

AUSTRALIA'S RIGHT TO KNOW

Submission to the Australian Law Reform Commission's Review of Secrecy Laws Issues Paper 34 December 2008

Executive Summary

- Access to and sharing of "government information" is an essential right of every Australian and fundamental to openness, transparency and accountability in government.
- Inconsistent with this right, in a plethora of current legislation there is an overwhelming presumption (explicit and implicit) that information in the hands of the government is either secret, private or confidential to the Commonwealth.
- ARTK believes the ALRC should focus on a coherent practical and effective system of ensuring information is open to all Australians and recommend that a principal object of all legislation should be to provide the right of access to information held on trust by government for the public unless on balance it is necessary for the protection of essential public interests not to do so.
- ARTK urges a number of reforms be made to the legislation that deals with secrecy including:
 - repeal section 70 of the *Crimes Act 1914* and replace it with legislation that places an onus on public servants to disclose information unless it has been established there is an essential public interest to be protected by maintaining the secrecy of certain information;
 - criminal penalties should only apply to unauthorised disclosures of information in situations where there is an overwhelming public interest in preventing disclosure, and the consequences of disclosure affect national security or public safety;
 - create the position of Information Commissioner with powers to promote fundamental rights to access information.



Introduction

Australia's Right To Know (**ARTK**) is a coalition of 12 major media organisations formed in 2007 to address increasing restriction on freedom of speech in Australia.

In 2007 the ARTK commissioned the *Moss Report into the State of Freedom of Speech in Australia (Moss Report)*. The Moss Report specifically highlighted increasing government secrecy as a major inhibitor on the free flow of information and in so doing, the freedom of speech in Australia.

ARTK welcomes the Attorney-General's terms of reference to the ALRC in relation to secrecy laws. In particular the ARTK agrees that it is highly desirable to have comprehensive, consistent and workable laws and practices.

The terms of reference specifically refer to "the increased need to share such information with and between governments and with the private sector".

At paragraph 1.76 the Issues Paper states:

As part of this process, information sharing is essential. Information flows may need to take place:

- where there is a crisis of national emergency;
- to better examine information held by government, by analysing and integrating information held across a number of different portfolios;
- to integrate service delivery, for example, between the Australian Taxation Office (ATO) and Centrelink, or between Centrelink and a private employment service provider;
- to manage areas of joint activity by encouraging the sharing of information with the Australian government, across jurisdictions and with the private sector.¹

Such sharing would be facilitated not by developing integration policies for information but by adopting a fundamentally more open approach to public information held in trust by the Government.

Access to and sharing of "government information" is an essential right of every Australian and fundamental to openness, transparency and accountability in government. In principle any secrecy is an anathema to that right and should only exist where there is an overwhelming public interest in such secrecy. Defining what is caught within the ambit of the term "government information" is a threshold step in ensuring there are appropriate parameters around secrecy laws.

Any approach to the question of secrecy should be that public access should only be excluded if it is in the public interest. More narrow and restrictive political or bureaucratic considerations that persist in much of the current legislation should not be relevant considerations.

The law in its current form is far too focussed on the rights of government and the bureaucracy and places too little emphasis on the fundamental proposition that access to information should be allowed.

The law should be reformed to ensure this.

Former Prime Minister Bob Hawke made the observation:

Information about government operations is not, after all, some kind of 'favour' to be bestowed by a benevolent government or to be extorted from a reluctant bureaucracy. It is, quite simply, a public right.²

¹ Ibid, 60.

A key element of this review should be that all government information should be available to the public as a matter of course. It is simply not enough to assert government must operate covertly in all manner of circumstances; it must only do so in exceptional circumstances and the need to do so should be clearly and publically articulated. Any government operations not subject to public review must be subject to judicial review and public interest exceptions.

The ARTK urges the ALRC to recognise that the review of secrecy laws should proceed from that foundation, drawing together what is currently a fragmentary approach to a synthesised and coherently articulated set of legal principles reflecting the above right to open government and that encourage and engage citizen participation.

In recommending any reform of the law, the ALRC should focus on coherency and simplicity. Any proposals for secrecy should only be made if there is an overwhelming public interest in maintaining secrecy.

The ARTK strongly urges the ALRC to return to first principles in its report by recommending a system that is practical and effective in ensuring information is open to all Australian citizens. The enshrining of the right to access and sharing of information has the additional benefit of raising awareness and educating the public as to the operation of its government. There is a good deal of evidence from overseas that open access to information strengthens democracy, confidence in government policy formation and action.

In that context, ARTK strongly urges a coherent approach to each of:

- the plethora of "secrecy" provisions that litter legislation as diverse as the *Crimes Act 1914* (Cth) and the *Dairy Produce Act 1986*;
- freedom of information legislation;
- privacy; and
- whistleblowers legislation.

Each of these legal principles should be part of an integrated approach to providing information to the public.

This submission addresses the following matters:

Section 1: Statement of Principles: the ARTK proposes a set of principles to be adhered to in the development of any law which restricts the free flow of information.

Section 2: Reform Proposals: this section sets out the reform proposals required to satisfy the principles set out in Section 1.

Section 3: Problems with existing laws: this section examines the existing secrecy provisions throughout the range of Commonwealth and State statutes and highlights the problems with the existing suite of laws. The section outlines the penalties which can currently be imposed and argues for reform of the penalty system. The section also discusses the public interest exception to the principle of the open flow of information.

Section 4: Interface of secrecy laws with other laws affecting the free flow of information: this section examines of the interface of the laws pertaining to privacy, public interest disclosure laws, and freedom of information.

² Quoted by Senator Andrew Murray in his second reading speech for the Freedom of Information Amendment (Open government) Bill 2003.

Section 1: Statement of Principles

The object of any legislation, be it secrecy, FOI, privacy or whistleblowers, should be informed by the following principles:

- all information in the custody of any government, bodies established or funded by government, privately contracted government services and government-subsidised private sector bodies within Australia resides there for one purpose, to serve the interests of the citizens of Australia. Such material is created and merely held in trust for, and in service of, its citizens. This principle applies to security information.
- citizens must be able to participate in the democratic process including the policy, accountability and decision making processes associated with it;
- all public bodies functions must be open to scrutiny, discussion, criticism and review;
- the accountability of public officials and transparency of their conduct are matters of public interest and must be increased;
- representative government must be reinforced; and
- secrecy laws should only override these principles in the most exceptional circumstances where necessary for the protection of essential public interests.

Section 2: Reform Proposals

Consistent with these principles, the ARTK strongly urges the following reform proposals:

- the creation of a culture within government which embraces openness;
- the introduction of a single public interest test that states:

"Access is to be provided to government information unless its disclosure is demonstrably contrary to the public interest."

The test's starting presumption that access to information is to be provided is a very positive step towards openness and should be a minimum standard in all legislation purporting to restrict specified information;
- revise the method for assessing the public interest test ;
- introduce a whole of government information policy and aim toward a "push" model where government routinely and proactively releases information including any underlying electronic data;
- ensure that in all legislation a principal object is to provide the right of access to information held by government unless on balance it is necessary for the protection of essential public interests not to do so, recognising, inter alia, the value of importance of openness, accountability and public ownership of information;
- prohibit government departments, bodies established or funded by government and government-subsidised private sector bodies from contracting out of disclosure, without establishing a public interest in doing so or the existence of specified confidential trade information;
- repeal section 70 of the *Crimes Act 1914* and replace it with legislation that places an onus on public servants to disclose information unless it has been established there is an essential public interest to be protected by maintaining the secrecy of certain information;

- create the position of Information Commissioner. The Information Commissioner would have the power to promote the fundamental right to information and to assess claims by government departments that it is in the public interest that information not be disclosed;
- repeal all blanket secrecy legislation and replace it with legislation that allows public disclosure unless its in the public interest not to do so; and
- revise internal and external review processes relating to the classification of material, such processes should be subject to review by the Information Commissioner.

ARTK urges the ALRC to adopt the above matters in any reform proposals.

Section 3: Problems with the existing laws

3.1 Key problems

In summary, the existing laws relating to secrecy suffer several key problems:

- there is an overwhelming presumption (explicitly and implicitly) that any information in the hands of a government official is either secret, private or confidential to the commonwealth. The systemic approach of the government its arms and officers to information is that it is "Commonwealth Government Information".

Such an approach is deeply flawed.

All information in the custody of any government, bodies established or funded by government, privately contracted government services and government-subsidised private sector bodies within Australia resides there for one purpose, to serve the interests of the citizens of Australia. Such material is created and merely held in trust for, and in service of, its citizens including security information.

- there are a plethora of provisions "introduced at different times with different language and different penalties". The thicket is so impenetrable that even an experienced public servant would have trouble determining what provisions apply and what information is protected. The consequence of this is a predisposition towards secrecy than disclosure;
- there are no core principles or values underpinning the "mosaic of prescriptions and proscriptions". Core principles must be clearly articulated and made consistent with and not distinguishable from core principle or values concerning the provision of information to the public;
- secrecy has always been seen by Governments, Ministers and public servants as an essential ingredient of the system. It is not. Secrecy should only be seen as an "exceptional" ingredient of the system used only in the most extreme circumstances;
- confidentiality and privacy are regarded as justification, or worse, an excuse for maintaining or imposing a shroud of secrecy;
- a "closed system" approach to information is antiquated and at odds not only with global technological advances in information sharing, but does not encourage effective public administration or public statement and advancement;
- it is apparent that Government and in particular its officers, are extremely reluctant to embrace openness, despite protests to the contrary, and maintain a culture of secrecy which is highlighted by the plethora of legislation and recent responses to disclosure of information;
- the legislative approach to date has been one of blanket restrictions applied to both government and public servants alike. Recent events show that even departments, who it may be argued deal almost exclusively with security information, should share much of their information openly. There is no warrant for clothing all aspects of the security services

in blanket secrecy nor for public servants to be unable to share information held by them in trust for the public; and

- responses of government to the threat of "terrorism" have been to increase and reinforce secrecy provisions without assessing the impact or desirability of that approach.

3.2 Secrecy provisions in legislation

Secrecy provisions are not easily found. There is an urgent need for consolidation of those provisions. Often such provisions originate from public decision makers' approach to the sharing of information. Importantly, the public should have confidence that the reasons information is being denied are justified and have utility.

Research carried out for the Moss Report has shown that, across Australia, there are 335 pieces of legislation which contain so-called secrecy provisions.

A summary from the Moss Report is presented in the table and discussion below.

Jurisdiction	Acts/regulations containing secrecy provisions
Commonwealth	80
New South Wales	45
Australian Capital Territory	33
Queensland	22
South Australia	16
Tasmania	17
Victoria	45
Western Australia	52
Northern Territory	<u>25</u>
TOTAL	335

Those provisions, in general, prohibit a person from disclosing or communicating, either directly or indirectly, information or documents obtained in the course of performing his or her duties or functions to any other person, except (as specified) within their own agency. The provisions which are broadly drafted and cover a wide range of 'confidential' information apply in most cases, including after a person leaves the organisation or stops performing certain functions. They prevent third parties from disclosing the information.

It is evident from these figures, and from ALRC's own review, that the "sometimes unintelligible mosaic of prescriptions and proscriptions"³ of secrecy laws in force in Australia, as noted by Paul Finn, has not been appropriately addressed since at least 1991.

In some Acts, particularly those which relate to an agency providing a service such as health, aged or disability support or is one related to national security or intelligence, the officer is not compelled to disclose information even to a court or tribunal except in certain circumstances – if, for example, it is a party to the proceedings. Some Acts give the responsible minister or courts or tribunals discretion to divulge certain information. No consistent approach is adopted. It is difficult to see any sound policy basis for withholding information relating to health, aged or disability support from a court.

The penalties for breaching the secrecy provisions can be severe. They can range from a number of penalty points to 25 years imprisonment for intelligence-related offences. The general penalty is imprisonment for six months to two years and/or a fine. For example, revealing confidential information relating to the *Dairy Produce Act 1986* can attract two years imprisonment. Penalty provisions are discussed in more detail below in section 3.5.

³ P Finn, *Official Information, Integrity in Government Project: Interim Report 1* (1991), 92

Some secrecy provisions are qualified such that disclosure of information in particular circumstances will not be an offence.

For example:

- where a person is authorised to make such disclosure;
- where the disclosure is made in the course of performing or exercising his or her functions or duties under the relevant Act;
- where the disclosure is permitted by the Minister or agency head who deems it to be in the public interest; or
- where the disclosure is made with the consent or authority of the person who applied to have the information treated as confidential or to whom the information relates.

The Moss Report gave a number of examples of prosecution arising from legislation:

- In *Johnston v DPP*⁴, an Australian Federal Police constable was convicted under the Commonwealth *Crimes Act 1914* of communicating information obtained by virtue of his position to another person.
- In *R v Lappas*⁵, the defendant was found guilty of espionage and unauthorised communication contrary to sections 78 & 79 of the *Crimes Act 1914* (Cth). He was an intelligence analyst with the Defence Intelligence Organisation. He took two "Top Secret" documents which he gave to a prostitute so she could sell them to a foreign power. At trial he was found to have been suffering from a mental illness at the time. He was sentenced to 2 years imprisonment.
- In *Grant v Headland*⁶, the appellant was a 19 year old probationary trainee of the Australian Security Intelligence Organisation who decided to see what response he could get to an overture to a foreign agency purporting to offer intelligence secrets. He was charged under section 79 of the *Crimes Act 1914* (Cth). He was convicted and appealed against the conviction and sentence. The appeal against the conviction was dismissed, but the appeal against the sentence was allowed because the security of the information was low and the appellant's intentions were loyal.

Whilst it is clear from the above examples that there are good reasons to retain specific secrecy provisions in legislation such as that which deals with Australia's defence, foreign relations, the activities of intelligence agencies and the investigations of crime and criminal perpetrators, it is more difficult to justify the need for specific regulations to be included in a vast array of legislation such as the disclosure of poor security at Sydney Airport or obesity within the defence forces.

ARTK commends and supports efforts to rationalise disparate and potentially conflicting laws and regulations into a more consolidated approach and, where possible to repeal unnecessary secrecy laws in favour of a central set of laws based on principles of openness and access to information. These principles as set out above would allow this approach.

Schedule A includes examples of provisions in Commonwealth legislation which impose secrecy or confidentiality obligations either unjustifiably, or, the purpose of which may adequately be achieved through legal equitable principles of confidentiality, in cases of civil liability, or by relying on already available secrecy provisions for criminal liability, such as under the *Crimes Act 1914*:

The examples in Schedule A illustrate that the type of information that the legislation is seeking to

⁴ *Johnston v DPP* (1989) 97 FLR 424

⁵ *R v Lappas* (2003) 152 ACTR 7

⁶ *Grant v Headland* (1977) 17 ACTR 29

protect could be adequately protected in accordance with equitable principles of confidentiality to deal with civil liability or legislation to similar effect. Criminal liability with terms of imprisonment of up to two years for unauthorised disclosure of information concerning the administration and regulation of agricultural industries or dental health seems excessive and disproportionate in the circumstances.

In any event, even if criminal sanctions were needed in these circumstances, the provisions of the *Crimes Act 1914* would already be applicable, or pecuniary penalties akin to damages may be more appropriate.

Consolidating secrecy provisions governing the handling of official information generated in a wide array of governmental activities would provide for a more consistent and reliable regulatory environment in which Commonwealth officers and other persons dealing with such information are aware of their obligations and can therefore act accordingly.

Moreover, such consistency would more effectively accommodate principles aimed at encouraging government to attain greater levels of proactive public disclosure of information it holds, unless persuasive public interest grounds can be identified for not disclosing such information, such as causing prejudice to national security, defence or international relations.

3.3 When should secrecy be permitted? The public interest exception.

The circumstances in which governments and the bureaucracy should maintain secrecy are extremely limited. Governments and private companies often overstate the need for secrecy and confidentiality. Recent events in the local and global economy starkly display the need for greater transparency and governance in the public and private sectors. In any event it is clear that decision making processes of government should not be nested in secrecy. The experience in jurisdictions where those processes are open to public scrutiny has been that it results in more professional, apolitical and reasoned decision making. That is to be encouraged.

If the wide array of secrecy provisions currently contained in various Australian statutes were repealed and replaced with legislation allowing for public disclosure unless it is necessary for the protection of essential public interests not to do so, then the balancing process required to determine where the public interest lies could be applied more consistently across a range of situations and circumstances.

To the extent that these secrecy provisions are not repealed, ARTK advocates amending such provisions consistently to include an express exemption allowing in every case for disclosure of information in the public interest.

In terms of developing the scope of such an exemption, ARTK advocates avoiding, as far as possible the tendency to rely on the general, preferring an approach whereby specific categories of the public interest are identified and set out in the legislation. Exemptions that are framed in terms of disclosures causing prejudice to the "effective workings of government" or "the ordinary course of government" are too broad, too subjective and risk being construed so widely as to encompass almost any administrative or governmental activity depending on the circumstances.

Similarly, exemptions should not be crafted to apply as of right or merely because information is generated or held by intelligence and security agencies – the information itself, rather than simply its source, would need to be assessed to establish if it legitimately fell within a proposed exemption necessary for the protection of essential public interests.

The following circumstances are likely to attract an overwhelming public interest against general public disclosure:

- information relating to intelligence and security operations, terrorism, defence and foreign relations;
- information obtained in confidence from, or entrusted in confidence to, other governments or international organisations relating to intelligence and security operations, terrorism, defence and foreign relations;

- operational military matters affecting the execution of and security of Australian troops on or to be deployed;
- national security issues;
- prejudice to the enforcement law, the investigation and prevention of criminal activity or the administration of justice;
- disclosures which could cause harm to any person or prejudice public safety.

However, even in each of the above cases, a balancing process must still be undertaken to assess the circumstances to confirm that maintaining secrecy of the information was in fact necessary for the protection of an essential public interest. For instance, there may be an overriding legitimate public interest in disclosing information about certain activities of intelligence and security agencies where such information reveals that an agency has exceeded limits imposed on it by law in the conduct of its affairs.

Furthermore, consistent with the High Court's assertions in *Commonwealth v Fairfax* (1980) 147 CLR 59, ARTK would not consider the potential to cause political embarrassment or exposing the government to public criticism as legitimate grounds for prohibiting disclosure in these circumstances.

3.4 Section 70 of the Crimes Act

As the ALRC review notes, Section 70 of the *Crimes Act* is a general prohibition against the unauthorised disclosure of official information by Commonwealth officers and Section 70 is the only provision remaining in Part VI of the *Crimes Act*, which is entitled 'Offences by and against Public Officers'. The ARTK believes Section 70 underpins the regime and culture of secrecy within Government.

Currently, s 70 provides that:

- (1) A person who, being a Commonwealth officer, publishes or communicates, except to some person to whom he or she is authorized to publish or communicate it, any fact or document which comes to his or her knowledge, or into his or her possession, by virtue of being a Commonwealth officer, and **which it is his or her duty not to disclose**, shall be guilty of an offence.
- (2) A person who, having been a Commonwealth officer, publishes or communicates, without lawful authority or excuse (proof whereof shall lie upon him or her), any fact or document which came to his or her knowledge, or into his or her possession, by virtue of having been a Commonwealth officer, and which, at the time when he or she ceased to be a Commonwealth officer, it was he or her duty not to disclose, shall be guilty of an offence.

Penalty: Imprisonment for 2 years. (*our emphasis*)

Section 70 is far too broad in its operation and does not discriminate between information to which the public has a right to access and that to which the public has an expectation that it would be in its interest that it is not to be disclosed, namely which it is his or her duty not to disclose.

The difficulty is manifest, an officer has no clear direction as to that information which attracts the duty of non disclosure and thus is in effect invited to treat all information in that manner to avoid the penal sanction. Further, the sanction is potentially out of proportion to the harm caused by any disclosure as it does not discriminate between circumstances as diverse as revelation under the Dairy Structural Adjustment Program to security information.

ARTK believes the approach of the Review of the Commonwealth Criminal Law (the **Gibbs Committee**), which recommended that the 'catch-all' provisions of ss 70 and 79(3) of the *Crimes Act* be repealed and replaced with provisions that impose criminal sanctions for the disclosure of certain types of information is a preferred model. The Gibbs Committee recommended that these types of information include:

- information relating to intelligence and security services, defence and foreign relations;
- information obtained in confidence from, or entrusted in confidence to, other governments or international organisations;

- information the disclosure of which would be likely to result in the commission of an offence; facilitate an escape from legal custody or the doing of an act prejudicial to the safekeeping of persons in legal custody; or impede the prevention or detection of offences or the apprehension or prosecution of suspected offenders.⁷

Whilst the ARTK does not accept all information relating to security services or entrusted by international organisations is necessarily secret, their approach of defining specific types of information is preferable.

The ARTK submits that s 70 and other catch all provisions should be replaced with provisions that deal with specific provisions articulating the information which is not to be disclosed and that all such provisions should have the proviso that the disclosure is permitted if a Court determines the disclosure is in the public interest.

3.5 Penalties

The ARTK strongly submits that, consistent with the above advocated approach, criminal penalties should only apply to unauthorised disclosures of information in situations where there is an overwhelming public interest in preventing disclosure, and the consequences of disclosure affect national security or public safety. Provision should be made that no criminal sanction will be applied in situations in which the Court determines that there was a public interest in the disclosure of the information (including disclosures of national security and safety).

Currently a large number of secrecy provisions, if breached, are punishable by imprisonment, notwithstanding the relative triviality of the offence and in many cases they merely seek to protect what can be described as information that is no more than commercial in confidence. Criminal sentences are not appropriate in such circumstances.

The current statutory regime is rendered almost unintelligible by its expanse and restrictiveness such that openness is not encouraged. The penalties are severe ranging from a number of penalty points to 25 years. The general penalty is for six months to two years. The actual examples set out above show that there is no endemic breaking of security related provisions.

The ARTK supports the view expressed by Paul Finn in *Integrity In Government Project*, that Commonwealth criminal legislation:

simply attaches criminal sanctions to the breach of whatever secrecy obligation happens to bind a given public official. This, of itself, gives reason for pause. But what makes it particularly obnoxious is that ... the secrecy obligations imposed by public service legislation are so all encompassing and unreasonable in their information coverage that strict compliance with them is practically impossible. In their current form those obligations have no place in a modern democratic State. There is an urgent need for their recasting. There is a like need to reconsider what their appropriate relationship should be to the criminal law even after that recasting.⁸

It is apparent, both from the recent cases and the extensive use of penal provisions in legislation that the relationship between secrecy provisions and their sanctions creates a culture of secrecy in the public service. John McGuinness' review of secrecy provisions shows public servants are subject to penal sanctions for disclosing innocuous information. John McGuinness has stated:

The fact that a prosecution is unlikely to be initiated for disclosure of non-sensitive information is no answer. A person's potential liability to prosecution should be precisely stated in legislation, not left as a matter of discretion to prosecuting authorities. Uncertainty in operation, as the Franks Committee observed, is one of the major faults of official secrets legislation: 'people are not sure what it means or how it operates in practice or what kinds of action involve a real risk of prosecution'.⁹

⁷ H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Final Report* (1991), [31.50].

⁸ P Finn, *Official Information*, *Integrity in Government Project: Interim Report 1* (1991), 43-44.

⁹ J McGuinness, 'Secrecy Provisions in Commonwealth Legislation' (1990) 19 *Federal Law Review* 49, 72., 73 citing Departmental Committee on s 2 of the *Official Secrets Act 1911* (1972) Vol 1, 14-15 (the 'Franks Committee').

Recent examples of penalties handed down following prosecution include:

- In 2007, Allan Kessing, an officer of the Australian Customs Service, was sentenced to imprisonment for a period of nine months but ordered to be released forthwith conditionally upon entering into recognizance in the sum of \$1,000 without surety, to be of good behaviour for a period of nine months.¹⁰
- In 2008, Tjanara Goreng Goreng was convicted and released pursuant to s 20(1)(a) of the *Crimes Act* without passing sentence upon entering into recognizance in the sum of \$2,000, to be of good behaviour for three years and to pay a fine in the sum of \$2,000.¹¹

The consequences of the imposition of a criminal conviction include the social stigma and discrimination associated with the offender's criminal record, ineligibility to hold public office or appointment as a director or senior manager of a corporation, liability for deportation if a non-citizen, and in some cases, loss of employment and ongoing re-employment difficulties. An offender may also face orders for confiscation of property under the *Proceeds of Crime Act 2002* (Cth).

Such consequences are too severe when compared to similar disclosures in a commercial setting carrying similar duties of fidelity.

In a commercial context, the disclosure of confidential information does not attract such a severe regime and the civil remedies (such as damages or dismissal) are adequate to deter a breach of the duty of confidence. The same should apply in the public sector.

The application of criminal penalties to disclosure by public servants results in a culture in which openness is discouraged for fear of the consequences.

The ARTK believes the criminal law should not be invoked unless there is a clearly identified rationale for the information to be treated as exceptional and thus protected. Only the most serious situations should attract such penal sanctions and even in those situations a public interest exemption should apply.

ARTK submits that as a general proposition disclosure of information obtained in the course of official duties should not attract a criminal penalty other than in clearly defined circumstances.

The mere fact information is obtained in the course of undertaking certain duties is not an adequate reason for secrecy. The inconsistencies referred to in the issues paper starkly illustrate the flaw of such an approach.

Clearly all information obtained by a police officer, a member of the defence force, ASIO, a space safety investigation officer or a transport safety officer is not of such a nature that it should impose an obligation of secrecy punishable by imprisonment.

Only national security and public safety are of sufficient gravity as to warrant the imposition of criminal penalties.

3.6 Confidential Information

The ALRC at paragraphs 2.92 and 2.93 provides the background to this issue namely;

- a number of the secrecy provisions identified by the ALRC aim to prevent the unauthorised disclosure of confidential information.
- Some do this by simply prohibiting the disclosure of 'confidential' information, which may or may not be defined in the Act.¹²

¹⁰ *R v Kessing* [2007] NSWDC 138 [4], [15], [83]. Kessing has appealed his conviction: A Copes, 'Customs Case Back in Court: Whistleblower Fights Conviction', *The Canberra Times*, 3 October 2008, 9.

¹¹ *R v Goreng Goreng* (Unreported, Supreme Court of the Australian Capital Territory, Refshauge J, 14 October 2008).

¹² *Industry Research and Development Act 1986* (Cth) s 47(1). Breach of confidence is discussed further in Ch 1.

- Other secrecy provisions identified by the ALRC aim to protect a specific type of confidential information – that is, confidential commercial information.¹³

The public policy which underlies these provisions is:

the need to ensure that people do not take improper advantage or suffer unjust consequences by reason of their disclosure to the Commonwealth and its agencies of matters that would normally be regarded as business confidences, simply because they wish to secure the benefits and incentives [provided for by an Act].¹⁴

ARTK accepts that government will from time to time become aware of commercial confidential information which it will have an obligation to protect. However, ARTK expresses its concern at the increasing use of confidentiality clauses in contracts and other arrangements to prevent the disclosure of information relating to government projects.

Confidentiality provisions in contracts should only cover material which is truly confidential, such as a trade secret. The terms of an agreement between a commercial entity and the government will not normally be entirely confidential, and often the terms and desirability of such contracts should be subject to public scrutiny. This is especially the case for contracts involving the sale of or provision of public facilities, infrastructure or services.

Many recent contracts impose a general obligation of confidentiality over material that is not truly confidential so that there is a contractual obligation not to reveal the information. This device should not be permitted or condoned in either government departments or in bodies established or funded by government, privately contracted government services and government-subsidised private sector bodies.

This practice was highlighted in 2007 following an investigation by the NSW Ombudsman of the decisions of several NSW public universities to refuse access to their Vice Chancellors' employment contracts.¹⁵ The Universities exempted the contracts in full under s.13(a) of Schedule 1 of the NSW FOI Act on the grounds that disclosure of the information would be a breach of confidence for which legal action could be taken. The NSW Ombudsman established that the exemption had been applied because the contracts contained confidentiality provisions. On advice from the NSW Solicitor General, it was demonstrated that disclosure of the information contained in the contracts would not give rise to an action for breach of an equitable duty of confidence, but only a breach of a contractual obligation not to disclose.

In the NSW Ombudsman's opinion, information such as the terms and conditions of employment contracts of public officers should be transparent and open to public scrutiny, other than in exceptional circumstances, and to predetermine exemption of documents under FOI by applying a contractual obligation to disclose is clearly contrary to the public interest.

The ARTK strongly submits that the practice and device of 'contracting out' of obligations to provide information to the public should not be condoned. Contractual arrangements between private entities and the above bodies should all contain a clause allowing general disclosure of information and allowing any dispute as to confidentiality to be determined by the Information Commissioner.

Section 4: Interface of secrecy laws with other laws which affect the free flow of information

ARTK considers that comprehensive and integrated reform of secrecy laws needs to be conducted such that the guiding principles set down in section 1 of this submission flow through all other areas of law regulating or otherwise having an impact on the free flow of information, so that a coherent approach to privacy, freedom of information and whistleblower laws can be achieved.

¹³ See, eg, *Agricultural and Veterinary Chemicals Code Act 1994* (Cth) s 162(1); *Gene Technology Act 2000* (Cth) s 187.

¹⁴ *Foley v Tectran Corporation Pty Ltd* (1984) 57 ALR 26, 31.

¹⁵ NSW Ombudsman Annual Report 2007-2008, p 148.

In particular, such laws should be informed by the notion that the public are entitled to hold government accountable for its decision-making processes and that access to information is critical to exercising that right, subject only to secrecy laws preventing access where necessary to protect essential public interests.

ARTK addresses some specific issues of importance in respect of the interaction of secrecy and other disclosure laws below.

4.1 Freedom of Information

4.1.1 Secrecy exemption

The ALRC has highlighted the difficulty in striving to achieve an appropriate balance between the competing objectives of the FOI regime, which establishes as general presumption of access to government information by the public unless an exception applies, and the objectives of secrecy laws which seek to restrict disclosure of official information unless it can be established that there is a public interest justifying its disclosure.

Section 3 of the *Freedom of Information Act 1982 (Cth)* (**FOI Act**) provides:

- "(1) The object of this Act is to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth by:
- (a) making available to the public information about the operations of departments and public authorities and, in particular, ensuring that rules and practices affecting members of the public in their dealings with departments and public authorities are readily available to persons affected by those rules and practices; and
 - (b) creating a general right of access to information in documentary form in the possession of Ministers, departments and public authorities, limited only by exceptions and exemptions necessary for the protection of essential public interests and the private and business affairs of persons in respect of whom information is collected and held by departments and public authorities; and
 - (c) creating a right to bring about the amendment of records containing personal information that is incomplete, incorrect, out of date or misleading.
- (2) It is the intention of the Parliament that the provisions of this Act shall be interpreted so as to further the object set out in subsection (1) and that any discretions conferred by this Act shall be exercised as far as possible so as to facilitate and promote, promptly and at the lowest reasonable cost, the disclosure of information."

Whilst the objects of the FOI Act are clearly stated, the FOI Act provides for at least some 17 detailed exemptions to disclosure, as well as other provisions excluding application of the FOI Act to certain institutions and agencies, such as the Inspector General of Intelligence and Security (IGIS), ASIO, ASIS and the Office of National Assessments (ONA).

Notwithstanding the stated objects, the effect of the availability of the wide array of exemptions under that Act gives rise to misconceptions among agency decision-makers that if an exemption exists, it should be applied, such that the reality is that "with a few exceptions the agencies of government have taken the Act as a guide to where they should dig their trenches and build their ramparts."¹⁶

The ability of an agency to exercise its discretion in the public interest to release information subject to an exemption under the FOI Act is expressly available in respect of certain exemptions, such as s 39 (Documents affecting financial or property interests of the Commonwealth), s 40 (Documents concerning certain operations of agencies) and s 43A (Documents relating to research). In other cases, the exercise of the agency's discretion is inherent within the exemption itself. See s 33 (Documents affecting national security, defence or international relations), s 34 (Cabinet documents), s 36 (Internal working documents) and s 37 (Documents affecting law and protection of public safety).

¹⁶ Submission quoted by Senator Andrew Murray in his second reading speech for the Freedom of Information Amendment (Open Government) Bill 2003. See also NSW Ombudsman Report "Opening up government: Review of the *Freedom of Information Act 1989 (NSW)*", February 2009.

Section 38 (Documents to which secrecy provisions of enactments apply) provides that a document is exempt if disclosure of the document, or information contained in the document, is prohibited under a provision of an enactment specified in Schedule 3 of the FOI Act or the provision expressly refers to the application of s 38 of the FOI Act to that document.

In this context, ARTK submits that s 38 of the FOI Act should be repealed on the basis that other exemptions under the Act already adequately deal with government information intended to be covered by relevant secrecy provisions.

As the ALRC concluded in its previous report *Open Government: A Review of the Federal Freedom of Information Act 1982* (1995), it is difficult to conceive of circumstances where information protected by secrecy provisions would not also fall within other exemptions in the Act, such as documents containing information the disclosure of which would prejudice national security, defence or international relations, or constitute a breach of Cabinet confidence, and so forth. This approach would then be consistent with the similar exemption regime for access to documents under the *Archives Act 1983* (Cth).

In such circumstances, public officials would still retain the protection of s 92(1) whereby an officer authorises access to a document in the *bona fide* belief that access was required by the FOI Act, then the authorising officer, and any other person involved in granting access, is protected from criminal prosecution under any applicable secrecy law.

Furthermore, repeal of s 38 would eradicate the potential confusion identified by the ALRC, in cases such as *Kwok v Minister for Immigration and Multicultural Affairs* (2001) 112 FCR 94¹⁷.

That case concerned a request by an applicant for information about alleged criminal activity of the applicant held by the Minister for Immigration and pertinent to a review of a decision denying the applicant a protection visa. The Federal Court held that the secrecy provisions of the *Migration Act 1958* should, in the context of the legislation, be taken to have attracted the s 38 exemption in respect of the information to which access was sought under the FOI Act, notwithstanding that the relevant provisions were not included in Schedule 3 and did not expressly refer to s 38 of the FOI Act.

4.1.2 Exemptions for intelligence or similar agencies

It is contrary to the public interest for all documents originating with or held by Australian intelligence agencies to be entirely exempt from disclosure under the FOI Act merely because of their provenance. There should be an assessment of the nature and content of information contained in such documents or any consideration of whether the public interest in disclosure outweighs any public interest in maintaining secrecy.¹⁸

Such an approach removes all transparency and public scrutiny of the operations of these intelligence agencies, even in circumstances where such scrutiny may be in the public interest, such as revelations of criminal activity or maladministration, or where the information concerns matters other than national security.

Under such a regime, unlawful acts and practices of intelligence and other government agencies such as those committed by the US military in Abu Ghraib prison, or the Australian government's investigations and dealings with Dr Mohamed Haneef, may never have come to light and the issues raised by such incidents would never had been publically debated.

In this respect, ARTK commends the approach taken in the NSW FOI Act which, rather than applying a blanket exemption to all such documents irrespective of their content, instead provides an exemption for documents dealing with law enforcement, public safety or anti-terrorism measures,

¹⁷ ALRC, Review of Secrecy Laws Issues Paper, December 2008, at para 7.21.

¹⁸ *Freedom of Information Act 1982* (Cth), s 7(2A)

except in so far as they reveal that the scope of law enforcement investigation has exceeded the limit imposed by law and disclosure would be in the public interest.¹⁹

4.1.3 Publication scheme

As an adjunct to the repeal and consolidation of exemptions, ARTK also advocates amending the FOI Act, in furtherance of its objects, to include requirements for all government agencies to establish and maintain a publication scheme.

Such an approach could operate in a similar manner to that set out in the United Kingdom's *Freedom of Information Act 2000* (UK) which requires each agency to establish and regularly maintain a register, to be approved by the Information Commissioner and available to the public on its website, setting out the types of information the agency makes publicly available, the manner in which that information can be accessed, and whether there is a cost involved in obtaining such information.

The ARTK notes that the NSW Ombudsman's recent report, *Opening up Government: Review of the Freedom of Information Act 1989 (NSW)*²⁰, contains similar recommendations that NSW FOI laws include requirements for agencies to maintain publication schemes and disclosure logs to facilitate transparency and open access to government information.

4.2 **Public Interest Disclosure Laws**

4.2.1 Current problems

Public servants are subject to the spectre of criminal punishment for informing the public of any potential corruption or maladministration in government. By raising the release of information to the level of criminality and exposing the public servant to penal servitude, a strong and profound message is sent to all public servants that secrecy and information hoarding is the norm to be observed.

In that context the potential consequences for public service whistleblowers who breach secrecy or confidentiality obligations are severe, and include possible imprisonment. A whistleblower may also suffer other consequences, including victimisation in the workplace and flow-on effects to their personal lives.

Whistleblowers need to be protected from retribution for their actions and as people well placed to identify improper activity, they should be encouraged to expose problems by having a range of mechanisms that allow public servants to bring issues to light.

In fact, if an integrated approach to the reform of secrecy laws were implemented, it is arguable that whistleblower legislation may become unnecessary, because disclosure of such information would be considered permissible in the first place, unless established that public interest grounds exist to prevent disclosure. In this respect, the protections that have been necessarily developed for whistleblowers would already inherently exist within the legislative architecture surrounding secrecy laws.

The problems with the present approach are starkly illustrated by three recent examples:

- In 2005 *The Australian* published reports of Customs Officer Allan Kessing on lax airport security, after the reports had been ignored by his superiors. Only after the reports became public knowledge and an independent review that confirmed his revelations was a \$200 million program put in place to improve security.

Allan Kessing was convicted of disclosing official information without authority. He acted in the public interest to protect public safety and national security, in circumstances where his superiors failed to act, and should not have been prosecuted.

¹⁹ *Freedom of Information Act 1989* (NSW), Schedule 1, ss 4 and 4A

²⁰ NSW Ombudsman, February 2009

- An army corporal is currently facing disciplinary action for speaking to Queensland's *Sunday Mail* about his discharge after being found to be obese in a body mass index test. Following an internal investigation, the army identified the officer as the source of the story and instituted disciplinary proceedings against him.²¹

Notwithstanding that there could be no risk of damage to national security by disclosing the information, the officer is afforded no protection under current whistleblower laws for seeking to raise a matter of public importance concerning the manner in which the Army dealt with the issue of the high fat content of food provided to its soldiers, and its impact on their health and wellbeing.

- Queensland nurse Toni Hoffman, had raised concerns about malpractice by Dr Patel with the police, the Queensland Coroner and her employer. Action was not taken and the matter was eventually raised with a Member of Parliament. The problems were brought to the attention of the public and Dr Patel was charged and extradited back to Australia. If she had gone to the media in the first place, immediate action could have been taken to address the danger to the health and safety of the Queensland public.

In these cases, the public servants involved recognised their real duty of fidelity was to inform the public of such material rather than hide it from public view and in acknowledgment of the purpose for which such information is entrusted to them and the government by the public.

The ARTK submits that, if the purpose of public interest disclosure or 'whistleblower' legislation is to:

- facilitate disclosure of wrongdoing;
- ensure that public interest disclosures are properly investigated and actioned; and
- ensure that persons making public interest disclosures are protected against detriment and reprisal,²²

then the need to reform public interest disclosure legislation, particularly at the Commonwealth level, is essential if we are to create a viable and consistent legal framework in which the regulation and enforcement of secrecy provisions can operate.

Under the current law, ARTK remains concerned whilst state and territory public interest disclosure legislation offers specific protection against civil and criminal liability for making protected disclosures of official information²³, there is no such protection at the Commonwealth level. A very limited public interest disclosure protection right is set out in section 16 of the *Public Service Act 1999* (Cth) and provides as follows:

"A person performing functions in or for an Agency must not victimise, or discriminate against, an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code of Conduct to:

- (a) the Commissioner or a person authorised for the purposes of this section by the Commissioner; or
- (b) the Merit Protection Commissioner or a person authorised for the purposes of this section by the Merit Protection Commissioner.
- (c) an Agency Head or a person authorised for the purposes of this section by an Agency Head."

The protection offered by section 16 is obviously very limited in scope and, most alarmingly, does not protect against civil or criminal liability arising under secrecy laws such as the *Crimes Act 1914* and the *Criminal Code 1995*.

²¹ "Whistleblower gap in the front line", *The Australian*, 2 March 2009, p 33.

²² A Brown, *Public Interest Disclosure Legislation in Australia* (2006) Griffith University, 5

²³ Whistleblowers Protection Act 2001 (Vic); Protected Disclosures Act 1994 (NSW); Whistleblowers Protection Act 1994 (Qld); Public Interest Disclosures Act 2003 (WA); Whistleblowers Protection Act 1993 (SA); Public Interest Disclosures Act 2002 (Tas); Public Interest Disclosures Act 1994 (ACT)

Furthermore, incidents of breaches of the APS Code of Conduct can only be reported internally, rather than to independent law enforcement agencies or, where circumstances may warrant, publicly through the media.

The Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs (**Committee**) recently released its report "Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector"²⁴ (**Whistleblower Protection Report 2009**). Recommendations in the report include that:

- new legislation be introduced titled the Public Interest Disclosure Bill with the primary objective to promote accountability in public administration;
- disclosures to be protected include serious matters relating to illegal activity, corruption, maladministration, breach of public trust, scientific misconduct, wastage of public funds, dangers to public health and safety, and dangers to the environment;
- the scope of statutory protection includes protection against detrimental action in the workplace and immunity from criminal and civil liability and other actions such as defamation and breach of confidence.

The Committee also recommended that whistleblowers should be protected if they disclose information to the media in certain restricted circumstances, such as where the matter has been disclosed internally and externally, and has not been acted on in a reasonable time, and the matter threatens immediate serious harm to public health and safety.

ARTK broadly supports these recommendations but considers that the proposed reforms in respect of protection for disclosure to the media are too limited. At a minimum they should be extended to further circumstances, such as the reporting of incidents of illegal activity, corruption and maladministration, where warranted. Providing protection only when the threatened serious harm is 'immediate' is too restrictive to be practicable in most circumstances. A less bureaucratic approach should be adopted.

Furthermore, as ARTK submitted in respect of the review conducted by the Committee prior to the release of its report, there are likely to be circumstances where public officials may be left with no option other than to contact the media directly, particularly if internal and other external reporting channels are not appropriate to deal with the matter adequately or expeditiously. In support of its position, ARTK cited high profile examples of the power of the media in bringing important issues to light, such as the eventual exposure of the practices of Dr Jayant Patel in Queensland.

These issues can be overcome by law reform promoting a culture of openness and transparency in government and public access to official information. The issue is then not who the material can be provided to but rather whether it is necessary for the protection of essential public interests for it not to be disclosed to the public.

4.2.2 Interaction with secrecy laws

The interaction of secrecy laws with public interest disclosure laws differs from jurisdiction to jurisdiction in Australia in terms of application and scope of protection provided to affected individuals. In particular the application of the legislation differs in each state and territory:

- under the Commonwealth laws (s 16) and in NSW (s 21), public interest disclosure legislation applies only to public officials²⁵;
- in Tasmania (s 6), the legislation extends protection only to public officers and government contractors²⁶;

²⁴ *Whistleblower Protection: a comprehensive scheme for the Commonwealth public sector*, Report of the Commonwealth House of Representatives Standing Committee on Legal and Constitutional Affairs, 25 February 2009

²⁵ Protected Disclosures Act 1994 (NSW)

- in Victoria (s 15), South Australia (s 5), Western Australia (s 5) and the ACT (s 15), protection extends to any person making a public interest disclosure about a public official or public body²⁷;
- in Queensland (s 9) persons other than public officers may make protected disclosures but only about limited circumstances such as to disclose substantial danger to the health or safety of a person with a disability, to protect degradation to the environment or to protect another whistleblower from reprisal²⁸.
- Furthermore, the Committee has recommended in its Whistleblower Protection Report 2009 that proposed Commonwealth public interest disclosure legislation should cover a broad range of employees in the Australian Government public sector including APS and non-APS agencies, contractors, consultants and their employees and parliamentary staff.

ARTK submits that the application of such legislation should be rationalised so that it applies consistently to any person making a public interest disclosure about the activities of any government anywhere in Australia, thereby extending protection more appropriately to journalists and other members of the community seeking to expose and address government corruption and wrongdoing for legitimate public interests.

In addition, consistent with submissions made above in respect of proposed Commonwealth legislation, ARTK believes that state and territory legislation should also expressly permit the disclosure of information directly to the media in certain circumstances, such as in order to expose corruption and maladministration as well as to address threats of harm to public safety.

4.3 Privacy

Given that there are likely to be many circumstances where official information, subject to secrecy obligations, will also constitute personal information for the purposes of the *Privacy Act 1988* (Cth), it does not appear feasible to seek to regulate personal information either exclusively through secrecy laws or exclusively under the Privacy Act. However, privacy should not be used a shroud to the provision of information to the public. It is the experience of the members of the ARTK that government departments often make such a claim to avoid disclosure of information that can or should be made public.

The Privacy Act and related secrecy laws should be reviewed to ensure that elements of the different legislative regimes remain consistent and compatible. In this regard, ARTK agrees that use of terminology across privacy and secrecy laws, such as the definition of personal information itself, should be rendered consistent wherever possible.

Furthermore, ARTK has not identified any specific circumstances where an exemption pertaining to a secrecy provision could allow for use or disclosure of personal information in circumstances where such use or disclosure would not otherwise be permitted under the Privacy Act but for the exemptions in IPP 10.1(c), IPP 11.1(d) and NPP 2.1(g), providing for use or disclosure as required or authorised by or under law.

ARTK considers that it is unlikely that the circumstances described above would arise regularly, and if they did so, the potential impact on the rights of the individual under the Privacy Act would be likely to be minimal, given that such use or disclosure exemptions in respect of secrecy laws are predominantly structured around the public interest, such as for the purposes of protection of national security and foreign relations, for assisting criminal investigation, to maintain public safety and related purposes.

ARTK also agrees that it would be inappropriate to introduce criminal sanctions into the Privacy Act.

²⁶ Public Interest Disclosures Act 2002 (Tas)

²⁷ Whistleblowers Protection Act 2001 (Vic); Public Interest Disclosures Act 2003 (WA); Whistleblowers Protection Act 1993 (SA); Public Interest Disclosures Act 1994 (ACT)

²⁸ Whistleblowers Protection Act 1994 (Qld);

However, it does not seem incompatible for civil and administrative remedies to apply along with concurrent criminal penalties applicable under separate legislation, such as the *Crimes Act 1914*, in circumstances where the unauthorised use or disclosure of personal information may also constitute a serious breach of secrecy laws. This circumstance would be analogous to a person's concurrent civil and criminal liability for assault, trespass or damage to property.

Finally, with respect to rights of access to an individual's own personal information held by an agency, the principles set out in IPP 6 and NPP 6.1 of the Privacy Act appear compatible to the extent that they intersect with secrecy laws. Essentially, IPP 6 allows for access to personal information unless the Commonwealth is entitled to refuse access on the basis of other security laws prohibiting access. NPP 6.1 provides a similar exemption, along with a more detailed series of exemptions pertaining to the public interest.

As discussed above in respect of use and disclosure, the approach to access to personal information will therefore be governed by appropriate consideration of matters in the public interest as they may relate to the circumstances of each case, thereby providing flexibility in the conduct of the balancing exercise to determine whether to release such information.

Conclusion

The ARTK urges law reform, in accordance with the proposals set out in this submission, to enshrine public interest considerations as the key determinant of access to government information, so that such access is seen as an essential right for all Australians and integral to accountability in government.

Access to information held by government should be provided as of right, unless on balance it is demonstrably contrary to the necessary protection of essential public interests. Government policy should be fundamentally restructured to adopt a unified and systematic model where information is routinely and proactively released.

Measures such as these will contribute to a socio-political culture which embraces openness and transparency, holding at its core the assumption that government information is ultimately owned by all citizens, held on trust by their government for their benefit, and to be made available to further their rights and purposes and those of the national interest.

Schedule A

- **Dairy Produce Act 1986, sch 2, cl 43**

Section 43 of Schedule 2 to the *Dairy Produce Act 1986* imposes confidentiality obligations on members and contractors of the Dairy Adjustment Authority in respect of protected information relating to the Dairy Structural Adjustment Program and the Supplementary Dairy Assistance (**SDA**) scheme.

These schemes provides for the payment of subsidies to Australian dairy producers out of the Dairy Structural Adjustment Fund. The maximum penalty for breach of section 43 is imprisonment for two years.

- **Agricultural and Veterinary Chemicals Code Act 1994, s 162**

(a) Section 162 of the *Agricultural and Veterinary Chemicals Code Act 1994* imposes confidentiality obligations in relation to the unauthorised disclosure of confidential commercial information by staff of the Australian Pesticides and Veterinary Medicines Authority (**APVMA**), such as information about a chemical product or any of its constituents, or about a label for containers for a chemical product

The maximum penalty for breach of section 162 is imprisonment for two years.

- **Australian Hearing Services Act 1991, s 67**

Section 67 of the *Australian Hearing Services Act 1991* imposes confidentiality obligations on members and consultants of the Australian Hearing Services Authority in relation to information held by the Authority, other than in the performance of duties, or the exercise of powers or functions of the Authority, under the Act. The functions of the Authority are to regulate the provision of hearing services, including research and development into hearing aid devices, in Australia.

The maximum penalty for breach of section 67 is two years imprisonment.

- **Australian Wine and Brandy Corporation (Annual General Meeting of the Industry) Regulations 1999, reg 9**

Regulation 9 of the *Australian Wine and Brandy Corporation (Annual General Meeting of the Industry) Regulations 1999* (made under the *Australian Wine and Brandy Corporation Act 1980* which regulates the promotion and control of grape products in Australia) prohibits persons appointed as tellers for the annual general meeting of the corporation by the Secretary from disclosing any information about the amount of levy or charge imposed on, the voting rights of, or the number of votes cast by, an eligible producer, except to a person (including a court) who is required by the Regulations, or proceedings relating to the Regulations, to determine the number of votes cast for a motion.

The maximum penalty for an offence against the Regulations is, if the person is a natural person, a fine not exceeding \$1,000; or, if the person is a body corporate, a fine not exceeding \$5,000 (section 46, *Australian Wine and Brandy Corporation Act 1980*).

- **Building and Construction Industry Improvement Act 2005, ss 65, 66**

Sections 65 and 66 of the *Building and Construction Industry Improvement Act 2005* impose confidentiality obligations on public officers who have obtained protected information for the purposes of the Act. The purpose of the Act is to provide an improved workplace relations framework for building work to ensure that building work is carried out fairly, efficiently and productively for the benefit of all building industry participants and the Australian economy.

The maximum penalty for breach of section 65 is imprisonment for 12 months.

- ***Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992, s 14***

Section 14 of the *Coal Mining Industry (Long Service Leave) Payroll Levy Collection Act 1992* imposes confidentiality obligations in relation to information relating to the collection of a levy imposed by the *Coal Mining Industry (Long Service Leave) Payroll Levy Act 1992*, on persons who are or have been appointees or employees of the Commonwealth

The maximum penalty for breach of section 14 is \$10,000 or imprisonment for two years, or both.

- ***Dental Benefits Act 2008, ss 34, 43, 44, 45, 46***

The *Dental Benefits Act 2008* provides a framework for the provision of dental benefits in Australia. Sections 34, 43, 44, 45 and 46 impose confidentiality obligations on public officials under the Act. An offence is committed if the person discloses to another person protected information obtained in the course of performing duties or functions or exercising powers under the Act, except as may be permitted by the Act.

The maximum penalty for breach of sections 34, 43, 44, 45 or 46 is imprisonment for two years or 120 penalty units, or both.

- ***Environment Protection (Alligator Rivers Region) Act 1978, s 31***

Section 31 of the *Environment Protection (Alligator Rivers Region) Act 1978*, an Act which provides for the appointment of a Supervising Scientist for the purpose of protecting the environment in the Alligator Rivers Region of the Northern Territory from the effects of mining operations, imposes secrecy obligations on every person who is or has been the Supervising Scientist or a member of staff of the Supervising Scientist, in relation to the direct or indirect making of a record or communication concerning the affairs of any other person acquired by reason of office or employment under or for the purposes of the Act, except as may be permitted by the Act.

The maximum penalty for breach of section 31 is \$1,000 or imprisonment for 6 months, or both.

- ***Food Standards Australia New Zealand Act 1991, s 114***

Section 114 of the *Food Standards Australia New Zealand Act 1991*, which is an Act that establishes a body known as Food Standards Australia New Zealand with functions relating to the development of food regulatory measures, imposes obligations on members and consultants of the Authority not to disclose, except as permitted by the Act, any confidential commercial information in respect of food acquired by reason of being such a member or consultant.

The maximum penalty for breach of section 114 is imprisonment for two years.

- ***National Water Commission Act 2004, s 43***

Section 43 of the *National Water Commission Act 2004*, an Act that establishes the National Water Commission, imposes confidentiality obligations on persons who obtain information in, or in connection with, the performance of a function or duty for the purposes of the Act, in relation to making a record of or disclosing information, and where the record or disclosure is not made in the course of performing that, or any other, function or duty for the purposes of the Act, or the record or disclosure is not required or permitted by law.

The maximum penalty for breach of section 43 is imprisonment for two years.

- ***Wheat Export Marketing Act 2008, s 74***

Section 74 of the *Wheat Export Marketing Act 2008*, an Act relating to the export of wheat and an accreditation scheme for wheat exporters, imposes confidentiality obligations on persons (including those persons who are a member of Wheat Exports Australia (**WEA**)) in relation to what may be done by those persons with protected confidential information as

defined in section 74 of the Act. Section 74 prohibits the relevant persons from disclosing information they have obtained to another person, except as permitted by the Act.

The penalty for breach of section 74 is imprisonment for one year.