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Public service confidentiality

The Public Service Regulations 1999 have been amended to make new provision for regulating the disclosure by APS employees of work-related information. Amended regulation 2.1 in essence prohibits an APS employee from disclosing work-related information if the disclosure could prejudice the effective working of government or if the information was, or is to be, communicated in confidence.

Background

Old regulation 2.1 prohibited an APS employee from disclosing any information about public business or anything of which the employee had official knowledge, except in the course of the employee's duties. This general prohibition had been in substantially the same form since 1902.

Questions about the interpretation and constitutional validity of the predecessor to the old regulation 2.1 arose in the Federal Court case of *Bennett v President, Human Rights and Equal Opportunity Commission* (2004) 204 ALR 119. Justice Finn found that the provision was a 'catch-all' provision prohibiting disclosure regardless of the nature of the information or the consequences of disclosure, including where the information was publicly available. He held that the provision infringed the freedom of political communication implied in the Constitution and was therefore invalid, essentially because the 'catch-all' nature of the provision was inconsistent with modern conceptions of open government and imposed too great a burden on the flow of government information. Justice Finn acknowledged that the Commonwealth might validly regulate disclosure of particular information for legitimate reasons relating to that information. Legitimate reasons included the effective working of government.

New regulation 2.1 commenced on 23 December 2004. It is designed to address changed community expectations and the matters raised by Justice Finn in the *Bennett* case (see Australian Public Service Commission Circular No 2004/8 at [2]-[3]).

New regulation 2.1

New regulation 2.1 is not a 'catch-all' provision. It prohibits disclosure by APS employees of information which they obtain or generate in connection with their employment in two (potentially overlapping) situations. These situations are:

- where it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies and programs; and
- where the information was, or is to be, communicated in confidence within the government or was received in confidence by the government from a person or persons

outside government, whether or not the disclosure would found an action for breach of confidence.

The new regulation does not prohibit disclosure in the course of duties or in accordance with an authorisation given by an Agency Head or as otherwise authorised by law.

The new regulation does not affect the operation of other Commonwealth secrecy and privacy provisions or the authority of an Agency Head to give directions in relation to disclosure of information.

Australian Public Service Commission Circular No 2004/8 gives guidance in relation to the application of the new regulation. Chapter 3: Managing Official Information of *APS Values and Code of Conduct in Practice: a guide to official conduct for APS employees and Agency Heads* has been significantly revised as a consequence of the new regulation, including revised guidance on making public comment.

AGS provided advice to the Australian Public Service Commission in relation to the formulation of new regulation 2.1.

Text of the new regulation 2.1 is available at:

<http://scaleplus.law.gov.au/cgi-bin/download.pl?/scale/data/numrul/20/10426>

Text of the APSC circular and guidance is available at:

<http://www.apsc.gov.au/circulars/circular048.htm> and

<http://www.apsc.gov.au/values/conductguidelines.htm>

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