Whitlam Oration

Delivered by Bret Walker SC
5 June 2018

THE INFORMATION THAT DEMOCRACY NEEDS
I was truly delighted when Bret Walker SC accepted our invitation to deliver the sixth Whitlam Oration on the theme The Information That Democracy Needs.

Globally and in Australia, democracies are facing some of the biggest challenges since the end of the Second World War. The erosion of trust in both the news media and our political institutions; the power of supra-national corporations; incursions on privacy and misuse of data; threats to institutions, civil society and independent journalism; the political and social ramifications of growing inequality; and attempts to balance national security against the rule of law and human rights protections are but some of the current policy dilemmas that make Bret’s Whitlam Oration very timely.

Successive Australian governments have faced criticism at home and from abroad about an emerging political culture that seeks to withhold information, reduce transparency, is increasingly defensive of inquiry and criticism and sometimes resistant to oversight.

Recently I met with Race Mathews, who served as Gough Whitlam’s Chief of Staff and as a federal and state MP, amongst other notable achievements. I sought his guidance on the contemporary relevance of the Whitlam legacy, and he described what he considered to be ‘Whitlamism’. Race described it as follows: ‘The proper business of politics is to secure informed public consent for seeking change through the provision of objective information from trusted sources.’

This definition of Whitlamism, so focused on transparency and debate, offers a clear resonance with both the goals of Whitlam Institute and the themes of Bret Walker’s Oration.

At the Whitlam Institute we strive to be a nationally significant institution delivering distinctive, bold and inspiring policy research and programs that promote common ground, inclusive national identity and civic engagement for all Australians. We aim to be recognised across the political spectrum as delivering a nation-building agenda that will, as Gough hoped, “…help the great and continuing work of building a more equal, open, tolerant and independent Australia”.

The Whitlam Oration has become a respected platform for prominent Australians to provide serious commentary on the contemporary relevance of the Whitlam Legacy and to contribute to public debate. This Oration, The Information That Democracy Needs, continues this great tradition.
The Hon. John Faulkner
Chairman of the Board of the Whitlam Institute

Bret Walker’s story is one of decades of public service - to his profession and the people of Australia.

A Commissioner in four major public Inquiries, Australia’s first Independent National Security Legislation Monitor, long voluntary service at the highest levels of the legal profession in scores of critically important roles, and he now heads the Murray-Darling Basin Royal Commission.

The public will be aware that there is no more authoritative voice from the bar table in the High Court of Australia than Bret Walker SC. In the 115-year history of the High Court few have achieved his prominence and standing. We also know he is the counsel of choice in all types of complex High Court cases – whether it be for individuals, corporations or governments.

But what the public may not know - what seems well hidden from public view - is Bret’s extraordinary generosity. I suspect very few know that despite his demanding schedule and huge workload Bret maintains an extensive pro bono practice.

Bret Walker has dedicated his life to the bar, its traditions, and to justice. But throughout his career he has never lost his deep understanding of our society and the impact of the law on the lives of our citizens. He is more than just one of the finest legal minds Australia has ever produced, he is renowned as a thinker, advocate and writer on the challenging and critically important issues of contemporary politics and governance.

Just like Gough Whitlam before him, Bret Walker has been unswervingly committed to justice and the creation of a fairer society, and has spent a lifetime thinking deeply about Australia’s constitutional structure and system of government. Also like Gough, he knows that the country’s laws should work for the benefit of its citizens and he believes in informed public discussion on critically important issues.

Who better to give a Whitlam Oration entitled “The Information That Democracy Needs”?
There are reasons why we are committed to open justice. They urge the importance in nearly all cases of court hearings being held in public. They have led to the ample availability of parties’ positions, as well as the eventual published reasons for judicial decision. Nowadays, not only are submissions in the High Court published on the internet, but counsel face the ordeal of broadcast speech – and vision. Perhaps, too much information.

Why are these approaches regarded as being in the nature of things for the courts of law, one of the arms of government? First, for the essential communication of its governing acts. Second, to justify its decisions by a sufficient statement of reasons. Third, to render the courts, the judges and lawyers, properly accountable to the people, the public, who are thereby governed. None of this is, I think, in the slightest degree controversial. Indeed, current concerns about open justice stem from the widely held suspicion that there are currently too many non-publication orders and closed courts.

How much more obvious, then, is the need to require our elected representatives and especially their executive delegates the Ministry and Cabinet, to allow us sufficient information to check them, test them, and remind them of their representative capacity? My suggestion is that this is socially and politically as important as the constitutional freedom of political communication. Like that implication eventually discovered by the High Court (on thoroughly Whitlamesque grounds), this irreducible need for information about government is not to be seen through an individualist prism: it is not a personal right, but rather an imperative of a representative, parliamentary, democracy.

But communication needs sensible content, as media magnates know (and so often fail to achieve). If our use, exercise and enjoyment of a guaranteed freedom of political communication is to mean anything, we must have serious subject-matter, not merely propaganda or tribal barracking. It is impossible to be fervently in support of a political discourse that never rises above that level – however comforting and entertaining it is from time to time, for sure.

If we must use the term “a national conversation”, at least let it have substance. Without proper disclosure of critical matters known only to government, how can we – why should we – discuss anything about the topic in question with them? Blindfolded, we’re led into manholes by those in charge of them … And if it is a combination of past government conduct and present government
intentions that is in question, as is usual, what cynics would gull us by calling the lop-sided exchange a “conversation”? It is certainly not polite conversation …

One aspect of modern politeness, irksome to some and admittedly not always elegant, is the acknowledgement of the traditional owners of the place where we meet. Tonight, the Burramattagal clan of the Darug people. That is real information, if in danger of becoming formulaic. (It is unpleasant how religious right-wingers deprecate such verbal formulae, given that the Missal and the Book of Common Prayer are themselves composed of liturgical formulae …)

The project of improvement requires a government intent on reform, such as was so vividly the case when Gough Whitlam became Prime Minister.

The shifts in Australian society that have produced this change in the formal manners of public gatherings is one in which Gough Whitlam was a giant. Such shifts do not occur by the actions of people who want to hear only “good news”. Those were the days when socio-political issues properly occupied the front page (first screen?) of the newspaper or news site.

Democracy would rot, not from the head, but in its popular body, were we all constantly to bask in the self-congratulation of “You’ve never had it so good!” (Of course, that Tory blessing, when accurate, is only so because when you’re moving up from a low base, such as social equality in the 1950s, the upwards trajectory has a long way to go.)

I am no more enamoured of pessimism than anyone, but the indignant objections to the so-called black armband view of history (or of the present, or of the future) threaten the main project of democratic – certainly, social democratic or Whitlamist – government. That is, improvement. A project conceived by the benign disbelief that there will ever be nothing to fix, no-one to help, no hope of anything better. Really, what a gloomy mind is the one who wants no information about social ills or political dilemmas – because he or she is not looking forward to curing or solving any such thing.

It is not an ABC or Guardian sourness that sees problems dominate the news about government. Does anyone really think that those nice chaps in the government – any government – are not only here to help, but are also well and truly on top of it? Come off it.

There is, rather, a serious and systemic bias threatened by this call for more “good news”. It implies an unpleasant superiority of the past over the present (so often the golden age of the speaker’s childhood years), and shows a dangerous complacency about the challenges of the future. It lauds the parents and risks the children.

The project of improvement requires a government intent on reform, such as was so vividly the case when Gough Whitlam became Prime Minister. The merits of proposed reform are rarely equally apparent to everyone at the same time, a state of affairs that would suggest a somewhat creepy passivity if it were ever true. Why await unanimity, in a democracy? Explanation and persuasion, two elements of the reform task, crucially depend on the flow of information from government to the people and, at least as importantly, from the people to government.
The economically realist social democracy advanced by the Hawke and Keating governments in retrospect seems in danger of becoming bipartisan. It certainly was not greeted thus when those two reformers started to explain and tried to persuade. Fortunately, they were sufficiently successful to achieve historically significant reform. I doubt whether things would have gone so well had Bob Hawke and Paul Keating not spent so much time and effort telling anyone who cared to listen why things could not go on as they were. And their persuasion had the foundation of published information and serious debate.

The information that democratic reform needs is, as we saw in those years, a body of knowledge and opinion that invites correction, contradiction and qualification. It becomes the more persuasive the more thoroughly it is tested. And tests in the privacy of the bureaucracy are never the same as the test of public debate.

What has become a clog on the flow of information is the detestable craft of predetermined lines of the day - the discipline of remaining “on message”.

It follows that in a decently informed democracy genuine reformers must embrace a real risk of failure in obtaining enough public support. The alternative approach rewards vociferous naysayers. A supposed reform idea that provoked not much opposition could very likely be not much of a proposal at all: neither seeking real change nor disturbing entrenched self interest.

But there is persuasion, and persuasion. Our politicians are entitled to use the press and broadcasting to get their messages out, as they put it. But the great social imperative of a free press, in our society, is not as an agent of government messaging, or even any partisan messaging. Of course journalists, commentators and proprietors have political attachments and hobby horses, but that unremarkable fact is no excuse not to hold all participants in political contest to account. A free press tries to do that by asking questions, often by way of challenge. And here we have been for some time now the victims of pseudo information, misinformation and irrelevant information.

I’m not referring to the human propensity to lie from time to time. I don’t suggest lies are the information democracy needs, even if so-called spin merchants are the living demonstration that too many people do think that. No, what has become a clog on the flow of information, more than lies, is the detestable craft of predetermined lines of the day - the discipline of remaining “on message”. I think it’s time that journalists provided a piece of information, and on our behalf, back to political interviewees who think it’s clever, or necessary for their survival in the tribe, to deflect serious questions, parrot non-answers and thrust non-responsive sound bites. Maybe the journalists should warn those interviewees that the public might be better served by not hearing them on air, until this degenerate discourse is abandoned.

We all know that there are some public figures who refreshingly engage with public questioning, and very often persuasively. At least, those few avoid the widespread discourteous, condescending and robotic repetition of the juvenile uninformative political interviewee. We should all inform politicians of that kind that they impede democracy.
Many of us provide information which is then used by politicians, by our answers to public opinion polls and surveys. Focus groups are the high end boutique versions of this democratic information flow. Unless we are careful, the feedback loop of public opinion polls and the conduct of politicians will surrender matters that should be governed through regular informed exercise of universal suffrage and compulsory voting for Parliament, to the reading of entrails conducted by virtually daily sampled snippets of unstudied responses to crafted questions. Push polling is not a mythical monster.

Perhaps we need, continually, much better disclosure and explanation of polling methods, reliability and connexions.

The resemblance between the pseudo democratic opinion polls and commercial advertising is no accident. “Market research” is a confronting term for the professional gauging of political opinions among the people, but it is grimly apposite. And we are as yet relatively uninformed and thus innocent of the techniques in play. Social and constitutional imperatives forbid, I think, any quality control of political communication, to and fro. But part of our information to government surely ought to be our reaction to slick or negative nonsense, so that those who promote it can at least be told, even if they will not learn, of the disapproval that kind of advertising creates for its sponsors.

The money that political campaigning requires creates its own urgent need for information. The regulation of donations and disclosure, the provision of public funding and the accounting for expenditure have all attracted legislative attention. And, I fear, much public disenchantment. What possible reason can there be to oppose real time disclosure of donations? Do I make good this point, or do I rather answer my own rhetorical question, by wondering what may have been the consequence (if anything) of the Prime Minister’s personal generosity to the Liberal Party of Australia being known before the close of polling?

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And the electors do not get the information about political donations that they need, if the real people, human beings not corporations, who are responsible for the money donated, are not revealed by real time disclosures. Whether by so-called shell companies or our pale imitations of the American PACs, disclosures lacking the names of the people responsible, by which I mean individuals, should be regarded as inadequate. A proper system to inform us of who is paying the piper would prohibit a party’s or candidate’s enjoyment of the money until that full disclosure has been made.

A practical way of achieving this modest reform would be to forbid any political donations except through the Electoral Commission as intermediary. The statutory duty of those public servants should be to satisfy themselves that they have been credibly informed of the identity or identities of the individuals responsible for the making of political donations. No doubt there can and should be an annual threshold for disclosure, which might be set, say, at around current average weekly earnings.
We are used to being told the names of individuals taking responsibility for political statements, especially during campaigns. The significance of the influence and support that donations to politicians convey, in our democracy, surely justifies being told also the names of individuals taking responsibility for putting their money where a politician’s mouth is.

The Houses now require Members to make continuous disclosure in the Register of Members’ Interests. Unfortunately, the standard of information in those records is neither consistent nor reassuring.

Donations by corporations and entities like the unions also require more information in order to serve the needs of democracy, than is presently the case. There is no problem, or should not be, in the names of the authorizing officers being published in connexion with each and every donation. But control of these artificial legal persons, which are really aggregations of the interests of individuals forming groups that change in composition almost constantly, justifies a further level of information to enhance the democratic purposes of political donations.

Trading corporation or trade union, it would be beneficial for shareholders or members to know before they buy or join that some of their money will be used for political donations. Preferably, they should know in advance how much might be devoted during a year for that purpose, and obviously they should also be warned of the identity or identities of the possible recipients of their money by way of political donations. And if the corporation or union intended to increase the amounts or change the recipients of their members’ money by way of political donations, there should be some corporate democracy, or a union vote, to approve that in advance.

One thing seems clear today. No-one appears bold enough to argue in public for a return to anonymous unlimited political donations. The reasons for that minimal consensus ought now be understood to compel extension of our present laws to full and immediate disclosure of the actual identities of donors. Then we can apply whatever monetary limits an informed democratic electorate, through its representatives, regards as appropriate from time to time.

The influence that money may have on Members of Parliament is by no means limited to political donations. The Houses now require Members to make continuous disclosure of such matters in the Register of Members’ Interests. Unfortunately, the standard of information displayed in the various entries you will see in those records is neither consistent nor reassuring. To be told about connexions with a corporation or a so-called trust is barely the beginning of understanding the relevance of the property in question for the political position of the parliamentarian making the supposed disclosure. And resorting to public registers of corporate information will rarely reveal much more of political relevance, while there are for all practical purposes no such public details available for the innumerable trusts in existence in this country.

So much for the availability of material by which a person rash enough to be concerned with the enforcement of section 44(iv.) and (v.) of the Constitution might be able to discover whether a parliamentarian was entitled to be chosen or continue sitting as one of our democratic representatives.
There are much more substantial reasons why a parliamentarian might not be fit to continue in office than breaches of section 44. The same is true of other officers of the Commonwealth apart from those bound by section 44 – from the lonely heights of the judiciary to the engine room of the public service. All three arms of government are for the purposes of democratic government, and accordingly must be accountable to the people. Some jurisdictions in this country have recognized the inadequacy of the parliamentary chambers with respect to their own members, courts with respect to their own judges and the public service with respect to its own officers, as the means to receive and investigate allegations of misconduct, of which corruption is merely the most urgent example.

Independent Commissions Against Corruption, and the like by whatever name, provide some answer to the serious question of who guards the guardians. Do we not need the kind of information that an ordered and impartial fourth arm agency like an ICAC can provide about allegations of official corruption? Is it not axiomatic that secret and informal dealing with such allegations compounds the democratic failure that results when rumours of corruption are not investigated officially?

However, such agencies are principally investigatory and should both formally and practically report to the Houses of Parliament. Perhaps, they might be permitted, with safeguards, to brief Directors of Public Prosecutions in the same way as investigating police do. Perhaps, they might be able directly to commit persons against whom they make adverse findings for trial, as if they were a grand jury in olden times or a magistrate today.

A critical safeguard on the kind of information that an ICAC should be able to give us, in cases of unfavourable findings, is that we should no longer be told that an individual has engaged in corrupt conduct, let alone that he or she has been found to have done so because their conduct involved the commission of a criminal offence. No other officer or agency briefing a prosecutor or committing a charged person for trial thereby informs the community that the person in question is a criminal. That would be a very serious kind of misinformation, in a society still attached, I think, to the notion of a fair trial before conviction.

It is one thing to conduct investigations in private, as police usually do. It is another thing to shield senior public servants, by which I mean those who decide matters of serious administration, or the content of advice to Ministers, from basic public knowledge of their activities. They are not, contrary to the delusions of some, a separate and superior caste. Many of us work in areas where we expect our names to be known, attached to our deeds. We expect the reasons for our decisions, or advice, or projects to be published. Is there really something so special about the public service that things should be so different for them? Happily, legislated attempts to reverse official secrecy as the general rule has done much to deflate these mandarin pretensions.
But it is worth recalling that affidavits to support claims of secrecy have for a long time oddly warned of the threat to the fearless and frank character of a public servant’s advice were it to be published. How very odd. The fearlessness of a person confident that his or her position will be known to very few. The frankness of a person who can be confident of the limited audience he or she has.

A special kind of advice to the executive government is from its lawyers. Generally speaking, the courts have accorded legal advice the most solid protected confidentiality, in the form of legal professional privilege. Unlike most forms of confidentiality, the protection extends to immunity from compulsory production, in the usual case, in court and elsewhere. Nearly 20 years ago, however, the New South Wales Court of Appeal decided, in a case in which I had a hand, that even that sacrosanct privilege did not protect legal advice to the government from compelled production to a House of Parliament. It could hardly be said that there has been an avalanche of disclosed government legal advice this century through parliamentary calls for papers, but at least judicial authority in this country is plainly in favour of that salutary power existing.

As I see it, the core principle for the Court of Appeal to deny that legal professional privilege entitled the executive to resist producing its legal advice to a House of Parliament was that the people’s representatives should not be denied knowledge of what the people’s government had been advised. Accountability in a system of responsible government in a parliamentary democracy was seen as compelling that outcome. It was an important watershed in the jurisprudence of government secrecy.

It is another milestone in the long march away from personal and absolute monarchy. We have in this country no Plantagenet king with separate and superior interests from his subjects. We may be crowned, but we are constitutionally a people’s republic.

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What explanation can both honestly and cogently be given for resistance by the executive government to disclosure and publication of its legal advice, except perhaps during the currency of specific litigation? After all, if the advice supports a government decision, as a lawyer I would like to think disclosure of the advice may assist in political persuasion. Even more as a lawyer, I insist that knowledge that the government has received respectable legal advice that what it proposes is unlawful should definitely be shared with the public. A genuine rule of law, in a democracy, cannot be satisfied by anything less.

I think a major qualification would be appropriate. It is doubtful that democracy requires that the State, represented by the government, should be at a marked disadvantage in litigation compared with the opposing party. Alfred Deakin’s great Judiciary Act of 1903 decreed equality, not disadvantage, for the polity as litigant. At least during the pendency of litigation by or against the government, including possible appeals and their consequences, legal professional privilege for advice concerning that litigation is a proper value to observe. But it should be so limited.
Do we think, though, that parliamentarians are by dint of their office able to deal with government legal advice better than we can? Are the representatives truly a superior location of political power than the people they represent? You may gather that I think not. It follows that the legally established availability of government legal advice to the people’s representatives should entail, without further ado, availability to the people.

This would simplify our current statutes regulating the freedom of information. It may even temper the bitterness of the gibe that such laws would be better termed “freedom from information”. Simply, except in cases of identified pending litigation, legal professional privilege should never be available to the government against any one or more of its people.

What are the functional reasons to support any objection? As a lawyer, I resent the notion that I would give worse advice if I knew it would be published. Actually, in my experience, knowledge of that possibility puts one on one’s mettle.

There is one area where continued secrecy so as to deny the people (if not the Houses of Parliament) information at the heart of government can be, I think, justified. It is Cabinet secrecy, at least of what I, like Chief Justice Spigelman, would regard as the true or irreducible kind of information concerning Cabinet deliberations. There are respectable contrary views, but responsible government on the model that involves Cabinet decision-making does clearly to my mind require that members of Cabinet keep their deliberations secret.

Such information is, of course, not to be confused with the abuses so roundly excoriated by the Fitzgerald Commission – the advisers wielding “Cabinet-in-Confidence” stamps to conceal important information about government dealings.

The contrary views include what I regard as an inspiring piece of judicial eloquence, by Justice Priestley in the Court of Appeal, who denied the legal right to absolute secrecy being given to any group of men and women in government, who insisted that the possibility of accountability can never be kept out of mind, and that the capacity for a House of Parliament to compel disclosure of Cabinet deliberations “can only be to the benefit of the people of a truly representative democracy”.

On the dark side, there has always been a great deal of information about what has happened in Cabinet that a democracy does not need, because we should not have it. We ought be peremptory in our condemnation of breaches of secrecy by members of Cabinet. It is contemptible. It has destroyed, I think beyond redemption, any confident belief in the honour of our political leaders.

The advent of legislation to compel the production of government information in this country is the most concrete demonstration that democracy needs such information, and will have it. Unfortunately, the retardant tendencies of supposed wise heads in the bureaucracy have bequeathed us a perverse set of exceptions, which render hollow the legislated encouragement
that their existence is not meant to deter disclosure. As a matter of policy, I wonder whether we have sufficiently precluded the obnoxious reflex to deny disclosure because, in truth, it would be embarrassing to government.

As an 18 year old when Gough Whitlam was first elected, I am no doubt biased in favour of the view that he and his government gave the initial and greatest impetus to changes that those in later governments – of both complexions – made to the régime controlling access to government information. It would be wrong for this project to be regarded as party political. There are, or have been in the relevant past, liberals on both sides.

Thus, the Administrative Decisions (Judicial Review) Act 1977 and the rest of the “new administrative law”, opened the flood gates on the reasons for administrative decisions. The common law, displaying the same wisdom that denied the capacity of married women to control property, regarded requests for the reasons for such decisions, even if or especially when they might be judicially reviewed, as a kind of civil impertinence. Our parliament set an example by decreeing the opposite. We should not backslide by seeing that reform as the furthest we should go in the quest to understand and challenge the conduct of our government.

My professional career permits me the perspective to suggest that the possibility of compelled disclosure of reasons, in an ordered fashion, under the ADJR Act, has unequivocally enhanced the quality of decision-making in the Commonwealth both as a matter of process and, as a consequence, of substance.

A recent boo-word has become fashionable to deflect justified demands for disclosure of government business. It is the hyphenated phrase “commercial-in-confidence”. The hyphens don’t make it special. Why should the terms and prices of the always expensive goods and services procured by government, on our behalf and with our money, be secret? That is, after there has been a tender or contracting process with whatever secrecy that genuine probity requires. After we have guarded against collusion between tenderers, and like corruption, what other than embarrassment could possibly justify preventing any one of us seeing all the terms on which a new freeway is being bought?

The current slack approach may well be commercial by some lights, but does nothing for democratic confidence.

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Another use of public money that is far too frequently cloaked in secrecy is the compromise or settlement of claims against the government. These involve technical questions of the proper conduct of litigation and expenditure of public funds, none of which justifies the secrecy of which I speak. What legitimate ground could there be not to know what the government agrees to pay, say, a person whose land has been compulsorily acquired, or a person who claims to have been unlawfully imprisoned on Nauru? In all such cases, the legitimate public interest is manifest: there is nothing merely prurient in our curiosity. The government has no private interests – it is an emanation of us, the governed people.
And a cardinal aspect of justice is consistency of treatment. Its achievement requires disclosure of prior cases, and its defeat will be promoted by concealment of their outcomes. Again, the rule of law in a representative democracy not unreasonably prefers that like cases be treated alike, unlike cases in appropriately unlike ways, and that we the people will know enough to spot the difference.

One of the furphies frequently raised to resist such disclosures is privacy. It is a misunderstood and overwrought value. It surely yields to the social requirements of democracy. However, across the board of current practice in relation to government secrets, registered data and even official procedures such as in courts, the privacy of individuals has become the cuckoo in the nest, so far as the information that democracy needs is concerned. I repeat, there is a linguistic and substantive misfit in too great a concern for the privacy of public servants.

Privacy has been the banner under which we suffer serious unevenness in access to information about the distribution of wealth and thus power in our society.

Privacy has been the banner under which we suffer serious unevenness in access to information about the distribution of wealth and thus power in our society. Long ago, by grace of the Australian innovation of registered title to land, we were all able to know the names of the proprietor of every registered piece of land in the country. That was, and is, not always very informative, given the sliding doors and trick mirrors of trusts and corporate personalities. Most of us have no doubt that we the people should be able to know without resorting to private detectives or energetic investigative journalists who it is that really owns the land in our national territory. No-one, I think, would say that we have achieved that state of affairs.

When it comes to the half-way decent operation of the public market in shares and securities, we are now used to requiring continuous disclosure, at least at intervals, of real ownership. Democratic concerns with what I would call the means of production surely justify at least equivalent disclosure with respect to land and business enterprises.

If one sees the efficient operation of markets as socially useful, itself a matter of democratic concern, one would favour more rather than less information about the location of control of the objects of trade.

Topically, the contribution to our consolidated government revenue by payments of tax on the part of corporations is important. Votes in parliament, and for parliament, may plausibly be influenced by information on the topic. Why then do we need to discriminate between companies and businesses as to which of them should have to disclose their relevant revenues and tax contributions? Would it not be fairer, and we be better informed, if that information was required of all corporations and businesses? And not anonymized by some industry category that proceeds by misleading averaging, but entity by entity?

What is truly private about the extent of tax contribution by tax paying entities for the public good? The profession to which I belong learned painfully that our fitness to participate in the administration of justice, one of the arms of government, makes barristers’ observance of the duty to pay tax, a matter of public interest. The law is that a legal practitioner’s failure to observe
the civic obligations of paying the price of civilization, that is tax, may render that lawyer unfit to practise.

It would be silly to encourage us lawyers in the delusion that we are really so special. Are the societies, admittedly few in number, where the tax paid by individuals is a matter of publicly available record, so far off the mark? The politics of tax, its imposition, its avoidance and its outright evasion are close to the centre of public life in a representative democracy. At present, none of us can know, except in the case of published criminal convictions, whether any of the participants in those public debates are engaged in revolting hypocrisy. That would appear to be a deficiency in participatory democracy.

At the other end of the fiscal pipeline, there is both good news and bad news. The bad news is not so surprising: the Australian style of drafting annual appropriations and the explanatory papers, by which the socially important Budget is presented, is getting less and less intelligible. Arcane conventions of drafting and non-legal conventions of esoteric meaning combine to defeat, in my opinion, the intended constitutional statement of democratically approved expenditures.

The good news is an example of what a cross-bench with a balance of power can encourage, namely the Parliamentary Budget Office. Drawing on the worthy precedent of the disinterested and estimable Parliamentary Library, this impartial group of public servants publishes intelligible estimates of the fiscal nature of various political projects. Most valuably, there are published proper expositions of the operative assumptions used by the politicians in question.

The fiscal information that our national democracy needs is not so much the 19th century accounting required by the Constitution and more or less adequately supplied. Rather, it is in a plain explanation and serious justification of the assumptions that drive forward estimates and other projections. On them depends the political fantasy of soaring surplus or devastating deficit.

There are other kinds of reports to government or about government, such as by Royal Commissions and offices such as the Independent National Security Legislation Monitor. I hope I do not delude myself, entirely, in seeing them as information that government may find useful. Seriously, though, an attitude to such information by government that is symptomatic of a deeper malaise can be seen in the untimeliness of such reports being published, or being responded to by the executive. The nearly invariable practice of delaying the tabling of such reports until the last day permitted is not clever, or consistent with the function of such reports being prepared. The undergraduate instinct to leave everything till the last moment should have been left behind upon taking up paid duties in Canberra.

There is a functional purpose to provide a period before which a report to government need not be tabled or published – it is to permit a reasoned government response to accompany or follow shortly thereafter. That occurs in a distinct minority of cases. Perhaps the Commonwealth should legislate to require a response, although I cannot imagine a meaningful sanction beyond political disapproval.
Governments gather a deal of good information in our modern administration by means of public consultation. The formal sequence of process requiring public consultation has been, I think, a significant generational improvement in democratic government. The involvement of those who could be bothered, not only at election time.

Unfortunately, the concomitant need for prior disclosure of proposals and their context, about which the public is supposed to be consulted, is by no means always met. Often, this can be litigated, but how much better would it be for government to realize that it is in the interests of government to obtain as intelligent and critical a response to its proposals, as widely as possible, before they become fixed policy.

War and foreign relations have long been understood to be areas of government responsibility where open public consultation could well be utterly counterproductive. So it was realized in 1787, the year before Captain Phillip’s First Fleet, when the Americans whose successful Revolution provided part of the impetus to the British settlement of this country, held their secret Convention in Philadelphia to devise a constitution for the new United States of America. One of their more striking themes stressed the vital qualities of “secrecy, vigor & despatch” widely considered to be desirable for the single-person executive head of Government. Strangely to modern eyes, the quasi-aristocratic delegates to this secret Convention devised a bicameral legislature in which the Senate, for the first term or so of General Washington’s inaugural presidency, sat in secret without anything like decent records.

The growing appreciation in the new American Republic that such behaviour was itself counterproductive to engendering a proper political spirit was part of a movement throughout Western societies that nowadays treats the publicity of legislative and representative scrutiny functions, by elected chambers, as axiomatic.

It is in the interests of government to obtain as intelligent and critical a response to its proposals before they become fixed policy.

But there has always been, and in broad terms is likely always to be, a powerful resistance to the disclosure of military affairs and matters of foreign relations. That commonsense generalization unfortunately fails to accommodate serious questions as to the limits we should expect on this exceptional category of government justifiably concealing its activities and knowledge from the people.

International humanitarian law, the laws of war governing its conduct by civilized nations, essentially deny that the way Australians fight for Australia must remain secret from the Australian community. To the contrary, the Criminal Code positively requires the eventual publicity of trial by jury for alleged war crimes or crimes against humanity. Care will continue to be necessary to ensure that the balance is struck concerning the publication of sensitive information, so as both to permit prosecutions to proceed and fair trials to be had. Our current rather complicated and less than comprehensive legislative efforts in this regard are commendable, but only as a beginning.
And then there are activities which are emphatically not the waging of war, such as the use of the Navy in deterring unauthorized maritime arrivals of irregular would-be immigrants or genuine asylum seekers. It is difficult to understand why any more secrecy should attend these police functions, albeit sometimes on the high seas, than routinely attends the manner of civilian policing within our States and Territories.

It is unimpressive that such Naval policing should be proposed for the kind of grateful celebration which is the mission of our national War Memorial, without a prior opportunity for the people to consider on the basis of proper information whether the activities are worthy of that accolade. I repeat, these are not the sacrificial activities of our armed forces at war.

My experience has strengthened rather than weakened my regard for those areas of government where secrecy, at least temporarily and often for a very long time, well beyond usual political cycles, is functionally essential. I have already mentioned the conduct of current military operations, and I will turn soon to foreign relations especially with respect to treaties.

But first, there are the topical and likely enduring areas of national security so far as concerns espionage and countering it, and counter-terrorism. They are areas which, it is true, deserve special monitoring and parliamentary scrutiny, such as by the Parliamentary Joint Committee on Intelligence and Security. With respect, that is an important body whose value is more potential than realized. Its powers and influence are yet to be fully appreciated. I commend the great contribution that John Faulkner has made in pressing for enhanced public benefit in the better use of such guardians.

In the zone of silence, so to speak, such as we must expect when terrorism is being detected or prevented, it becomes all the more pressing to devise alternative methods of accountability apart from the constant publicity which serves that function for ordinary government administration of “a free and confident society”. It is a source of mild national satisfaction that Australian means of checking and reporting on activities many of which must remain secret are demonstrably superior to those of most countries engaged in counter-terrorism, and are arguably not inferior to any. It would be a source of intolerable national complacency were we to regard these systems as themselves beyond improvement.

The swirl of political concern with so-called foreign influence, literally today, is just one example of how seriously we should query those who would tell us what the information is that democracy needs. Proposed legislation is, as I speak, still on the drawing board. Appropriate public consultation has resulted in quite an array of detailed objections and improvements being raised. So much the better.

For my part, I think it may be unwise to concentrate too much on the foreign provenance of supposed influence. We have quite enough home-grown bad ideas and dinky-di venality to be just as concerned about secret Australian influence as secret foreign influence. However, of course
there is a further reason, bluntly of loyalty and geopolitical conflict of interest, to examine the possibility of providing more information than is currently available about those who seek in the lobbies or anywhere else to affect the positions and conduct of our government, or indeed our Parliament.

But the provision of information to whom? If only to the executive or the presiding officers of the Houses of Parliament, there would be a further gap in the democratic justification for compelling by law the revelation of what would otherwise be preternaturally confidential dealings. Whatever else should be debated about legislation proposed to address the problem of “foreign influence”, there should be attention paid to the prompt disclosure of particulars to us, the voters and the public.

How much more straightforward, if alarming to the governing class, would be the routine, literally daily, revelation of Ministers’ and Members’ appointments, meetings and discussions with anyone apart from their staff and colleagues. It may be a prospect of infinite tedium as reading matter, but at least an alert cadre of journalists – and political opponents – would have the means to be aware of a kind of information that democracy obviously needs.

In theory, I suppose an elevated form of foreign relations is the diplomatic achievement of a treaty. This country’s legal and political traditions mean that we live with the nation being externally bound by its treaties, but the population being neither bound by nor benefitting from the consequences of a treaty, unless and until our Parliament makes them Australian statute law. Under an appropriate head of power, the Commonwealth can legislate in breach of its international obligations. But there is the external affairs head of power which extends the Commonwealth’s legislative power so long as it is exercised so as to implement our treaty obligations.

It follows that treaties, their making, their terms and their observance by the nations bound by them should be part of the political discourse of this country. By one of the British as opposed to American choices of those who prepared our constitutional drafts in the 1890s, we have foisted on us what can be, and has occasionally been, the treaty outcomes of secret negotiations. How far from the democratic ideals brandished in opposition to Chief Justice Jay’s controversial agreement of the 1795 crucial economic treaty with the United Kingdom. The very secrecy of his actions as a delegate of George Washington was railed against as itself a ground for impeachment.

Worlds apart, perhaps, but the affliction of the Australian population with the consequences of so-called investor-State dispute settlement clauses in contemporary trade treaties provides a double measure of secrecy as a vice in government. Always, we should be told when the executive is minded to bind the country to these pernicious provisions whereby the lawmaking of our Parliament and the judgements of our courts may be effectively nullified, or worse still punished. How can this be occurring without more protest? Why wasn’t Chief Justice French’s speech temperately demolishing the merits of such provisions not more widely appreciated? Simply, because too few people have been informed about these secretly negotiated provisions for secret
arbitrations by foreigners for the foreign reversal of Australian law. Or, less kindly, because they are just another, if more breathtaking, example of the patronising belief by some persons in Canberra that they not only know better than we do, but that it is better that we do not know enough to question them.

All of these deficiencies justify the kind of schematic rebuilding that remains my admiring impression of the ethos promoted, not always with practical success, by the governments of the man whose life and contribution we recognise this evening. I am not sure whether Gough Whitlam would approve of my last proposal, given his struggle to achieve enough power and authority both within the Party and in Parliament, at a time when leaks seemed to make buckets out of sieves.

Without a decent flow of information in this popular democracy, how can we have anything like our “equal share” in its power?

It is that there is no point in fierce attachment to the public obtaining information in order to keep government accountable, unless public-spirited persons best placed to reveal such information for the purposes of holding government to account may do so without penalty. This country’s so-called whistle-blower legislation displays wisps of righteous sentiment, but a niggardly set of protections and a far from comprehensive coverage. It is in urgent need of modernizing.

Immediately after Federation, Professor Harrison Moore saw as the great underlying principle of our Commonwealth that the rights of individuals were sufficiently secured by ensuring, as far as possible, “to each a share, and an equal share, in political power”. That is not strictly accurate about our Federal and bicameral system, and preceded anything like an equal suffrage. And it is very conservative in relation to entrenched human rights, for example. But it does convey the true popular core of our democracy. And without a decent flow of information in this popular democracy, how can we have anything like our “equal share” in its power?

Many years later, but long before taking office on the High Court bench, Stephen Gageler saw in the making of the Australian Constitution a distinct change from the 18th century disdain for popular democracy. Rather, “ordinary politics was seen as the primary means by which people exerted real, tangible and ongoing control over government”. Long may that continue. And so, our demand for the information we need should not abate.
How much more obvious, then, is the need to require our elected representatives and especially their executive delegates the Ministry and Cabinet, to allow us sufficient information to check them, test them, and remind them of their representative capacity? My suggestion is that this is socially and politically as important as the constitutional freedom of political communication. Like that implication eventually discovered by the High Court (on thoroughly Whitlamesque grounds), this irreducible need for information about government is not to be seen through an individualist prism: it is not a personal right, but rather an imperative of a representative, parliamentary, democracy.
The Whitlam Institute within Western Sydney University is a dynamic public policy institute that commemorates, and is inspired by, the life and work of the Hon Gough Whitlam AC QC.

It pursues the causes he championed and is guided by the principles upon which Gough Whitlam’s parliamentary career and years of service to the people of Australia were founded.