COMMERCIAL CONFIDENTIALITY AND THE VICTORIAN *FREEDOM OF INFORMATION ACT 1982*

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Introduction

This paper is delivered in a context where the role of state government, and local government, bodies has changed over recent times. A number of functions which were formerly considered the responsibility of government have been released by government in favour of the private sector. Services such as rubbish collection, non-emergency ambulance services and the provision of the services by which the state's highways are maintained. This process has had its sequel in applications under the *Freedom of Information Act 1982* (Vic) (the FOI Act) which have had to be determined by the AAT. For each application determined by the AAT there are many more which must be determined by primary decision makers and on internal review. This talk seeks to draw together the lessons that can be learnt from recent decisions in the AAT.

This paper commences with a review of the received learning of the two key FOI Act exemptions: s.34(1) and 34(4). That received learning is found in *Gill's* case (*Re Gill and DITR* (1985) 1 VAR 97, affirmed by the Full Court in *Gill v DITR* [1987] VR 681) and *Croom's* case (*Re Croom and ACC* (1989) 3 VAR 441, and in the Court of Appeal: *ACC v Croom* [1991] 2 VR 322).

The paper then examines issues that have arisen in recent decisions of the AAT involving these two exemptions. The most recent decisions are:

- *Re Mildenhall and Vic Roads* (Fagan P, 19 February 1996) concerning the decision by Vic Roads to enter into a contract to "outsource" its Plant Branch to a company managed by former employee of Vic Roads;
- *Re Thwaites and Metropolitan Ambulance Service* (Galvin DP, 5 February 1996) concerning the award of tenders to private companies to transport non-emergency ambulance cases;
- *Re Marple and Department of Agriculture* (1995) 9 VAR 29 (MacNamara DP, 20 July 1995) concerning documents generated in the decision to grant one company the tender to acquire the lease of government veterinary clinics;
- *Re Mildenhall and Department of Treasury (No. 2)* (1994) 8 VAR 102 concerning tender documents leading to the appointment of one company as financial adviser on the restructure of the TAB - the *Tabcorp* case;
- *Re Mildenhall and Department of Treasury* (1994) 7 VAR 342 concerning documents whereby a company "owned" by the State Government entered into contractual

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arrangements to stage the Grand Prix - *the Grand Prix* case.

The paper addresses other exemptions by which information conveyed to agencies can be viewed under the FOI Act including:

- paragraphs 30(1)(a) & (b) (internal working documents) - as to when "consultants" are viewed as "officers" for the FOI Act: *Re Mildenhall and Vic Roads*;
- paragraph 31(1)(e) (enforcement of the law) - *Re Schifferegger and Department of Agriculture* (1995) 9 VAR 61;
- subsection 33(1) (personal affairs) - *Re Mildenhall and Department of Treasury (No. 2)* (supra) (personal details); *Re Cole and Department of Justice* (1994) 8 VAR 114 (the *DPP* case) (at p 129 concerning Counsel's fees).

The alignment of *Gill* and *Croom*

The meaning of a phrase as found in subsection 34(1) and paragraph 34(4)(a) of the FOI Act involves the proper construction of these provisions of an Act of Parliament. Decisions of the Full Court (or now the Court of Appeal) of the Supreme Court determine the meaning of these provisions. The two decisions of the (former) Full Court on these provisions involve, it is submitted, on analysis, the application of principles that are not congruent.

In *Gill*, in the leading judgment of Justice Murray, at p.687, the Full Court established that the presence of the word "or" between paragraphs 34(1)(a) and 34(1)(b) of the FOI Act was to be given effect to, that is, the contention that Parliament intended the two paragraphs should be read conjunctively (as if "and" appeared between them) was rejected: [1987] VR 686 at line 40. More relevantly, for this discussion, the Full Court, in the leading judgment of Murray J, considered what meaning should be given to the phrase "other matters of a business, commercial or financial nature" which appear in paragraph 34(1)(a) after the phrase "trade secrets". The AAT had concluded that the phrase should be read in context and in particular with the context of the words "trade secrets" and concluded:

> The material must have some special characteristic which distinguishes it from the more mundane information acquired by the agency. If s.34(1)(a) was given such a wide interpretation all material would be exempt and there would be no necessity for s.34(1)(b) or (2). ...

Justice Murray rejected the view of the AAT (Judge Higgins) notwithstanding that it "might have a great deal to commend it from the point of view of practical common sense". The Full Court in *Gill* concluded that the words of subsection 34(1):

> ... are absolute and it is not open to the Court to import into them a discretionary power to make *ad hoc* judgments in particular cases. It does not appear to me that it is open to the Court to adopt any other view than that the words of (a) mean what they say. It may well be that this result extends exemption further than Parliament, as a matter of policy, would wish but this is a matter for Parliament and not for the Court. [1987] VR 687.

The tension is evident by examining the second decision in *Croom*. The leading judgment was given by Justice O'Bryan. He agreed that the words employed by Parliament must be given their ordinary meaning, but such a meaning is determined by reference to the context. He concluded that Parliament did not intend to exempt from the operation of the FOI Act every piece of written information obtained by an agency merely on the basis that it had been acquired and provided by a business undertaking in the ordinary course of its business. He observed:

> The provision appears to be directed to the possibility that information of what could be regarded as a sensitive kind from the perspective of the undertaking should not become generally available. Protection is to be provided to the undertaking and not simply against the disclosure of information which falls within the general described category set out in this section. Such an approach is consistent with the language of the section, in conformity with the scheme and purposes of the Act, and does not conflict with anything said by the Court in Gill's case. Accordingly, where information contained in a document relates to some matter of business in order that a claim for exemption could be successfully made, it would be necessary to show that the information impinged in some way or other upon the actual conduct or operations of the undertaking itself. (emphasis added)

O'Bryan J. concluded that accident investigation reports prepared for workers' compensation purposes for the Accident Compensation Commission by insurance assessors were not exempt: [1991] 2 VR 322 at 330, 331.

O'Bryan J also considered subsection 34(4), but in passing. He observed that the term "disadvantage" in the context of trade or commerce carried on by an agency means "injury of a financial kind" and not mere tactical disadvantage in litigation: [1991] 2 VR 322 at 331.

While the Full Court in *Croom* did not in terms overrule the decision in *Gill* there is a distinction between giving the words "other matters of a business, commercial or financial nature" their "ordinary meaning" (*Gill*) or as describing documents that "impinge" on the operations of the undertaking (*Croom*). It is the *Croom* gloss that is now applied.

Subsection 34(1) - documents relating to trade secrets etc.

Subsection 34(1) of the FOI Act provides:

> 1. 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 -
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> (a) the information relates to trade secrets or other matters of a business, commercial or financial nature; or
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> (b) the disclosure of the information under this Act would be likely to expose the undertaking to disadvantage.
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> 2. In deciding whether disclosure of information would expose an undertaking to disadvantage, for the purposes of paragraph (b) of sub-section (1), an agency or Minister may take account of any of the following considerations:
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> (a) whether the information is generally available to competitors of the undertaking;
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> (b) whether the information would be exempt matter if it were generated by an agency or a Minister;
>
> (c) whether the information could be disclosed without causing substantial harm to a competitive position of the undertaking; and
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> (d) whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking, for instance, the public interest in evaluating aspects of government regulation of corporate practices or environmental control-
>
> and of any other consideration or considerations which in the opinion of the agency or Minister is or are relevant.

As noted above, the primary issue under paragraph 34(1)(a) is whether the information relates to matters of a business etc. nature to the extent of impinging in any way on the actual conduct or operations of such

undertaking. In practical terms this raises questions of proof: the FOI applicant may be expected to assert release can have no such effect; the respondent agency may assert, but without proof or conviction, that release will have the postulated effect (the onus rests on the agency to establish the exempt status of the document); yet few undertakings that provide information care to be joined as "party joined" (subsection 34(3) FOI Act and under the AAT Act). In the absence of the "undertaking" the AAT is left to make its own judgment as to the effect of releasing documents which judgment may in turn be guided by the assertion that the undertaking knows of the proceedings before the AAT but has chosen not to participate. This was the case in *Re Mildenhall and Vic Roads*.

"Commercial in confidence" is a mark which often appears upon documents in this area. The decision of Fagan P in *Mildenhall and Vic Roads* (see above) establishes that such a marking is not conclusive. Fagan P observed (p 69):

> Many of the documents in this case are marked with expression 'Commercial in Confidence" or with some similar rubric. That factor was frequently emphasised. Such a marking cannot in all cases prevail. It may be for example that the material contained in the document in question has no intrinsic quality attaching confidentiality at all or that the document was disseminated by its maker far and wide beyond the bounds of confidentiality.

It is possible to conceive of circumstances where documents contained business information which did not impinge on the commercial operations of the business (paragraph 34(1)(a)) and which did not expose the undertaking to disadvantage (paragraph 34(1)(b)) could be said to have been "communicated in confidence" within subsection 35(1) where disclosure would be expected to impair the ability of the agency to obtain the information in the future (paragraph 35(1)(b)). The most recent illustration of this exemption (*Re Thwaites and Department H&CS* (1995) 8 VAR 361) concerned that arose within the Public Service, namely whether release of "re-admission" statistics obtained in a confidential survey of hospital doctors would be perceived as exposing those doctors to criticism and removing the source of the information. In relation to the dealings between agencies and commercial undertakings, it is suggested that there is a live issue as to whether information provided *by tenderers* to agencies which is claimed to be "in confidence" could be exempt under paragraph 35(1)(b) of the FOI Act, notwithstanding that it could be not exempt under paragraph 34(1)(a). Such an issue could arise where a tender was submitted on the explicit basis that the agency would not release the information. In *Re Mildenhall and Department of Treasury* (1994) 8 VAR 102 the AAT (Mr Galvin DP) found that -

> ... the evidence was clear that the information in dispute [documents by tenderers seeking to advise on the float of the TAB or analysis of these findings] is regarded by those who provided it as being communicated in the strictest confidence and that a major consideration in that regard is prevention of its becoming known to competitors. According to the evidence, release would give rise to real not merely fanciful disadvantage to tenderers. (8 VAR 102 at p 108).

Only half of this issue arose in *Re Mildenhall and Vic Roads* because the "confidentiality agreements" which were there made between the agency and the tendering commercial undertakings had the effect that the *undertakings* undertook not to release the information but it would seem no like obligation was imposed on the agency. The decision of *Re Mildenhall and Vic Roads* represents a high water mark in this process. The tenders submitted by the unsuccessful and successful tenderers (Documents 2, 3 and 4) were found to be not exempt from release (Reasons pp 24, 25).

Each case must be judged upon its facts. This conclusion can be contrasted with

that obtained in *Re Mildenhall and Department of Treasury (No 2)* (see 8 VAR at 106-109) where it was concluded that release of the documents in question would involve releasing:

> ... information concerned with the capacity of the relevant firms to provide assistance in the pursuit of their professional objectives [the information] deals with the personnel, qualifications, experience, fees and modus operandi. It is not merely derived from a business undertaking but is of a business or commercial nature.
>
> The evidence was that it was provided on a confidential basis because it was commercially sensitive and because release of it would prejudice the firms in regard to their competitors.

Apart from information concerning the "structure" of commercial agencies, the AAT has respected information involving "methodology" of agencies, that is, information which would reveal the methodology by which the agency set about its task: see *Thwaites and Metropolitan Ambulance Service* where the methodology of a consultant as to valuation of ambulance services was considered in this light.

Recent decisions reveal that the AAT does not accept that the concluded agreements between agencies and commercial undertakings contain information acquired from the commercial undertaking but rather "constitute the record of the transaction between the parties" (*Thwaites and MAS* at p 393).

Often in analysing what information has been "acquired" from a commercial undertaking in a commercial environment, it is well to acknowledge the amount of information that is publicly available from the ASC under the *Corporations Law*. There may well be cases where "proposed" financial structures submitted to agencies in the course of their dealings with commercial undertakings are exempt because they do not represent the final financial structure which may be recorded, by way of a registered security over company assets such as a debenture, as required by the *Corporations Law*.

As a conclusion, there is a lot to be said for the aphorism that if you sup with the devil you are best to use a long spoon, that is, that commercial undertakings who seek to obtain business and profit from agencies do so in the knowledge that the provisions of the FOI Act (*inter alia*) have the effect that, like all government contractors, their fees, and the basis on which they are earned, are matters of public record. How much more information will be released under the FOI Act depends, in practical terms, on whether the information is of a self-evidently confidential nature (in which case the undertaking would be expected to argue for exemption before the AAT) or such inferences as can be drawn from the acquiescence of the undertaking.

Subsection 34(4) - agencies in trade and commerce

Subsection 34(4) of the FOI Act provides:

> A document is an exempt document if -
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> (a) it contains -
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> (i) a trade secret of an agency;
>
> or
>
> (ii) in the case of an agency engaged in trade or commerce -information of a business, commercial or financial nature-
>
> that would if disclosed under this Act be likely to expose the agency to disadvantage...

Recent decisions under this paragraph raise the following points.

(a) ***Whether an agency engaged in trade or commerce***

In *Re Marple* MacNamara (DP) had to consider whether the Department of Agriculture, in operating regional veterinary laboratories at regional centres, was engaged in "trade or

commerce" within subsection 34(4). He concluded:

(i) Because the reference in subsection 34(4) was only to agencies "engaged in trade and commerce" it did not seek to cast an overall characterisation upon an agency; thus an agency could be regarded as "engaged in trade and commerce" even if the trade and commerce was insignificant and only incidental to its other functions (9 VAR at 46).

(ii) The terms "trade" and "commerce" are ordinary terms and not terms of art. They are expressions of fact and terms of common knowledge (9 VAR at 47).

(b) *"One off" foray into trade and commerce*

In *Re Vic Roads and Mildenhall* Fagan P concluded that the "one off" sale by Vic Roads of its Plant Branch did not constitute Vic Roads as being "engaged in trade and commerce".

He further concluded that Vic Roads was not in the "trade and commerce" of having sold its Plant Branch, advising other Victorian or interstate government agencies of the means by which such "Plant Branches" were valued.

(c) *Date of characterisation*

In *Marple and Department of Agriculture* (9 VAR at 47) MacNamara concluded that the date on which the status of the agency was to be determined was the day that the exemption was sought to be invoked. He observed:

> For myself I see no reason why the expression 'an agency engaged in trade or commerce' when used in a section creating a Freedom of Information exemption should not be regarded as speaking as at the date that the exemption is sought to be invoked. I am fortified in that view by the balance of the exemption insofar as it extends to material which, if disclosed, would 'be likely to expose the agency to disadvantage ...'. This seems to be looking to the future and it is not obvious how an agency which had ceased to trade as at the date of the freedom of information request would thereafter be disadvantaged with respect to its trade and commerce. The rights of an applicant for documents under the FOI Act and the responsibilities of the respondent agency are fixed as at the date of making the request ... It seems a corollary from this that the elements establishing the existence or non-existence of an exemption should be judged as at that date. In my opinion, therefore, the question of whether, for the purpose of s.34(4), an agency is engaged in trade or commerce or not must be resolved as at the date of the request.

(d) *Disadvantage.*

It will be remembered from *Croom* that the "disadvantage" of the agency must be of a commercial kind ([1991] 2 VR at 331).

Other relevant exemptions

(a) *Paragraph 30(1)(a) - internal working documents*

This provision exempts from release documents which would disclose matter in the nature of opinion, advice or recommendation prepared by an officer, or consultation or deliberation between officers.

It is noteworthy that in *Re Mildenhall and Vic Roads* Fagan P accepted that consultants (such as accountants retained by Vic Roads to value its Plant Branch) were "officers" of an agency because they were "any person employed by or for the agency" within the definition of 'officer' in section 5 of the FOI Act (Reasons, p 12 citing *Ryder v Booth* [1985] VR 869; *Re Brogg and Department of the Premier in Cabinet* (1989) 3 VAR 201 at 207-8).

A further noteworthy point of the *Vic Roads* decision is that the distinction must be borne in mind between information obtained from a commercial agency and opinions of officers as to what that information means; thus in *Vic Roads* opinions of officers, expressed by means of a corporate diagram, were found to be exempt within subsection 30(1) as representing consultation between those officers as to the meaning of documents submitted by tenderers.

(b) *Paragraph 31(1)(e) - law enforcement documents*

By paragraph 31(1)(e) documents are exempt if disclosure would endanger the lives or physical safety of persons who have provided confidential information in relation to the administration of the law - In *Schifferegger and Department of Agriculture* (1995) 9 VAR 61, AJ Coghlan concluded that this exemption extended to protect the identity of persons who held licences under the *Prevention of Cruelty to Animals Act 1986* (Vic) to conduct a scientific establishment where experiments were conducted on animals.

(c) *Subsection 33(1) - personal affairs*

By subsection 33(1) the FOI Act provides:

> A document is an exempt document if its disclosure under this Act would involve the unreasonable disclosure of information relating to the personal affairs of any person (including a deceased person).

The reconciliation of the decisions under this exemption would be worthy of a separate paper. Recent decisions indicate that the exemption does not prevent the disclosure of salary details within a "band" or range (see *Re Forbes and Department of the Premier in Cabinet* (1993) 6 VAR 53; cf *Ricketson and Royal Women's Hospital* (1989) 4 VAR 10). This exemption does not render exempt payments made to counsel: *Re Cole and Department of Justice* (1994) 8 VAR 114 at 129.

(d) *Public interest*

In two of the recent "commercial" decisions considerations of "public interest" within subsection 50(4) loomed large.

In *Mildenhall and Vic Roads* the transaction in question concerned the sale of the Plant Branch of Vic Roads to a company managed by persons who had formerly been managers of Vic Roads who ran the Plant Branch. Fagan P found that there was no suggestion of wrong-doing on the part of the persons involved; he found there was no "illegality, unlawfulness, irregularity, antinomy, impropriety or sharp practice" (*Mildenhall and Department of Treasury & Ors* (1994) 7 VAR 342 at 375). However, Fagan P was "put in mind" of analogous relationships in the law which involve fiduciary obligations such as those between directors of a company and a company itself, or a trustee and beneficiaries or members of local government authorities voting on matters in which they have an interest. He therefore concluded that subsection 50(4) of FOI Act applies to, in an unstated sense, "clear the air".

In *Thwaites and Metropolitan Ambulance Service* a tender was granted to several companies to run the "non-emergency" ambulance service. An officer of the service, who was involved in analysing the tenders submitted, had previously resigned from the service and been financially involved in one of the tenderers. The officer was invited to reply to the

service and rejoinder on the basis that he had severed all lease work for the company. Inadvertently he remained as a surety for one of the tenderers. Galvin DP concluded this circumstance, together with others, warranted the release of otherwise commercially confidential information. The other circumstances were:

- the acknowledgment by a consultant that the consultant had no knowledge of government's "outsourcing" guidelines;
- the fact that all of the successful tenderers were companies who had previously been invited to be "interim" transporters;
- the circumstance that the annual report of the Metropolitan Ambulance Service totally obscured the amount paid to the private contractors.

Conclusions

It is submitted that these recent decisions establish that:

(a) the AAT will not find exempt documents which are described or labelled as "commercial in confidence" for that reason alone;

(b) the question of whether documents provided to an agency under contractual arrangements which impose an obligation of confidence on the agency are exempt notwithstanding that the contractual obligations run counter to the FOI Act is an issue that remains open;

(c) documents supplied to an agency by commercial undertakings will only be exempt under paragraph 34(1)(a) where the documents "impinge" on the actual conduct and operations of the agency: and even then, it is submitted, where the documents contain currently sensitive material, that is, not material which is of historic value or which has been superseded;

(d) while the Tribunal accepts that paragraphs 34(1)(a) and (b) are to be read disjunctively by reason of the word "or", the flavour of "disadvantage" to an agency within paragraph 34(1)(b) is entering upon the question of whether the documents "impinge" upon the conduct of the undertaking;

(e) an agency itself can be engaged in trade or commerce within subsection 34(4) of the FOI Act notwithstanding that is only a small part of the operation of the agency;

(f) the activities of an agency are to be determined as at the date the exemption under subsection 34(4) is claimed;

(g) other exemptions remain to be applied to documents which may not be exempt under subsection 34(4), eg, documents relating to the personal circumstances or qualifications of employees can be exempt under subsection 32(1) and/or paragraph 31(1)(e) and/or subsection 35(1);

(h) on a practical level the AAT, and the decision maker, will respect (but not unquestioningly implement) the views of a commercial undertaking as to the effect of release of its documents;

(i) the "commercial" exemption remains subject to subsection 50(4) where the public interest "requires" release.

The amount of public information can militate both in favour and against release under subsection 50(4):

- it can militate in favour of release where the public is otherwise not fully informed (eg. *Thwaites and Metropolitan Ambulance Service*);

- it can militate against release where the AAT may conclude that other aspects of the law (such as corporate law) indicate a limit of public disclosure (see *the Grand Prix* case, *Re Mildenhall and Department of Treasury* (1994) 7 VAR 342 at 371-372).