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'Breach of Confidence' in Section 45 of the Freedom of Information Act 1982 (Cth) and Clause 46 of the Freedom of Information Bill of Queensland

Abstract

Under both s 45 of the Freedom of Information Act 1982 (Cth) (FOI Act) and c 46 of the Freedom of Information Bill of Queensland (FOI Bill), access to a document may be denied if the disclosure of such document may result in an action for breach of confidence by a person or body other than the government and its agencies. Breach of confidence, as we will see, is the ground for exemption. While 'breach of confidence' is a concept which derives from common law or equity, it may not, although maybe it should (as the author will argue), have the same meanings under s 45 and c 46 as in general law. This article is intended to examine certain issues arising from the operation of s 45 and forthcoming operation of c 46.

Keywords

breach of confidence, Freedom of Information Act, Freedom of Information Bill of Queensland

**'BREACH OF CONFIDENCE'
IN SECTION 45 OF THE
FREEDOM OF INFORMATION ACT 1982 (CTH)
AND CLAUSE 46 OF THE FREEDOM OF
INFORMATION BILL OF QUEENSLAND**



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Introduction

Under both s 45 of the *Freedom of Information Act 1982 (Cth)* (FOI Act) and c 46 of the Freedom of Information Bill of Queensland (FOI Bill), access to a document may be denied if the disclosure of such document may result in an action for breach of confidence by a person or body other than the government and its agencies. Breach of confidence, as we will see, is the ground for exemption. While 'breach of confidence' is a concept which derives from common law or equity, it may not, although maybe it should (as the author will argue), have the same meanings under s 45 and c 46 as in general law. This article is intended to examine certain issues arising from the operation of s 45 and forthcoming operation of c 46.

Section 45 of the FOI Act states:

- (1) A document is an exempt document if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence.
- (2) Subsection (1) does not apply to any document to the disclosure of which paragraph 36(1)(a) applies or would apply, but for the operation of subsection 36(2), (5) or (6), being a document prepared by a Minister, a member of the staff of a Minister, or an officer or employee of an agency, in the course of his duties, or by a prescribed authority in the performance of its functions, for purposes relating to the affairs of an agency or a Department of State unless the disclosure would constitute a breach of confidence owed to a person or body other than:
 - (a) a person in the capacity of Minister, member of the staff of a Minister or officer of an agency; or

- (b) an agency or the Commonwealth.

This section provides exemption to a confidential document. While it does not generally apply to the documents specified in s 36(1)(a) which exempts certain internal working documents in the nature of, 'or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of an agency or Minister or of the Government of the Commonwealth',¹ it may apply to certain 'internal working documents' which do not fall under s 36(1)(a). For example, governmental documents used for making decisions or recommendations with respect to an enactment or scheme,² documents containing purely factual material,³ and reports of a scientific nature or records relating to the exercise of an adjudicative function⁴ are not exempt under s 36(1), but may so be under s 45(2) when the disclosure of these documents involves a breach of confidence owed to a person outside Commonwealth (other than the persons or bodies specified in s 45). Therefore, whether a disclosure constitutes a breach of confidence is essential under s 45.

Clause 46 of the FOI Bill, which was introduced to the Queensland

1 FOI Act, s 36(1)(a).

2 These are specified in s 9(1) which makes certain documents available for public inspection and purchase. It states:

This section applies, in respect of an agency, to documents that are provided by the agency for the use of, or are used by, the agency or its officers in making decisions or recommendations, under or for the purposes of an enactment or scheme administered by the agency, with respect to rights, privileges or benefits, or to obligations, penalties or other detriments, to which persons are or may be entitled or subject, being:

- (a) manuals or other documents containing interpretations, rules, guidelines, practices or precedents including, but without limiting the generality of the foregoing, precedents in the nature of letters of advice providing information to bodies or persons outside the Commonwealth administration;
- (b) documents containing particulars of such a scheme, not being particulars contained in an enactment as published apart from this Act;
- (c) documents containing statements of the manner, or intended manner, of administration or enforcement of such an enactment or scheme; or
- (d) documents describing the procedures to be followed in investigating breaches or evasions or possible breaches or evasions of such an enactment or of the law relating to such a scheme;

but not including documents that are available to the public as published otherwise than by an agency or as published by another agency.

3 S 36(5) states that a document cannot be exempt 'by reason only of purely factual material contained in the document'.

4 S 36(6) states that exemption under s 36 does not apply to:

- (a) reports (including reports concerning the results of studies, survey or tests) of scientific or technical experts whether employed within an agency or not, including reports expressing the opinions of such experts on scientific or technical matters;
- (b) reports of a prescribed body or organization established within an agency; or
- (c) the record of, or a formal statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

Parliament on 5 September 1991, provides:

- (1) Matter is exempt if
 - (a) its disclosure would found an action for breach of confidence; or
 - (b) it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest.
- (2) Subsection (1) does not apply to matter of a kind mentioned in section 41(1)(a) unless its disclosure would found an action for breach of confidence owed to a person or body other than
 - (a) a person in the capacity of-
 - (i) a Minister; or
 - (ii) a member of the staff of, or a consultant to, a Minister; or
 - (iii) an officer or an agency; or
 - (b) the State or an agency.

This clause also allows a document to be exempt on the basis of its confidentiality. However, it adopts more specified criteria in determining the eligibility of a document for exemption. Apart from the 'breach of confidence' test under c 46(1)(a), c 46(1)(b) specifies four elements, namely whether the information is of confidential nature, whether the information was communicated in confidence, whether disclosure of the information could reasonably be expected to prejudice the future supply of such information and whether there is 'public interest' to justify the disclosure. It is not very clear whether c 46(1)(a) and c 46(1)(b) are merely supplementary to each other or whether they set forth distinct tests for determining the existence of a breach of confidence. If the former is the case, subclause (b) operates to explain the application of the breach of confidence test set out in subclause (a). In the latter case, 'breach of confidence' under c 46(1)(a) may be subject to criteria different from those specified in c 46(1)(b). In addition, c 46 seems to suggest that matters exempted under c 41(1)(a), ie an advice or opinion given in the deliberative processes of exercising government functions, may not be automatically exemptible if a breach of confidence described under c 46 arises. This may suggest that internal working documents are not subject to c 41(1)(a) alone, but also to the overriding effect of c 46 if a 'breach of confidence' owed to a person or body other than a Minister, his or her staff, the State or its agencies, or officers of the agencies, is founded.

Section 45 and c 46 can be contrasted in several aspects. First, s 45 states generally that a document may be exempt if an action for breach of confidence is founded, but c 46 appears to provide both in general and specified terms that exemption is available if an action for breach of confidence is established under either subclause (a) or subclause (b). Second, only certain 'internal working documents' are subject to the 'breach of confidence' test under s 45 of the FOI Act, but all documents relating to

deliberative processes may so be under c 46 of the FOI Bill. Third, s 45 of the FOI Act adopts only a broad (or less restrictive) test of 'breach of confidence' for determining the availability of the exemption, thus excluding the applicability of public interest consideration; but c 46 of the FOI Bill proposes specified tests (or considerations), and in particular specifies whether there is a 'public interest' and whether disclosure prejudices future supply of confidential information are relevant considerations. The effect of Queensland's provision is that even if a matter of confidential nature was communicated, or supplied in confidence, its disclosure may be allowed when there is a 'public interest' to negative the duty to maintain the confidentiality of the information or to justify the breach of confidence.

'Breach of confidence' is actionable at common law or in equity. It is based on a duty to maintain confidence which may be derived from contracts⁵ or the principle of equity.⁶ A widely accepted construction of the principle of equity in relation to the duty of confidence is Swinfen Eady LJ's statement in *Lord Ashburton v Pape*⁷ that the court should 'restrain the publication of confidential information improperly or surreptitiously obtained or of information imparted in confidence which ought not to be divulged'.⁸ The same principle was restated by Mason J in *Commonwealth v John Fairfax & Sons Ltd.*⁹ In addition, a duty of confidence may also arise from a proprietary right, based on the proposition that the confidential information is a property of the confider or the employer.¹⁰ While recognizing a duty to maintain confidentiality, common law also allows the breach of this duty on several grounds, including public interest defence,¹¹ iniquity defence (also known as iniquity rule)¹² and public domain defence.¹³

This article will examine the practices of the Administrative Appeal Tribunal (AAT or Tribunal) and Federal Court in dealing with exemption under s 45 of the FOI Act and investigate the differences between the concept of breach of confidence under s 45 of the FOI Act and at common

5 *Initial Services Ltd v Putterill and Another* (1968) 1 QB 396, per Denning MR, at 405, and Salmon LJ, at 408-410.

6 *Seager v Copydex Ltd* [1967] 2 A11 ER 415, per Denning MR, at 417.

7 [1913] 2 Ch 469.

8 *Ibid* at 475.

9 (1981) 32 ALR 485, at 491

10 For example, see *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health* (1990) 95 ALR 87.

11 For example Lord Goff in *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 A11 ER 546, observed that the public interest defence 'may require a court to carry out a balancing operation, weighing the public interest in maintaining confidence against a countervailing public interest favouring disclosure', at 865.

12 *Gartside v Outram* [1856] 26 Ch 113; for the difference in terminology, see *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 A11 ER 545 per Scott J at 582, and in contrast, *A v Hayden* (No 2) [1985] 59 ALJR 6 per Gibbs CJ at 9.

13 The courts will not protect confidentiality of the information which is already in the public domain or publicly accessible. See, for example, *Baueris v Commonwealth* (1987) 75 ALR 327, per Beaumont J at 327; *Attorney-General v Guardian Newspapers Ltd (No 2)* [1988] 3 A11 ER 545 and *Attorney-General (UK) v Heinemann Publishers Aust Pty Ltd* (1987) 8 NSWLR 341.

law or in equity. This article will further examine the issues which may arise from the application of c 46 of the FOI Bill by looking at the practices of the AAT and Federal Court in dealing with s 45.

The Administrative Appeal Tribunal's Approach to the Application of 'Breach of Confidence' Under Section 45(1) of the FOI Act

The AAT has established three criteria (or considerations) for the application of s 45, in particular s 45(1). The three criteria were first set out in *Maier and Attorney-General's Department and CRA Ltd and Mary Kathleen Uranium Ltd*¹⁴ and restated in *Maier and Attorney-General's Department (No 2): CRA Ltd and Mary Kathleen Uranium Ltd*.¹⁵ They are whether the information is confidential, whether the information was communicated in confidence or in such a way that there was an obligation of confidentiality, and whether disclosure would be an unauthorized use by the confidant although not necessarily with a prejudicial or detrimental effect.¹⁶ The criteria can be further reduced to two considerations, namely whether the information was communicated in confidence and whether the information is confidential.¹⁷

In *Re Dyki and Federal Commissioner of Taxation*,¹ the Tribunal applied each of the three criteria in turn to determine whether a breach of confidence could be established in that case. First, in addressing whether the information is confidential, the Tribunal accepted what Beaumont J said in *Baueris v Commonwealth of Australia*,¹⁹ where His Honour stated that quality of confidence means that the information in question must be confidential, be inaccessible to the public and not be something which is public property and public knowledge.²⁰ The Tribunal thus decided that the observation of Beaumont J on the breach of confidence 'may provide a useful analogy for purposes of s 45',²¹ although in *Re Angle and Department of Arts, Heritage and Environment and Others*,²² the Tribunal observed that in order to fall within the scope of s 45(1) 'it is not necessary to show that disclosure would amount to a breach of confidence as understood by the rules of common law or equity'.²³ This suggests that although the Tribunal refused to import wholly the common law interpretation of breach of confidence, it did give significant consideration to the rules governing breach of confidence at common law or in equity wherever applicable. The above-mentioned

14 (1985) 7 ALN N411.

15 (1986) 13 ALD 98 at 109.

16 *Re Maier and Attorney-General's Department (No 2)* (1986) 13 ALD 98 at 109.

17 *Re Public Interest Advocacy Centre and Department of Community & Services and Health and Schering Pty Ltd* (party joined) (1991) 23 ALD 714 at 727.

18 (1990) 22 ALD 124.

19 (1986) 75 ALR 327.

20 *Ibid* at 329.

21 *Re Dyki and FCT* (1990) 22 ALD 124 at 137.

22 (1985) 9 ALD 113.

23 *Ibid* at 120.

statement of Beaumont J in *Baueris v Commonwealth of Australia*,²⁴ which was accepted by the Tribunal in determining the existence of a breach of confidence involves the application of public domain defence - one of the considerations applied by courts to negate the duty of confidence at common law or in equity.

Second, in determining whether the information was communicated in confidence in *Re Dyki and FCT*,²⁵ the Tribunal looked at the circumstances involved. While it observed that the information could not be regarded as having been communicated in confidence merely 'because of the particular relationship between the parties, or because the information communicated was and would be recognized to be of a confidential nature',²⁶ the Tribunal found the information was communicated in confidence on the ground that there was evidence to suggest 'that employees communicate their applications for promotion in confidence'.²⁷ This seems to suggest that whether the information was communicated in confidence is to be judged according to the intention of the parties, the manner in which the information was communicated and general practice or custom in which the information was communicated and intended to be communicated.

Third, as to whether the disclosure would be an unauthorized use by the confidant, the Tribunal in *Re Dyki and FCT*²⁸ examined the details of the circumstances involved. It then found the disclosure would not be an unauthorized use of information by the confidant on the ground that the dispute involved a review of non-appealable promotion decision before the Merits Protection and Review Agency (MPRA) and that the access to relevant documents 'is both relevant and fundamental to an MPRA review of the shortlisting process'.²⁹ Does this imply that a statutory power or an authorized power of an agency or person may override the duty of confidence when the exercise of this power is involved? Or does this mean that there is an implied authorization to use the confidential information when the use of this information is, directly or indirectly, authorized by law and perhaps policy? Probably both propositions may make disclosure an authorized one. However, if the exercise of a statutory power prevailed over the confidentiality of a document, does this indicate the primacy of public interest (ie the public interest in assisting an authority to perform its authorized functions), or prevailing force of statutes, given that many Acts grant the exercise of a power without specifying that the duty of confidence is subject to the exercise of this power?

In contrast to the approach of applying these three criteria to determine whether a breach of confidence can be established under s 45(1), the AAT in

24 (1986) 75 ALR 327 at 329.

25 (1990) 22 ALD 124.

26 *Ibid* at 138.

27 *Ibid* at 139.

28 *Ibid*.

29 *Ibid* at 139.

a more recent case - *Re Public Interest Advocacy Centre and Department of Community Services and Health and Schering Pty Ltd* (party joined)³⁰ applied two criteria in determining the availability of exemption under s 45(1). The Tribunal stated that:

The tests to be applied by the Tribunal are thus twofold:

- (a) was the information communicated in confidence; and
- (b) is the information confidential.³¹

The Tribunal did not apply each criteria separately as it did in *Re Dyki and FCT*.³² Rather, it found prima facie that the information concerned was communicated in confidence. In determining whether the information involved is confidential, the Tribunal resorted to the Federal court's decision in *Corrs Pavey Whiting & Byrne v Collector of Customs*.³³ The Tribunal observed that it 'is clear from the judgment in *Corrs Pavey Whiting & Byrne* that the tests to be applied under s 45(1) of the FOI Act are not those involved in forming a judgment as to whether the disclosure of a particular document would be actionable under the general law'.³⁴ Accordingly, it decided that 'limited assistance can be derived from *Smith Kline & French* [(1990) 22 YCR 73] as the case dealt with the extent of the equitable obligation of confidence'.³⁵ Nevertheless, the Tribunal found that it had before it similar facts as faced by Gummow J in *Smith Kline & French Laboratories (Aust) Ltd v Secretary, Department of Community Services and Health*,³⁶ and thus determined that the information communicated was confidential in the sense that it could not be disclosed to the commercial disadvantage of the confider.³⁷ The need to protect business secrecy and an implied understanding that the information should not be released without authorization, for its disclosure may result in commercial disadvantages to the supplier of the information, are the bases of the Tribunal's decision in *Re Public Interest Advocacy Centre and Department of Community Services and Health*.³⁸ In addition, the Tribunal applied the rules for examining a breach of confidence as explained in *Baueris v Commonwealth*,³⁹ and found certain materials in question were not confidential because they had been in the public domain or become public knowledge.⁴⁰

30 (1991) 23 ALD 714.

31 *Ibid* at 727.

32 (1990) 22 ALD 124.

33 (1987) 13 ALD 254.

34 *Re Public Interest Advocacy Centre and Department of Community Services and Health* (1991) 23 ALD 714 at 728.

35 *Ibid* at 728.

36 (1990) 95 ALR 87.

37 *Re Public Interest Advocacy Centre and Department of Community Services and Health* (1991) 23 ALD 714 at 728.

38 *Ibid*.

39 (1986) 75 ALR 327.

40 *Re Public Interest Advocacy Centre and Department of Community Services and Health* (1991) 23 ALD 714 at 728.

*Re Public Interest Advocacy Centre and Department of Community Services and Health*⁴¹ is significant in at least two respects. First, it indicates a continuous effort of the AAT to distinguish between a breach of confidence under s 45(1) and a breach of confidence at common law or in equity. The Tribunal again emphasized that a breach of confidence under s 45 can be established even if the act is not actionable at common law.⁴² Thus, we could assume that a breach of confidence under s 45(1) may be subject to 'some wider meaning,'⁴³ or alternatively fewer restrictions than a breach of confidence in equity. The main difference between a breach of confidence under s 45 and a breach of confidence at common law or in equity is that, according to the ATT and Federal Court (as we will see in next section of this article), s 45 does not require the consideration of public interest or other policy matters which must be taken into account in applying the equitable rules relating to breach of confidence. Thus, the ATT has rejected the applicability of the consideration of 'public interest' in certain cases.⁴⁴

Second, the Tribunal did not take into account whether disclosure is unauthorized. Does this mean that a breach of confidence can be founded as long as the information is of confidential nature and was communicated in confidence? The third limb of the criteria for determining whether an action for breach of confidence exists, as developed in *Maier and Attorney-General's Department and CRA (No1)*⁴⁵ is whether disclosure would be an unauthorized use by the confidant although not necessarily with a prejudicial or detrimental effect.⁴⁶ This limb in fact involves a negative test which suggests that if a disclosure is authorized the duty of confidence can be legally discharged. Thus, no breach can be found when the confidant is authorized by the confider or law to disclose the information in question. The Tribunal did not make it clear whether it still regards this as part of the general criteria for establishing a breach of confidence under s 45. Nor is it clear whether the Tribunal regarded the authorized disclosure as an inherent part s 45 which is so inherent that the Tribunal does not have to deal with it at all.

41 Ibid.

42 Ibid at 728.

43 *Corrs v Collector of Customs* (1987) 13 ALD 254 per Gummow J at 269. However the view of Gummow J on s 45(1) is a minority opinion in that case.

44 For example *Re Maier and Attorney-General's Department (No 2)* (1986) 13 ALD 98. In that case, the Tribunal held that 'public interest' is not 'an ingredient in the duty of confidence at either common law or equity but is only relevant as a consideration in the granting or not of equitable relief, and therefore refused to incorporate into the concept of 'breach of confidence' a notion of 'public interest' when applying s 45 (at 111). A similar but less unambiguous position with regard to 'public interest' can be seen in *Re Baueris and Commonwealth Schools Commission, Department of Education* (1986) 10 ALD 77 in particular at 83-86.

45 (1985) 7 ALN N411.

46 *Re Maier and Attorney-General's Department (No 2)* (1986) 13 ALD 98 at 109.

The Federal Court's Approach to the Application of 'Breach of Confidence' Under Section 45(1) of the FOI Act

'Breach of confidence' is both a matter of law and a matter of fact. In its first respect, it involves the determination of the nature of a relationship - duty of confidence - or of an act which is alleged to have constituted a breach. In the *Attorney-General's Department and Anor v Cockcroft*,⁴⁷ Bowen CJ and Beaumont J dealt with the same set of facts on which the AAT had decided that the information involved had no quality of confidence as required in s 45. However, the judges found that the confider in that case neither waived nor intended to destroy the confidentiality of the information involved and that availability of the information to certain people did not mean that the information was in the public domain.⁴⁸ A breach of confidence was thus established in that case. In relation to the matter of fact, Bowen CJ and Beaumont J in *Attorney General v Cockcroft*⁴⁹ were of the opinion that whether 'the communications in question attracted confidentiality is principally a question of fact.'⁵⁰ However, the boundary between a matter of law and a matter of fact is rather blurred or arbitrary in such cases. An example can be seen in *Attorney General v Cockcroft*⁵¹ where the fact that the document was published and available to limited people was treated as a matter of law in the sense that such limited availability does not destroy confidentiality of the document. By the same token, however, we may assume that the manner in which the information was communicated may well be treated as a matter of law when whether a particular manner is regarded as being confidential becomes an issue of concern.

In dealing with a breach of confidence under s 45(1), the court has supported the criteria applied by the Tribunal. For example, in *Boots v Department of Immigration and Ethnic Affairs*,⁵² Beaumont J concluded that the application of s 45 is not confined to circumstances in which disclosure would amount to an actionable breach of confidence in general law and that the Tribunal is not bound to take into account any countervailing public interest,⁵³ although in *Baueris v Commonwealth*⁵⁴ His Honour observed that 'the circumstances in which equity will restrain a breach of confidence provide a useful analogy' to the determination of a breach of confidence under s 45(1).⁵⁵ His Honour's view that a breach of confidence under s 45 is not subject to the same rules as applied to a breach of confidence in equity was shared by Sweeney and Jenkinson JJ in *Corrs v Collector of Customs*,⁵⁶

47 (1986) 64 ALR 97.

48 *Ibid* at 108.

49 *Ibid*.

50 *Ibid* at 108.

51 *Ibid* at 108.

52 (1986) 11 ALN N191.

53 *Ibid*.

54 (1987) 13 ALD 470.

55 *Ibid* at 471-472.

56 *Ibid* per Sweeney J at 256 and Jenkinson J at 256-258.

where their Honours stated that s 45 confers exemption to documents without taking into account policy considerations affecting the decisions on a breach of confidence in equity.⁵⁷ In contrast, in the same case (*Corrs v Collector of Customs*)⁵⁸ Gummow J observed that breach of confidence under s 45 should be 'approached in terms of the general law'.⁵⁹ His Honour summarized four criteria for determining a breach of duty at common law or in equity. These are:

The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge), (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of that information.⁶⁰

In his minority judgment Gummow J also applied the consideration of 'public interest', an approach strongly resisted by the Tribunal, eg in *Re Maher and Attorney-General's Department (No 2)*.⁶¹ However, as we have seen, the opinion of Gummow J as to s 45 represents the minority view of the Federal Court.

Predominant Construction of Section 45(1) of the FOI Act

In the light of the AAT's and Federal Court's practices in the construction of s 45(1) of the FOI Act, we may conclude that s 45(1) is subject to considerations different from those applicable at common law or in equity, although 'breach of confidence' is a concept derived from common law and equity. As we have seen, the considerations of whether the information is confidential, whether the information was communicated in confidence, and whether disclosure would be an unauthorized use by the confidant although not necessarily with a prejudicial or detrimental effect⁶² are interpreted in accordance with their meanings in general law. The Tribunal, accordingly, in *Re Dyki and FCT*⁶³ stated that it is 'now clear that, notwithstanding that s 45 is not restricted to the common law or equitable notion of breach of confidence, the approach of this Tribunal has been to apply similar criteria when addressing the application of breach of confidence in s 45'.⁶⁴ This suggests that the criteria set out by the AAT for the application of s 45(1) are no more than a selected use of rules governing breach of confidence in

57 Ibid per Sweeney J at 255-256 and per Jenkinson J at 258.

58 Ibid.

59 Ibid at 262.

60 Ibid per Gummow J at 262-263.

61 (1986) 13 ALD 98.

62 *Re Maher and Attorney-General's Department (No 2)* (1986) 13 ALD 98 at 109.

63 (1990) 22 ALD 124.

64 Ibid at 137.

equity or at common law. This conclusion can be supported by the similarities between these three criteria and the criteria applied by Gummow J in *Corrs v Collector of Customs*,⁶⁵ where His Honour stated that for the purposes of s 45(1) a plaintiff must specify the information in question, must show that the information has the necessary quality of confidentiality, must prove that the information was communicated in such a manner as to import an obligation of confidence, and that there is actual or threatened misuse of that information.⁶⁶ The last three criteria mentioned by Gummow J are the same as the three considerations adopted by the Tribunal. Therefore, the only difference between the Tribunal's approach to the application of breach of confidence under s 45 and its application at common law is that the Tribunal, with the support of the majority of the Federal Court, has excluded the applicability of certain policy considerations, in particular 'public interest', in determining whether a duty of confidence would be breached by allowing access to a particular information. The ground for the Tribunal to exclude 'public interest' consideration is that the legislature did not intend to apply 'public interest' as a test for the application of s 45, otherwise it should have specified this in s 45 as it did in other relevant sections of the Act (eg ss 33A, 36 and 40).⁶⁷

There are other considerations relating to the breach of confidence under s 45. First, the purposes of providing the information do not affect the confidentiality of the information. Thus, in *Baueris v Commonwealth*⁶⁸ the court determined that the fact that the information in question was provided to the Commonwealth Schools Commission for the purpose of obtaining a grant did not affect the operation of s 45.⁶⁹ Second, the right to amend personal records provided under Part V of the FOI Act (Part IV of the FOI Bill) operates independently of s 45.⁷⁰ This means that the duty of confidence under s 45 may be examined without taking into account its relation to certain provisions in the same Act. Third, the confidentiality of a document does not automatically cease to exist because the information relates to the applicant himself or herself, although adequate considerations would be given to this fact.⁷¹ Last, disclosure to the author who created the information in question does not form a breach of confidence under s 45(1).⁷² The above-mentioned considerations, although may not be exhaustive, reflect the past practice of the Tribunal and Federal Court in dealing with s 45(1).

Application of Section 45(2) of the FOI Act:

Section 45(2) was inserted in 1983 by Act No 81 of 1983 for the purpose of

65 (1987) 13 ALD 254.

66 Ibid per Gummow J at 262-263.

67 *Re Maher and Attorney-General's Department (No 2)* (1986) 13 ALD 98 at 111.

68 (1987) 13 ALD 470.

69 Ibid at 472.

70 *Boots v Department of Immigration and Ethnic Affairs* (1986) 11 ALN N191.

71 Ibid.

72 *Re Cameron and Joint Coal Board* (1988) 17 ALD 19 at 23.

restricting the applicability of s 45(1) to the internal working documents falling under s 36(1)(a), the disclosure of which is determined by applying the 'public interest' test set out in s 36(1)(b).⁷³ While s 45(1) does not apply to internal documents under s 36(1)(a), it is applicable to certain internal working documents, provided that such documents are excluded from the application of s 36(1) by virtue of s 36(2), (5) and (6). This means that certain 'unexemptible' internal working documents may become exemptible under s 45(2) if a breach of confidence can be established. Thus, the ATT in *Re Brennan and Law Society*⁷⁴ observed that s 45 is 'a residual exemption capable of applying to any confidential information received by an agency, the disclosure of which would involve a breach of confidence, being information not otherwise specifically exempted under s 41 or s 43',⁷⁵ and, perhaps, also s 36(1). 'Reference to the legislative history of the s 45 exemption confirms that this was its intended operation (see s 15AB of the *Acts Interpretation Act 1901*)'.⁷⁶

The application of s 45(2) involves two major steps. First, if a document falls under s 36(1)(a), s 45(1) is not applicable. Second, if s 36(1)(a) does not apply, the exemption of the document concerned should be determined in accordance with the same criteria applicable to s 45(1).⁷⁷ Thus, we may conclude that s 45(2) sets out descriptive requirements (in conjunction with s 36), and therefore, 'once a document satisfies the descriptive requirements of s 45(2) then, irrespective of its contents',⁷⁸ it is not subject to the criteria for determining a breach of confidence under s 45. The actual effect of s 45(2) is that the documents falling under s 36(1) would be more likely to be disclosed than they are otherwise subject to s 45 because of public interest consideration set out in s 36(1)(b). On the other hand, certain internal working documents which fall outside s 36(1) exemption may be exempt under s 45(2) if a breach of confidence can be established. In particular, documents which are available for public inspection under s 9(1), or which are accessible under s 36 because they only contain purely factual material or because they are reports or records described in s 36(s), would not be accessible if the agencies or authorities concerned could establish the existence of a breach of confidence.

Public Interest Test and Clause 46 of the FOI Bill

Clause 46 of the FOI Bill serves the same purpose as s 45 of the FOI Act, exempting matters communicated in confidence.⁷⁹ As we have seen,

73 *Re Brennan and Law Society* (1985) 8 ALD 10 at 21.

74 (1985) 8 ALD 10.

75 *Ibid* at 20-21.

76 *Ibid* at 21.

77 For example see *Re Brennan and Law Society* (1985) 8 ALD 10; *Re Lordvale Finance Ltd and Department of Treasury (No 2)* (1985) 12 ALD 321; and *Re Lordvale Finance Ltd and Department of Treasury (No 3)* 12 ALD 445.

78 *Re Dillon and Department of Treasury (No 2)* (1985) 10 ALD 66 at 68.

79 Explanatory Notes for the FOI Bill at 5.

structural similarities can be found between c 46 and s 45. Each consist of two separate subsections: the first subsection sets out exemptions and the second subsection restricts (or intends to restrict) the application of the first subsection. However, these two provisions differ considerably both in substance and in the scope of their respective applications.

Clause 46(1) applies to documents the disclosure of which would involve a breach of confidence. Clause 46(1)(a) sets out 'breach of confidence' as a general ground for exemption. Clause 46(1)(b) specifies four considerations (or criteria) for determining whether a document is exempt under c 46(1)(b) although it is not clear whether a document falling within c 46(1)(b) is also necessarily subject to c 46(1)(a). As we have seen, of the four descriptive criteria under c 46(1)(b), the first three function to establish whether a breach of confidence can be founded if access to the information concerned is allowed, and subsequently the public interest consideration is used to negate the need to maintain the confidentiality of the information in question, or to justify the breach of confidence if a duty of confidence is established. The adoption of the public interest test in c 46(1)(b) makes this clause substantially different from s 45 of the FOI Act, which grants a wider exemption to documents than the general law would in the same circumstances because s 45 does not take into account the public interest in a given case. Thus, when c 46(1)(b) expressly adopts 'public interest' as a consideration, it has in fact accepted the rules governing the breach of confidence established at common law or in equity. This means that the FOI Bill has proposed a greater right of access to the public than the FOI Act.

Clause 46(1) differs from s 45(1) also in the sense that c 46(1)(b) takes into account whether disclosure would prejudice the future supply of information. In contrast, the AAT may find a breach of confidence as long as the disclosure of the confidential information would amount to an unauthorized use by the confidant although not necessarily with a prejudicial or detrimental effect.⁸⁰ It appears that a confidential document is exempt under c 46(1)(b) only when a need to protect future supply of information can be reasonably perceived. Again, c 46(1) of the FOI Bill proposes a regime which provides the public wider access to information.

Clause 46(2) of the FOI Bill states that c 46(1) does not normally apply to internal working documents falling under c 41(1)(a), but if the disclosure of the information involves a breach of confidence owed to a person or body other than a minister or his or her staff or consultant, or the state and its agencies and members of the agencies, c 46(1) would apply. This indicates again that the FOI Bill may have adopted a more liberal approach to the granting of access to the public than the FOI Act, if that is what the Parliament intended. The actual effect of c 46(2) is that the documents exempted under c 41(1) would not be automatically exempt when the breach of confidence arises as an issue. Thus, c 46(2) overrides the effect of c 41(1).

the Act' necessarily exclude the operation of public interest element when s 45 is involved? Certainly not. While rejecting the 'leaning position' in applying s 3, the Court in *News Corp v NCSC*⁹⁸ did not equalize a wide interpretation (or a narrower interpretation) with the inclusion (or exclusion) of public interest consideration in s 45. The phrase used under s 45 is 'breach of confidence', which, as a common law concept, includes public interest considerations. This was not argued by the Tribunal in *Re Baueris*,⁹⁹ where the Tribunal observed that 'it was not argued before us that public interest of the broad nature invoked in this application is part of the common law relating to breach of confidence'.¹⁰⁰ The question we would then like to ask is given that s 45 does not explicitly exclude the applicability of public interest, can we logically exclude the application of an inherent part of a concept, because the provision concerned does not 'expressly spell out' this inherent part. In another words, we may ask whether the FOI Act has expressly defined the meaning of 'breach of confidence' under s 45. If not, is it reasonable or rational to assume that a concept does not include an element which is an inherent part of the concept in general law from which that concept is derived?

Third, let us now look at what the Court said in *Waterford v Department of Treasury*,¹⁰¹ where it concluded that s 42(1) of the FOI Act should not be read down by reference to other sections of the Act.¹⁰² Does this mean that every section of the Act does not need to be read down by reference to any relevant provisions of the Act? If so, how do we reconcile the statement of Bowen CJ and Fisher J in *News Corp v NCSC*,¹⁰³ which is the same statement: noted by the Tribunal in *Re Baueris*,¹⁰⁴ that each provision of the Act should be interpreted according to its words, 'bearing in mind the stated object of the Act'.¹⁰⁵ Further, how do we reconcile this conclusion with established judicial practices of statutory interpretation!¹⁰⁶ Similarly, it is also questionable whether it is reasonable to apply a conclusion derived from a given case to circumstances substantially different from the case from which the conclusion was drawn, given that such extended application departs or differs from the intended meanings of that conclusion? This appears to be the

98 (1984) 6 ALD 83.

99 (1985) 10 ALD 77.

100 Ibid at 85.

101 (1985) 7 ALD 93.

102 Ibid at 95.

103 (1984) 6 ALD 83.

104 (1985) 10 ALD 77 at 85.

105 *News Corp v NCSC* (1984) 6 ALD 83 at 85.

106 For example Pearce and Geddes in their *Statutory Interpretation in Australia* 3rd ed Sydney Butterworths (1988) at 64-65, argued that the 'starting point to the understanding of any document is that it must be read in its entirety...The apparent scope of a section may also be limited by other sections in the Act...The approach of looking at the whole of an Act may also result in a limitation of the effect of an expression even though it has been defined in the Act.' They referred to, inter alia, *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 60 ALR 509, *Ross v R* (1979) 25 ALR 137, and *Hall v Jones* (1942) SR(NSW) 211 as authorities. In the same book, they discuss the practice of statutory interpretation in relation to remedial and penal provisions. For example, on

case when the Tribunal in *Re Baueris*¹⁰⁷ based its conclusion in relation to s 45 on the Federal Court's decision in *News Corp v NCSC*.¹⁰⁸ The inappropriateness of the Tribunal's use of analogy is even clearer when we compare the texts of the two provisions involved. Section 42(1) provides in specified terms that a 'document is an exempt document if it is of such a nature that it would be privileged from production in legal proceedings on the ground of legal professional privilege', but s 45(1) states in general terms that a 'document is an exempt document if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence'. Apparently, when the operation of a provision with specified requirements can be independent from certain provisions, it does not necessarily mean that a provision with general terms could also operate in the same way.

Fourth, let us look at *Corrs v Collector of Customs*¹⁰⁹ where the Federal Court confirmed the interpretation of s 45 given by the AAT. The reasoning of Jenkinson J in *Corrs v Collector of Customs*¹¹⁰ represents an interesting but less unambiguous approach to the construction of s 45. It seems that His Honour excluded the applicability of public interest consideration by comparing the differences in circumstances where a court would apply equity rules relating to a breach of confidence and where s 45 exemption is resorted to.¹¹¹ His Honour found that at common law disclosure of a confidential information must be made to a person who has a proper interest to receive the information, but under the FOI Act any person may

pages 164 and 165 they argue that remedial or beneficial provisions which give benefits to a person should be interpreted liberally, because the provisions are intended to give benefits to a person or a class of persons. However, s 45 of the FOI Act should not be regarded as a beneficial or remedial provision (at least not a conventional type, eg social welfare), because the FOI Act confers the benefit of freedom of information to the public and accordingly, s 45 not only gives exemption to a document falling under this section, but also restricts the operation of the exemption. Thus, if we regard s 45 as a 'beneficial provision', we must acknowledge that it is a restriction on the benefit of the public to freely obtain information and, inter verse, the restriction on the availability of the exemption under s 45 confers the benefit of having access to the information not exempt under s 45 to the public. Therefore, we should treat s 45 as a kind of provision which provides both exemption and restriction to the availability of the exemption. Pearce and Geddes also discuss the judicial practice of interpreting provisions containing both benefits and penalties. They observed that 'there is a conflict between the approach of interpreting beneficial legislation liberally to achieve its purpose and, as is discussed under the next heading, not extending the operation of a penal provision beyond its strict words' (at 166). To resolve the difficulties, 'the court indicated that it was necessary to look at the dominant purpose of the legislation. If, as in the instant case, this was to protect workers from risk of injury, the strict construction required of a penal statute should not be adopted so as to deprive a worker of the protection the Parliament intended to afford'. Bearing in mind the purposes of the FOI Act (Cth), s 45 should be interpreted in favour of the public rights to information rather than restricting it except to the extent of exemption allowed expressly in s 45.

107 (1985) 10 ALD 77 at 85.

108 (1984) 6 ALD 83.

109 (1987) 13 ALD 254.

110 (1987) 13 ALD 254 Jenkinson J at 256-258.

111 *Ibid* at 256.

request the information in question.¹¹² His Honour then moved on saying that the Act does not impose an obligation of confidence upon the recipient of the information for the imposition of such obligation would be contrary to the object of the Act,¹¹³ nor does it require that a recipient has a proper interest to receive the information.¹¹⁴ Subsequently, His Honour concluded that the 'circumstances prescribed or contemplated by the Act as those under which administrative decisions are to be made concerning the grant of access to documents under the Act are so ill suited to the finding of the facts and to the framing of orders upon which depends the vindication of those policy considerations which are subsumed under the rubrics 'just cause', 'public interest' and 'clean hands', that I am moved to adopted a construction of s 45 which would displace those considerations from the purview of s 45.¹¹⁵ In the light of these comments, it appears that His Honour excluded the applicability of certain considerations at common law because (i) the circumstances involving disclosure of confidence at common law and granting of exemption under s 45 are different; and (ii) the Act, in particular s 45(1), cannot properly accommodate the application of certain common law rules, such as public interest consideration. With due respect to His Honour's observation, we cannot help wondering (i) while public interest consideration may justify the disclosure of information at common law or in equity, whether or not a recipient has a proper interest to receive the information in question is the result of the application of public interest but not the precondition for its operations; and (ii) while s 45(1) sets out in general terms that exemption is available if certain actions for breach of confidence exists, it does not describe any circumstances at all, nor does it expressly exclude the applicability of established meanings of breach of confidence founded at common law or in equity. Thus, it is questionable whether there are convincing reasons at all for His Honour's exclusion of equity rules on breach of confidence in *Corrs v Collector of Customs*.¹¹⁶

The observation of Jenkinson J in that case became less unambiguous and difficult to follow when His Honour construed s 45, following his previously indicated dissatisfaction with the wording of s 45. His Honour approached the issue by reciting the statements by Gummow J in the same case and expressing his disagreement with these statements. By stating that the necessary quality of confidence is not affected by any real likelihood of committing civil wrong and that 'iniquity' should be, as Denning LJ said in *Fraser v Evans*,¹¹⁷ a mere instance of just cause for breach of confidence, His Honour concluded that if 'that view be correct, the language of s 45(1) is not inapt to confer exempt status on a document which contains confidential information received under circumstances importing an obligation of confidence, without regard to those considerations of public policy to which

112 Ibid.

113 Ibid at 257.

114 Ibid.

115 Ibid.

116 (1987) 13 ALD 254 per Jenkinson J at 256-258.

117 [1969] 1 QB 349 at 362.

courts have allowed an influence in determining whether to grant or withhold remedies for 'breach of confidence' in exercise of equitable or common law jurisdiction.¹¹⁸ Again, with all respect, in the light of the judgment, we fail to see why public interest and other relevant considerations should be excluded from the application of s 45, although His Honour might have implied that 'iniquity' is an instance, rather than a rule at common law, and therefore could be excluded from s 45. An essential difference between Jenkinson J's approach and that of AAT's is that His Honour hardly looked at the language of s 45 at all in his efforts to construe this section. In another words, it appears that while the Tribunal excluded the applicability of public interest by arguing that the section contains neither express nor implied terms to that effect, Jenkinson J observed that the circumstances to which s 45 is intended to apply do not warrant the application of public interest consideration. The remaining issue is, perhaps, why His Honour held that the circumstances of s 45 justify the application of certain common law rules but not others?

Fifth, let us look at the FOI Act itself. Indeed, many sections of the FOI Act expressly contain public interest consideration, but s 45 does not. However, the question is how many of them contain 'breach of confidence' as the ground for exemption. None, except s 45. Accordingly, we may ask whether it is logical to compare literally s 45 with other sections of a descriptive nature relating to exemption. It must be pointed out that s 45(1) is the only section in Part IV which does not set out descriptive requirements for granting exemption. Therefore, we may conclude, at least, that the Parliament's intention as to the applicability of 'public interest' under s 45 should not be determined by the omission of 'public interest' in s 45, as the AAT did in *Re Maher and Attorney-General's Department (No 1)*.¹¹⁹

Sixth, the ground on which the Tribunal excluded the application of public interest in *Re Maher and AttorneyGeneral's Department (No 1)*¹²⁰ may also be challenged. In that case the Tribunal commented that because the exemptions are granted in the Act for the purposes of protecting 'public and private interests', no contrary or overriding public or private interests should be taken into account unless the section concerned so specifies.¹²¹ There seem to be two points of ambiguity in the Tribunal's observation. First, there is a difference between 'public interest' contained in many sections of the Act and 'private and public interests' mentioned by the Tribunal, because the latter implies the interests of confiders not to disclose the information concerned but the former could mean either. Secondly, the Tribunal is inaccurate in implying that all public interest considerations specified in the sections of the Act are intended to override the implied private or public interests to maintain the confidentiality of the matter in the same sections. For example, s 36 states that an internal working document is exempt if its

118 *Carrs v Collector of Customs* (1987) 13 ALD 254 at 258.

119 (1985) 7 ALN N411.

120 *Ibid.*

121 *Ibid.*

disclosure 'would be contrary to the public interest'. In contrast, s 40 states that a document concerning certain operations of an agency is not exempt if its disclosure would, 'on balance, be in the public interest'. If the proposition of the Tribunal that exemptions are allowed for protecting merely private and public interests not to disclose information was accurate, ss 36 and 40 should have adopted the same terms so that the meaning of 'public interest' in these two sections is consistent. This, therefore, suggests that 'public interest' adopted in the Act has its original meaning as derived from common law and, refers to the public interest both in maintaining the confidentiality of the information and in disclosing the information. Thus, the Tribunal's ground for rejecting public interest consideration in *Re Maher and Attorney-General's Department(No 1)*¹²² is, at least, inaccurate.

Last, but not least, there is perhaps another argument of the AAT's reasoning that may be questioned. The Tribunal seemed to reject the public interest element in *Re Baueris*¹²³ under an implied proposition that public interest should not be considered 'where no action in equity lies'.¹²⁴ The same proposition can be seen in *Re Maher and Attorney General's Department (No 2)*,¹²⁵ where the Tribunal stated that the notion of public interest 'is not an ingredient in the duty of confidence at either common law or equity but is only relevant as a consideration in the granting or not of equitable relief'.¹²⁶ It seems that the Tribunal has divided equitable rules on breach of confidence into two categories or steps: establishing the duty and restraining the breach. It also appears that the Tribunal has drawn a technical distinction between equitable remedies to restrain the disclosure of confidential information and statutory exemption to prevent the disclosure of confidential information. Literally, the Tribunal is correct to imply that exemption under s 45 is a statutory exemption rather than an equitable remedy. It is also technically faultless in saying that public interest is a consideration in granting equitable relief. However, in the context of s 45, by virtue of the existence of the Act (perhaps we should quote the phrase used by Bowen CJ and Fisher J in *News Corp v NCSC*,¹²⁷ bearing in mind the stated object of the Act'), we fail to see the virtue of drawing such a distinction. Although s 45 does not provide equitable remedies, it indeed prevents the disclosure of a document 'if its disclosure under this Act would found an action, by a person rather than the Commonwealth, for breach of confidence'.¹²⁸ The Tribunal's effort to distinguish s 45 and equitable rules of breach of confidence would appear to be doubtful in the light that 'breach of confidence' is not defined anywhere in the Act, rather it is actionable at common law or in equity.

Further, there is significant similarity between the functions of equitable

122 (1985) 7 ALN N411.

123 (1985) 10 ALD 77.

124 *Ibid* at 86.

125 (1986) 13 ALD 98.

126 *Ibid* at 111.

127 (1984) 6 ALD 83 at 85.

128 FOI Act s 45(1).

remedies and s 45 exemption: both protect the information in question from being disclosed, although the courts award injunctions or similar measures pursuant to general law and the Tribunal (or Federal Court) makes decisions as to whether the document concerned is exempt under s 45. Given the functions of s 45 and the reliance of the concept of 'breach of confidence' under s 45(1) upon the general law, it is questionable whether the established meanings of breach of confidence at common law could be divided by merely the fact that the expression 'breach of confidence' is adopted in a statutory exemption. It is also unclear why the granting of s 45 exemption must exclude public interest consideration, given that the exemption under s 45 (which in a sense serves the same purposes as injunctions in equity) does not expressly exclude the applicability of public interest.

To sum up previous discussions, we may conclude that (i) there seems to lack rationale in the presently dominant construction of s 45 which excludes the applicability of public interest consideration; (ii) the proposition that 'public interest' is not specified clearly in s 45 and thus the Parliament did not intend to import this consideration in s 45 is doubtful in the sense that s 45 was intended to be a general provision at the beginning and thus cannot be restricted by comparing with other provisions of a descriptive nature; (iii) there needs more convincing reasons to explain why only part of the common law meaning of breach of confidence is allowed by the Tribunal and Court. The only vague, but possible, explanation for why the AAT and Federal Court have rejected the applicability of public interest consideration may be derived from the implied proposition of the Tribunal in *Re Maher and Attorney-General's Department (No 2)*,¹²⁹ that is the exemptions under the Act are intended to protect certain interests of the confiders. Because, perhaps, the exclusion of public interest would result in a wider extent of exemption than if public interest considerations were to be taken into account, this consideration has therefore been excluded. However, if providing a wider exemption to documents falling under s 45 is the real intention of the Parliament, the Parliament should make its intention unambiguous by inserting restrictive words in s 45, which imports a common law concept 'breach of confidence' as the ground for exemption.

Certain issues arising from clause 46(1)(a) and clause 46(1)(b) of the FOI Bill

As we have seen, c 46(1) has two limbs. Clause 46(1)(a) grants exemption of a document if 'its disclosure would found an action for breach of confidence'. Clause 46(1)(b) exempts a document if 'it consists of information of a confidential nature that was communicated in confidence, the disclosure of which could reasonably be expected to prejudice the future supply of such information, unless its disclosure would, on balance, be in the public interest'. The two subsections are linked by the conjunction 'or'. Literally, this may suggest that two limbs are conjunctive or disjunctive, although

129 (1986) 13 ALD 98.

more likely to be alternative than cumulative.¹³⁰ If alternative, the operation of c 46(1)(a) would raise the same issues as s 45(1) has, which we have dealt with in this article, in particular, whether public interest forms part of the concept of breach of confidence under c 46(1). Clause 46(1)(a), if different from c 46(1)(b), may arguably suggest a possibility of importing the public interest element, because public interest is specified in c 46(1)(b). By the same token, c 46(1)(a) may also be arguably less restrictive than c 46(1)(b), because unlike c 46(1)(b) 'public interest' is not mentioned in c 46(1)(a). To complicate the issue, c 46(1)(a) also needs clarification in the sense that it does not specify whose actions for breach of confidence under this clause are counted. In contrast, s 45(1) of the FOI Act limits its application to actions brought by persons other than the Commonwealth, but c 46(1)(a) seems to suggest that exemption is available to both government agencies and the general public. If so, there will be considerable differences in the scope of c 46(1)(a) and s 45(1).

Clause 46(1)(b) seems to be substantially different from exemption under s 45(1), not only because c 46(1)(b) expressly adopts 'public interest' as a consideration, but also because c 46(1)(b) specifies that exemption is available only when disclosure of confidential information 'could be reasonably expected to prejudice the future supply of such information'. Compared with s 45, c 46(1)(b) seems to provide a rather narrower protection to documents in question. Further, c 46(1)(a) and c 46(1)(b) suggest a different tendency in granting exemption. Clause 46(1)(a) seems to be capable of providing a wider protection than s 45(1) because it may apply to actions brought by the State or its agencies; but in contrast, c 46(1)(b) seems to be more restrictive than s 45(1), because public interest consideration may in many cases negate a duty of confidence which may otherwise be founded under s 45.

Prevailing effect of clause 46 over documents falling under clause 41

It seems that documents relating to deliberative processes under c 41(1) are subject to the overriding effect of c 46, because c 46 is triggered off when a breach of confidence is founded. This means that to be eligible for c 41 exemption a document must be not only an internal working document described in c 41, but also that its disclosure would not involve breach of confidence described in c 46. If it does, whether the document can be exempted should be determined under c 46 rather than c 41. Consequently, it is literally possible that an internal working document may be exempt under c 41 but be denied the exemption under c 46. Does this mean that an internal working document must be first examined under c 46 before being put under

130 Pearce and Geddes in the *Statutory Interpretation in Australia*, above note 106 at 21-2 observed that the courts may read 'and' and 'or' interchangeably only in circumstances where the courts believe that the legislature made a mistake and a wrong conjunction is used. Legislative intention, nature of the items connected by the conjunctions 'and' and 'or' and the relationship between the items are relevant considerations. In the context of c 46, however, there seems to be a lack of convincing reasons to read 'or' as 'and'.

c 41? Clarification seems to be needed. Literal meanings of c 46(2) seem to defy the purpose for the very existence of c 46(2). Without it, c 46(1), as proved in federal experience, is capable of applying to internal working documents falling under exemption of another provision, ie c 41.

In conclusion, we may say that the FOI Bill in general has imposed fewer restrictions on the public's access to information communicated in confidence. It has expressly adopted public interest in c 46(1)(b) as a relevant consideration and thus effectively strengthened the rights of access under that subclause. But it needs further clarification with regard to the operation of c 46(1)(a), the relationship between c 46(1)(a) and c 46(1)(b), and operation of c 46(2). If the current wording appropriately reflected the intention of the Parliament, c 46 must be clarified. On the other hand, if it is not consistent with the legislative intention, c 46 certainly needs modification so that confusion and discrepancy in its forthcoming operation can be avoided.