Bill 1999, Legislative Assembly Hansard 11 November 1999, p. 349

²⁶⁸ Professor A Freiberg, submission p. 11

and the inherent vagueness and ambiguity in the exemptions necessary for the protection of essential public interests.

7.2 Commercially sensitive material produced by government agencies

Decisions concerning the disclosure of commercially sensitive material produced by government agencies (as opposed to GBEs which are dealt with separately below) require the balancing of two competing sets of public interests – the interest in ensuring that Victorian government agencies are able to operate as effectively as possible, and public interest in ensuring political and financial accountability.

As discussed previously, it should not be enough to justify refusing disclosure (which is otherwise required for accountability purposes) on the basis that the profitability of government enterprise will be adversely affected. Rather, it must be established that disclosure will interfere with the proper and efficient performance of governmental functions to such an extent as to outweigh the benefits that would flow from releasing the information into the public domain and upholding the accountability regime.

This approach is consistent with that taken by the High Court in *Commonwealth v John Fairfax & Sons* that is, the onus should be on the government to demonstrate not only that it has some interest that would be harmed by disclosure but also that disclosure would be contrary to public interest.

Section 34(4) of the Freedom of Information Act, as amended,²⁶⁹ contains a requirement of unreasonableness which requires an agency to demonstrate not only that disclosure will expose it to disadvantage but also that it is overall contrary to the public interest.

The Committee believes that it would be helpful to provide an inclusive list of criteria for evaluating the reasonableness of disclosure for the purposes of s. 34(4). For example, the real risk that disclosure would prejudice contractual negotiations or the employment process would weigh against disclosure. On the other hand, where a document provides evidence of some wrong-doing or would assist in clearing up some ongoing controversy, this should weigh in favour of disclosure.

²⁶⁹ Act No. 57 of 1999 assented to 21 December 1999

In the past, parliamentarians have deliberately chosen not to seek to define public interest, but it is suggested that an inclusive list would still leave sufficient scope for flexibility. It would also be helpful in countering the tendency for agencies to assume that commercially sensitive information should automatically be treated as exempt.

Possible examples include cases:

- where those who are likely to exploit the information are not operating in a competitive market, leading to a danger that any benefits to be realised may not be passed on to the public at large;
- where disclosure may impair important governmental or regulatory functions; ²⁷⁰ and
- where there is the potential to use the information to realise substantial profits in other jurisdictions, ²⁷¹ in which case it may be appropriate for the government to seek to exploit the information on behalf of the Victorian public.

The Committee recommends that:

Recommendation 7.1:

Section 34 of the Freedom of Information Act should be amended by inserting a new subsection after s. 34(4). This should provide:

In deciding whether disclosure of information would expose an agency unreasonably to disadvantage for the purposes of sub-section (4), an agency or Minister must satisfy one or more of the following considerations –

- (a) there is a real risk that disclosure would prejudice contractual negotiations or the agency's**

²⁷⁰ Possible examples: Submission by VicHealth, page 2 (tobacco replacement and workplace health programs); Overseas Project Corporation Victoria (joint ventures).

²⁷¹ The EPA reported that it uses the intellectual property it develops to compete internationally: submission. See also: submission by Overseas Project Corporation Victoria. The University of Melbourne reported that it makes use of “commercial-in-confidence” clauses where patents are yet to issue so as to protect Australia’s intellectual property: submission p. 2

ability to attract, select or retain suitably qualified employees;

- (b) the information is likely to be exploited in a way that does not benefit the general public due to the market power of the enterprise by which it will be exploited; for example, where there is a lack of contestability due to the existence of barriers to entry into that specific market;**
- (c) the disclosure may impair important governmental or regulatory functions;**
- (d) there is the potential to use the information to realise substantial profits in other jurisdictions;**
- (e) there are no considerations in the public interest in favour of disclosure which outweigh considerations of damage to the competitive position of the agency, for instance, the public interest in revealing evidence of some wrong-doing or in shedding light on some matter that has been the subject of ongoing controversy.**

7.3 Commercially sensitive information received or obtained by government agencies from private sources

Decisions concerning the disclosure of commercially sensitive material received or obtained by government from third parties require the consideration and balancing of different sets of interests – the private interest of the third parties in protecting the confidentiality of their own information, the public interest in ensuring that Victorian government agencies continue to receive the same quantity and quality of information from third parties, and the public interest in ensuring political and financial accountability.

Some factors that may weigh against disclosure may appear to be predominantly private in nature, but these interests are protected because it is in the public interest that commercial entities should be able to operate effectively and that the flow of information and interaction between business and government should not be unnecessarily impeded.

Government agencies may receive or obtain commercially sensitive material in two contexts; it may be supplied under compulsion or it may be volunteered. Disclosure in the case of the former may be required either as part of some regulatory or taxation regime or as a pre-condition to obtaining some benefit or permission; in the case of the latter, it may be volunteered to obtain some commercial benefit (whether direct or indirect) or, more rarely, simply to assist the government.

It is arguable that information obtained under compulsion should receive a greater level of protection, both on the basis of the potential for unfairness and the fact that such information may be expected to be subject to some form of statutory protection. It is also arguable that it is contrary to the public interest to disclose undertakings from volunteering information or providing information that is as extensive as possible.

However, it should not automatically be assumed that disclosure will adversely affect the supply of information to the government. Some businesses may provide information for purely altruistic reasons, but the majority of information is supplied on the basis that its supply will further the interests of the supplier. This is especially the case in the context of tendering and contracting out.

Likewise it is important to consider the extent to which a document discloses information about the activities of the government. It is arguable, for example, that information supplied by a business in the context of a taxation matter does not shed any light on the activities of the government. Further, the public interest in the disclosure of such non-governmental information is minimal. On the other hand, information about the nature of the interaction between an agency and the government sheds light on the activities of the government and, as a result, it is arguable that there is a public interest in its disclosure.

Section 34(1)(1)(b) offers scope for assessing these matters. The drafting of s34(1)(a) is premised on the assumption that the harm resulting from the disclosure of information which falls within the criteria for exemption will always be such as to

outweigh any public interest in disclosure. This means, for example, that information that reveals evidence of corrupt dealings between a contractor and a government agency may be withheld on the basis that its disclosure will result in the disclosure of a trade secret (however minor) belonging to the contractor.

Unless s. 34(1)(a) is amended either to include a public interest test (or, alternatively but less preferably, the legislation is amended to include a narrow definition of trade secret) it is likely that it will come to be used in a way which undermines the rationale for the inclusion of the unreasonableness requirement in s. 34(1)(b).

These problems are exacerbated by two further factors. The first is that s. 34(1) provides that a document is exempt if it “relates” to the matters specified in paragraphs (a) and (b). This wording suggests that a document may qualify for exemption if it simply refers to, or discusses, a trade secret even though it does not in fact disclose it.

A second problem is that the requirement to consult with the relevant undertaking applies only to claims for exemption under paragraph (b). This means that there may be an incentive for agencies to choose to rely on paragraph (a), therefore avoiding potentially burdensome consultation requirements.

It is the Committee’s view that there is no valid reason for the different treatment of trade secrets and other commercial information and that fairness requires that undertakings should be consulted also in relation to decisions concerning the disclosure of their trade secrets. Furthermore, such consultation is especially desirable given that it will be difficult for an agency to make an informed decision as to whether or not information qualifies as a trade secret without first discussing its status with the relevant undertaking.

The Committee recommends that:

Recommendation 7.2

Section 34(1) of the Freedom of Information Act should be amended to read:

A document is an exempt document if its disclosure under this Act would disclose -

trade secrets belonging to a business, commercial or financial undertaking; or

information of a business, commercial or financial nature acquired by an agency or a Minister from a business, commercial or financial undertaking-

that would, if disclosed, be likely to expose the undertaking unreasonably to disadvantage.

Recommendation 7.3

Section 34(3) of the Freedom of Information Act should be amended to require agencies to consult with undertakings in relation to decisions under s. 34(1)(a) as well as those under s. 34(1)(b).

Once again the Committee is of the view that it would be helpful for officials to be guided by an inclusive list of factors that may be taken into account in assessing the competing arguments for and against disclosure. As previously noted, s. 34(2) contains a list of criteria which decision-makers may take into account in deciding whether disclosure would expose an undertaking to disadvantage. The Committee is of the view that these are useful in focussing on the aspects of harm that s. 34(1) should be designed to prevent, and in identifying public interest considerations over and above the general public interest in disclosure.

However, the Committee endorses the view expressed by Professor Zifcak that 'sharp practice' is also a relevant consideration and would favour a specific reference to it in s. 34(2).²⁷² It is also of the view that it would be helpful to insert a further paragraph which focuses attention on the question as to whether the document sheds light on the activities of the government.

Another relevant matter is whether information is volunteered or provided under compulsion. In the case of the former the critical question is whether or not it was provided on the understanding that it would be treated as confidential. Information which was not provided in confidence arguably should not be exempt.

On the other hand information which is provided in confidence should be exempt in cases where it can be demonstrated that its disclosure will cause harm to the position of the confidant or prejudice to the future supply of such information provided there is not countervailing public interest in disclosure.

This approach is consistent with that taken by the courts in relation to breach of confidence and essentially focuses on the question as to whether or not the information discloses some wrongdoing or iniquity. An important issue here is the appropriateness of any undertaking of confidentiality given that

²⁷² Professor S Zifcak, transcript of evidence, pp. 18-20

the routine use of such undertakings could be used to undermine the objectives of the legislation. This is especially the case in relation to contractual arrangements which are discussed below.

Information which is provided in confidence in circumstances where its disclosure may prejudice the future supply of information is dealt with under s. 35(1)(b) but s. 35(2) specifically excludes information provided by a business, commercial or financial undertaking. It is therefore suggested that the list of factors in s. 34(2) should be expanded to include a consideration as to whether disclosure of information supplied would prejudice the future supply of such information but also to include consideration of the motives of the business in supplying the information and the appropriateness of any undertaking of confidentiality given.

Where there is no likelihood of such prejudice the existing criteria would operate to provide exemption in cases where the potential harm to the information subject outweighs the public interest in disclosure. There is arguably no issue of unfairness involved as the undertaking has a choice whether or not to provide information and presumably does so where it perceives that this will advantage it some way.

On the other hand, where information is provided under compulsion, the predominant issue is one of potential unfairness. However, as most of the information in this category arguably does not shed light on the activities of government it should generally qualify for exemption in cases where it is likely to have an adverse effect on the information subject. In addition most legislation which requires the provision of commercially sensitive information contain specific secrecy provisions which provide a basis for exemption under s. 38.

The Committee recommends:

Recommendation 7.4

Sub-section 34(2) of the Freedom of Information Act should be amended by inserting additional paragraphs that refer to:

- **the question as to whether the documents reveal any unethical or dishonest behaviours or practices;**
- **the question as to whether the information sheds any light on the activities of the government; and**
- **the question of the appropriateness of any undertakings relied upon to argue against disclosure of commercial in confidence information.**

Recommendation 7.5:

Section 34(3) of the Freedom of Information Act should be amended to make it clear that there is no requirement to consult in respect of information which is required to be disclosed under other legislation.

7.4 Commercially sensitive material produced in the context of contracting out and competitive tendering

In the case of contracting out and competitive tendering, there are issues concerning rights of access to information in the possession of contractors. There is also more likely to be a conflict between the commercial interests of third parties and the need to ensure the proper accountability of government agencies given that much of the information generated will relate both to the affairs of agencies and to those of third parties.

The Committee believes that this is an area where proper accountability is vital given the potential for corruption and where there may be an incentive for agencies to use provisions designed to protect third parties as a device for avoiding unwelcome or bothersome scrutiny of their own affairs.

As discussed in chapter 5, the Committee is of the view that certain documents in the possession of contractors, including documents that relate either directly or indirectly to services provided by the contractor to government in circumstances where the contractor does not supply substantially similar services to the private sector (excluding other governments), should be deemed to be documents in the possession of the contracting government agency and therefore subject to the operation of access provisions in the Act.

The Committee noted that there were a number of submissions that referred to the need for confidentiality, especially in relation to the tender process. For example, Melbourne City Council submitted that:

*'If tenderers are not confident that Council will preserve the confidentiality of the information they provide then it is very likely that they will not submit a tender. If there is no competition to Council's in-house teams to provide the services being tendered then it is very difficult for Council to demonstrate to its ratepayers and the wider community that it is receiving the best value for money it possibly can when paying for services. It is Council's experience that the greatest efficiencies, service improvements and cost savings have been generated in those tenders where the competition from the private and charitable sectors is at its keenest.'*²⁷³

²⁷³ Maroondah City Council, submission p. 3

On the other hand, as noted by Professor Freiberg:

*It would surprise me given the cut throat nature of the competitive market environment that somebody would give up a fairly major contract on the basis that that kind of information will be made available and if everybody knew that information was available.*²⁷⁴

Likewise as pointed out by the Executive Director VCOSS:

*Consumer confidence is an important market principle, and consumers need information to have confidence in a service or product.*²⁷⁵

Another very important consideration is the need to ensure accountability and limit as far as possible any opportunity for corruption or for abuse of power by the agency.²⁷⁶ As noted in the submission by the Australasian Council of Auditors-General, the accountability relationship between the individual and the State must affect accountability for commercial dealings between government and private entities.

The private sector must expect that, when it deals with the State, the disclosure requirements cannot merely be those that pertain to commercial transactions between two private sector entities. If the accountability arrangements are the same, insufficient weight will have been given to the need for the State to be accountable to the citizen.

*Those in the private sector who wish to gain commercial advantage from dealings with the Government cannot seek to escape the level of scrutiny that prevails in the public sector. Such scrutiny is required because of the non-commercial nature of much Government activity, the non-voluntary relationship between individuals and their Government and the different rule of law which applies in the public sector to the private sector.*²⁷⁷

Another submission noted that:

²⁷⁴ Professor A Freiberg, transcript of evidence, p. 48

²⁷⁵ Ms Morrison, transcript of evidence, p.74

²⁷⁶ As noted in the submission by the Public Sector Research Centre, p. 13, Graeme Hodges's international survey of contracting literature (G Hodge, *Contracting Out Government Services: A Review of International Evidence*, Montech, Melbourne University (1996)) found that "the risk of corruption is ever present", in the contracting processes, and that it can be "a risk to the democratic process itself through the influence of political processes"

²⁷⁷ Australasian Council of Auditors-General, submission p. 3

If 'commercial confidentiality' is requested or demanded, then the request needs to be tested against what a 'reasonable person' might expect.

The requirement to call tenders for works (or services) is supposed to encourage competition and, presumably, achieve lower costs for the taxpayer. If the facts of a particular matter are concealed, because of 'commercial confidentiality', then true and fair competition will fail and the way opened for manipulation and even corruption.²⁷⁸

There have been several reported cases concerning requests for access to details of contractual arrangements between government agencies and private bodies. Some of these have occurred in contexts where the contracts have been the subject of controversy and extensive media coverage. This highlights the tensions that exist between the natural desire of agencies and private businesses to avoid unwelcome media scrutiny and the legitimate public interest in knowing what use has been made of public funds.

The Victorian AAT has evolved a broad test of public interest which attaches significance to the role of transparency in promoting public debate and participation and the need to ensure proper standards of public administration by facilitating the disclosure of documents that reveal evidence of iniquity or wrongdoing.

In the light of the strong policy reasons which favour the transparency of such information, it is the Committee's view that there should be a specific requirement for contracting parties to identify those parts that are claimed to be confidential and to specify their reasons for making such claims (see suggested procedure in ATTACHMENT 1)

²⁷⁸ Templestowe Cemetery Trust, submission p. 3

It is also the Committee view that tenderers should be required to append to their tenders a schedule which would contain specified information including the tender price. Contracts or parts of contracts that are not subject to specific claims of confidentiality and the tender schedules should be specifically excluded from exemption under s. 34.

It is also the Committee's view that there should be some external monitoring of confidentiality claims in contracts. The preferred approach would be to require any claims for exemption to receive approval from some independent body such as the Ombudsman prior to the conclusion of the contract. This would be fairer from the point of view of the contractor.

The Committee recommends

Recommendation 7.6:

Section 34 of the Freedom of Information Act should be amended to include an additional subsection which excludes from the operation of s. 34(1) any material in a contract which has not been previously identified and approved as requiring confidential treatment for a period which extends beyond the date of the request. This amendment should be restricted to information relating to contracts which were concluded after the date of introduction of the screening requirements.

7.5 Material in the possession of GBEs

As discussed at Chapter 5, the Committee believes that GBEs (but not privatised bodies) should not be exempted from public sector disclosure requirements.

The Committee notes that the Victorian Government's program of reform, which commenced in October 1992 with the aim of ensuring that GBEs become 'efficient and, commercially-oriented businesses', is not necessarily intended to achieve privatisation for all GBEs; in some cases corporatisation or commercialisation may be ends in themselves. However, as this program continues, administrative law accountability mechanisms which have previously applied, including

obligations under the Freedom of Information Act, are being phased out and replaced by competition, corporations law, community service obligations and accountability to independent offices such as the Regulator-General.

The Committee agrees with the views expressed by the then Head of the Cabinet Office, Ms Sussex, that:

*The accountability that is attached to privatisation is the accountability to ensure that the process of privatisation occurs properly and then subsequently the accountability for the regulatory role, which the government retains in the longer term. It is not possible to retain accountability for something for which the government is no longer directly responsible.*²⁷⁹

While the decision to privatise a body is a political one which is outside the scope of this review, the decision to adopt the structure of a GBE rather than to fully privatise gives such bodies a public dimension that calls for some scrutiny beyond those available via the private law context. As noted in a conference paper presented to the Australian Institute of Administrative Law:

*The argument that the application of administrative law principles to GBEs is incompatible with a minimalist role of government can be answered with the contrary view that the very concept of publicly owned and controlled GBEs is not completely consistent with that minimalist role. If the government truly desires the complete removal of administrative law mechanisms to its decision making, partial or complete privatisation might be more appropriate.*²⁸⁰

For the reasons previously explained, the Committee agrees with the point made in the submission by the Australasian Council of Auditors-General that even where a public sector entity participates in a competitive market, there remains involuntary ownership by taxpayers which means that the government, for as long as it controls that entity, should be obliged to account to Parliament for its management. Furthermore:

²⁷⁹ Ms M Sussex, Head of the Cabinet Office, transcript of evidence, p. 3

²⁸⁰ Nicolee Dixon, "Is there a Place for Administrative Law in Government Business Enterprises?" in L Pearson (ed), *Administrative Law, Setting the Pace or being left behind?* (AIAL, 1997) 398

Because the community has delegated to Parliament extensive legislative powers that can affect individuals (and because Parliament has delegated significant powers to the Government) there is an expectation that the accountability for Government activities will be more acute than for the voluntary transactions between individuals that occur in the private sector.

Indeed the whole basis of law relating to activities in the public sector differs from that applying to the private sector. Whereas, generally, the private sector may do what has not been proscribed, the public sector generally may do only that which has been prescribed or allowed.²⁸¹

The ARC in its discussion paper, *Administrative Review of Government Business Enterprises*, expressed a contrary view where it stated that:

In relation to accountability for government decision making, a GBE that faces competition should not be in a position to make government decisions. Decisions made about GBEs by the government would continue to be subject to the administrative law package in accordance with the normal principles.²⁸²

The ARC's Report, *Government Business Enterprises and Commonwealth Administrative Law* concluded that:

Commonwealth administrative law statutes should prima facie apply to bodies that are government-controlled, including GBEs; and

GBEs should be exempt from the operation of Commonwealth administrative law statutes in relation to their commercial activities undertaken in a market where there is real competition.²⁸³

The Committee noted that the Legal and Constitutional Committee, in its 1984 Report on the Freedom of Information in Victoria expressed the view that, as a matter of principle, freedom of information legislation should apply to all agencies funded exclusively from consolidated revenue and to any other

²⁸¹ Australasian Council of Auditors-General, submission p. 3

²⁸² Administrative Review Council, *Administrative Review of Government Business Enterprises*, Discussion Paper, (1993) 46

²⁸³ Administrative Review Council, *Administrative Review of Government Business Enterprises*, Report (1995) para 4.29

agency established for a public purpose in which the Government had a significant financial or controlling interest.²⁸⁴

The Council rejected the argument that alternative forms of accountability, whether to a Minister, to Parliament or to the market, should be considered as sufficient to displace the presumption that the public should have a general right of access to documents in the possession of the agencies concerned. The Council pointed out that accountability generated through access to documents was qualitatively different for that produced by the requirement to report to the executive or Parliament.²⁸⁵

The Tasmanian Legislative Council Select Committee Report on Freedom of Information recommended that all GBEs should remain under or return to coverage of the FOI Act.²⁸⁶ This report made the point that because GBEs are organisations that are to various degrees, funded by the public purse, taxpayers should have a right to access information in order to facilitate public accountability.

A similar approach has been taken by New Zealand where the Report of State-Owned Enterprises (Ombudsman and Official Information Acts) Committee 1990²⁸⁷ expressed the view that 'the nature and functions of the SOEs, their role in the community and their ownership, are the deciding factors in whether they should be covered by the Ombudsman Act and Official Information Acts.'²⁸⁸ Emphasis was placed on the fact that they are publicly owned, the hybrid nature of their functions and issues of scale of monopoly. These views were specifically endorsed by the NZ Law Reform Committee.²⁸⁹

One other difficulty which is mentioned in Professor Freiberg's evidence, is the practice of agencies refusing to release information on the basis that it might be commercially useful to them should they corporatise or privatise.²⁹⁰ While such an approach may have some validity in the context where there has been a formal decision to privatise a body or a part of its

²⁸⁴ Ibid, para 3.15

²⁸⁵ Ibid, para 3.19

²⁸⁶ R Snell and Helen Sheridan, "*Finetuning the Freedom of Information Act 1991 (Tas) with a Sledge Hammer: A response to the Legislative Council Select Committee Report on Freedom of Information*" released April 1997 to Tasmanian Legislative Council Select Committee, p.4

²⁸⁷ AJHR 1.22A cited in para 1.5 NZ Law Commission, Report 40, *Review of the Official Information Act 1982* (1997)

²⁸⁸ NZ, *Report of State-Owned Enterprises (Ombudsman and Official Information Acts) Committee* (1990) para 4.4

²⁸⁹ Ibid para 1.8

²⁹⁰ Professor A Freiberg, transcript of evidence, p. 52

operations, it is clearly open to abuse if available on the basis of a mere possibility. Moreover, the commercial sensitivity of such information needs to be balanced against the need to ensure that the privatisation process is properly carried out. As with contracting out, there is an obvious potential for corruption and it is important therefore that the decision making process is open and transparent.

7.6 Conclusion

The Freedom of Information Act plays a key role in ensuring accountability while seeking to strike an appropriate balance between the public interest in transparency and the need to protect the legitimate interests of the government and its agencies and third parties.

The exemption provisions most frequently relied upon to protect commercial information, ss. 34(1) and 34(4) have both recently been amended to minimise their potential to undermine proper accountability on the part of the agencies and third parties which engage in commercial transactions with the Government. However, the Committee believes that the continuing blanket protection for trade secrets is unnecessarily wide and that there is insufficient guidance as to the factors that should be taken into account in assessing the reasonableness of disclosure.

The Committee believes that information generated in the context of competitive tendering and contracting out warrants specific attention due to the potential for corruption and the problems arising from a convergence of interests in maintaining secrecy. This can best be resolved by requiring the disclosure of information that not been previously identified and approved as requiring confidential treatment.

CHAPTER 8 CONCLUSIONS

The Committee believes that open and accountable government can be undermined by the constant use of commercial confidentiality reasons to deny access to information to the public.

The Committee is concerned that the previously broad exemption provisions under the Freedom of Information Act created an environment in which agencies regularly claimed blanket exemptions for any information relating to their commercial dealings. The Committee is also concerned that agencies have sought to rely on claims for commercial confidentiality to restrict effective oversight of the Government's financial and administrative functions.

The Committee believes that the Auditor-General, the Ombudsman and Parliamentary Committees should have unrestricted rights of access to commercial information.

The Committee is especially concerned about the lack of transparency in the contracting out and tendering process and, in particular, about the indiscriminate use of confidentiality provisions in government contracts and their potential for precluding proper scrutiny both of the Government's role as principal and the performance of the contractual duties by contractors.

The Committee believes that key information about tenders and contracts should be made publicly available. Any claims of confidentiality should be made prior to the submission of tenders or the conclusion of contracts and should be fully justified. Furthermore when claims of confidentiality are made for key information in contracts and tenders, the Ombudsman should have a role in determining whether the information should be protected. That determination will require a balancing of the rights and interests in favour of disclosure against the rights and interests of the individuals asserting the need for confidentiality.

The Auditor-General should have responsibility for ensuring that the public is informed as to the nature and extent of all contracts which alter core government relationships or functions, create unusual or substantial contingent liability or which involve material expenditure of funds.

The Committee believes that it is important both for the guidance of public officers and for ensuring fairness to tenderers and contractors that guidelines should be developed which set out the procedures to be followed in relation to claims for commercial confidentiality. These guidelines should require agencies to provide tenderers and contractors with detailed advice prior to their submission of sensitive commercial information and should require the inclusion in contracts of standard clauses which make it clear that contractual information is subject to overriding disclosure requirements.

Four principles should apply when agencies are assessing claims for confidentiality:

- **the right of the people to know;**
- **the accountability of Parliament to the people;**
- **the responsibility of the Executive Government to the Parliament; and**
- **the rights of individuals or organisations to be treated fairly and to protect their personal and business information from unreasonable disclosure.**

While commercial secrecy has a proper place in the conduct of government, the classification should be more narrowly defined and consistently applied against a set of principles developed by the Public Accounts and Estimates Committee. This arrangement applies equally to information generated by government or information provided by the private sector to the government.

After reviewing all the evidence, the Committee supports the proposal that the question of whether or not commercial in confidence information should be disclosed should start from the general principle that the information should be made public unless there is a good reason not to. In other words, the Committee believes that there should be a reversal of the principle of onus of proof which would require that the party arguing for non-disclosure should substantiate that disclosure would be harmful to its commercial interests (in the case of third parties) and in relation to agencies, the onus should be on the government to demonstrate not only that it has some interest that would be harmed by disclosure but also that disclosure would be contrary to the public interest.

While some provisions may be legitimately confidential, confidentiality should not be permitted when the overall

impression created would be misleading to the public and the Parliament and where confidentiality impedes the Parliament in the discharge of its constitutional role of scrutiny of the Executive Government.

Transparency and public accountability in public administration and service provision have been enhanced since the introduction of the Freedom of Information Act in 1983. However, the contracting process can diminish this in two ways. First, the contract between government and contractor can be declared “commercial in confidence” and so evade the provisions of FOI. This means that the contractors’ obligations in relation to service quality standards, handling of complaints, employment and training of staff and many other matters of public interest may be removed from public scrutiny. Secondly, the internal operations of the contractor are not subject to FOI or the Audit Act unless government and public access to information by the contracting agency is specified in the contract. This diminishes access to information by ministers, the Auditor-General and the public.

The Committee agrees that if contracting out services becomes more widespread, these practices could close off large areas of services from public scrutiny and accountability without any public debate or parliamentary scrutiny. This also creates a two tier system in which accountability and social rights are available in some public services and not in others. This situation must be addressed by legislative changes.

Where confidentiality clauses do exist they do not override legislative provisions that require information to be included, for instance in tabled financial statements or annual reports. They also do not limit the capacity of the Auditor-General to report to the Parliament.

The Committee supports the view that the Parliament has the right as well as the obligation to examine commercial documents where that examination is necessary to properly acquit its functions.

The common use of confidentiality clauses suggests that there is an uneven appreciation within the Government of the oversighting role of the Parliament. At worst their prevalence could be interpreted as suggesting that there should be a reduction in the parliamentary accountability regime to which the government is subject.

The Committee found that the impetus for classifying information about commercial dealings as commercial in confidence had not come from the private sector, but from within government. The Committee finds this practice totally unacceptable and contrary to the spirit of the Westminster system of governance.

The Committee agrees with various witnesses that public acceptance of government and its agencies and the role of officials depends on trust and confidence. The obligation for the Government to be open and accountable requires agencies to make public as much information as possible to enable interested persons to assess decisions made by agencies and the Government. While this obligation may legitimately give way to conflicting considerations of commercial sensitivity in some cases (for example where information contains valuable intellectual property), the Committee found that there should be a strong preference for disclosure of information.

The Committee has made a number of recommendations that will:

- **improve access and reporting by the Auditor-General in relation to commercial and contract information;**
- **strengthen public accountability in relation to material held by government agencies and third parties;**
- **improve access to the details contained in government contracts;**
- **strengthen the Freedom of Information Act; and**

- **improve the culture and attitude within the public sector in relation to the application and classification of material as commercial in confidence.**

The Committee has concentrated on defining the principles and guidelines that should be applied by Ministers, government agencies, and public officials in determining whether information is commercial in confidence and should be publicly released.

The Committee believes that by encouraging and developing a culture of openness within government, the number of requests for government and contract information, particularly applications under the Freedom of Information Act, will diminish.

APPENDIX 1

Approaches in Other Jurisdictions

Other Australian Freedom of Information Acts

Victoria was the first Australian state to enact Freedom of Information legislation, and this Act shares many features with the Commonwealth Act. Freedom of Information legislation has since been enacted in all of the other Australian States and also in the Australian Capital Territory. This legislation has many common features. Each of the Acts provides, for example, for universal rights of access to public sector documents subject to specific exemption provisions, including provisions which protect commercially sensitive material.

The recent amendments to s. 34(1) of the Victorian Act derive from the approach taken in s. 43(1) of the Commonwealth Act. As noted in the main body of this report, s. 43(1) contains a criterion of unreasonableness that has been interpreted²⁹¹ as requiring a balancing of the competing interests for and against disclosure.²⁹²

The equivalent provisions in the Australian Capital Territory and other state Acts contain requirements to demonstrate some adverse effect; those in the Queensland²⁹³ and West Australian²⁹⁴ Acts also contain explicit public interest tests. On the other hand, the Victorian Act is the only one that confers on an external review body an overriding discretion to grant access to documents that it finds to be exempt.

There is less uniformity in the provisions that protect the affairs of agencies. Section 40(1)(d) of the Commonwealth Act, exempts documents if the disclosure of the information they contain could reasonably be expected to have a substantial adverse effect on the proper and efficient performance of an agency's functions. This is subject to an additional requirement that the disclosure must also be contrary to the public interest.²⁹⁵ The Commonwealth provision has provided the model for similar

²⁹¹ *Searle Australia Pty Ltd v Public Interest Advocacy Centre* (1992) 36 FCR 11, 120

²⁹² *Ibid* 438-9, 440, 440-1

²⁹³ *Freedom of Information Act 1992* (Qld), s 45(1)(c)

²⁹⁴ *Freedom of Information Act 1992* (WA), Exemption 4(7) (Sch 1 cl4(7))

²⁹⁵ *Freedom of Information Act 1982* (Cwlth), s40(2)

provisions in other jurisdictions,²⁹⁶ although not all of these contain separate public interest tests.²⁹⁷

Other important differences relate to the categories of agencies that are excluded from the legislation. The Commonwealth Act, for example, has a Schedule to the Act which specifically excludes listed bodies from the operation of the Act either entirely or in respect of specified activities. A number of agencies that substantially or predominantly engage in commercial activities are excluded in respect of their commercial activities.²⁹⁸ The term ‘commercial activities’ is defined as:

*activities carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments; or activities carried on by an agency that may reasonably be expected in the foreseeable future to be carried on by an agency on a commercial basis in competition with persons other than governments or authorities of governments.*²⁹⁹

Other jurisdictions have made a policy decision not to exclude Government Business Enterprises from the operation of Freedom of Information legislation given that documents that may cause harm if disclosed will be protected under specific exemption provisions.

RELEVANT OVERSEAS LEGISLATION

The concept of freedom of information did not originate in the United States,³⁰⁰ but the US Act³⁰¹ is of particular significance because it provided the model for the legislation that has since been enacted in a large number of common law countries

²⁹⁶ See *Freedom of Information Act 1989* (ACT), ss 40(1)(e); *Freedom of Information Act 1989* (NSW), Exemption 16(a)(iv), (Schedule cl 16(a)(iv)); *Freedom of Information Act 1991* (SA), Exemption 16(a)(v) (Sch cl 16(1)(a)(v)); *Freedom of Information Act 1992* (WA), Exemption 11(1)(d) (Sch 1 cl 11(1)(d))

²⁹⁷ Those that do are the Australian Capital Territory and Western Australia

²⁹⁸ These include: the Aboriginal and Torres Strait Islander commercial Development Corporation, the Albury-Wodonga Development Corporation, the Australian Port Corporation and the Federal Airports Corporation

²⁹⁹ *Freedom of Information Act 1982* (Cwlth), s7(3)

³⁰⁰ Sweden has had legislation since the 18th century, although its current legislation, the *Freedom of the Press Act* came into operation in 1949

³⁰¹ *Freedom of Information Act*, 5 USC s552

including Australia, New Zealand,³⁰² Canada,³⁰³ Ireland³⁰⁴ and Hong Kong.³⁰⁵

Exemptions in respect of commercially sensitive material

United States – Federal Freedom of Information Act

Exemption (b)(4) of the Act provides that the right of access does not apply to matters that are ‘trade secrets and commercial or financial information obtained from a person and privileged or confidential’. The courts have suggested that this has a two-fold justification: encouraging cooperation by those who are not obliged to provide information to the government and protecting the rights of those who must.³⁰⁶

The expression ‘trade secret’ has been narrowly defined as requiring a ‘direct relationship’ between the trade secret and the productive process. It has been defined as:

*A secret, commercially valuable plan, formula, process, or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort.*³⁰⁷

The courts have attempted to interpret the provision as excluding information generated within the federal public sector, and have drawn a distinction between information that is volunteered and information that is required to be provided. This distinction focuses on the different interests that are affected in each case. The government’s interest in protecting volunteered information from disclosure will be to ensure the continuing availability of such information and its continued accuracy. The third party’s interest in protecting information that it is required to provide will be confined to circumstances where disclosure will result in some commercial disadvantage; in the case of volunteered information, a wider range of interests may legitimately require protection. It has therefore been held that volunteered information is protected if it would

³⁰² Official Information Act 1982

³⁰³ Access to Information Act 1985

³⁰⁴ The Irish Freedom of Information Act 1997 came into operation on 21 April 1998

³⁰⁵ The UK does not have legislation in place as yet but the government has issued a Green Paper which outlines a proposal for a FOI Act: Your Right to Know: The Government’s Proposals for a Freedom of Information Act, Cmnd 3818 (HMSO, 1997)

³⁰⁶ *National Parks and Conservation Association v Morton* 498 f 2d, 872 (DC Cir 1992)

³⁰⁷ *Public Citizen Health Research Group v FDA* 704 F2d 1280, 1288 (DC Cir, 1983)

not customarily be released to the public by the information provider.³⁰⁸

The US Justice Department has issued guidelines that advise that third party submissions may be treated as non-voluntary, even where they are not specifically required under some statute, if they are required as a condition of doing business with the government.

It is the normal practice to make public the total price of any contract awarded, but many Freedom of Information applications are for details on how that price is made up. These are decided on a case by case basis having regard to the requirement of competitive harm. However, there has been a willingness to treat the prices charged by the government as a cost of doing business with the government.

The US Act, unlike the Australian legislation, does not contain any specific reverse-for procedures. Instead these are contained in Executive Order 12600 which requires agencies to establish procedures to notify third parties when it is determined that it may be necessary to disclose their commercial information. This provides that submitters of confidential commercial information should designate, *at the time the information is submitted to the agency or a reasonable time thereafter*, any information of which the disclosure would result in substantial competitive harm.

Individual agencies have developed procedures for determining the confidentiality status of commercial information they receive. The Environment Protection Authority, for example, has developed a systematic approach that includes sending a notice to the suppliers of information which is the subject of requests for access. The notice requires suppliers to comment on the following points:

- the portions of the information that are alleged to be entitled to confidential treatment;
- the period of time for which confidential treatment is desired;
- the purpose for which the information was supplied;
- whether a business confidentiality claim accompanied the information, measures taken by the business to guard against undesired disclosure of the information to others;

³⁰⁸ *Critical Mass Energy Project v NRC*, 975 F2d (DC Cir, 1992)

- the extent to which the information has been disclosed to others, and the precautions taken in connection therewith;
- pertinent confidentiality determination, if any of the Environment Protection Authority or Federal agencies; and
- whether the business asserts that disclosure of the information would be likely to result in substantial harmful effects on its competitive position and, if so, what those harmful effects would be, why they should be viewed as substantial, and an explanation of the causal relationship between disclosure and such harmful effects.

Although commercial information generated by an agency is usually released, it may be exempt to the extent that it is generated in the process leading up to the awarding of a contract and expires on the awarding of the contract or withdrawal of the offer.³⁰⁹

In the case of contracts between the government and private sector, the holder of the contract generally wins the contract with a formal bid listing the total price, which is routinely made public.³¹⁰

In the context of applications for details about how the price of winning bids is made up, there has been a body of case law generated. The courts have taken the approach that prices submitted in conjunction with a contract to the government are 'required' (compared with volunteered) information and therefore subject to the competitive harm test. However, it has been held that the disclosure of prices charged to the government 'is a cost of doing business with the government'.

Also as noted in Professor Freiberg's submission³¹¹, United States federal and state procurement laws generally require contractual arrangements to be publicly accessible, and there is a federal requirement under Securities and Exchange Commission rules that publicly listed companies must lodge their procurement contracts for inspection.

This has led, in some instances to the ironic position of Australians being able to access some details of

³⁰⁹ See *Federal Open Market Committee v Merrill* 443 US 340 (1979)

³¹⁰ J T O'Reilly, *Federal Information Disclosure* (2nd ed, 1991)

³¹¹ Professor A. Freiberg, submission p.18

*contracts relating to the Australian-based activities of American corporations through United States Corporate law, but having those same documents denied to them locally because of claims of “commercial confidentiality”*³¹²

United States – Californian Freedom of Information Act

This example of a US state Act does not have a general business exemption, but it does offer protection for some trade secrets. It contains a number of detailed provisions but the significant aspect is the Californian government’s approach to disclosure of commercial information. Most contracts are open for public inspection, as are bids for government contracts.

The *Public Records Act*, s. 6524, provides an exemption in respect of:

- (d) information received in confidence by any state agency;
- (k) records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege; and
- (q) records of state agencies ... which reveal the special negotiator’s deliberative process, discussions, communication, or any other portion of the negotiations with providers of health care services, impressions, opinions, recommendations, meeting minutes, research, work product, theories, or strategy, or which provide instruction, advice, or training to employees.

Except for the portion of a contract continuing the rates of pay, contract for in-patient services ... shall be open to inspection one year after they are fully executed...If the California Medical Assistance Commission enters into contracts with healthcare providers for other than in-patient hospital services, those contracts shall be open to inspection one year after they are fully executed. Three years after a contract or amendment is open to inspection, under this subdivision, the portion of the contract or amendment containing the rates of payments shall be open to inspection.

³¹² Ibid, pp.18-19

There are other similar conditions relating to some other health-related contracts but, apart from these, it appears that all other contracts are open for public inspection.³¹³

Section 6255 states that:

The Agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not making the record public clearly outweighs the public interest served by disclosure of the record.

Public Contract Code Division s. 10304 states that:

All bids shall be sealed and shall be publicly opened and read at the time set for the in the request for bids, provided any person present desires the bids to be so read ... the department shall maintain confidentiality regarding each bid until the public opening and reading takes place.

³¹³ Kathleen Yates, Legal Counsel at the Office of Legal Services, Department of General Services, 25 October 1997.

New Zealand

Section 5 of the New Zealand *Official Information Act 1982* embodies an underlying principle of the availability of official information:

The question whether any official information is to be made available, where that question arises under this Act, shall be determined, except where this Act expressly requires, in accordance with the purposes of this Act and the principle that the information shall be made available unless there is a good reason for withholding it.

Where s. 9 applies, it provides *inter alia* that there is good reason for withholding official information, for the purpose of section 5. The exemption is when all the circumstances of the particular case mean that withholding information is outweighed by the desirable public interest in making the information available.

The grounds that constitute good reason include the need to withhold the information to protect against:

- (i) disclosure of a trade secret; or
- (ii) unreasonable prejudice against the commercial position of the person who supplied or who is the subject of the information.

The practice guidelines state that the Ombudsman has generally accepted that information is protected under this section where disclosure of pricing information is likely to reveal a tender's pricing/market strategy in a competitive market. However, requests for total tender prices and identities of successful and unsuccessful tenders have usually not been protected.

It should also be noted that the Ombudsman has taken the approach that an agency must demonstrate how the commercial position of the party will be prejudiced and why that prejudice is unreasonable, before it can assert that disclosure will result in prejudice

Section 9(2)(ba) also exempts information which is subject to an obligation of confidence or which any person has been or could be compelled to provide under the authority of any enactment, where the making available of the information:

- (i) would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied;

- (ii) would be likely otherwise to damage the public interest.

In cases where information was not supplied under compulsion, it is necessary to establish whether the information was the subject of an obligation of confidence. Such obligations may also be relevant where they are necessary to ensure the quality or timeliness of information required to enable the agency to discharge its functions.

Section 9(2)(i) enables a Minister of the Crown or any department or organisation holding the information to carry out, without prejudice or disadvantage, commercial activities.

The approach taken to this provision involves:

- identifying the commercial activity in question;
- identifying the prejudice or disadvantage that may result if the information is made available;
- establishing precisely how that prejudice or disadvantage would occur; and
- assessing whether disclosure of the information would be so likely to cause the prejudice or disadvantage predicted that it is necessary to withhold it.

In applying these tests in the tendering situation, a starting point is to establish:

- the particular market activity to which the information relates;
- the characteristics of that market activity - for example the number of competitors and degree of competition;
- the criteria on which the tender contracts are awarded and how the information relates to those criteria; and
- the degree to which the information could be said to reveal a tender's marketing/pricing strategy which a competitor would be able to use to obtain a competitive advantage.³¹⁴

In addition, s 9(2)(j) enables a Minister of the Crown or any department or organisation holding the information to carry on,

³¹⁴ L Donnelly, "The Official Information Act in the Corporatised World, Commercial Information and the Official Information Act" Papers of the Official Information Act Seminar held Wellington on 26 February 1997, p.56-7

without prejudice or disadvantage, negotiations (including commercial and industrial negotiations).

Public interest considerations identified by the Ombudsman in the context of tenders include:

the public interest in the New Zealand public having access to information on how government departments and organisations and local authorities spend public funds. (Practice Guidelines 69), which flow from the stated purpose of the Act 'to promote the accountability of officials'.

Canada

The Canadian *Access to Information Act* contains exemptions in ss. 18 and 20 in respect of the economic interests of Canada and third party interests. Section 18 encompasses trade secrets or financial, commercial, scientific or technical information that belongs to the Government of Canada or a government institution and has substantial value (or is reasonably likely to have substantial value). It also covers information of which the disclosure could reasonably be expected to prejudice the competitive position of a government institution.

This requires demonstration that either the information has substantial value or its disclosure will adversely affect an agency's competitive position. However, there is no overriding public interest balancing test.

Section 20 encompasses four categories of information:

- (a) trade secrets of the third party;
- (b) information of which the disclosure could reasonably be expected to result in material financial loss or gain to the third party;
- (c) information of which the disclosure could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of a third party; and
- (d) information of which the disclosure could reasonably be expected to interfere with the contractual or other negotiations of a third party.

In the last three instances, there is a limited public interest override. This applies where disclosure would be in the public interest as it relates to the public health, public safety or

protection of environment, and where the public interest in disclosure clearly outweighs a financial loss or gain to a third party, prejudice to the competitive position of a third party or interference with the contractual or other negotiations of a third party.

Ireland

The Freedom of Information Act contains exemptions that apply to information provided in confidence and commercial information.

Section 26(1) provides exemptions where:

- (a) *the record contains information given to the public body in confidence and on the understanding that it would be treated as confidential (including information that a person was or could have been required by law to provide) and disclosure is likely to prejudice the giving of further similar information from the same or other persons when it is important to the body to continue to receive further similar information;*
- (b) *disclosure of information would constitute a breach of duty of confidence provided for or by an agreement or enactment or otherwise by law.*

Section 27 provides exemptions where:

- (a) *disclosure would make public trade secrets;*
- (b) *disclosure of financial, commercial scientific or technical or other information could reasonably be expected to result in material financial loss or gain to the person to whom the information relates or could prejudice competitive position;*
- (c) *disclosure would prejudice the conduct or outcome of contractual or other negotiations.*

This is subject to a public interest override.

United Kingdom

The United Kingdom has been notable for its lack of Freedom of Information legislation, although there is now a Bill before Parliament. A White Paper³¹⁵ presented to Parliament in December 1997 contained proposals for a universal right of access whereby all requests would be considered equally on

³¹⁵ UK, *Your Right to Know: The Government's Proposals for a Freedom of Information Act*, Cmnd 3818 (HMSO, 1997)

their contents, not on the stated or presumed intentions of the applicant.³¹⁶

The Freedom of Information Bill which is currently before the House of Commons³¹⁷ applies to a wide range of bodies³¹⁸ but has been the subject of considerable criticism. Two particular issues of concern are the existence of a number of so-called “class exemptions” which do not require any demonstration of adverse effect and the fact that the external review body, the Information Commissioner, does not have the final say as to whether information should be disclosed in the public interest.³¹⁹

³¹⁶ Ibid para 2.6

³¹⁷ A copy of the Bill is available at <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmbills/005/2000005.htm>. See also <http://www.parliament.the-stationery-office.co.uk/pa/cm199900/cmbills/005/amend/00201m01.htm> for amendments made following the committee stage.

³¹⁸ See clause 15 and Schedule 1

³¹⁹ See Campaign for Freedom of Information, Freedom of Information Queen's speech briefing, 23 November 1999, which is accessible at www.cfoi.org.uk/qsbriefing1199.html

As it now stands, the Bill contains the following clauses:

- 39 (1) *Information is exempt information if –*
- (a) *it was obtained by the public authority from any other person (including another public authority), and*
 - (b) *the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that other person.*
- (2) *The duty to confirm or deny does not arise if, or the extent that, the confirmation or denial would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute actionable breach of confidence.*
- 41 (1) *Information is exemption information if it constitutes a trade secret.*
- (2) *Information is exemption information if its disclosure under this Act would, or would be likely to prejudice the commercial interests of any person (including the public authority holding it).*
- (2) *The duty to confirm or deny does not arise if, or the extent that, compliance with section 1(1)(a) would, or would be likely to, prejudice the interests mentioned in subsection (2).*

APPENDIX 2

Submissions received

Agriculture Victoria Services
Ambulance Service Victoria - North Western Region
Ambulance Service Victoria- South Western Region
Association of Consulting Engineers
Auditor-General of Victoria
Ausdoc Group Ltd
Australasian Council of Auditors-General
Australian Conservation Foundation
Australian Education Union (Victorian Branch)
Australian Federation of Business and Professional Women
Victoria Division Inc.
Australian Food Industry Science Centre
Australian Shareholders' Association Ltd
Australian Society CPAs
Black Box Catalog Australia Pty Ltd
Casterton Memorial Hospital
City of Ballarat
City of Greater Dandenong
City of Greater Geelong
City of Kingston
City of Monash
City of Moonee Valley
City of Yarra
City West Water
Civil Contractors Federation
Clerk of the Senate
Coghill, Dr K.
Colac Otway Shire
Commonwealth Ombudsman
Deacons Graham & James
Dental Board of Victoria
Department of Premier and Cabinet
East Gippsland Shire Council
Energy Action Group
Environmental Protection Authority
Federation of Community Legal Centre
First Mildura Irrigation Trust
Freiberg, Professor Arie
Gippsland Water

Glenelg Water
Grampians Region Water
Hall Chadwick
Hobsons Bay City Council
Holden
Institute of Chartered Accountants
Lindsay Associates Pty Ltd
Lower Murray Water Authority
Manningham City Council
Maribyrnong City Council
Maroondah City Council
Melbourne Catholic Social Services
Mid-Goulburn Water
Mitchell Shire Council
Moyne Shire Council
Mt Alexander Hospital
Museum of Victoria
Overseas Projects Corp
Parks Victoria
People's Committee for Melbourne
Public Sector Research Centre University of NSW
Public Transport Corporation
RMIT Union
Rural Finance Corporation
Save Albert Park
South East Water
South West Water
Southern Hydro
Stanton Consulting
State Swimming Centre
Stewart, Mr Iain
Swinburne University of Technology
Sykes, Mr Trevor
T A C

Templestowe Cemetery Trust
Trustees of Parliamentary Contributory Superannuation Fund
Unimelb Limited
University of Melbourne
University of Sydney
University of Tasmania, Law School
Veterinary Board of Victoria
VicHealth
VicSuper
Victoria Legal Aid
Victoria Police

Victoria University
Victorian Casino and Gaming Authority
Victorian Council of Social Service
Victorian Employers' Chamber Commerce
Victorian Institute of Sport
Victorian Ombudsman
Victorian Plantation Corp
Warrnambool and District Hospital
Wells, Mr E Michael
Western Health Care Network
Westernport Water
William Angliss 2000 Pty Ltd

APPENDIX 3

Witnesses to the Inquiry

List of organisations and witnesses who gave evidence at public hearings and private briefings in Melbourne, Canberra and Sydney.

Private Hearing 13 August 1997

Department of Premier and Cabinet Assistant	Ms M Sussex, Head of Cabinet Office; and Ms M Van Rees, Secretary, Government Branch
La Trobe University	Professor S Zifcak, Associate Professor of Law
Victorian Auditor- General	Mr Ches Baragwanath

Public Hearing 18 August 1997

Victorian Government Purchasing Board Department of Treasury and Finance	Mr L Bailey, Director, Office of Purchasing and Procurement; Mr J Peachey, Manager, Policy and Review Mr R Venables, Project Officer, Quality and Compliance
Graduate School of Management Monash University	Dr K.Coghill, Senior Research Fellow
University of Melbourne	Professor A Freiberg, Professor of Criminology

Private Hearing 9 September 1997

Public Sector Research Centre, University NSW	Mr Michael Paddon
NSW Auditor General	Mr A C (Tony) Harris

Private Hearing 10 September 1997

Deputy Clerk of the Senate Miss A Lynch

Public Hearing 22 September 1997

Ombudsman	Dr B Perry
Catholic Social Services Catholic Social Justice Commission	Father J Caddy Ms L Curran
Victorian Council of Social Service	Ms P Morrison, Executive Director
Federation of Community Legal Centres	Ms A George; Ms A Sharam; Ms J Cox; Mr C Singh; Ms S Burchfield; Mr S Biondo; and Ms C Gow
Save Albert Park Gillespie;	Ms C Hutchens; Ms M Mr D Littlewood; and Dr H Ward

Public Hearing 6 October 1997

Australian Shareholders' Association	Mr J Stock, Chairman Mr S Mather, Victorian Councillor
Australian Stock Exchange Ltd.	Mr S Crosby, Manager, Companies Ms D Hambleton, Legal Counsel
Maribyrnong City Council	Mr P Shanahan, Chief Executive Officer. Ms K Manley, Tender Coordinator
Mr E M Wells	Chartered Accountant
City of Manningham	Ms H. Lanyon, Director of Quality and Corporate Services

Mr B. Douglas, Executive Manager,
Infrastructure

Public Hearing 20 October 1997

University of Tasmania Mr R Snell, Lecturer,
Law School

Worksafe Australia Dr Vladimir (Reg) Diakiw,
Research Officer

Public Transport
Corporation Mr J Lind, Financial Controller
Hillside Trains

Private Hearing 21 October 1997

Australasian Council of Mr D Pearson
Auditors-General Convenor of the Council

Private Meeting 22 February 1999

Australasian Council of
Public Accounts
attended Commercial in Confidence was an
agenda item at a conference

Committees 5th Biennial
Conference by the Chairmen and Members of all
Public Accounts Committees and
Auditors-General in Australasia and
from a number of overseas
countries. The views expressed at
that meeting have been taken into
account in formulating the
Committee's recommendations.

APPENDIX 4

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