Commercial Confidentiality, Criminal Justice and the Public Interest

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Introduction

The privatisation, corporatisation, contractualisation or outsourcing of government services is now part of public sector management orthodoxy. The modern re-invention of government, which sees governments as 'purchasers' of services, rather than providers, as 'steerers' not 'rowers' (Osborne and Gaebler 1992) represents an important shift towards a 'contractual mode of government' (Freedland 1994:86) and away from the notion of government as a collective public enterprise. Although the reasons for this move are open to various interpretations, there is little doubt that this process has had a significant impact upon the nature and extent of government accountability.

At the moment, a number of committees across Australia are examining the implications of the contracting out of government services. These include a Select Committee of the Legislative Council of South Australia,[1] the Senate Finance and Public Administration References Committee,[2] the Administrative Review Council[3] and the Public Accounts and Estimates Committee of the Victorian Parliament which has launched an inquiry into commercial confidentiality and the public interest.[4]

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1 Established in 1995 to enquire into, and report on the tender process and contractual arrangements for the operation of the Mount Gambier prison with reference, inter alia, to the legality of the contract, public standards of accountability as embodied in the contract and the methods by which Parliament can ensure scrutiny of expenditure of public funds in the provision of correctional services by organisations other than the Department of Correctional Services. The Committee has not yet reported.

2 This Committee, 'noting the necessity for public accountability for all government services provided by private contractors', is looking at the rights, interests and responsibilities of consumers, services providers and government agencies, the nature of the tendering process, the jurisdiction of the Ombudsman, the issue of ministerial responsibility, access to information and 'Whether and to what extent claims of commercial-in-confidence should be accepted as limiting the right of Parliament to examine contractual arrangements between government agencies and service providers': see calls for submission, *The Financial Review* 15 November 1996.

3 The Council has released an Issues Paper on the administrative law implications of the contracting out of government services, looking particularly at the rights of the recipients of services under contract as well as mechanisms of accountability (ARC 1997).

4 The Committee's terms of reference require it to (1) ascertain the legal or other frameworks applying to the concept of commercial confidentiality in the public and private sectors in Australia and overseas; (2) establish the major constructs underpinning the notion of government accountability and public interest, and outline existing mechanisms and systems aiming to ensure these; (3) establish what type of information over and above that provided to shareholders of private companies is considered to be in the public interest or required to be made available to ensure public accountability; and (4) establish what principles should guide the application of commercial confidentiality within the public sector in relation to the Auditor-General and the Parliament.

This paper examines the relationship between commercial confidentiality and the public interest with special reference to the provision of correctional services. Central to its arguments are the concerns recently expressed by the Auditor-General of South Australia, Mr Ken MacPherson (MacPherson 1995) that the introduction of privatised or contractual modes of government may lead to the creation of a culture of secrecy and dependency, result in lax internal controls and decrease the level of accountability. The Auditor-General has warned that in the modern managerial culture of government, accountability mechanisms such as freedom of information legislation, Ombudsmen, Parliamentary committees and the Auditors-General have come to be seen as impediments to good government rather than as part of it.[5] In Victoria, the Auditor-General has expressed concerns that claims of commercial confidentiality have hampered his ability to report freely, openly and comprehensively on outsourced activities (Victoria, Auditor-General 1996).

The process of contractualisation

Contractualisation, or outsourcing of government services is a normal activity of government. At the federal level it has been estimated that Australian governments purchased goods and services valued at over $26 billion in 1992–1993 (Seddon 1995:8), while in New South Wales, in 1993–94, government agencies awarded some 82,000 contracts worth $1.064 billion for a wide range of services, including legal services, information technology, cleaning, building and others (ICAC 1995:1). What is new about governments' behaviour[6] is the extent and range of such activities and their effect on traditional public infrastructures.[7] In some spheres of government, some form of 'market testing' is now compulsory.[8]

> Contract has become the most significant mechanism for the ordering of public resources and the delivery of services, both to the public and to the government itself. It has replaced public administration in significant areas of government (Seddon 1995:6).

The reasons for contractualisation[9] are various: they include (Alford & O'Neill 1994:6; McDonald 1994:36; Vagg 1994:292; Shichor 1995:8; ARC 1997:2) a general belief in the virtues of the free market, a belief in public choice theory (that a competitive market place

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5 The general line of argument is that government services are most efficiently delivered through private sector forms or analogues, and that their delivery on a commercial basis requires a form of level playing field, which in turn requires the fetters of government administration and accountability to be jettisoned in favour of the accountability of the general market, primarily through competition (Allars 1989:115).

6 This observation applies with equal force to the private sector where 'down-sizing, right-sizing' and other managerial techniques have resulted in outside contractors replacing full-time employees.

7 The process of contractualisation is not confined to the external delivery of services. Within the public service itself, contractual relationships are created between superiors and subordinates (Alford & O'Neill 1994:4).

8 See, eg, *Local Government (Competitive Tendering) Act* 1994 (Vic) which requires that 50% of services must be subject to a contestable process.

9 A distinction is drawn here between contractualisation and privatisation: contracting out consists in making a contract for a private enterprise to perform a function previously performed within the public sector; privatisation refers to transfer or activity to the private sector. Under privatisation, both the function and organisation performing it are in private ownership (Freedland 1994:86). For the purposes of this submission, there is little practical difference between the two concepts. Corporatisation refers to the conversion of a government business enterprise in to a firm, but one which remains owned by the government (Allars 1995:45).

produces goods and services more efficiently), a philosophical dislike of government, a practical recognition that the state cannot deliver the required services, the desire for greater flexibility in provision of services, the desire to free up state resources for other purposes and the need for increased control of services and costs.

In Victoria, since 1992, a wide range of government activities has been contracted out, some of which have been the subject of intense political debate and speculation. Much of it has been fuelled by the secrecy of the contracts entered into (Alford & O'Neil 1994:2).[10]

Contracting out in the criminal justice system

Contracting out in the criminal justice system is not a new phenomenon. Delivery of food, health services, educational programs, juvenile correctional or care facilities and others have long been part of the correctional environment. In this context, what is relatively new is the contracting out of entire prisons and the extent of that devolution within the context of the prison system as a whole. In Victoria, a number of correctional services have been contractualised, including prisoner security at hospitals and courts as well as prisoner transport between prisons and courts. Proposals are now before the government to contract out Victoria's criminal and prison records. The government has contracted out two men's prisons, each of about 600 beds, and a 125 bed women's prison at Deer Park is now open. It estimated that between 40–50 per cent of prisoners will be in private facilities by 1998.

However, unlike cleaning or information technology services, the provision of correctional services carries with it greater responsibilities and unusual requirements of accountability. Because prisons are concerned with the liberty of individuals, issues of authority, legitimacy, procedural justice, liability and corruptibility must play a major role in their management (Logan 1990:5).

Implications of contractualisation

Over the years government service delivery has, albeit reluctantly, been subject to accountability through administrative law remedies, freedom of information legislation, ombudsman laws, annual reporting requirements, publication of accounts, ministerial responsibility and the like. Imperfect as many of these mechanisms have been, a public law culture has been important in keeping the concept of 'responsibility' in the concept of 'responsible government'.

However, the contractualisation of government functions has created the perception that these activities are no longer within the public realm (Arrowsmith 1990:232). The distinction between the 'public' and 'private' realms has eroded as an increasing number of government functions, including many which were previously regarded as 'core' functions,[11]

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10 See, eg, debates relating to the Crown Casino, the Metropolitan Ambulance computer dispatch system, sale of electricity distribution companies, the Grand Prix (Noone 1996), the Victorian bid for the 2006 Commonwealth games, road services, advertising contracts, payments to consultants, privatisation of Tabcorp, provision of non-emergency ambulance services, the Docklands project and others.

11 The question of what, ultimately, is a 'core' activity is the subject of debate. Currently the core functions of government in Victoria are regarded as 'policy development, resource allocation, specification of services and standards setting, monitoring and regulation' (Public Service Commission 1994, cited in Alford & O'Neill 1994:4). There is almost no activity, whether it be policing, defence, currency, law-making power and others which has not been, or cannot be conceived of as being, in private hands: cf ARC 1997:7; Industry Commission 1996:252.

have been transferred to the private sector.[12] The 'State' contracts as State contracts increase. Recently, two English commentators have observed that, as a result of privatisation and contracting out:

> there is now an increased likelihood that extensive powers will be exercised by bodies which have no direct connection with the State ... [Some] forms of privatisation of public utilities have been accompanied by intricate regimes of statutory regulation. No such regulatory regimes exist, however, where the relationship of private organisations with the State is governed solely by contract, a relationship whose operation traditionally concerns only the contracting parties. The rapid extension of the 'contract State' raises urgently the questions as to whether the private law of contract is sufficient to ensure that public functions are properly supervised or whether their exercise should be subject to judicial review. Put another way, should the State be able effectively to 'contract out' of its public law duties and responsibilities by reconstituting its functions in terms which have been regarded historically as exclusively the province of private law? (Fredman & Morris 1994:69)

These are profound issues. They point to a major transformation in the relationship between the state and the citizen. They are even more important in the context of the criminal justice system, where the implications are not just fiscal but affect basic rights and freedoms. Whether it be the employment of private agencies to deliver prison escort services, prison food, offender supervision, therapy or surveillance, or the total ownership of correctional facilities, what is significant is that, in the name of efficiency, the notion of 'public administration' is being transformed into a series of interlocking private, or semi-private contracts between governments and the private sector.

The implications of the contracting state[13] for the processes of government and for public law of government by contract are many (Freedland 1994:102). They include a diminution of public law accountability (Seddon 1995:15 & Chapter 7; Allars 1995; Freedland 1994),[14] changes in the concepts of accountability,[15] changing notions of 'public interest',[16] increased, or changed, opportunities for corruption in the contracting process (NSW, Independent Commission Against Corruption 1995:2; Hodge 1996; UNSW, Public Sector Research Centre 1996:251)[17] and a diminution in the challengeablity of contracts.

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12 On the validity and usefulness of the public/private distinction see Allars 1995:46 and references cited therein. The ARC has also noted the tendency for private and public law to merge in the areas of privacy law and the development of industry specific ombudsmen and other complaint-handling schemes (ARC 1997:3).

13 The process of contracting out carries with it the possibility of almost infinite regression. By a process of multiple contracting, not only may the primary service be contracted out, but the processes of auditing, evaluation and monitoring may also be contracted out. Government is thus further and further removed from the service it once controlled totally. Additionally, by means of contracting out and delegation of powers, contractors may be authorised to exercise all or any of the functions of government officials, such as prison governors, prison officers or community corrections officers, without formally holding such positions and without the same level of training or possibly accountability; see, eg, *Corrections Act* 1986 (Vic), s9A.

14 Public, or administrative law remedies have been developed to regulate the activities of governments and agencies. Corporatisation of government functions may place the new entities beyond the reach of the courts in their exercise of public law powers.

15 Accountability is determined less by conceptions of the public interest than by considerations of financial efficiency and cost related numerical targets.

16 Contracts limit the number of interested parties, whereas 'public interest' recognises a wider range of constituencies.

17 This can occur through the lack of a competitive selection process (in Victoria it has been reported that 157 contracts each worth over $100,000 have been awarded without going to tender between January 1993

One crucial problem arises from the operation of the doctrine of 'commercial confidentiality' which is increasingly being used as a shield to mask the activities of government.

In Victoria, both in relation to state-owned enterprises and in the budget papers relating to core government activities, less and less information is becoming available. The *State-Owned Enterprises Act* 1993 restricts access to the financial and operating records of state-owned authorities and therefore diminishes the opportunity for independent scrutiny.[18] The Budget papers are becoming more opaque as more government spending is channelled through contracts with the private sector. Kenneth Davidson, economic commentator for *The Age*, argues that expenditures incurred by the process of 'steering' rather than 'rowing' are now:

> hidden behind the notion of 'commercial in confidence.' This is simply a fig leaf to hide lack of accountability. Lack of accountability leads to bad government and ultimately to corruption. ... I believe that if you take the Queen's shilling, the fact of the taking and the precise reasons why it was took should be made public in a manner that is easily accessible by members of the public who have not spent a lifetime trying to find their way through a labyrinth of state public accounts.

The remainder of this paper examines the effects of contractualisation and the concept of commercial confidentiality upon mechanisms of accountability.

The basis of confidentiality rights

Knowledge, whether it be in private, business or government hands, is power. Disclosure of information can therefore result in a diminution of power (Cockburn & Wiseman 1996:1). Traditionally, the common law has supported the control of knowledge and has protected confidences on the ground that those who create knowledge can expect to reap their legitimate commercial reward (Cockburn & Wiseman 1996:3). Nonetheless, governments and courts have recognised that the rights of privacy, secrecy or confidentiality are not unqualified, that there must be 'a balance between the public interest in the dissemination of information and the private interest in the ownership and control over the exploitation of information' (Cockburn & Wiseman 1996:1).[19]

Obligations to disclose information have been created both under the common law and statute (Cockburn & Wiseman 1996:4–5). At common law they may arise out of general contract law, under the doctrines of mistake, misrepresentation or unconscionable dealing and under the law of fiduciary obligations. Under statute, obligations to disclose have been

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and December 1995; the minimum value of these contracts is $15.7m, but the estimated total value is $60m: see *Herald Sun*, 1 December 1995 '$60m Secret State Deals'), the selection of contractors who had prior relationships with the purchaser, partiality and collusive tendering. In his study of contracting out, Hodge (1996) found no evidence of corrupt practices in Victoria, but argued that the exclusion of such activities from public scrutiny could open the way for such practices: see *The Age* 12 July 1996 ('Tenders Could Lead to Deals: Study'). A particular problem is the relationship between political donations and the awarding of contracts.

18 See Alford & O'Neill 1994:28; Kenneth Davidson, 'More Data, Please, Mr Treasurer', *The Age* 8 September 1995.

19 The obligation to disclose or disseminate information and the ability to exploit such information are not necessarily incompatible. The laws applying to protection of intellectual property provide one example of attempts to advance the production of knowledge while rewarding the producer.

created under freedom of information (FOI) laws, corporations law, in relation to employment contracts and in a range of other areas.

Commercial confidentiality

Both at common law and under statute protection is afforded to trade or business secrets. Trade secrets generally consist of 'items or collections of information which, because of their inaccessibility to the rest of industry, confer a competitive advantage on the firm which possesses or uses them' (Gurry 1984:6).

Information is a commodity which has economic value which partly reflects the effort expended its development. Confidential information of this nature will generally be protected if it is not public property, can be identified and particularised, and is regarded as secret. Finn has outlined the general legal principles concerning confidential information:

> A person who receives or acquires information in confidence cannot use or disclose that information for any purpose other than that for which it was received or acquired without the consent of the person or body from whom or on whose behalf it was received or acquired, unless that use or disclosure (a) is authorised or required by law; or (b) is justified in the public interest (1991:120).

According to Finn, in order to be protected in this manner, the information must be confidential, that is, it must be relatively secret and not public property or knowledge (*Interfirm Comparison (Australia) Pty Ltd v Law Society of NSW).* Its confidential nature may be indicated by explicit agreement to that effect. The aim of the obligation is to maintain trust in relationships and to protect the legitimate interests of the information owner. Accordingly, the consent of the person to whom the obligation is owed will make permissible a use or disclosure which would be impermissible and wrongful without consent.

Although there is a public interest in maintaining confidences:

> the law does not exist merely to protect confidentiality for its own sake. Rather, it is a tool in the preservation and promotion of quite diverse individual, social and public values and public interests. And it is these values, these public interests, that can provide the foundations for the transformation of confidentiality from a privacy expectation, from a matter of ethics, or whatever, into a concern of the law (Finn 1984:498).

Where claims of commercial confidentiality are made to oppose the release of information, it should be demonstrated that the disclosure will breach the trust between the parties and/or will adversely affect the commercial interests of the contractor, for example, by giving a competitor an unfair advantage (Evan 1996:11). In the public arena, where private information has been transmitted to government as part of a commercial arrangement, the conflict of values is patent. On the one hand, the promotion of trade and commerce lies at the core of the market economy. In a recent review of contract correctional services in Victoria, the now Commissioner of Correctional Services, Mr John van Groningen stated:

> Critics who seek total and unfettered access to these companies as public members must consider the critical nature of certain material relating to sensitive commercial information and the vulnerability they would expose the contractor to if they were to have an open door to all persons seeking details of the companies' financial and procedural systems (1994:34).

On the other hand, governments 'are constitutionally required to act in the public interest' (*Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd:* 191 per McHugh J; see also *Stephens and Ors v West Australian Newspapers Ltd:* 114 per McHugh J) recognising, however, that the interests of government and the public interest are not coterminous (Finn 1991:18). In a democracy, a government must accept that it must subject the discharge of its functions to the scrutiny of the opposition and the constituents. In

Commonwealth of Australia v John Fairfax & Sons Ltd (1981) 55 ALJR 45, 49, Mason J stated that it is:

> unacceptable in our democratic society that there should be a restraint on information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action.

This approach has been reinforced by the High Court in the political speech cases where it recognised an implied freedom of communication in the Constitution (*Theophanous v The Herald and Weekly Times Limited and Anor*; Murphy 1996:3). Recently, the Australian Law Reform Commission, in a review of freedom of information laws, observed that as a general rule, government information should be accessible to the people because it belongs to the people, subject to need to protect the privacy of individuals and the competitive commercial information of third parties (ALRC 1995:6). It was of the view that accountability was the essence of a democratic society and that accountability meant more than merely the right to vote at an election. It stated:

> Access to government information is a prerequisite to the proper functioning of a democratic society. Without information, people cannot exercise their rights and responsibilities or make informed choices. Information is necessary for government accountability. Limited information can distort the accountability process: governments are questioned about the wrong issues and programs are incorrectly evaluated (ALRC 1995:6).

Balancing confidentiality and accountability

The question of accountability is a complex one (Mulgan 1997). The concept of accountability refers to the requirement that a person or organisation be subject to oversight, direction or a direction that they produce information (Thynne & Goldring 1987:8).[20] Its guiding values include 'openness and transparency in decision making, fairness, consistency, rationality, impartiality, lawfulness and probity of actions, appropriate use of information, and accessibility to individual grievance procedures' (Commonwealth Ombudsman 1996:157).

As the ARC notes:

> Accountability has been described as being fundamental to good governance in modern open societies. Public acceptance of Government and the roles of officials depends upon trust and confidence founded upon the administration being held accountable for its actions (1997:10).

In the context of the process of contractualisation, accountability may refer to the respective responsibilities of both governments and contractors to a range of constituencies: the executive arm of government to Parliament, to the courts and to citizens and contractors to the government, to the service recipients and to other persons who may be affected by their activities (ARC 1997:7).

In the correctional context, the history of the accountability of public prisons in Australia has not been a happy one. The trail of Royal Commissions such as the Nagle Commission in New South Wales and the Jenkinson Commission in Victoria testify to the fact that

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20 'Accountability' can be distinguished from 'responsibility': Thynne & Goldring 1986:7. The term 'responsibility' itself has various meanings including the allocation or undertaking of duties or tasks, the requirement that a task be performed to an expected level of performance, legal liability and may also extend to the notion of 'responsiveness' to an electorate or constituency.

prisons have been dangerous and secretive places. The problem of the accountability of prisons is clearly not confined to private prisons. Through the centuries, both public and private correctional providers have been guilty of abuse, mismanagement, corruption and waste. The following arguments in favour of greater accountability in the private correctional sphere do not assume that public prisons, and the system of accountability which has operated to date, have been perfect. Far from it. Rather, what is being suggested is that the process of contractualisation has added an additional layer which has made accountability more difficult and costly (Keating 1990:132).

Mechanisms of accountability

What accountability mechanisms are required under the new system of contractualised government?[21] How effective are they in the face of the burgeoning claims to commercial confidentiality?

Freedom of information laws

If, as has been argued previously, access to information is central to concepts of accountability, then freedom of information laws are central to the question of that access. Freedom of information laws are in place in all jurisdictions.[22] The principle underlying the legislation is expressed in its objects. Section 3(1) of the Victorian Act states:

> The object of this Act is to extend as far as possible the right of the community to have access to information in the possession of the Government of Victoria for certain public purposes — by
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> (a) making available to the public information about the operations of agencies and, in particular, ensuring that rules and practices affecting members of the public in their dealings with agencies are readily available to persons affected by those rules and practices; and
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> (b) creating a general right of access to information in documentary form in the possession of Ministers and agencies limited only by exceptions and exemptions necessary for the protection of essential public interests and the private business affairs of persons in respect of whom information is collected and held by agencies.

The FOI provisions are problematic for a number of reasons. First, there is the question of whether the term 'agency' does, or should, incorporate government business enterprises (GBE), whether corporatised or not, and whether the work of unincorporated government agencies should be regarded as being equivalent to business enterprises.[23]

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21 For an extensive discussion of government accountability and administrative law see ARC 1997: Chapter 2; Thynne & Goldring 1987.

22 *Freedom of Information Act* 1982 (Cth); *Freedom of Information Act* 1982 (Vic); *Freedom of Information Act* 1989 (NSW); *Freedom of Information Act* 1989 (ACT); *Freedom of Information Act* 1991 (SA); *Freedom of Information Act* 1991 (Tas); *Freedom of Information Act* 1992 (Qld); *Freedom of Information Act* 1992 (WA).

23 Under federal law, a wide range of GBEs have been exempted from the application of the FOI legislation, including the Commonwealth Bank, Telstra, the Australian Postal Corporation and others (Allars 1995:47; ARC 1997:5). Under Victorian law, documents may be exempt if the agency engages in 'trade or commerce'. On the characterisation of such agencies see *Re Marple and Department of Agriculture*. In a recent report on FOI laws, the Administrative Review Council and the Australian Law Reform Commission

The second problem arises from the vagueness and ambiguity inherent in section 3(1)(b) of the Act which allows for latitude in its interpretation. As Peter Bayne, a leading commentator on freedom of information legislation has observed:

> They raise the issues to be addressed, but do not, of themselves, yield an answer to the question of whether an exemption applies in that matter. As in any administrative law context, to draw the line on the limits of power requires resort to some premise not explicitly recognised by the legal doctrine (1993:9).

It is that unarticulated premise which is at issue in the conflict between commercial confidentiality and the public interest. Freedom of information laws exempt documents if they contain information obtained 'from a business, commercial or financial undertaking'. (*Freedom of Information Act* 1982 (Vic), section 34(1)) and[24]

(a) the information relates to trade secrets, or other matters of a business, commercial or financial nature[25] or

(b) the disclosure of the information would be likely to expose the undertaking to disadvantage.

In deciding whether disclosure of information would expose an undertaking to disadvantage, the agency, or Minister, or ultimately, the Administrative Appeals Tribunal, may take into account such considerations as whether the information is generally available to competitors, whether the information could be disclosed without causing substantial harm to the competitive position of the undertaking and whether there are any considerations in the public interest in favour of disclosure which outweigh considerations of competitive disadvantage to the undertaking.[26]

In Victoria a number of attempts have been made under the FOI legislation to gain access to documents relating to private prisons, prisoner transport and security. Access to some of these documents, or parts of these documents has been obtained only after lengthy actions in the Administrative Appeals Tribunal which have been expensive and time-consuming. These applications reveal the deficiencies of the public accountability mechanisms upon which the government has based its claims to make the system more open and accessible.

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recommended that a GBE engaged in commercial activities in a competitive market should not be subject to FOI law, even when it had some regulatory functions or community service obligations (ARC/ALRC 1995; ARC 1997:5) but that other arrangements be made for public access to information. This recommendation was opposed by the Commonwealth Ombudsman. There is a broader question here as to whether FOI laws should be extended to the private sector 'in particular in areas of collective consumption such as health care and education, and essential services relating to water, electricity, gas and telephone services delivered by private sector individuals or organisations, whether independently or by 'contracting out' arrangements with governments' (Allars 1995:51; see also ARC 1997:71).

24 Similar provisions exist in legislation in other jurisdictions. Under commonwealth legislation, commercially sensitive material includes trade secrets, information concerning a person, organisation or undertaking in respect of business, professional, commercial or financial affairs, if disclosure would, or could reasonably be expected to, have an unreasonable adverse effect on business and information of that nature which could reasonably be expected to prejudice the future supply of information to the Commonwealth: *FOI Act* s43(1).

25 A provision to this effect is also found in the *Corrections Act* 1986 s30(1)(i)(ii) in relation to contracts entered into by the Director-General or the Minister.

26 *FOI Act* 1982 (Vic) s34(2).

A considerable amount of case law has developed in Victoria relating to the interpretation of these sections (Murphy 1996; Hurley 1996).[27] Many of the recent cases have involved documents involving financial relationships between the government and the public sector. As Murphy notes:

> The cases have a number of common features in that they were all the subject of political controversy, they involved the expenditure or potential expenditure of government monies, they all relate to commercial or quasi-commercial activities of government and in all of them there were existing forms of accountability mechanisms available. Speaking generally the applicants were substantially unsuccessful in the applications (1996:11).

Government or private information?

Freedom of information laws are intended to permit access to government information whilst at the same time protecting private information in the hands of government (Lane 1996). However, not all information held by government is identical in nature or importance. Finn (1991:19) has identified four types of information in the public sector: (a) public information, being the stock of knowledge publicly available in the community; (b) third party information, being information supplied to government by third parties about their private, personal or business affairs; (c) government information, which is information of, or about government which has been generated by government; and (d) proprietary information which is owned by government.

Clearly a distinction needs to be drawn between private information which has been compulsorily obtained from a person, such as census data, and private information which has been volunteered to government, whether for commercial purposes or otherwise. Coerced information should be afforded more protection than volunteered information in order preserve the framework of trust which the reciprocal relationship between the state and the citizen requires (Gurry 1984:18). However, information *relating to* the private sector is not the same as information *received from* it. There is a tendency to confuse the two, with governments claiming that any information in the former category is as entitled to the same degree of confidentiality as the latter. This is too broad. In some freedom of information cases in Victoria, access has been sought to the contents of the contracts entered into, or proposed to be entered into, between governments and private contractors. Initially, access has been refused on a number of grounds, including commercial confidentiality. However, when obtained,[28] it is clear that the information can properly be classed as, in Finn's terms, 'government information' rather than information provided by the contractor to the government. The contracts have been drawn up by the government itself and contain relatively standard terms which cannot reasonably be regarded as either the information of, or trade secrets belonging to, the contractor.[29]

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27 Recent cases which have involved the claim of commercial confidentiality include *Re Mildenhall and Vic Roads* 19 February 1996 (re outsourcing a road plant branch); *Re Thwaites and Metropolitan Ambulance Service* 5 February 1996 (private ambulance services); *Re Marple and Department of Agriculture* (lease of government veterinary clinics); *Re Mildenhall and Department of Treasury (No. 2)* (appointment of financial advisor to Tabcorp); *Re Mildenhall and Department of Treasury* (Grand Prix). Cases which have upheld the need for commercial confidentiality include *Re Conlan and Rural Finance Commission; Re Pescott & Victorian Tourism Commission (No 2); Re Binnie and Department of Industry, Technology and Resources*; Re State Bank of New South Wales and Department of Treasury.

28 A number of contracts relating to the provision of prison transport services, hospital and court security have been released under freedom of information applications, though not in their totality.

29 These relate to such matters as: definitions and interpretations, engagement, control period, security,

The argument that disclosure of financial and similar information would damage the reputation of the government by diminishing the confidence of contractors in the government's ability to maintain commercial confidentiality (*Haermeyer & Mildenhall v Department of Justice,* witness statement, John van Groningen) is tautologous and based on an unsound analogy with information which has been coerced or compelled. It is tautologous because, if one accepts as a general principle that the expenditure of public funds carries with it different responsibilities than the expenditure of private funds, and that those who deal with governments in future could, in the absence of unusual or special circumstances, expect that information provided by them will be made public (*Thwaites v Department of Health and Community Services*), then there cannot be a betrayal of trust because no confidence is offered. Because a tender for a government contract is a voluntary, not coerced, activity, those who wish to enter into such an arrangement must be prepared to abide by the rules of the tender, which could, and in my opinion should, include a disclosure requirement. There is no moral obligation upon government to maintain the privacy of such information.

That there is a public interest in government activities relating to the private sector has recently been re-affirmed by the High Court in *Esso Australia Resources Ltd v Plowman*, which concerned an arbitration of a dispute about natural gas pricing between two public companies on the one hand and various public utilities, on the other. The Victorian Minister for Energy and Minerals and the utilities had sought a declaration that information concerning the pricing should not be revealed (Seddon 1995:262). The High Court, by a majority, refused to grant the declaration, stating (at 413 per Mason CJ):

> The courts have consistently viewed government secrets differently from personal and commercial secrets. As I stated in *The Commonwealth v John Fairfax & Sons Ltd*, the judiciary must view the disclosure of governmental information "through different spectacles". This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure ...
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> The approach adopted in John Fairfax should be adopted when the information relates to statutory authorities or public utilities because, as Professor Finn notes, in the public sector "[t]he need is for compelled openness, not for burgeoning secrecy". The present case is a striking illustration of this principle. Why should the consumers and the public of Victoria be denied knowledge of what happens in these arbitrations, the outcome of which will affect, in all probability, the prices chargeable to consumers by the public utilities.

These comments would apply with even more force in relation to contracts entered into between governments and correctional agencies.

Government trade secrets

Where a government corporatises an activity and places it in competition with the private sector, it might be argued that the government is engaging in a commercial activity and is thus itself protected by commercial confidentiality. Its own costs and expenses might then be regarded as trade secrets, revelation of which would weaken its place in the market.

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movement of prisoners, recording and reporting, performance criteria, administrative standards, employee standards, minimum standards, annual fees, start-up, performance security, term and further conditions, contract monitor, liabilities, indemnities and insurances, dispute resolution, default and determination, contractor's property, confidentiality, governing law and venue, waiver and variation, entire agreement, time of essence, further assurances, severance, notices, no assignment, costs. For a discussion of model prison contracts in the United States see Robbins 1989.

Even in the absence of corporatisation, the argument relating to government trade secrets is being advanced in the context of competitive tendering, compulsory or otherwise, as well as in relation to the process of evaluating competing bids for government services. In *Haermeyer & Mildenhall v Department of Justice*, the Project Director of the New Prisons Project, Mr Tony Wilson claimed that benchmarking costs and financial calculations,[30] which formed the basis of the comparison between public and private sector delivery, were trade secrets of the agency, exposure of which would disadvantage the government. It was argued that the private sector could reconstruct the benchmark for subsequent projects and price their bid competitively. If such logic were taken to its conclusion, the cost of any government activity could be considered a trade secret if there were a possibility that at some time that service could be put out to tender.

Although such arguments may have some force in relation to the provision of other services they should have little or no application to the provision of correctional services. Unless and until the government considers that the running of prisons, probation and parole service are commercial enterprises, their functions must be viewed as governmental, and the information created by them, as public information.

The relative efficiency and cost of delivering correctional services in the public or private realm is the main rationale for market testing and outsourcing of public services. These are complex matters which require careful examination but cannot be undertaken if the comparative information is not made public on the ground of commercial sensitivity.[31] To be valid, cost comparisons between institutions require similar institutions with a relatively similar inmate mix in similar areas. Cost comparisons must include not only the relatively straightforward costs of running the prisons but also such matters as capital costs, the costs of financing, expenditures by other agencies, for example, medical services, the costs to government of contractualisation or privatisation,[32] the costs of monitoring the contract and taxation revenues gained or foregone (McDonald 1990; Shichor 1995:137).

However, public costs are often unknown or uncalculated, while private costs tend to be regarded as commercially confidential. For a proper evaluation and comparison of costs to take place, both the public and the private sectors will need to make their bottom lines, if not their calculations, more transparent. In the absence of valid comparisons, the process of contractualisation will continue to be based on ideology rather than economics.[33]

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30 The government was, however, willing to release information relating to the definitions of benchmarking and the composite factors making up the benchmark. These related to designated capacity, average prisoner occupancy, staff numbers, recurrent costs, overheads, education and training and the like.

31 A prime example of this problem is found in this exchange in the British Parliament in June of 1996. A question was asked of the Home Secretary as to whether he would publish the methodology and research used to compare the cost of public and private gaols during 1993–94. The response was that the study, carried out by a private organisation, could not be published because it contained a considerable amount of commercially confidential information. It is of interest to note that an evaluation of the Wolds Remand Prison in England found the task of comparing public and private facilities a 'complex exercise', made more difficult by the claims of commercial confidentiality. The reviewers urged that details of contracts and costs of operation of the private sector prisons should be available to the same degree as in the public sector (Bottomley et al 1996).

32 Including costs of preparation of contracts, legal costs, costs of evaluation of tenders, probity auditing, etc.

33 A 1996 General Accounting Office examination of five studies comparing the operational costs and quality of service in public and private prisons in the United States found that it was almost impossible to draw conclusions about the cost savings of private prisons: US GAO 1996; Note, Corrections Alert 1996.

It is of interest to contrast the obsessive desire for secrecy in Australia with the situation in the United States where State and federal procurement laws generally require that contractual arrangements be publicly accessible. There is also the federal requirement under Securities and Exchange Commission rules that publicly listed companies must lodge their procurement contracts for inspection. This has led, in some instances, to the ironic position of Australians being able to access some details of contracts relating to the Australian-based activities of American corporations through United States corporate law, but having those same documents denied to them locally because of claims of 'commercial confidentiality'.[34]

Detriment

Under Victorian FOI law, it is not sufficient to prevent disclosure merely to claim that the information obtained relates to business, commercial or financial matters (see *Re Gordon and Commissioner for Corporate Affairs*; *Re Gill and Department of Industry, Technology and Resources*; *Re Croom and Accident Compensation Commission*; *Re State Bank of New South Wales and Department of Treasury*). Some detriment to the person or organisation whose information may be released must also be shown. What kinds of detrimental effects may occur if information of this kind were released?

Information about the amount paid under contracts,[35] or other information of a financial nature, is the type of information most likely to be withheld from third parties.[36] This is the information which is potentially of greatest value to competitors and is information provided by the contractor. It would consequently be most likely to be protected as commercially confidential. It has been argued that release of detailed financial information would permit competitors to become aware of the financial terms of the contract and would disadvantage the successful tenderer in the future (*Haermeyer & Mildenhall v Department of Justice*, witness statement, John van Groningen), enable competitors to become aware of the contractor's management and performance strategies and enable future

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34 See, eg, the efforts of the *Sunday Herald Sun* in 1995 which obtained copies of the contract dealings of the Wackenhut Corporation filed with the United States SEC in relation to the construction of the Fulham Prison in Sale which showed the cost of construction ($53m) and the cost of the first year of operation ($14m); see *Sunday Herald Sun* 26 November 1995 ('Private Jail Firm Under Fraud Probe'). Details of the sale of the State's electricity distribution networks were also made available on the Internet through the SEC, whereas they were kept secret in Victoria: see *The Age* 27 October 1995 ('Stockdale Defends Contract Secrecy'). Access to such documents may not be simple, as it is necessary to identify the relevant documentation, which may take the form of a number of documents, some of which may incorporate others by reference (Harding 1997). Some contracts may become public by other means, such as leaks: see *The Age* 18 December 1995 ('Prison Operator Paid for Overcrowding) which published details of contracts relating to the Junee Correctional Centre in New South Wales, the Arthur Gorrie Detention Centre in Queensland and the Fulham Prison in Victoria.

35 In Victoria, the structure of payments to private prison contractors is quite complex. Contractors are paid on a performance basis, but the payment stream is made up of three parts: an accommodation services charge, for the provision of the facilities; a correctional services fee, for the operation of the prison; and a performance linked fee, which represent the investment reward, or the profit, on the contract: *New Prisons Project Bulletin* December 1995.

36 However, it is not the only kind of information sought to be withheld on these grounds. According to some reports, a coroner investigating a death in a private facility in Queensland was unable to obtain information about the contract, or staffing numbers on the night in question because these matters were commercially confidential: *Independent on Sunday* 16 September 1994; *The Age* 18 December 1995. In England, a parliamentary question on the level of chaplaincy services in a private prison could not be revealed for similar reasons: *The Law Magazine*, 22 January 1988.

bidders to undercut the present contractor when bidding on a contract renewal. At the same time it is argued, possibly inconsistently, that the tendering process would be affected by reducing the possibility that future tenderers may offer significantly more competitive bids (*Haermeyer & Mildenhall v Department of Justice).*

However, there are a number of significant problems with these arguments. As Gurry argues, trade secrets are, by their very nature, anti-competitive (Gurry 1984:9). Laws which protect information, while rewarding the creator of the secret, lessen competition. A truly competitive market requires fully informed participants so that, rather than restricting access to price information, it could be argued that its revelation would spur others to compete more vigorously. Vagg has written

> There can be no reason for such secrecy except to prevent the cost basis of the contract from being discovered by possible competitors. Yet not only should this information be made public as a matter of legitimate public interest in government expenditure, the very idea that the terms of successful government contracts should not be publicly available seems to run counter to the idea of a commercial 'level playing field' on which different firms can properly compete (1994:300).

A distinction is sometimes drawn between the total amount of the contract and its constituent elements, between the result of a transaction and the transaction itself. Whilst the former should be made public, a case could be made that such matters as hourly rates, expenses and various other costs could be regarded as being in the nature of a business secret (*Re Ventura Motors and Metropolitan Transit Authority).* The University of New South Wales Public Sector Research Centre has suggested that confidentiality should be maintained during the tender process but that, once a contact is signed, most of its provisions should be made public, with the onus being on the contractor to argue for exclusion of provisions on grounds of commercial disadvantage (UNSW, Public Sector Research Centre 1996:257).

Though the claims for commercial confidentiality of fees and costs are frequently and stridently made, the inconsistent application of the commercial confidentiality rule in Victoria has undermined its commercial or ethical basis.[37] Documents released by the government of Victoria in a number of freedom of information applications relating to the prison privatisation process have revealed not only the total costs of services, but also hourly rates, expenses, and start up fees. Among the documents released were[38] some relating to

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37 The inconsistency in the approach by various levels of government in different jurisdictions to the disclosure of commercially sensitive information has been noted by the Industry Commission (1996:93). It observed that in Queensland, the contract for Borallon prison is publicly available, except for details on price, and that this represented a move away from the government's previous stance which was to treat the whole contract as commercial in confidence. The Commission was not able to establish the Victorian government's policy on information disclosure (1996:94). At the federal level it would appear that an unsuccessful tenderer may seek information about who was the successful tenderer and what price was accepted. Commonwealth: Finance Regulation 43B requires that details of supplier, supplies and price of successful contract for item costing more than $2000 must be published in the Gazette: Seddon 1995:261. At the local government level, the *Local Government (Competitive Tendering) Regulations* 1994 require a register to be kept of certain information relating to the tendering process.

38 In 1996, independent of FOI requests, the Department of Justice released the briefing document provided to short-listed parties for the new women's prison. According to the Minister for Corrections, the brief was published in its entirety except for a small number of commercially confidential exclusions. The brief contains the project objectives, prison management principles, the concept for the prison, commercial principles in relation government financial policy objectives and comprehensive contractual safeguards.

the provision of legal and financial advice, project management, process auditing and prisoner transport services, all of which contained financial details relating to expenses, daily and hourly rates of staff, fees charged, estimates of time, maximum fees and comparisons of competing consultancy rates. There appears to be no logical grounds for the distinction between these precise financial details relating to the provision of ancillary services and those relating to prison contracts themselves.[39]

Whose confidence?

Where private individuals only are involved, a claim for confidentiality of their contract or agreement may be accepted on the basis of privacy and that no state or public interest may be involved (Duncan 1996).[40] However, where those latter interests are involved, any agreement with regard to confidentiality cannot and should not be determinative of the issue (*Mildenhall and Vic Roads*).

It has been earlier argued that a distinction should be drawn between information provided to governments, possibly under compulsion, and information obtained voluntarily by government, or created by government itself. Although commercial confidentiality is intended to protect the interests of third parties, it is standard practice in Victoria for contracts drawn up on behalf of the government to contain clauses binding both parties to secrecy.[41] Remarkably, it is often government which most stoutly resists disclosure of the contractual information, even where the contractor has no objections to its release. These 'self-limiting' clauses should have no place in government contracts.

Where governments act in a commercial, or semi-commercial capacity, the conflict between their public and private interests is highlighted. In Victoria, the government has established a number of proprietary companies to run events and promote the State in respect of the Grand Prix. Contracts between the government companies and other companies contained confidentiality clauses. The ambivalent views of the Victorian Administrative Appeals Tribunal towards such clauses is evident in the following case in which the

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39 State budget papers have usually provided details of total outlays, so it is often only a matter of waiting for the contracting agency's annual report to be produced. Thus, the Annual Report of Corrective Services in New South Wales in 1995 contained a one line item under the heading 'Other Operating Expenses' titled 'Junee Management Fees' with an amount of $17,088,000 for the year ending June 1995. The note to that item states: 'The Junee Correctional Centre which accommodates 600 inmates is operated by Australiasian Correctional Management Pty Ltd under a five year contract which commenced in April 1993. The management fee is fixed for the term of the contract and is subject only to annual inflation factor.' The Victorian Government's Autumn Economic Statement of 1996 noted that $130m was being spent on three new prisons.

40 However, Duncan (1996:261) notes that, even in relation to private contracts, 'a line should be drawn between a legitimate right to protect true confidential information and the right of the other party to compete properly in the market place.' The difficulty of drawing the line between private agreements and public interest is indicated by the confidentiality agreement entered into by the former Finance Minister Ian Smith and his former employee and lover Ms Cheryl Harris in relation to payments made in settlement of legal claims: *The Age* 20 March 1997 ('Harris Refuses to Disclose Payout'). The public interest involved here concerns the possible use of taxpayers' funds in the settlement or payment of legal fees. Whether Mr Smith was acting in a public or private capacity remains a moot point.

41 The standard clause in the contracts so far released requires the contractor to maintain absolute confidentiality with regard to the subject matter or terms of Agreement or negotiations leading up to it for all time, unless such details have been released into public domain by Correctional Services, or have come into the public domain for other reasons or by process of law.

applicant for details of the contracts had argued that the parties could not rely on the confidentiality clause. In this case, the applicant had argued that

> ... it was contrary to the public interest not to disclose the documents where the foundation for the confidentiality was simply an agreement that the respondent and the companies had made among themselves and others. The right of the public to know should not be stultified by agreements for confidentiality made between the parties to the activities in question (*Re Mildenhall and Department of Treasury and Ors*: 374).

The Tribunal responded that:

> On the other hand, as has been observed, modern governments are and may necessarily be involved in the management (including the funding) of business, commercial or financial undertakings these days on their own as government or in some form of joint enterprise with other entities. Unless governments were able to offer and, in fact honour confidentiality to those with whom they deal in business, then it is clear that their capacity to participate in business activities would be severely limited. Furthermore, it is far from clear to me that the terms of the confidentiality clause are such as to prevent a disclosure of information covered by the agreement as a result of an order of the Administrative Appeals Tribunal.

In my submission, government is not a business, and the business of government is not profit.[42] The public interest demands that the contractual arrangements between governments and correctional agencies, as a matter of practice, be made public and open. Providers of services or products to government under contract should be in the same position as public servants. Those who contract with the government for the performance of public duties should be aware that their interests as corporate citizens extends beyond the bottom line. Further, it should not be necessary for those who wish to obtain such information to resort to action in tribunals or courts, actions which are both expensive and time consuming.

Whose money?

Few people are completely unaccountable for the receipt or expenditure of monies. Private persons and companies are accountable to taxation and corporate authorities. Public companies are accountable, in theory, to their shareholders.[43] Where public funds are expended, there is a paramount duty upon government to account for the use of such funds.[44] Governments are, or should be, accountable to the taxpayer through Parliament.

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42 On the differences between running government *as* a business, government *like* a business and incorporating business into government, see Stone 1997.

43 It is ironic that governments and companies are so reluctant to reveal details of contracts, yet often a great deal of the relevant information will be found in the companies' annual report to its shareholders. For example, details of the losses incurred by a British private prison contractor, Premier Prison Services Ltd, a joint venture between Wackenhut of the United States and a British firm Serco, were noted in its report. The report revealed the income from the prison service and the costs of providing the service, including auditing expenses, property rental and depreciation. It stated the average number of employees, the total amount paid for wages, salaries, social security and pension costs and interest expenses. Employee costs amounted to about 60% of the cost of running the service. The parent companies also filed annual reports: see *Prison Report* Privatisation Factfile 11, Autumn 1995, 11. The earnings of executives of public companies must be reported in annual reports.

44 See *Thwaites v Department of Health and Community Services* per Mr P Nedovic: 'There is a public interest in accountable government. Accountable government includes the release of information as to government decision-making affecting the public. Release of such information assists the process of informed public participation in the making of government decisions ... The quantum of expenditure of public money ... or things funded from the public purse is a matter of public interest.'

The philosophy of 'no taxation without representation' should have as a concomitant 'no expenditure without accountability'. The Clerk of the Senate recently affirmed that this single principle was equally applicable to all contracts: 'the receipt of public funds by contractors involves public scrutiny of their activities in the parliamentary forums' (Evans 1996:9). Accountability for the expenditure of public funds includes ensuring that proper processes are observed, such as tendering and treasury approvals (*Re Mildenhall and Department of Treasury and Ors:* 369; *Thwaites v Department of Health and Community Services*),[45] public scrutiny of any transactions which may be outside the reach of public auditing bodies such as the Auditor-General (*Re Mildenhall and Department of Treasury and Ors:* 369; *Thwaites v Department of Health and Community Services*),[46] and the transparency of all financial obligations incurred by governments or their agencies.

The fact that an expenditure is directed towards the *private* sector does not alter the *public* nature of the source of the funds. It is the source of the funds, not their destination, which is of paramount concern in the question of accountability. In a recent freedom of information case in Victoria, the Administrative Appeals Tribunal ruled that the costs to the State of a secondment to government of an individual employed by a private company should be made public because it was an amount paid from the public purse (*Thwaites v Department of the Treasury).* For that reason, the public was entitled to know the amount allocated, approved and paid. The Tribunal stated that, by accepting a secondment to government, a person forfeits his or her right to privacy in respect of their remuneration to the extent that it is paid from public funds: 'It is in the general public interest to see how taxpayers' money is spent.'[47] As Hurley argues:

> There is much to be said for the aphorism that if you sup with the Devil you are best to use a long spoon, ie that commercial undertakings who seek to obtain business and profits from agencies do so in the knowledge that the provisions of the *FOI Act* (inter alia) have the effect that, like all government contractors, their fees, and the basis on which they are earned, are matters of public record (1996:10).

Parliamentary accountability

Governments must be accountable to Parliaments, and Parliaments to their electorates (ARC 1997:11). Executive government in Australia is based upon principles of delegation and responsibility, with the Minister having the ultimate responsibility for government functions (Evans 1996). The interpolation of contractual delegations creates severe problems for the notions of ministerial responsibility.[48]

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45 See also Seddon (1995:200) (public bodies seeking tenders are under a public responsibility to use public money in the best possible way and to maintain the integrity of the tendering process). Remedies for tenderers unhappy with the tender process are also important: ARC 1997:8.

46 It might be noted that if the Auditor-General is increasingly excluded from auditing expenditure of funds of agencies, either because they are placed outside his jurisdiction, or on commercial confidentiality grounds, then the importance of narrowly construing the exemptions under the *FOI Act* increases concomitantly.

47 See also *Forbes v Department of the Premier and Cabinet* re details of the total salary package of a senior public servant.

48 An example of the ambiguity of the concept of ministerial responsibility in the correctional context is cited by the University of NSW Public Sector Research Centre. In England, after prison administration had been separated from the Home Office and some prisons had been contracted out, the Home Secretary stated that he was not responsible for, and therefore could not answer questions about, escapes from prisons. The Director General of the Prison Service revealed, however, that budgetary and other policy decisions had created the operational framework and that the Minister had played a significant role in the prison system

In order to discharge its supervisory responsibilities over the executive, Parliament must be able to have access to all agreements entered into between the state, or state-owned enterprises and others in order to ensure, at minimum, that the terms of the contract are appropriate, the prices accepted are fair and reasonable and contracts are being complied with (Evans 1996). Public Accounts and Estimates Committees, by virtue of their powers of parliamentary privilege, must be able to hold Departments and agencies to account for their expenditure of public funds.[49] In this context it is instructive to note the deadlock which recently occurred in South Australia in relation to the demand by a Select Committee of that State's Upper House to have access to contracts in relation to the privatisation of water authorities. The Upper House asserted that it had the legal privilege to examine the contracts, but the Crown resisted on the grounds of Crown privilege and that it would 'offend commercial and intellectual confidence provisions and compromise the Government's bargaining position on future contracts'; (*The Age*, 4 May 1996, 'MPs Must Solve Water Row: QC'; *The Weekend Australian*, 24–25 February 1996, 'Constitutional Crisis Looms over Contracts'). The Auditor-General, Mr McPherson, had previously told another inquiry into hospital contracts that the committees would be derelict in their duties if they did not examine the contracts (see also *Business Review Weekly*, 4 March 1996 'State Contracts Row'; UNSW, Public Sector Research Centre 1996:255–257).

Another method of accountability to Parliament is the requirement that Departments and agencies table annual reports of their activities. This is only a limited form of accountability in this context, as agencies may obscure the nature and form of payment or bury the amounts in larger line items.

Auditor-General

The Auditor-General generally has a right to scrutinise the activities of agencies and bodies that receive public monies, but questions of access, and therefore accountability, arise when information is withheld on the basis of commercial confidentiality. The Issues Paper released by way of background to the Victorian Public Accounts and Estimates Committee observes that professional ethics require the Auditor-General to observe the confidentiality of information acquired in the course of an audit, but that the *Audit Act* itself does not exempt commercially confidential information from publication. The Paper notes that there is no alternative machinery within the parliamentary arena 'to evaluate the merit of claims the certain material should not be publicly disclosed in reports to Parliament'.

The problem of accountability in this context will be exacerbated if proposals to allow government departments to contract the auditing function itself are implemented. Who will have access to those audits and will the contracts between the department and the private auditors be public documents, or themselves subject to commercial confidentiality?

The resolution to the conflict between commercial confidentiality and public interest and accountability in this context may lie in the adoption of the suggestion made by the Clerk of the Senate in a recent submission to a Senate Committee. In his submission he argued that the accountability of contractors to Parliament could be served by requiring commercially sensitive information to be disclosed to Parliament, or a Parliamentary committee,

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(UNSW, Public Sector Research Centre 1996:248).

49 According to a recent report, the House of Commons Home Affairs Committee was able to obtain information from United Kingdom prison companies in relation to their profit margins which the Home Office and the companies had refused to divulge on the grounds of commercial confidentiality: 'Fresh Evidence' 1996:2.

on a confidential basis, if it were established that publication of that information would damage the contractor's commercial interest (Evans 1996:11). In such cases, public knowledge would be limited, but public accountability would be ensured.

Ombudsman

The office of Ombudsman has been established to investigate actions that relate to matters of government administration, which may include the commercial dealings of government (Allars 1995:52). However, in the absence of statutory provision, the Ombudsman cannot investigate the activities of independent contractors unless they are acting as agents or employees of government (Commonwealth Ombudsman 1996:192). The reach of the Ombudsman over statutory authorities is variable, but in the context of Victorian prison administration, the Victorian Ombudsman is empowered to investigate the activities of private prisons.[50] One assumes, but cannot be sure, that, in order to resolve complaints made by prisoners against the custodial authorities, the Ombudsman has the power to examine the contract between the government and the private prison operator to determine the nature of the services that the contractor is required to deliver to prisoners.[51]

Administrative law

Administrative law originally developed to hold governments to account to private individuals for government delivered services.[52] It is intended to promote the values of 'openness, rationality, fairness and participation in the resolution of disputes' (Allars 1995:45; ARC 1997:13). Economic theories of government, on the other hand, tend to promote such values as efficiency and effectiveness.

Administrative law remedies, such as those under the *Administrative Decisions (Judicial Review) Act* 1977 (Cth), have come to be regarded as impediments to the operation of government business enterprises. The removal of such enterprises from the 'public' sphere has significant consequences in terms of public accountability. Fredman and Morris (1994:69) have observed that:

> administrative law is being pushed out of the public sphere by re-labelling public activities. This re-labelling is done by the expedient of using the mechanism of contract to fulfil public purposes. The rhetoric of contract, in particular 'freedom of contract', is then employed to insulate the government from scrutiny. When this freedom is combined with the use of contract for the ordering and control of public resources, the synthesis becomes dangerous.

Judicial review of contracts, and of government business enterprises (GBEs) is problematic. The legislation generally requires that the administrative action being challenged be a decision of an administrative character made under an enactment (section 3(1); Allars 1995:56). It would appear under recent judicial decisions (*General Newspapers Pty Ltd (trading as Hannaprint) v Australian and Overseas Telecommunications Corp Ltd*) that while a decision to enter into a contract by Department or agency may be reviewable if the decision to enter into the contract had force by virtue of an enactment, a decision, made by

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50 Under s9G of the *Corrections Act* 1986 (Vic) the *Ombudsman Act* 1973 (Vic) applies to a contractor as if the contractor were a public statutory body; see also discussion in ARC 1997:68.

51 The Commonwealth Ombudsman has recommended that her office should have the power to investigate complaints about the delivery of contracted out government services (Commonwealth Ombudsman 1996:193).

52 On Commonwealth administrative law remedies see ARC 1997:12.

a Department or by a GBE, which was entered into under a general power conferring a capacity to contract, is not reviewable (Allars 1995:61). Decisions made under a contract are even less likely to be reviewed.

The law in relation to justiciability under the judicial review legislation is complex and contradictory, and that, together with problems relating to standing (ARC 1997:13) to seek remedies where a public rather than private right is sought to be vindicated, indicates that the present law relating to judicial review may be an unsuitable vehicle for accountability for government contracts.

Contractual remedies

It has been argued that the contracting out of services improves both the quality of services and enhances accountability. It is said to do so by clearer specification or articulation of the services to be delivered and the distribution of responsibilities, of the criteria on which performance is to be measured and by the avenues of redress set out in the contracts (Industry Commission 1996:5–6; ARC 1997:15). While there may be some validity in the first two aspects, the last is problematic.

The doctrine of 'privity of contract' holds that contracts are only of concern to the contracting parties and may not necessarily be challenged by those affected by them (ARC 1997:22). It therefore limits the range of persons who can challenge a contract.[53] In relation to prison contracts, many more parties have interests, for example, in prisons, than the government and the correctional services provider: the prisoners themselves, their families, the courts, Parliament, the media and the public in general (Keating 1990:132).[54] Accountability, in this context, is relevant to three different sets of relationships: between the contracting parties (that is, government and operator), secondly, between the government and the public, and finally, between the prisoner and the contractor. To date, debate about the nature of accountability of correctional contractors has focused almost exclusively upon the relationship between the contracting parties, ignoring the interests of those who stand outside the contract but are affected by it directly or indirectly.[55]

Accountability for contracted services has three important elements (Keating 1990:133): financial,[56] supervisory[57] and evaluative.[58] In relation to private prisons, the Victorian public has been assured that the government will maintain strict and close control of the activities of the private contractors, in fact to a level higher than that which has been the case at any previous time (Van Groningen 1994:35). This will be achieved

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53 On statutory exceptions to privity of contract see ARC 1997:55.

54 The question here is whether, for example, prisoners will have legal standing to challenge contracts or allege breaches of contract. In order to do so, they will need access to the contract and to the performance standards under the contract. The same applies to the delivery of any service, eg, garbage delivery: Seddon 1995:20. In the United States, a contract can confer rights on third party beneficiaries (Shichor 1993).

55 Even if there were some contractual relationship between the contractor and the service recipient, it may be impractical for the recipient to seek redress because of cost, time, difficulty of access to the legal system or personal reasons (ARC 1997:28). On whether prisoners should be regarded as 'customers' or 'clients' see Weller 1997; Vardon 1997.

56 That is, has the private entity expended public funds only for authorised purposes and in accordance with approved budget: what is the mechanism for audit?

57 That is, the monitoring and assessment of contractor's performance of services.

58 That is, the need to obtain data to determine whether contracting with private entities makes sense for government.

through a number of mechanisms including (New Prisons Project, *Bulletin*, 8 July 1994:4; Van Groningen 1994:33; Harding 1994:66): (1) limiting contractors to administering punishment, not allocating it; (2) leaving sentencing and classification with government; (3) giving government unfettered access to all aspects of the operations of the contractor; (4) limiting the contract period; (5) requiring submission of periodic reports to government;[59] (6) contract accountability;[60] (7) contract monitoring;[61] (8) using performance based contracts; (9) probity laws; (10) independent evaluation of contracts by the Department of Justice; (11) continuing the application of the *Freedom of Information Act* and the *Ombudsman Act* 1973.

Although this scheme appears comprehensive, it has two major flaws. The first relates to the limited nature of the accountability. The government and its officers may have access to a contract and are thus able to monitor compliance, but the public do not. The public are thus required to have trust in the government's ability and willingness to enforce the contract. Sadly, the basis of that trust is being increasingly eroded.[62] Contractual accountability cannot stop with the government contracting party. The second flaw in the system is that the public remedies referred to, namely FOI laws, may themselves be limited by the claims of commercial confidentiality.

The ordinary concepts of contracts, and contractual remedies, are inadequate to deal with public contracts. New concepts and remedies are required. As Seddon argues:

> What we are concerned with here is the proper *use* of contract to achieve important public goals. There are no contract remedies which deal with this question. Something outside contract has to be found. The political process is unlikely to meet this need because it is too attenuated and cannot be immediately responsive (1995:21).

For the public to be able to determine whether the private sector is more efficient, flexible and responsive than the public sector, it is essential that they have available to them as much information about the contract and the standards as is consonant with requirements of public safety and security.

Special tribunals, agencies or officers

Apart from the general administrative law remedies, governments and industry groups have established a plethora of special complaint handling, investigatory and monitoring authorities.[63] In Victoria, the *Corrections Act* 1986 (Vic), section 9D, establishes the position of a

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59 Section 9(e) of the *Corrections Act* 1986 requires the contractor to submit periodic reports and audited accounts to the Director-General in relation to the contractor's operations, operational achievements against performance indicators and the contractor's financial position and viability.

60 Section 9(h) requires notification by the contractor to the Director-General of any change in the management or control of the contractor.

61 Section 9D requires the appointment of Monitors: their reports form part of the Department's Annual Report under the *Annual Reporting Act* 1983.

62 A recent report in *The Age* 30 March 1997 ('Reports Downgrade Assaults at Private Jail') alleges that serious incidents at the Deer Park private women's prison have been downgraded or excluded from reports to the State government. The newspaper believes that the contract contains financial penalties on the company, Corrections Corporation of Australia, on the number of serious incidents, implying that there are pecuniary incentives to downplay the number and seriousness of such reports. It notes, however, that the government has refused FOI requests for access to the incident reports on the ground that the information would expose the company to disadvantage.

63 See, eg, the various Ombudsmen (banking industry, telecommunications industry), complaints authorities,

'contract monitor' responsible to the government 'for the assessment and review of the provision of services by contractors' as well as any other functions. That monitor must make an annual report to the government on his or her operations, which report must form a part of the Department's Annual Report. Although the monitor has access to all documents in the possession of the contractor, which, one assumes, would include the contract, there is some doubt whether the monitor can make reference to matters in those contracts which are commercially confidential. Unsurprisingly, in Victoria, no monitor has been appointed as private prison contracts to date have been entered into not with the Director-General, but with the Minister, under section 8A of the *Corrections Act* 1986. Such contracts do not require a monitor to be appointed, which is not to say that the contracts are not monitored by the office of the Correctional Services Commissioner.

Corporate law

There is no right to total corporate privacy. Business corporations are creatures of law and are subject to regulation and disclosure (Bayne 1984:194). The *Corporations Law* (Cth) imposes a number of obligations on corporations and their officers to disclose various types of information (Fisher 1996). These include directors' duties to disclose,[64] obligations to shareholders,[65] disclosure of records, disclosure in prospectuses and others. However, none of these provisions requires corporations to disclose details of individual contracts either to the shareholders or to the public at large[66] and thus places alleged commercially confidential information out of the reach of those who may have an interest in such contracts or be affected by them as third parties.

In relation to the delivery of services in general, and in the correctional context in particular, corporate disclosure may be an inadequate mechanism of accountability where those services are delivered by unincorporated bodies, unlisted companies or not-for-profit agencies who may not be required to disclose financial details of their activities or sufficient detail to be of any value (ARC 1997:16).

Commercial confidentiality and the public interest

As is evident, there are inherent conflicts between the interests of individuals, corporations, governments and the public interest (Finn 1991:23). As in all such matters, the resolution of these conflicts requires a balance to be struck in each case and, indeed, the Victorian FOI legislation specifically provides a public interest test.

The concept of the 'public interest' is particularly amorphous (Elliott 1988:188). In *DPP v Smith* (75), the Victorian Supreme Court observed, unhelpfully, that:

> The public interest is a term embracing matters, among others, of standards of human conduct and of the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its

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regulators, etc. For a comprehensive listing see ARC 1997: Appendix D.

64 Most of which derive from their position as fiduciaries to the company and relate to such matters as conflicts of interest.

65 These may relate to such matters as the emoluments and other benefits of directors, related party transactions, share capital and ownership.

66 See certain registration requirements in the United States.

> members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals ... (see also *British Steel Corporation v Granada Television Ltd*; *Sinclair v Mining Warden at Maryborough*).

In the context of the contractualisation of government services, in particular, correctional services, the 'public interest' has a number of dimensions. There is the public interest, already adverted to, in the maintenance of duties of confidence. Privacy is a value which is highly esteemed in our society.[67] There is also a public interest in ensuring that government services be delivered efficiently and at a low cost (Seddon 1995:7). However, as noted above, the public interest in contracts involves notions of accountability as well as publicity, and the accountability of the state to its citizens as citizens, rather than as consumers, involves more than an assurance that the competitiveness of the market place will deliver efficient outcomes (Commonwealth Ombudsman 1996:157).

The gradual exclusion of the traditional forms of public accountability in the name of economic efficiency is a cause for serious concern. The concept of 'commercial confidentiality' has become an all-purpose shield behind which governments at all levels are masking their increasingly commercial activities. As the process of contracting out increases, the dividing line between what is 'public' and what is 'private' becomes ever more blurred, and as the core activities of government diminish, the consequences of a policy of commercial secrecy will see a smaller and smaller proportion of public expenditures being subject to scrutiny. Perhaps the traditional forms of accountability are losing their relevance (Mulgan 1997). If so, there may be a need to develop new forms. If, as governments argue, the market now provides the best form of accountability, that market must be open and well-informed (Fredman & Morris 1994:79). The price for market accountability may well be the loss of commercial confidentiality. Governments and the private sector cannot have it both ways: secret markets with no public law accountability.

Privacy and commercial confidentiality are important values, but not the only relevant values at stake. Where there is a conflict between commercial confidentiality and public interest, the preference should be for disclosure (Industry Commission 1995:6; see also ARC 1997:70). Perhaps the public interest may be less where the information concerns a street cleaning contract than the running of a prison service, but there is a public interest nonetheless. If history has taught us nothing else, it should have taught us that eternal vigilance is required over governments and their agencies, especially when they act with an unshakeable belief that they have all the answers to society's ills. The Western Australian Royal Commission into various commercial activities of the government observed that 'effective accountability was a casualty of its [the government's] entrepreneurial zeal' (Western Australia 1992: Volume 6, para 27.2.9). It concluded (para 27.2.11):

> In a system of government such as our own, power is given to elected and appointed official alike to be exercised for the benefit of the public. This is the condition, the 'trust', on which that power is given. Of course, in any particular case, the question whether a proposal serves the public interest is the very stuff of politics, requiring open and vigorous debate. This makes for a healthy society. But when government seeks to 'live by concealment' — it can be anticipated that instances will occur where official power and position

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67 See *Re Mildenhall and Department of Treasury and Ors*: 374 where the AAT noted the public interest to be served by the maintenance of confidentiality so that business will not be discouraged from dealing with government. It would seem that in the United States the requirement to file contracts with the SEC has not inhibited companies from dealing with governments.

> are both misused and abused. But what our inquiry has revealed is how lamentably lacking are the safeguards against misuse and abuse to which the public should be entitled.

We seem to have learned few of the lessons of WA Inc. (Stone 1997). The ultimate question is not whether or not contracts are proper or adequate but whether or not they are secret. Public confidence in the process of government will only be maintained if all the facts relating to government dealings are placed before the people (Harding 1994:71).

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