Rights and Wrongs of Knowing in Chemical Conflict

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ABSTRACT

In the context of 'toxic disputes' over chemicals and hazardous waste, it has been argued that greater 'visibility' of chemical contamination issues would facilitate better public recognition of the conflict and thereby bring speedier remedial action by social and political institutions. However, greater awareness of chemical hazards is dependent on the public's access to information and in many chemical conflicts the concentration of information, and thereby power, resides with the select groups of industry and government. Following the chemical contamination tragedies in Bhopal in 1984 and Seveso in 1976, support for society's right to know about chemical hazards grew. Yet decades later, as we face the new century with burgeoning chemical use and the growing problems of waster destruction, the rhetoric of community right to know still significantly outstrips the reality. Environmentally sustainable chemical decision-making requires reliable, comprehensive and accessible information. Yet, the legal and regulatory frameworks in which toxic disputes take place do not allow for an open and equal exchange of information among participants. All regulatory regimes in Australia concerning chemicals and hazardous waste provide extensive protection for commercial business information (CBI) with little consideration of the public interest. This paper reviews the restrictions faced by affected individuals, non-government organisations and the general community when accessing chemical information in multiparty toxic disputes.

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International Commitments to Right to Know

The need for access to information on toxic chemicals was clearly recognised in Principle 10 of the Rio Declaration from the United Nations Conference on Environment and Development (UNCED). Agenda 21 of UNCED acknowledged that it is in the public interest for the community to be informed, to exercise their right to understand, to make informed choices and to participate in informed decision-making.[1] Chapter 19 of Agenda 21, 'Environmentally Sound Management of Toxic Chemicals' focused on the generation, harmonisation and dissemination of chemical data, and strengthening capacity for chemical management. It also contained specific reference to the right of communities to chemical information and the obligations on industry and governments to generate and provide that information.

Internationally, there are a plethora of forums concerned with generating, collecting, disseminating and assessing chemical information. In 1994 the global Intergovernmental Forum on Chemical Safety (IFCS) was established to provide advice and promote environmentally sound chemical management through information dissemination and capacity building.[2] The IFCS Forum III (Bahia, Brazil 2000) identified a range of barriers to chemical information exchange, including lack of standards for data quality, incompatibility of electronic formats, access costs and confidentiality restrictions.[3] Public interest non government organisations (NGOs) attending the Forum intervened urging countries to provide public access to information on where hazardous chemicals are used, the location and scope of contaminated sites, information on analytical methods for testing individual chemicals, and on alternatives to hazardous chemicals.[4]

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1 Agenda 21: Programme for Action for Sustainable Development Rio Declaration on Environmental Development, United Nations Conference on Environment and Development (UNCED), 3–14 June 1992, Rio de Janeiro, Brazil.

2 Intergovernmental Forum on Chemical Safety, President's Analysis of Progress, March 2000 (IFCS/FORUMIII/08 INF 14th June).

3 Intergovernmental Forum on 'Chemical Safety, Barriers To Information Exchange For The Sound Management Of Chemicals', prepared by the Forum Standing Committee Working Group for Forum III, Third Session of the Intergovernmental Forum On Chemical Safety, Brazil 15th – 20th October 2000, (IFCS/FORUMIII /11w).

4 A transcript of the intervention is as follows: 'To facilitate effective partnerships in chemical management, NGOs and civil society should have access to the widest range of information possible. We call on this forum to urge participating countries and organisations to ensure that critical health and environmental information is available and is not withheld under inappropriate commercial confidentiality arrangements. Currently confidentiality arrangements may encompass restrictions of information on where chemicals are used, information on location and content of environmental contaminated sites, information on how to test the individual chemicals, and information on alternatives to hazardous chemicals'.

The resultant 'Bahia Declaration on Chemical Safety'[5] affirmed that an informed public is vital for effective chemical management and called on all governments to:

- increase access to information in chemical safety
- recognise the community's right-to-know about chemicals in the environment
- recognise the community's right to participate meaningfully in decisions about chemical safety that affect them.

Multilateral Environmental Agreements

Australia has signed but not yet ratified two multilateral environmental agreements (MEAs), which promote access to information on chemical hazards.

The Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998)

The Rotterdam Convention aims to facilitate information exchange about the hazards of certain chemicals to support national decision-making and ensure prior informed consent for the import of hazardous chemicals.

The Parties agreed to facilitate:

> [t]he exchange of scientific, technical, economic and legal information concerning the chemicals within the scope of this Convention, including toxicological, ecotoxicological and safety information [and] [t]he provision of publicly available information on domestic regulatory actions relevant to the objectives of [the] Convention.

Article 14 also provides for confidential data protection: 'Parties that exchange information pursuant to this Convention shall protect any confidential information as mutually agreed'. However, the Convention outlines extensive information that should not be regarded as confidential.[6]

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5 See Para 11/6, Bahia Declaration on Chemical Safety, Intergovernmental Forum on Chemical safety, Brazil 15th – 20th October, 2000, (IFCS/FORUMIII/11w).

6 This includes the common name, chemical name, trade name and chemical abstract Service (CAS) number, hazard classification, uses, physico-chemical, toxicological and ecotoxicological properties, regulatory information, risk or hazard evaluation, hazards and risks to human health, including the health of consumers and workers or the environment, information on alternatives and their relative risks, integrated pest management strategies, industrial practices and processes, including cleaner technology.

The Stockholm Convention on Persistent Organic Pollutants (2001)

The objective of the Stockholm Convention is to protect human health and the environment from persistent organic pollutants (POPs) by phasing out and banning intentionally produced POPs, and by reducing and, where feasible, eliminating byproduct POPs, dioxin and furans. The Convention has specific articles focusing on public information access. Article 10 'Public Information' obligates parties to provide public information about POPs, and Article 9 sets out the kind of information that will be exchanged between Parties. Article 9.5 also accommodates the protection of mutually agreed confidential information; 'For the purposes of this Convention, information on health and safety of humans and the environment shall not be regarded as confidential. Parties that exchange other information pursuant to this Convention shall protect any confidential information as mutually agreed'. The phrase, 'information on health and safety of humans and the environment' will be interpreted by the Parties to the Convention and it remains to be seen whether it will encompass site-specific information about POPs production, use, imports/export, or the location of contaminated sites and POPs storage.

Community Right to Know in Australia

The Australian public's interest in chemicals, particularly those that they are likely to encounter in their everyday lives, is well established.[7] The focus is on the identity of chemical substances, their uses and effects, as well as industrial waste and environmental pollution in general. The concept of community right to know is subject to a wide range of interpretations but in the context of chemical management, it commonly refers to the right of members of the community to access information about chemicals, their hazards and the risks they pose (PIAC 1994: 3).

Community right to know may encompass a right to access information on some or all of the following (adapted from Adams & Ruchel 1992):

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7 See 'Community Attitudes to Environmental Issues' (ANOP 1993). This report provided clear evidence of community concern over the use of chemical substances and their possible release into the environment. A related study by the Australian Bureau of Statistics (1998) called *Environmental Issues – People's Views and Practices* found that in 1998 about 70% of people reported environmental concerns, a figure substantially unchanged from earlier years. Air pollution continued to be the main environmental concern. In the 12 months to March 1998, 8% of respondents had formally registered their concern about an environmental problem. In 1999 the proportion expressing concern about environmental issues had fallen slightly to 69%. Hazardous chemicals ranked behind air and water pollution and destruction of ecosystems but were identified by 11% of Australians as an issue.

- hazardous chemicals in manufacturing, processing, storage, handling, disposing and transport
- emissions/releases to the environment
- toxic chemicals used in consumer products
- chemical product labelling including inerts
- contaminated sites and chemical storage sites
- chemical usage and environmental loads
- involvement in emergency planning and siting of chemical facilities
- monitoring of chemical facilities.

In Australia, the campaign for community right to know peaked in August 1991 with the fire at the Coode Island chemical storage facility. Because it was situated on the Melbourne waterfront surrounded by residential suburbs, this meant that mass evacuations had to be carried out. In the aftermath, the local community organisation, Hazardous Materials Action Group (HAZMAG) was funded by the Victorian State government to prepare a report on the fire for the Coode Island Review Panel (Adams & Ruchel 1992). The report examined access to information on the storage, use and transport of hazardous chemicals and recommended legislation to ensure greater public access to chemical information. Similarly in rural Australia, transport related chemical spills, incidences of pesticide drift and contamination of rivers and creeks motivated regional communities to demand information on agricultural chemicals, their use, their impacts and their pollution.[8]

Industry's Community Right To Know Code of Conduct

In response to the growing pressure for right to know, the Australian Chemical Industry Council (ACIC) developed their Community Right To Know Code of Conduct (July 1993) as part of the industry's Responsible Care Program.[9] The voluntary code endorsed the principle that communities had a right to know about hazardous substances stored at local premises or transported through their area. However, these rights were to be subject to 'safeguards' and Plastic Allied Chemicals Industry Association (PACIA) members were not required to disclose information that was:

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8 The Development and Trialling of Pollution /Environmental Auditing GIS Methodology For Local Government Area, 1990–91, BioRegion Computer Mapping & Research, North Coast Environment Council. Prepared for Chemical Assessment Branch, Dept. of Environment (DASETT).

9 Australian Chemical Industry Council Media Release 'Chemical Industry Gives Community Right To Know' 13th July 1993, plus PACIA 'Responsible Care, A Public Commitment' Code of Practice, Plastics and Chemicals Industry Association Inc.

- commercially confidential
- a trade secret
- protected by law
- information that could endanger safety ('the terrorist argument').

Voluntarism in community right to know has been severely criticised by a number of authors.[10] The voluntary nature of industry codes limits their enforceability and the implementation of the right to know code is dependent on individual companies or the discretion of management at individual facilities. As a result, the information that is made public is arbitrary and not consistent across industrial facilities.

In 1995, Greenpeace Australia surveyed industry members of PACIA for information on their chemical emissions. While the survey was based on information and chemicals listed under the Right To Know Code of Practice, fewer than 35% of the industrial facilities responded to the questionnaire and even fewer again, provided comprehensive or adequate information in their responses.[11]

The National Pollutant Inventory as a National Environment Protection Measure (NPI NEPM)

The Commonwealth Government's response to right to know was the announcement of the National Pollutant Inventory (NPI) in 1992. It was heralded as an innovative community right to know program, which would deliver information on chemical emissions to enhance environmental decision-making, facilitate waste minimisation and cleaner production and fulfil community right to know.[12]

Nevertheless, the decision to develop the NPI as a National Environment Protection Measure (NEPM) under the National Environment Protection Council Act 1994 ('NEPC Act'),[13] resulted in a NPI that could not provide comprehensive or nationally consistent right to know to the Australian community (Pitts &Fowler 1996: 5). While the limits of this paper do not allow a comprehensive review of the NPI (Lloyd-

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10 See Public Interest Advocacy Centre 'Legislating for a Community Right To Know' Issues Paper No.1 prepared by Public Interest Advocacy Centre Community Right To Know Project, funded by the Law Foundation of New South Wales, March 1994 at 6 and Gunningham, N., & Cornwall, A., 'Toxics and the Community: Legislating the Right to Know' Australian Centre for Environmental Law, Law Faculty, Australian National University. Canberra, 1994 at 5.

11 Personal communication with Matt Ruchel, Greenpeace Australia Toxic Campaigner, June 1999.

12 Environment Protection Agency, National Pollutant Inventory Discussion Paper, February 1994.

13 NEPC Act, s34.

Smith 1998), suffice to say that the community's right to access chemical information is limited by the NPI's:

- lack of compliance/enforcement[14]
- limited chemical list[15]
- failure to include information on storage and emergency plans
- exclusion of transfers (chemicals released or transferred to sewer, landfill or treatment facilities)
- failure to cite the term community right to know.

Most importantly, the NPI NEPM could not provide a national approach to the third party rights (s32) or the assessment of claims for commercial confidentiality, with both being left to individual jurisdictions.

Assessment of Confidentiality in the NPI

A Guidance Handbook[16] was developed to assist jurisdictions in their evaluation of claims for confidentiality. There is a requirement to ascertain whether the commercially sensitive information is valuable, whether there are alternative means of obtaining the information and whether there is a public interest.[17] While the jurisdictions may establish the commercial case relatively easily, the criterion notes that public interest is not a static concept and will need to be assessed on a case by case basis. It should consider:

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14 NPI NEPM 'S25 Enforcement provisions: (3) The Council envisages that no enforcement action will be taken for a breach of the reporting requirements that relates: (a) solely to information required for the NPI; and (b) to the first and second reporting years.(4) The Council envisages that no enforcement action will be taken for a breach of the reporting requirements that relates: (a) solely to information required for the NPI; and (b) solely to substances specified in Table 2 of Schedule A that are not specified in Table 1 of that Schedule; and (c) to the fifth reporting year. S25 (6) However, because of the cooperative basis for the NPI, the Council does not envisage that significant monetary or custodial penalties will be prescribed for breaches relating solely to information required for the NPI'.

15 While the US Toxics Release Inventory (TRI) requires the mandatory annual reporting of over 650 toxic substances, the NPI requests companies to report on 38 substances in the first two years, and approximately 95 substances in the year 2000 (later delayed until 2001).

16 National Pollutant Inventory, Guidance Handbook for Facilities Claiming Commercial Confidentiality for Data Reported to the NPI, May 1999 (*This version distributed for final clearance).*

17 Appendix C to *the Guidance Handbook for Facilities Claiming Commercial Confidentiality for Data.* Reported to the National Pollutant Inventory, May 1999.

- the nature and seriousness of any potential hazards
- whether failure to disclose the specific information would compromise protection of the environment or public health
- whether the release of generic information would suffice to make the public aware of any potential hazard
- the location of the emission relative to populated areas
- whether the benefits of having public access to the information outweighs the potential for damage to the commercial interest.

The Handbook notes that even if the commercially sensitive information consists of the identity of a known carcinogen, it would still be possible to conceal the exact identity of the substance while releasing sufficient generic identification to make the public aware of the nature of any potential hazard.

International Tenets of Trade Secret Law

All community right to know initiatives face the competing requirement for regulatory and legal protection of confidential business information (CBI) and trade secrets. Internationally, the tenets of trade secrets were consolidated in the 1994 Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Following the establishment of the World Trade Organization (WTO), an agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)[18] was developed which provides for protection for 'undisclosed information'. The information must have commercial value and the owner must have taken reasonable steps to keep it secret. The TRIPS Agreement requires member countries to provide effective remedies for trade secret misappropriation including injunctive relief, damages, and provisional relief to prevent infringement and to preserve evidence.

Defining a Trade Secret

There are many definitions of the term 'trade secret'. In 1938, the US Restatement of Torts defined it as, 'any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it… a trade secret is a process or device for continuous use in the operation of the business'.[19]

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18 Agreement on Trade-Related Aspects of Intellectual Property Rights — ANNEX 1C — Related Aspects Of Intellectual Property Rights.

19 As noted in Organon (Australia) Pty Limited and: Department Of Community Services and Health and Public Interest Advocacy Centre No. N87/324 AAT No. 3892 Freedom of Information, Administrative Appeals Tribunal Decisions, Administrative Appeals Tribunal, General Administrative Division, Sydney 5:11:1987, Sections 15-23.

A more recent definition is: '[a]ny technical, commercial or other information or device occurring or utilised in the day to day activities of the home or business'.[20]

While there is no precise definition, the context in which a dispute over ownership of information arises, may determine whether a court will treat the information as a trade secret or CBI. In the United States, where community right to know has its own legislation, a precedent for access to information on pesticide ingredients was set by the Columbia Federal District Court. Confidentiality restrictions to regulatory chemical data had resulted in a civil action brought by the US National Coalition Against the Misuse of Pesticides in 1994.[21] In 1996, the Court ruled that with limited exceptions, the US Environmental Protection Agency (EPA) should provide information about the identity of 'inert' ingredients. The court agreed with public interest groups that the US EPA improperly relied on unsubstantiated claims by manufacturers that the identities of the ingredients were trade secrets. The court ruled that EPA and the manufacturers had failed to show that competitive harm would occur from release of the identity of the majority of chemicals in the products that were the subject of the lawsuit. The US EPA was forced to disclose the inert ingredients in several pesticide formulations previously protected under commercial confidentiality.

Generally in Australia, regulatory definition of trade secrets and CBI remain vague, yet in the area of chemical management, claims for confidentiality may encompass information as varied as:

- product ingredients
- formulation details
- the identity of inerts
- the scientific names of industrial chemicals, their uses and import quantities
- pesticide usage data
- chemical storage sites and stockpile details
- chemical levels in contaminated sites
- specific identity of chemical emissions.

In 1987, the Administrative Appeals Tribunal in Organon provided a test for assessing trade secrets.[22] The AAT listed the following criteria:

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20 McComas, Davidson and Gonski 'The Protection Of Trade Secrets' (1981) as reported in Organon.

21 *National Coalition Against the Misuse of Pesticides (NCAP) et al v. Carol Browner, EPA et al* 1994. Civil Action No. 94–1100 November 15 Columbia Federal District Court.1996.

22 Organon (Australia) Pty Limited and Department Of Community Services and Health and Public Interest Advocacy Centre No. N87/324 AAT No. 3892 Freedom of Information,

- whether the information is technical in character
- the extent to which it is known outside the business of the owner of the information
- the extent to which the information is known by persons engaged in the owner's business
- measures taken to guard the secrecy of the information
- the value of the information to competitors
- the effort and money spent on developing the information
- the ease or difficulty with which others might acquire or duplicate the secret.

However, these criteria have been criticised by NGOs on policy grounds, claiming that in the context of the community's right to know, there should be a primary obligation to disclose information. Most importantly, where information is kept confidential there should be public notification of the fact and an opportunity to appeal a decision about commercial confidentiality.

In 1991 Worksafe Australia adopted a National Policy Statement on the Commercial Confidentiality of Data Relating to Workplace Substances (National Occupational Health & Safety Commission 1991). The guideline stated that claims for commercial confidentiality need to be weighed against the public interest in the publication of information concerning workplace substances and their effects on health, safety and the environment. The National Policy Statement was never adopted by the state jurisdictions.

The Public Interest

Without legislated right to know in Australia, the concept of the 'public interest' is essential to the community's ability to access chemical information. While, public interest does not have a simple definition, it encompasses aspects of efficiency and equity[23] and implies that the needs of community welfare should transcend the partisan wishes of either or both the parties to a dispute.[24] In Australia, the term public interest is found in various statutes including *The Industrial Chemical (Notification and Assessment) Act 1989* and State and Commonwealth Freedom of Information legislation.

Administrative Appeals Tribunal Decisions, Administrative Appeals Tribunal, General Administrative Division, Sydney 5:11:1987, Section 24.

23 Hardy, C., McAuslan, M., and Madden, J., 'Competition Policy and Communications Convergence' *University of New South Wales Law Journal*, Vol 17 (1) at 171.

24 Benson, J., Griffin, G., and Smith, G., 'The Concept of the Public Interest and The Industrial Relations Act 1988 (Cth)'. Working Paper No 55, September 1990, prepared for the Centre for Industrial Relations and Labour Studies, University of Melbourne at 5.

An early but clear enunciation of the underlying principle of public interest was provided in 1913 by Heydon, J. in the Butchering (Wholesale) Award: 'This Court has laid it down that one of its functions is to protect the public, which is to be regarded as a silent party in every dispute'.[25] However, the Australian judiciary has often adopted a more narrow interpretation of the concept of public interest. In *Corrs Pavey v. Collector of Customs*,[26] the Court found that there was a public interest in information where the subject matter was the existence or likelihood of a crime or serious misdeed of public importance. The Court also highlighted Justice Goof's comment in Kaufman that while 'It might well be in the public interest to have a valuable chemical formula or the secrets of an invention disclosed but that could never justify a breach of confidence'.[27] However, this limited interpretation of the public interest is at considerable odds with values expressed by public interest advocates, particularly in application to disputes over access to regulatory information. In this framework, there is the public interest in being able to live and work in a safe environment, and in protecting the environment from degradation and contamination (Anderson & Hounslow 1991: 42).

Pizer (1994: 70) suggests in his review of public interest that the law needs flexibility to keep pace with changing social attitudes and this could be enshrined in three broad categories that define the public interest: the prevention of harm, the improvement of the administration of justice, and the realisation of the democratic ideal.

In *Rundle v. Tweed Shire Council and Anor* 1988,[28] concerned with access to regulatory information on pesticides, a subpoena was served on the Applicant, the Secretary of the Commonwealth Department of Community Services and Health. It required the production to the Court of all documentation relating to the environmental and health effects of the herbicide, 2,4-D. The Commonwealth sought to be excused noting that Section 20 of *The Commonwealth Agricultural and Veterinary Chemicals Act 1988* prevented the release of any confidential commercial information in respect of a chemical product or a constituent. However, s20 (2) did provide for the disclosure

25 (1913) 10 A.R.(NSW) at 247 as reported in Benson et. al., 1990.

26 *Corrs Pavey v. Collector Of Customs* (1987) 74 ALR 428 at 499.

27 *Church of Scientology of California v. Kaufman* (1973) RPC 635 at 649–658 per Goff, J. As reported in *Corrs Pavey v. Collector Of Customs* (1987) 74 ALR 428.

28 *Rundle v. Tweed Shire Council & Ano*r [1988] NSW LEC 104 (20 December 1988) Land and Environment Court of NSW, No. 40241 of 1987.

of confidential commercial information in respect of a chemical product to a court in any action or proceeding.[29]

The defence argued that proper environmental consideration had been given to the use of 2,4-D by the Registrar of Pesticides, and that it was not for the Court to determine whether the herbicide was likely to significantly affect the environment. However, Bignold, J. found that if the Applicant was denied access to the relevant documents, she would face the proceedings with only the knowledge that the use of the 2,4-D had been cleared by the relevant public authorities but without knowing the scientific or technical basis for such clearance, and more importantly, without having any opportunity to question the validity of the scientific or technical appraisal. He concluded that the balance clearly favoured disclosure in the interests of justice. Nevertheless, Bignold, J. excluded all material that fell within the category of 'confidential commercial information' as defined by Section 4 (1) *of The Commonwealth Agricultural and Veterinary Chemicals Act 1988*, that is:

> (a) a trade secret relating to the chemical product or constituent;
>
> (b) any other information relating to the chemical product or constituent that has a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or
>
> (c) information… concerning the lawful commercial or financial affairs of a person, organisation or undertaking…

This case highlighted the tension between the public interest in the disclosure of chemical information and the commercial interests of ongoing secrecy. It could be argued that while the courts are willing to protect the secrecy of CBI, with a definition so wide as to include any information relating to a chemical that has a commercial value then the concept of the public interest is meaningless.

Public Interest in the *Industrial Chemicals (Notification & Assessment) Act 1989*

The 1997 amendments to the *Industrial Chemicals (Notification & Assessment) Act 1989* ('ICNA Act') introduced limited consideration of the public interest in the assessment of confidential listing on industrial chemicals. The ICNA Act has two sections dealing with confidential information, that is:

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29 The Applicant in the class 4 proceedings was seeking declaratory and injunctive relief in respect of the use by the Respondents of the herbicide 2,4–D, asserting that such use is in breach of sections 111 and 112 of the *Environmental Planning and Assessment Act 1979*.

1. CBI provided as part of the assessment for new and priority chemicals

2. listing on the confidential section of the Australian Inventory of Chemical Substances.

Since coming into effect in July 1990, the National Industrial Chemical Notification and Assessment Scheme (NICNAS) assesses new industrial chemicals and existing chemicals of high concern (Priority Existing Chemicals) from chemical data packages supplied by the applicant.[30] These data are held as commercial-in-confidence and when NICNAS compiles their Public Report, a company may request certain information not be published in the Public Report. This is termed 'exempt information' and the NICNAS Director can keep the information confidential if satisfied that publication could reasonably be expected to prejudice substantially the commercial interest of the applicant; and the prejudice to the applicant outweighs the public interest in the publication of the information.[31]

However, some basic information may not be claimed as exempt (Section 5, Regulations 3 and 4), including:

- common name known to the public, importer or manufacturer
- general uses
- precautions and restrictions for manufacture, handling, storage, use and disposal
- assessment recommendations that relate to disposal
- procedures for emergencies involving the chemical
- physical and chemical data that does not reveal the composition
- prescribed data relating to health and environmental effects of the chemical, (if required).

The type of information typically claimed as exempt is related to the identity of the chemical, for example chemical name, CAS number, molecular and structural formula, constituents and impurities, spectral data and specific import volumes (NICNAS 2000). Consumer and public interest NGOs have serious concern as to the usefulness of public reports on industrial chemicals when the identity of the chemical itself is withheld (ACA 2000).

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30 NICNAS data requirements are defined in Parts A, B, C and D of the Schedule to the *Industrial Chemicals (Notification & Assessment) Act 1989*.

31 Sections 75 and 79 of the *Industrial Chemicals (Notification & Assessment) Act 1989*.

Guidelines for Establishing a Case for Confidential Listing of Chemicals on the Australian Inventory of Chemical Substances, *July 2000*

New industrial chemicals assessed under NICNAS are included on the Australian Inventory of Chemical Substances (AICS) only after five years, in order to protect the rights of the original provider of the chemical data. At the end of the five-year period, the proponent can request that the chemical be listed in the confidential section of the AICS. Both the non-confidential and confidential sections include only the chemical name, Chemical Abstracts Service Registry Number if available, molecular formula and synonyms. The AICS does not include health information or any information linking the chemical with the applicant. The AICS includes a large number of chemicals that were listed before NICNAS was established and consequently, have not undergone a health or environmental assessment.[32] Until 1997, a chemical was only allowed two three-year options for listing in the confidential section, based on commercial interest only. In 1997, amendments to the ICNA Act meant that once a chemical was listed in the confidential section it could remain there indefinitely,[33] subject to approval every five years. The 1997 amendments also saw the criteria modified to include consideration of the public interest. In order to list in the AICS confidential section, the holder of the chemical needs to make a special application to the NICNAS Director, addressing certain criteria set out in the NICNAS Guidelines for Establishing a Case for Confidential Listing of Chemicals on the Australian Inventory of Chemical Substances, July 2000.[34]

In August 1998, NICNAS established an independent technical advisory panel (TAG) to develop the guidelines and help ensure consistency in the decision making process for confidential listing on the AICS. However, the final decision still rests with the Director and the applicant may appeal the decision to the Administrative Appeals Tribunal. The guidelines list the information needed to support a claim for confidential listing. While the requested information appears comprehensive, providing an adequate information base on which to make a decision of public

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32 The first edition of the *Australian Index of Chemical Substances* (AICS), a listing of industrial chemicals in commercial use in Australia (1 January 1977 to 28 February 1990) included approximately 36,000 non-confidential chemicals, with a further 2,500 in the Trade Name section and 1,000 in the confidential section. Additional chemicals were added during a two-year amnesty from 1993 to 1995.

33 In the *Attorney General v. Jonathan Cape*, [1976] QB 752, Lord Widgery found that the public interest in disclosure of beneficial trade secrets may be stronger where the period of protection has extended beyond the period conferred under the patents regime.

34 These guidelines apply to information submitted as applications for confidential listing on the AICS under relevant sections [14(3), 18A and 19(6)] of the Act. They are included in the *NICNAS Handbook for Notifiers* to assist industry in the decision to lodge an application for confidential listing on the AICS.

interest, in reality, data to fulfil these criteria do not exist for the vast majority of chemicals. For example, there is usually little, if any, information on exposure patterns, synergistic impacts, degradation products or environmental monitoring. As well ecotoxicology data is not required for new chemicals defined as 'polymers of low concern'. The process has been soundly criticised by public interest NGOs, noting that while it includes an independent TAG, decisions are still based on the discretion of the Director with 'little transparency regarding the manner of the decision, thus echoing pre-1997 practices' (Vakas 1999: 9). NGOs have also argued that until adequate assessments are carried out, chemicals that do not have minimum health safety screening information should not be permitted to be listed in the confidential section of AICS (Anton 2000).

Freedom of Information Legislation in Australia

While Commonwealth, State and Territory Freedom of Information Acts require disclosure of information, they too provide for comprehensive protection of commercially sensitive information, including trade secrets. FoI legislation is viewed as protection for the principles of democratic government; openness, accountability and responsibility. In spite of this, *The Commonwealth Freedom of Information Act (1982)* provides little guidance on how competing public policy considerations ought to be balanced. As demonstrated in *Rundle*, public access to chemical information is particularly problematic where CBI has been submitted to fulfil legislative requirements for chemical registration.

The Public Interest Advocacy Centre (PIAC) in their attempts to obtain information submitted by manufacturers in support of a new drug or medical device, have observed that Sections 38, 43 and 45 of *The Commonwealth Freedom of Information Act* are regularly invoked to exempt information of a commercial nature (Carver 1993: 4). All three exemptions may apply to chemical regulatory data, but Section 43 and 45 have the greatest potential to impact on access to chemical information.

Section 43 Trade Secrets, Commercial Information and Supply of Information to Government

Section 43 provides exemption for a document if its disclosure under the act would disclose:

(a) trade secrets;

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed; or

> (c) information (other than trade secrets or information to which paragraph (b) applies) concerning a person in respect of his business, all professional affairs all concerning his business, commercial or financial affairs of an organisation or undertaking…

In *PIAC v. Schering Pty Ltd*, [35] the AAT in applying the criteria laid down in Organon, held that health and safety data could not be a trade secret because it was not information of a technical character. The AAT made a similar finding in *Searle Australia Pty Ltd v. PIAC*.[36] However, on appeal, the Full Federal Court found that the tribunal had erred in finding health and safety data was not a trade secret and noted that while the Organon criteria was a useful guide, the final determination of what is a trade secret is still primarily a question for the administration's decision maker. They noted that 'technicality' is not a requirement for a trade secret, and that it only needs to be an asset of the trade or useable in trade.[37] Yet, in 1993 in *Hittich v. Department of Health, Housing, Local Government and Community Services*,[38] the AAT again held that health and safety data could not be considered a trade secret. They argued that health and safety data for a specific therapeutic formulation could have no use beyond the application of that formulation, and therefore could not be 'useable in trade'.

There are similar inconsistencies in decisions regarding exemptions under s43 (1) b) where information of a commercial value could be diminished or destroyed. In *PIAC v. Schering*, AAT held that health and safety data relating to Schering's IUD contraceptive had commercial value, which may be destroyed if it was disclosed and therefore was exempt, despite the finding in *Hittich* that health and safety data relating to a drug was not covered under these exemptions (S43 (1) b)). In relation to exemptions where disclosure would unreasonably or adversely affect persons or business (s43 (1) c)), there is little consistency. The AAT has found both in favour of incorporating a notion of balancing public and private interests[39] in the consideration of this exemption, and rejecting it.[40]

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35 *PIAC v. Schering Pty Ltd* (N87/537 16th August 1991).

36 *Searle Australia Pty Ltd v. PIAC* (N88/1222 19th September 1991).

37 Searle Australia Pty and Public Interest Advocacy Centre and Department Of Community Services and Health No. G588 of 1991 FED No. 317 Administrative Law — Trade — Residual Matters (1992) 108 ALR 163 (1992) 36 FCR 111, Section 37.

38 *Hittich v. Department of Health, Housing, Local Government and Community Services* (N92/323 16th June 1993).

39 *Angel v. Department Of Arts, Heritage and Environment* (9 ALD 113).

40 *PIAC v. Schering Pty Ltd* (N87/537 16th August 1991).

However, some exemptions under s43 have been addressed in a more consistent fashion. Despite arguments by the Commonwealth Government that disclosure in one incidence could reasonably be expected to prejudice the supply of future information to the Commonwealth, the AAT has consistently rejected this claim. In *Searle*, the AAT stated they had difficulty accepting the claims of the Commonwealth, as the information was not voluntary but a legislated requirement for companies seeking approval to market a particular product in Australia.[41]

Section 45 Confidential Information

Section 45 provides an exemption for a document 'if its disclosure under this Act would found an action, by a person other than the Commonwealth, for breach of confidence'. The Full Federal Court in *Corrs, Pavey, Whiting and Byrne v. Collector of Customs* found that determining whether a document was exempt, depended on the applicant being able to identify specific information that had the necessary quality of confidentiality. The information had to have been received with an obligation of confidence, and actual or threatened misuse of the information had to be demonstrated.[42] In *Searle*, the AAT adopted less exacting criteria, that is; a) was the information communicated in confidence, and b) was the information confidential.

This interpretation of Section 45 could be widely applied to information provided in a chemical regulatory setting. On appeal, the Full Federal Court overturned the AAT determination, finding that with the commencement of the FoI Act (1982), there could be no understanding of absolute confidentiality and that the provisions of the FoI Act could not be avoided by simply agreeing to keep documents confidential.[43] While the Full Federal Court finding provides some assurances to those involved in chemical disputes, it is apparent from this summary review of impediments to public access to information that there is little consistency in the interpretation of exemptions under *The Commonwealth Freedom of Information Act.*

Conclusion

Despite Australia's international commitments to right to know through Agenda 21, and more recently the 'Bahia Declaration,' as well as the signing of the Rotterdam and the Stockholm Conventions, Australia still has no State or Commonwealth 'right to know' legislation.

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41 *Searle Australia Pty Ltd v. PIAC* (N88/1222 19th September 1991) at 28.

42 *Corrs Pavey, Whiting and Byrne v. Collector Of Customs* (13 ALD) at 262.

43 Searle Australia Pty and Public Interest Advocacy Centre And Department Of Community Services And Health No. G588 of 1991 FED No. 317 Administrative Law – Trade – Residual Matters (1992) 108 ALR 163 (1992) 36 FCR 111, Section 61.

All of Australia's regulatory regimes concerned with chemicals and hazardous waste include confidentiality exemptions for commercial information. In their regulation, there is little public scrutiny of the assessment of CBI confidentiality and few guidelines exist on how to balance this with public interest. Even those programs that were initially established to serve the community's right to know, such as the National Pollutant Inventory have commercial confidentiality provisions.

While there have been limited moves to introduce the public interest into the assessment of confidentiality applications for the listing of chemicals on the AICS, this has not affected the confidentiality of CBI in the Public Reports on industrial chemicals. *The Commonwealth Agriculture and Veterinary Chemicals Act (1994)* does not require the consideration of the public interest when assessing confidentiality applications. In the case of agricultural chemicals, persistent and toxic substances are routinely released into the commons in considerable quantities. By definition, there is a public interest in the protection of the environment and our life support systems from pollution. Of more concern is that even in the case where the court finds in favour of the public interest in accessing regulatory data on chemicals, there may still be significant restrictions imposed on information defined as CBI.

Neither has the introduction of freedom of information legislation ensured access to information. FoI Acts still provide protection for confidential information, trade secrets and any other commercial information of value. With no independent scrutiny of the allocation of CBI status, the final arbiter in the majority of FoI applications is the recipient agency, who may be under considerable pressure to maintain confidentiality.

In Australia, the NGO community involved in addressing the threats of hazardous chemicals and participants in toxic disputes face a culture that fosters confidentiality and secrecy rather than the open information exchange as promoted by Agenda 21. Community right to know in chemical management remains a myth, limited by the regulatory and legal systems that protect the extensive, and as yet, undefined self-interest of the chemical industry.

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