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Identifying and Protecting Confidential Information

This Briefing is directed at assisting Commonwealth agencies to identify whether information they deal with should be protected as confidential information, whether in a contractual context or otherwise.

The expression 'confidential information' is used in this Briefing to describe information which is 'inherently confidential', or secret, *and* which is the subject of an obligation of confidence.

The guidance provided does not only relate to 'commercial' information. There are a number of categories of information that the courts have protected as confidential information. These are discussed below.

This Briefing is not directed to giving guidance on *disclosing* information that may be confidential;[1] does not deal with the provision of information (submissions, evidence) to Parliamentary Committees or with claims for Public Interest Immunity;[2] and does not deal with a *breach* of an obligation of confidence.

Why is it Important to Identify Confidential Information?

Commonwealth agencies operate within a governance and accountability framework established under both legislation and policy.

However, agency accountability depends on the availability of information about how the activities of the agency have been conducted.

For many years there has been disquiet amongst parliamentarians, auditors-general, ombudsmen, academics and public commentators about the growing use of confidentiality clauses in government contracts which have had the effect of limiting access to such information.

In response to these concerns, commencing in October 2000, the Australian National Audit Office (ANAO) conducted a performance audit on the use by agencies of confidentiality provisions in Commonwealth contracts. The ANAO concluded in its report[3] that there were weaknesses in how agencies dealt with the issue of confidential information, in particular that there was uncertainty over what information was confidential information, and where there were confidentiality provisions in contracts, there was usually no indication of what specific information was confidential.[4]

There is now mounting pressure to change past practices in relation to use of confidentiality clauses, not only to accommodate accountability requirements, but also for practical and legal reasons: if the information the confider wishes to protect is not specifically identified, the recipient will not be clear about precisely what information is to be kept confidential, and courts will not issue injunctions to prevent disclosure or use of the information if they consider that the recipient would be unable to decide which information to avoid using or disclosing to keep clear of contempt of court.

In its report, the ANAO suggested a specific change in approach, namely:

> '…agencies should include provisions in tender documentation that alert prospective tenderers or contractors to the implications of the public accountability responsibilities of agencies.' [5]

and also:

> '…that agencies consider the issue of what information should be kept confidential before they agree:
>
> - to accept information on the basis that it is to be kept confidential;
> - to insert a clause into a contract which obliges the parties to keep this information confidential; or
> - to take any other measures which result in the information inadvertently being regarded as confidential. [6]
>
> …
>
> agencies' approach should also provide for contractors to indicate what information they consider should be classified as confidential.' [7]

The process of identifying information that is confidential information is not always easy nor scientifically precise. Such identification will depend on making an assessment about *both*:

- the nature of the information; *and*
- the circumstances surrounding the communication and receipt of the information.

It is always important to bear in mind that a recipient of information does not become subject to an obligation of confidence in relation to the information merely because the information is of an 'inherently confidential' nature (for example, a trade secret). The recipient would only become subject to an obligation of confidence in relation to particular information if at the time the recipient received the information, an equitable or contractual obligation of confidence was created in respect of that information.

Types of Information Held by Government

Any information that is developed, received or collected by or on behalf of the Commonwealth Government, through its agencies and contractors, is referred to in the Commonwealth environment as 'official information'. [8]

To enable an appropriate decision to be made by an agency about what it may agree to protect as confidential information, it is helpful to divide official information into different categories.

Finn [9] identifies four types of information in the public sector, which is a useful categorisation for these purposes. These are:

- Public Information – the stock of knowledge publicly available in the community;
- Third Party Information – information supplied to government by third parties about their private, personal or business affairs;
- Government Information – information about government which has been generated by government; and
- Government Proprietary Information – information about government acting in a non-governmental capacity. This category includes, for example, information produced by government in scientific research or business activities, which is not significantly different from that produced in the private sector, and which government holds in the same way as a private sector enterprise does.

Public Information does not raise issues of confidentiality. The other three types of information described by Finn potentially do.

The protection available from the courts in relation to a particular item of information varies depending on the type of information being considered. For example, courts treat Third Party Information quite differently from information about the operations of government. This difference in treatment turns on notions of the 'public interest'. Agencies should take this into consideration when making a decision about what information is appropriate to protect as confidential information.[10]

Identifying Confidential Information

Subject to the qualifications described below, information will be treated by the courts as confidential information if:

- an obligation under the law of Equity to protect information as confidential information has arisen in all the circumstances (ie because of the nature of the information, and the circumstances in which it was provided); or
- the information is specifically protected as confidential information under a contract.

When consideration is being given to whether certain information should be treated as confidential information, an agency should also consider:

- 'public interest' issues;
- relevant statutory provisions prohibiting disclosure of certain information; and
- relevant provisions of the *Freedom of Information Act 1982* and the *Privacy Act 1988*.

There are limits on the kind of information which can be protected as confidential under a contract. For example, if an attempt is made to protect from disclosure certain Government Information as confidential information when an analysis of public interest issues leads to a conclusion that the information is not confidential in nature ('inherently confidential'), a court may refuse to enforce a contractual obligation not to disclose that information.

In analysing what information to identify as confidential information, the most useful place to start is to examine the circumstances in which an equitable obligation to protect information arises in the absence of a contract.

In the absence of a contract, a confidence is formed whenever one party (the confider) communicates to another (the recipient) private or secret matters on the express or implied understanding that the communication is for a restricted purpose.[11]

The equitable obligation of confidence is based on the principles of good faith and fair dealing with the work of another, such that a person who has received information in confidence should not be allowed to take unfair advantage of it, or fraudulently abuse the trust reposed in him or her.

TESTS FOR EXISTENCE OF EQUITABLE OBLIGATION

In order to establish that an equitable obligation of confidence has arisen, all the following elements must be present:

- the information must be specific and not merely global;
- the information must be 'inherently confidential'; and
- the information must have been communicated and received in circumstances which imposed an obligation of confidentiality on the recipient.

The elements are not satisfied by simply marking documents as confidential or COMMERCIAL-IN-CONFIDENCE.

Although all elements of the test must be satisfied, these elements are not in all cases completely independent of one another. The circumstances in which information is communicated may themselves dictate the confidentiality of the information in question.[12]

Detriment to the provider of the information is *not* required to establish an obligation of confidence. [13]

Specific Information

It is implicit in the notion of confidentiality that a secret must be distinguishable from the range of information which is generally available. [14] Also, information must be 'something that can be traced to a particular source and not something which…it is impossible to say from what precise quarter' it was derived; [15] identified 'with specificity, and not merely in global terms'; [16] particularised, and not be described in terms of broad, sweeping categories; and sufficiently developed (that is, have sufficient particularity).

The most compelling reason why it is necessary to be specific about the information that is to be protected as confidential information is that otherwise the recipient of the information will not be clear about the information they are obliged to keep confidential.

In one case [17] the confider provided several documents to the recipients, and the recipients were using information in the documents in their business. The confider applied to the court for an order to restrain the recipients from using the information, but did not specify which particular information was not to be used. The court refused to make an order in the terms sought saying that the recipients 'would be placed in a most embarrassing situation [because they would not be able to] decide what business methods, literature and paperwork to avoid using in order to keep clear of contempt of court…'.[18]

Inherently Confidential

There are two elements which go to establishing that information is 'inherently confidential'. These are that the information:

- is 'sufficiently secret'; and
- is significant.

Sufficiently Secret

For information to be 'sufficiently secret', it must not be 'public property or public knowledge' or to put it another way, 'it must be private information and not in the public domain'. [19] Accordingly, except by improper means, another party who would wish to have it would have difficulty obtaining it. [20]

The test which is most often used by the courts to decide whether information is inaccessible involves an assessment of whether any special labours would be necessary for a member of the public to reproduce it. If the information can only be reproduced at the cost of time, labour and effort, this is a good indication that the information is 'inherently confidential'.

Information can be characterised as public knowledge even though it is well known only in a particular industry or profession. [21] However, publication in one place but not in the 'local' jurisdiction, may not destroy the confidentiality of the information. [22] Neither will confidentiality be destroyed where the information appears only briefly in transient form (eg for a few seconds on television) to a small segment of the community. [23]

If part of the information has been published, the remainder may still be inherently confidential. [24] For example, if a part of a report has been published, this does not, of itself, destroy the confidentiality of undisclosed parts of the report. [25] Similarly, the information may in some circumstances be shared with others without destroying its confidentiality. [26] Information will not remain confidential forever. It will generally lose its inherently confidential character over time.

Significant

The information in question must be significant in that the preservation of its confidentiality or secrecy is of substantial concern or interest to the confider. [27] The information will not be confidential merely because the confider wishes it to be confidential.

The information must not be trivial in nature, and not so innocuous, or of so little consequence, as to qualify as 'trivial tittle tattle'. [28]

The requirement of significance appears to be satisfied if the information has commercial value. [29] If a confider can show that members of the public are prepared to pay money to obtain the information, this will be persuasive evidence that the information is significant.

The investment of time and money is not a decisive indicator in itself of the fact that information has a commercial value. Information can be costly to produce without necessarily being worth anything. [30]

Communicated and Received in Confidence

The basis of the obligation to respect confidences 'lies in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained'. [31]

Generally, for information to be treated as confidential information by the courts, it must at the time have been communicated by the confider and received by the recipient on the basis of a mutual understanding that the information was not to be disclosed except where authorised.

Where there is no express statement of confidentiality, one test for deciding whether an obligation of confidence exists is whether information has been supplied by the confider for a limited purpose and in circumstances where there is a reasonable expectation that confidentiality will be preserved. However, it has been held that the 'test of confider's purpose will not ordinarily be appropriate where each party's interest in quite different, and known to be so'. [32] In that case the court held that the use by the department of information which had been supplied for one purpose, for another purpose, was not a breach of the confidence.

'Communicated' in the context of confidential information is used widely to include all situations in which a recipient is given access to information with the knowledge and consent of the confider.

This issue must be judged according to the understanding of the parties *at the time* of the communication of the information.

Where information is required to be produced by statutory demand, and is not given voluntarily, the recipient of the information may not be under an obligation of confidence in respect of that information. [33] Whether or not the recipient will be under an obligation of confidence will depend on the wording of the statute, which may in some cases state that the information is to be kept confidential. [34]

TYPES OF INFORMATION THAT MAY BE 'INHERENTLY CONFIDENTIAL'

There are four broad categories of information that the courts have been prepared to protect as confidential information so long as the additional element, communication of the information to the recipient in the appropriate circumstances, is also present. These are:

- business or commercial information
- personal information
- government secrets
- artistic or literary information.

The first three of these are the most relevant for agencies.

Business and Commercial Information

Some, but certainly not all, of the information that an agency will be provided with in the course of their activities will be business or commercial information.

There appears to be a widely held belief in agencies that all business or commercial information is

confidential information. This is not correct. For business or commercial information to be confidential information, it must meet the criteria for the existence of confidential information discussed above. Such information, of itself, is not regarded by the courts as 'inherently confidential' information.[35] However, one category of business or commercial information that is consistently treated by the courts as 'inherently confidential' is 'trade secrets'.

The Federal Court has held that a trade secret has three characteristics:

- it must be information used in, or useable in, a trade;
- 'the owner must limit the dissemination of it or at least not encourage or permit widespread publication'; and
- it is 'information which if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret'.[36]

Trade secrets cover a range of information, some of which relates to the production of goods and services and includes, for example, inventions (eg a tool), manufacturing processes, chemical formulae, engineering and design drawings, craft secrets and recipes (eg Worcestershire sauce, Coca-Cola).

Another important class of 'inherently confidential' business or commercial information is information which a business entity generates about its own activities. This kind of information can include profit margins, costs of production and pricing data; sales statistics; customer and supplier lists; sources of supply; market projections; details of promotional strategies and expansion plans; information about customer requirements; details of a business entity's current negotiations; and negotiated prices paid by customers.

In relation to pricing information in the Commonwealth environment, whilst the total price paid under a government contract is not 'inherently confidential' (because of gazettal requirements),[37] the details of the rates or pricing structures might be 'inherently confidential'.

There may be legitimate grounds for an agency to accept an obligation of confidentiality in relation to the rates being charged by the supplier. It will be a question of the facts and circumstances in each case whether the particular information is 'inherently confidential'.

Personal Confidences

Personal information can come within the ambit of confidential information if it meets the requirements listed above. Types of personal information which could be regarded as 'inherently confidential' are information relating to sexual conduct, personal finances, religion, political beliefs, and tax affairs.

As in the case of business or commercial information, the confidentiality that may be attached to personal information ceases when that information enters the public domain.[38]

Government Information

The tests described above are also applicable to ascertaining whether any information about government which has been generated by government (ie Government Information) is inherently confidential, and whether an obligation of confidence has arisen where that information is held by a third party.

However, whether it will be possible for the government to show that a third party is under an obligation of confidence in respect of particular Government Information depends on different considerations to those which apply to the case of an individual or business. For an obligation to exist, it must be shown not only that the information is 'inherently confidential', but also that it is in the public interest that such information remain 'inaccessible' or 'secret'.[39]

Therefore it is important for an agency to give consideration to public interest issues when they are considering whether to seek to impose an obligation to protect Government Information under a contractual provision, or otherwise. [40]

DURATION OF OBLIGATION Obligations of confidence may come to an end in a number of ways, including:

- the parties could pre-agree a defined period during which the obligation of confidence is to be in operation, and this period expires;
- the information comes into the public domain;
- the information provided in confidence loses its 'inherently confidential' nature over time.

The confider of the 'inherently confidential' information is usually in the best position to propose a period during which the obligation of confidence is to be in force. This should be a realistic period taking all the relevant circumstances into account. Even if a long period is agreed, the obligation will not subsist if, say, the information comes into the public domain, or the information loses its 'inherently confidential' character over time.

DETRIMENT Detriment to the confider of information or other persons is not required to create an obligation of confidence in relation to particular information. Detriment is only relevant, if at all, when there is a breach of an obligation of confidence.

However, in considering whether the Commonwealth should agree that information should be treated as confidential information, for example, under a contract, it would be relevant to consider whether disclosure of the information would in fact cause detriment of some kind to the confider or another party. Where no detriment has been, or will be, suffered, equity may refuse to enforce the obligation.

But in considering possible detriment, it is important for an agency to keep in mind where the Commonwealth is wishing to impose an obligation of confidence in respect of Government Information, that publication of confidential Government Information will be restrained only if it will injure the 'public interest' if the information is disclosed.

PUBLIC INTEREST ISSUES As discussed above, 'public interest' issues should be considered by officers in advance of making any decision on what information to protect, or agree to protect, as confidential information. The analysis is different depending on whether the agency is dealing with Third Party Information [41] or Government Information.

Third Party Information

Some cases indicate that in certain circumstances there may be 'public interest' grounds for denying protection to Third Party Information that might otherwise be confidential information.

On the basis of these cases, some commentators have argued that there is a 'defence of public interest' to an action for breach of confidence. [42] Whilst such a 'defence' is not widely accepted in Australian courts, what is widely accepted is the 'iniquity' or 'clean hands' exception applied by the courts of equity, that is, the courts of equity will not protect information about illegal activity, breach of the law (including fraud) or serious misbehaviour. [43] This defence is only likely to be successful in a narrow range of circumstances. In *Commonwealth of Australia v John Fairfax & Sons Ltd* [44] Mason J stated:

> 'the defence [of public interest] applies to disclosures of things done in breach of national security, in breach of the law (including fraud) and to disclosure of matters which involve danger to the public.' [45]

The disclosure must actually be in the 'public interest', that is, the information must have been disclosed because some serious harm to the public may occur if the confidentiality is maintained, rather than simply being *of interest* to the public.

The law in this area is not settled. However, an agency should not agree to a request from a person to protect as confidential information Third Party Information that reveals illegal activity, a breach of the law (including fraud), serious misbehaviour or matters which involve danger to the public.

Government Information

In respect of Government Information, the law aims to balance the requirements for official secrecy with the public's right to know. What this means in practice is that the courts will not grant protection for Government Information unless the disclosure of that information will injure the public interest.

According to Mason J in the *Fairfax* case:

> 'The equitable principle [of confidentiality] has been fashioned to protect the personal, private and proprietary interests of the citizen, not to protect the very different interests of the executive government. [Government] acts, or is supposed to act, not according to standards of private interest, but in the public interest. This is not to say that equity will not protect information in the hands of the government, but it is to say that when equity protects government information it will look at the matter through different spectacles.
>
> . . .
>
> It is unacceptable, in our democratic society, that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticize government action.
>
> Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.
>
> The court will not prevent the publication of information which merely throws light on the past workings of government, even if it be not public property, so long as it does not prejudice the community in other respects. Then disclosure will itself serve the public interest in keeping the community informed and in promoting discussion of public affairs. If, however, it appears that disclosure will be inimical to the public interest because national security, relations with foreign countries or the ordinary business of government will be prejudiced, disclosure will be restrained.' [46]

The courts have not been specific about the extent of the expression 'the ordinary business of government will be prejudiced…'. The expression is likely to include at least some cabinet material, high level policy proposals not already in the public domain the disclosure of which could prejudice Commonwealth/State relationships, [47] and material the disclosure of which would prejudice law enforcement.

Another possible ground of prejudice to the ordinary business of government could be that disclosure of the terms of a contract especially unfavourable to the government (particularly, say, indemnity provision or limitation of liability provisions) could prejudice the Commonwealth in relation to its ability to negotiate satisfactory contracts in future. By analogy, see paragraph 4.5, Note 2 of the *Legal Services Directions* relating to the Commonwealth entering into settlements of claims on a confidential basis. Note 2 provides as follows:

> 'Examples of when it could be in the Commonwealth's interests to agree to a confidential settlement include:
>
> (a) a person against whom the Commonwealth has made a claim makes an attractive offer

of settlement, but only on condition that the terms not be disclosed, and

(b) the Commonwealth seeks to settle a claim against it on condition that the terms of settlement not be disclosed, with a view to avoiding prejudice in responding to other similar claims against it.' [48]

It is not possible to identify precisely and exhaustively all the kinds of information which might come within this category.

Impact of Various Commonwealth Legislative Provisions

When making an assessment in the Commonwealth environment about what information to protect as confidential information, it is essential that an agency also takes into account the legislative regime under which they operate. This will include legislation that applies generally to Commonwealth agencies, as well as legislation that applies to only specific agencies. It may be that a specific legislative provision provides sufficient protection for certain information without the need to enter into a confidentiality obligation.

STATUTORY SECRECY PROVISIONS

Broad protection against disclosure of official information is provided for in the *Crimes Act 1914*, the *Privacy Act 1988*, the *Archives Act 1983* and the *Public Service Act 1999*. In addition, there are about 150 pieces of Commonwealth legislation (and growing) containing provisions affecting the use of particular categories of information. [49]

Generally, these Acts are limited to creating offences for disclosures that have already occurred. The reason why it has been thought relevant to mention these statutory secrecy provisions in this Briefing is that an agency should be aware, when they are considering either whether to agree with a third party that certain Third Party Information should be protected as confidential information, or whether to impose an obligation of confidence on the third party in respect of Government Information, what if any statutory secrecy provisions apply to the agency and/or its officers, in relation to the information that they are considering.

However, it should be noted that a contract confidentiality clause cannot avoid or reduce the obligations imposed under statutory secrecy provisions. Nor will compliance with a confidential information clause necessarily ensure compliance with a statutory secrecy provision.

FREEDOM OF INFORMATION ACT 1982

The general principle underlying the *Freedom of Information Act 1982* (FOI Act) is that official information should be made available to the general public except where the disclosure would be detrimental to the protection of essential public interests or the private and business affairs of persons and organisations about whom the information was collected.

Where the FOI Act applies, it confers on 'every person' a legally enforceable right to obtain access to a document of an agency or of a minister. [50] This right is, however, subject to various exemptions. As a general principle, it would not seem to be appropriate to protect as confidential information, information for which an exemption under the FOI Act could be not claimed.

Without being exhaustive, exemptions under the FOI Act include:

- information disclosing trade secrets or other sensitive business, commercial or financial information (s.43); [51]
- information the subject of an obligation of confidence in favour of a person other than the Commonwealth (s.45); [52] and

- unreasonable disclosures of personal information (s.41).

However, section 14 of the FOI Act expressly permits disclosure of exempt information. Thus, the fact that the information could be exempt from disclosure under the FOI Act does not necessarily justify protecting it as confidential information under a contract or otherwise.

Having regard to the above, it would be prudent for an agency to familiarise themselves with the grounds for exemption under the FOI Act, or seek advice on these issues as necessary, when they are making a decision about what information to protect as confidential information.

PRIVACY ACT 1988 As discussed above, personal information as defined in the *Privacy Act 1988* is capable of protection as confidential information if it meets the requirements for the existence of confidential information under the equitable principles.

Whether an agency wishes to, or agrees to, protect personal information as confidential information will depend on the circumstances. If this is considered appropriate, an agency will need to go through the analysis described above.

Exceptions to Confidentiality

As well as considering what information should be identified, including under a contract, as confidential information, it is important for an agency to consider what qualifications should apply to the obligation to maintain the confidentiality of information (that is, to not use or disclose the information unless authorised by the confider). In particular the agency should ensure that it is able to operate efficiently and to discharge its accountability obligations.

These exceptions can be tailored to suit the particular circumstances of the agency, but exceptions that should generally be insisted on by an agency are the ability to disclose the confidential information to the responsible minister, or to the Parliament (or a committee of the Parliament). It is also useful to include 'standard' exceptions, for example, that the information is required by law to be disclosed (eg under a subpoena).

Protecting Confidential Information

The *Commonwealth Protective Security Manual* (PSM) is guidance that is resorted to most frequently when agencies are making assessments and decisions about how to treat information in their possession. However, the guidance provided in the PSM is not directed to assisting an agency to make a decision about whether information is legally confidential information. It is directed at protecting the resources in the agency, including the information held by an agency. Making a decision pursuant to the PSM decides what procedural and physical security is to be given to information.

If an obligation of confidence is owed by the agency in respect of certain information, the agency would then be obliged to follow the guidance in the PSM to decide, how, physically, to secure that information. The PSM assumes that a decision on whether information is confidential information has been made *before* the information is classified under the PSM. Paragraph 6.39, for example, provides that information might be classified as X-IN-CONFIDENCE if its compromise could 'breach … undertakings to maintain the confidentiality of information provided by third parties'. However, that information might also be classified as PROTECTED or HIGHLY PROTECTED, depending on the level of damage that may result if the information is compromised.

There is potential for confusion arising out of some of the terminology that is used in the PSM. For

example the use of the term 'CONFIDENTIAL' as a National Security protective marking may cause confusion with the use of the term 'confidential' in a legal sense in those agencies which deal with National Security Information.

In relation to Non-National Security Information, there is often confusion surrounding the use of the protective marking COMMERCIAL-IN-CONFIDENCE. The term is often used interchangeably with the term 'confidential information'.

Neither the protective marking 'CONFIDENTIAL' or the protective marking 'COMMERCIAL-IN-CONFIDENCE' have the same meaning as the legal concept of confidential information. The PSM reminds readers that the security classification system and the protective markings set out in Part C 'carry no direct implications in law'.

NOTES

1 Disclosure of information by an agency, whether it is confidential information or otherwise, raises complex legal issues and this needs to be examined on a case by case basis.

2 For information about this see: *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989, available through http://www.pmc.gov.au/publications.cfm.*

3 ANAO *The Use of Confidentiality Provisions in Commonwealth Contracts* (Audit Report No 38, 2000–01), 24 May 2001

4 Ibid at 15

5 Ibid at 67

6 Ibid at 54

7 Ibid at 73

8 *Commonwealth Protective Security Manual* (Attorney-General's Department, 2000), Part C: Paragraph 1.3

9 Finn, P (1991) *Official Information,* Integrity in Government Project: Report No. 1, ANU at 19.

10 See discussion at pp 6–8 of this Briefing.

11 Gurry, F 'Breach of Confidence', in P D Finn, *Essays in Equity* (Law Book Company, 1985) p 111.

12 *Titan Group Pty Ltd v Steriline Manufacturing Pty Ltd* (1990) 19 IPR 353, at 379 per O'Loughlin J.

13 See p 7 of this Briefing for a discussion on detriment. Detriment may be required to establish an actionable breach of confidence.

14 Gurry, F *Breach of Confidence* (Oxford: OUP, 1984), p 83

15 *Terrapin Ltd v Builders Supply Co (Hayes) Ltd* [1967] RPC 375

16 *Corrs Pavey Whiting & Byrne v Collector of Customs* (Vic) (1987) 14 FCR 434 per Gummow J at 443

17 *Amway Corporation v Eurway International Ltd* [1974] RPC 82 (Ch)

18 Ibid, pp 86–87

19 *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* (1948) 65 RPC 203 per Lord Greene MR at 215

20 Ibid at 415

21 *O'Brien v Komesaroff* (1982) 150 CLR 310 at 326

22 *Wiggington v Brisbane TV Ltd* (1992) 25 IPR 58

23 *G v Day* (1982) 1 NSWLR 24

24 *Seager v Copydex Ltd* [No 1] [1967] 1 WLR 923

25 *Castrol Australia Pty Ltd v EmTech Associates Pty Ltd* (1981) 33 ALR 31

26 *DPP* v *Kane* (Supreme Court of NSW, 29 May 1997, unreported)

27 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414

28 *Coco v A N Clark (Engineers) Ltd* (1969) RPC 41 at 48

29 Gurry, op. cit. p 83

30 *Re Hassell and Department of Health of Western Australia* (WA Information Commissioner, decision number DO2594, 13 December 1994)

31 *Moorgate Tobacco Co Ltd v Philip Morris Ltd (No 2)* (1984) 156 CLR 414 at 438 per Deane J

32 *Smith Kline and French Laboratories (Australia) Ltd v Secretary, Department of Community Services and Health* (1991) 99 ALR 679 at 691

33 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434; 74 ALR 428, Gummow J*; Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Services and Health* (1992) 108 ALR 163; *Re Drabsch and the Collector of Customs (*unreported AAT decision, 5 November 1990)

34 *John v Australian Securities Commission* (1993) 116 ALR 567

35 *O'Brien v Komesaroff* (1982) 150 CLR 310 at 327–328

36 *Searle Australia Pty Ltd v Public Interest Advocacy Centre and Department of Community Health and Services* (1992) 36 FCR 111 at 120; 108 ALR 163 at 173

37 *Commonwealth Procurement Guidelines*, February 2002, section 1.2

38 *Duchess of Argyll v Duke of Argyll* [1967] I Ch 302

39 *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39 per Mason J

40 See below for a discussion on 'public interest' issues.

41 The analysis is similar for Government Proprietary Information.

42 *Gartside v Outram* (1856) 26 LJ Ch (NS) 113

43 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434; 74 ALR 428 Gummow J; *Smith Kline and French v Department of Community Services and Health* (1990) 17 IPR 545 at 583

44 (1980) 147 CLR 39

45 Ibid at 57

46 Ibid at pp 51–52

47 *Corr & Department of Prime Minister and Cabinet* (1994) 35 ALD 141 at 148

48 *Legal Services Directions* issued by the Attorney-General pursuant to section 55ZF of the *Judiciary Act 1903*, with effect from 1 September 1999 (http://law.gov.au/aghome/legalpol/olsc/policies.html#Legal).

49 'In Confidence', A report of the inquiry into the protection of confidential personal and commercial information held by the Commonwealth, House of Representatives Standing Committee on Legal and Constitutional Affairs, June 1995.

50 *Freedom of Information Act 1982* (Cth), s 11(1)

51 A decision on whether an exemption could be claimed under section 43 is based on an analysis of the wording of section 43, rather than on the confidential information criteria that are spelt out in this Briefing.

52 The information in this Briefing dealing with whether Third Party Information is confidential information would assist in such an analysis.

For general information please contact Anne Caine of our Canberra office on telephone (02) 6253 7145, e-mail anne.caine@ags.gov.au or any of the following lawyers:

Canberra	Anne Caine	(02) 6253 7145
	Madeline Campbell	(02) 6253 7408
Sydney	Jim Heard	(02) 9581 7477
Melbourne	Libby Haigh	(03) 9242 1499
Brisbane	Maurice Swan	(07) 3360 5702
Perth	Peter Macliver	(08) 9268 1100
Adelaide	Sarah Court	(08) 8205 4231
Hobart	Peter Bowen	(03) 6220 5474
Darwin	Jude Lee	(08) 8943 1405

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