



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES  
COMMITTEE

**Reference: Departmental and Agency Contracts**

THURSDAY, 25 MARCH 2004

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**SENATE**

**FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE**

**Thursday, 25 March 2004**

**Members:** Senator Forshaw (*Chair*), Senator Watson (*Deputy Chair*), Senators Heffernan, Ludwig, Moore and Ridgeway

**Participating members:** Senators Abetz, Brandis, Carr, Chapman, Conroy, Coonan, Crossin, Eggleston, Chris Evans, Faulkner, Ferguson, Ferris, Harradine, Harris, Knowles, Lees, Lundy, Mackay, Mason, McGauran, Murphy, Murray, O'Brien, Payne, Sherry, Tchen, Tierney and Wong

**Senators in attendance:** Senators Forshaw, Heffernan, Ludwig, Moore, Murray and Watson

**Terms of reference for the inquiry:**

To inquire into and report on:

The second year of operation of the Senate order for the production of lists of departmental and agency contacts.

**WITNESSES**

**HAWLEY, Mr John Maxwell, Executive Director, Assurance Audit Services Group, Australian National Audit Office..... 1**

**HINCHCLIFFE, Ms Suzanne Maree, Director, Assurance Audit Services Group, Australian National Audit Office..... 1**

**HUTSON, Mr Jonathan William Jay, Division Manager, Financial Framework Group, Department of Finance and Administration..... 1**

**LOUDON, Mr Richard Michael, Branch Manager, Procurement, Department of Finance and Administration ..... 1**

**WATSON, Mr Michael Joseph, Group Executive Director, Assurance Audit Services Group, Australian National Audit Office..... 1**



**Committee met at 4.06 p.m.**

**HAWLEY, Mr John Maxwell, Executive Director, Assurance Audit Services Group, Australian National Audit Office**

**HINCHCLIFFE, Ms Suzanne Maree, Director, Assurance Audit Services Group, Australian National Audit Office**

**WATSON, Mr Michael Joseph, Group Executive Director, Assurance Audit Services Group, Australian National Audit Office**

**HUTSON, Mr Jonathan William Jay, Division Manager, Financial Framework Group, Department of Finance and Administration**

**LOUDON, Mr Richard Michael, Branch Manager, Procurement, Department of Finance and Administration**

**CHAIR**—I declare open this public hearing of the Senate Finance and Public Administration References Committee. Today's hearing is part of the committee's ongoing inquiry into the order of the Senate for the production of lists of departmental and agency contracts. I would like to welcome to the hearing, as observers, a parliamentary delegation from the Kingdom of Tonga. Along with Senator Murray and Senator Mason—the Chair of the Senate Finance and Administration Legislation Committee—I had the opportunity and the pleasure to meet with the delegation earlier this morning. We appreciate your interest in the work of our committee and your attendance here this afternoon. Leading the delegation today is His Royal Highness Prince Tu'ipelehake. I hope you find that this hearing is of interest and of value to you.

In December 2002, the committee reported on the first year's operation of the Senate order. There have been a number of developments since then. Firstly, the government did respond positively to the committee's report, agreeing with almost all of its recommendations. Since that time, the Senate has also amended the order on three occasions to reflect recommendations and advice from the committee. In January this year, the Department of Finance and Administration, with input from the Australian National Audit Office and key agencies, issued guidance on the issuing of contract details on the Internet, which was one of the recommendations in the committee's report. In meeting another of the committee's recommendations, it has also been agreed that the ANAO will examine the contracting processes of the Australian Security Intelligence Organisation, ASIO, and the Australian Secret Intelligence Service, ASIS, to confirm their compliance with all relevant legislative and policy requirements. Finally, the Audit Office has produced several reports on compliance with the order, the most recent of which was report No. 31, tabled in February.

I welcome officers here today. Today's hearing will focus on the second year's operation of the order. The committee expects to report to the Senate towards the middle of the year. I remind officers that the Senate has resolved that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless the parliament has expressly provided otherwise. I also remind officers that an officer of a department of the Commonwealth or of a state shall not be

asked to give opinions on matters of policy and shall be given a reasonable opportunity to refer questions asked of the officer to superior offices or to a minister.

Evidence given to the committee is protected by parliamentary privilege. This means that witnesses are given broad protection from action arising from what they say, and that the Senate has the power to protect them from any action which disadvantages them on account of the evidence given before the committee. Correspondingly, I remind witnesses that the giving of false or misleading evidence to the committee may constitute a contempt of the Senate. We prefer to conduct our hearings in public. However, if there are matters which you wish to discuss with the committee in private, we will consider your request. Would you like to make an opening statement?

**Mr Watson**—The Auditor-General's office would like to make an opening statement.

**CHAIR**—Please go ahead.

**Mr Watson**—I am the group executive director in charge of the financial audit of the Australian National Audit Office, and that is where this particular work is done. I would like to set the scene for you, depending on how this unfolds later on. As you would be aware, the ANAO have now completed five audits of agency compliance with the Senate order. Our audits have all formed an opinion, as required by the order, on whether there has been any inappropriate use of confidential provisions in contracts. However, the audits have also formed an opinion on whether agency policies and procedures are in place to ensure that the contract lists on the Internet are accurate. Contractors and agency staff have a shared view on the policy on the use of confidential provisions and whether in practice the policies are being adhered to. We will be able to discuss this during the hearing.

Since the committee's report on the first year of operation of the Senate order, we have completed three audits, tabled in February 2003, September 2003 and February 2004. In total we have audited 30 agencies over the period of the order, and by the time the current audit is complete we will have audited roughly half of all FMA agencies. Certainly we have already audited the agencies with the largest numbers of contracts. We have also examined 236 contracts. A sixth audit has commenced, and some of our remarks during the hearing will be able to draw on early conclusions that we have made from information that is publicly available.

I have with me today John Hawley, the branch head responsible for the series of audits. He has a good knowledge of the subject matter of the audits, as he has been responsible for all five tabled audits and is responsible for the sixth. Importantly, he was also responsible for the initial audit in 2000-01 which, at the request of this committee, provided some of the framework for the first committee report and the Senate order.

Finally, we in conjunction with Finance will be able to advise you on the progress that both bodies have made in dealing with the recommendations in your report on the first year of the order. I should add that in my view the Senate order, together with the policy advice provided by Finance, has had a big impact on the way the Commonwealth deals with the confidentiality of information in contracts. I also think that our audits have helped with providing advice and information to agencies about the intent of the order and the policy documents.

Our audits have shown that there is still some way to go to get the policy into practice and that there is a need for all parties to be conscious that developing policy is one thing and implementing it is another. Mr Hawley is prepared to report briefly on the conclusions we have reached as a result of the last three audits, if you wish; otherwise, we will come to the detail during the panel discussion. I am happy to make that particular document available for the parliamentary record.

**CHAIR**—Thank you. Mr Hawley, will it take long to run through your part?

**Mr Hawley**—I only have three general points to make to the committee.

**CHAIR**—Would you like to do that now?

**Mr Hawley**—Yes, thank you. Having looked at this over a number of years, the thing that we found, quite honestly, is that the policy is getting into place in the agencies. That has been helped a lot by the Finance guidance. But in practice—and I think Mr Watson alluded to this—when you get down to the working level, particularly in the bigger agencies, the message is not always getting through. I do not think that is just the case with this audit; it has a lot to do with the way the messages get through. So we are talking a lot about more training and more awareness. Of course, staff turnover has an impact on this. Agencies have to be vigilant about what is going on in their areas.

I think there has been a great improvement. When we first started these audits, 34 per cent of these contracts in, let us say, September 2002 had confidential provisions. At our last figures, at this month, from the previous reporting period, which has just finished, it is 12 per cent. So there has been a dramatic drop in the confidential provisions. What has not changed much is that, every time we go into the agencies, the majority of the contracts that we look at are, in our view, still inappropriately classified. We work through with the agencies on that as it happens.

The only other thing I would say, from an audit perspective, is that there is a general willingness from everybody we audit to try and understand the intent of the audit, to try and understand what this is about and to deal with contractors, who are not always used to this discipline being put on them, to discuss what is confidential and what is not. So we have found that there has been a lot of willingness within the agencies to conform with what the requirements are.

**CHAIR**—Thank you. Mr Hutson, do you wish to make some comments?

**Mr Hutson**—We do not have an opening statement, but we are happy to assist the committee through the panel discussion.

**CHAIR**—I think the appropriate way might be if we proceed to questions from members of the committee, and either or both groups can respond and comment.

**Senator WATSON**—Before I ask my first question, I would like to acknowledge the work that both the Australian National Audit Office and the department of finance have done in trying to promote the shift in thinking and practice within the agencies to make sure that government contracts are more open and more transparent, as such, and accountable—and, after all, that is

the rationale behind the order. So, before we proceed to questions, congratulations to you both on what you have been achieving—and I note Mr Hawley's comments. This question is to the Audit Office: while it appears that the letter of the law has been complied with, there is a bit of a problem in getting it down to the staffing level, where the contracts are actually negotiated. I think that is where the problem arises. You comment that, 'agencies should make sure that the policies are known, and acted upon'—I repeat: 'and acted upon'—'at all levels within the agency. This reinforces the need for an ongoing effective awareness regime.' What more can be done or what can you do, by any means, to make sure that that filters down to the people who are actually negotiating the contracts? What more can be done?

**Mr Hawley**—I am sure that Finance can also answer this question. We were talking about it on the way over. I was saying that when our audits are tabled, rather than relying on the audit report arriving in the agency and expecting it to flow down and for people to actually take an interest, perhaps I should be emailing to the list of contract officers that Finance has and summarising what the audits are saying, what the latest developments are and what things we are finding. That might just stimulate the contract officers to send another email to the people who are actually dealing with the contracts. It might just be an awareness thing. We think our audits are very clear; but perhaps they may not be as clear as we think when we work it out.

**Senator WATSON**—I have a suggestion: do you think there should be a letter from this committee to the various agency heads to make sure that it filters down?

**Mr Hawley**—We do of course send that to the agency heads, with a letter saying that we have done another one of these audits.

**Senator WATSON**—But, from our committee's perspective, would it be effective if the chairman, for example, wrote expressing his concern? We are trying to get some new means or mechanisms to make sure that this accountability and transparency really does extend down to the people who negotiate the contracts. Because of turnover of staff and that sort of thing, some people do lose sight of their obligations.

**Mr Hutson**—We have certainly been aware of it. I think the most recent audit that Mr Hawley did has raised with us the very point that he has made, which is that we would have expected by this stage to have seen greater convergence within agencies in terms of compliance, across the board, with the terms of the order. That does not seem to have happened. There are a couple of things that we are doing, or that we have done, that should accelerate that in any event. The first of course is the guidance which we prepared following the last committee recommendation. That was put out in January, so that will take some time for that to filter through. But, as I said, this book which we produced in January, which gives guidance on how to comply with the order, has only recently been released. As a follow up to that, we are running a forum of agencies on 20 April to re-emphasise to them the need to comply with the order and what that actually means—not just about physically putting stuff on your web but also about the way you change the practices throughout your agency.

**Senator WATSON**—As I mentioned before, you are complying with the letter of the law. But, for example, when you received that Audit Office report, did you or one of your officers take that up and write to the relevant agencies, drawing attention to the concerns of the Audit Office, apart from deciding to have a seminar in April?

**Mr Loudon**—We have not written a response, but what we are doing, with the forum in particular, is looking at the implementation of the listing as a process, which is going quite well, and also trying to get some feedback from agencies on what we can do with them to reinforce it. The aspect that we are particularly keen on discussing face to face with agencies is the further distribution of the guidance on confidentiality, which is actually the one that we think should be driving behavioural change. It has now come to the forum. We would then look at whether we need to produce a Finance circular to reinforce behavioural change with agencies and how they may do that. But, given the experience to date, we were looking at agencies to assist us and asking what are the issues that they are facing. We get some of that out of the audit, but the problem I think we have with just letters is their narrow distribution.

**Senator WATSON**—Yes, it is a problem. When you receive a copy of an audit report such as this it raises the question of whether it is necessarily the Auditor-General's duty, which I do not think it is, to send it to all government departments to ensure the message is received by all the agencies, or is it? Do you send your reports to all government agencies?

**Mr Hawley**—We send a copy to every FMA agency, yes.

**Senator WATSON**—I just suggest that perhaps when that happens you probably should do a follow-up letter to ensure that the message that is conveyed through the Audit Office gets on the CEO's desk. That is the issue I would like to take up.

**Mr Hawley**—One thing that does happen—and I have not been to every audit committee but I have been to enough audit committees—is that Audit Office reports are discussed at audit committees. I will put my hand up and say I do not know whether this audit report was ever discussed, but the general principle out there is that when an Audit Office report comes out the internal audit group get together, talk about what has come out of the audit and normally present some sort of findings to the audit committee.

**Senator WATSON**—Somehow these messages from audit committees do not always get up to what I call the CEO, and that is why I think maybe the department of finance could have an enhanced role in this.

**CHAIR**—Perhaps I could follow that up—I would be interested in your comment. Is there a particular area or level where you identify concern? You made this comment, as Senator Watson mentioned, that the policies are not known and acted upon at all levels within the agency. I take it from that that maybe the problem could be at somewhat lower levels. I assume that it is still at levels where the personnel would be involved in the negotiation or the tendering or construction of the contract itself.

**Mr Hawley**—There are two models out there. One is the centralised model, where the contracts are held in house and every contract comes through a central person, and generally speaking that is a little better for the control of this than the decentralised model. So if you took a large organisation, for instance, it might have outstations everywhere and it becomes more difficult for that message to get through. When we are talking at all levels, contracts might be negotiated—these sorts of contracts over \$100,000 will not be negotiated at a junior level, but it is certainly not done at a CEO level.

**Senator MURRAY**—Mr Hawley, as you well know, both the Auditor-General and the Joint Committee of Public Accounts and Audit have been particularly concerned about third parties where, on a contracting out basis, you have the difficulties of how you audit somebody who is not within the direct ambit of government. I accord with what Mr Loudon said: it is the confidentiality area which is of most concern, where confidentiality is inappropriately claimed or applied, therefore preventing proper accountability both from our perspective as a parliament and probably from your perspective. I want to draw your attention to your latest report, No. 31, at page 56. It makes Mr Loudon's point as well as the point I am making. At paragraph 4.51 it says:

In applying the Finance criteria—

and I should say, for the *Hansard* record, that the Finance criteria are in the booklet held up by Mr Loudon earlier—

for determining whether information should be protected as confidential information, the ANAO considered that only five—

that is one-sixth, which would be about 15 per cent—

of the 30 contracts listed, or which should have been listed, as containing confidential provisions were appropriately listed.

I think that is the nub of the problem. You are pretty well telling us that stuff is getting on the Internet, give or take a bit of slackness and delay here and there, but they do not have the message about the content of contracts, which is what drove us to this thing in the first place. I would like your response on those observations, because I do not think that letters—with all respect to the earlier discourse—are going to help. I think in the end it is the finance department's turn to lay down a circular and say, 'Listen, chaps, this is how it's going to be.' But I would like your two sets of views on that.

**Mr Hawley**—I could not agree more with you. Whilst we have been looking at whether it is appropriate or not and whether the Internet list is right—all the sorts of things in our audit objectives—we really have been trying to find out what the negotiation process is with the contractor. So, if somebody wants to contract with me, what is the process that says, 'Come on—is there anything confidential? And, if it is confidential, why?' That is what this is really about. I do not think that message has yet got through at the grassroots level with the contracting organisations. For instance, I think—although I might be corrected here—that some agencies have now got a little thing which talks about confidentiality. It is almost: 'Check with so-and-so before you even do anything about this,' because it is not obvious, unless they go back to policy documents, what that is all about. So there is a flag in some of those contracts now, saying, 'Before you negotiate this contract, come and talk to somebody who knows, who is across the detail.' The concept is not difficult, but it does take some time to understand that you have to have this negotiation with a contractor to work out what is confidential and what is not. Just because he or she wants it to be confidential does not necessarily mean that it is confidential information—and that is quite a difficult concept, I think.

**Senator MURRAY**—While waiting for the reply from Finance, I would suggest to you—from previous estimates questioning of Public Service officers—that they often make the assumption that having something confidential is in the interests of the Commonwealth, when it is not. I think that point is very well made in your own advice. Perhaps you could respond to that.

**Mr Hutson**—Perhaps I could take it more generally. My division is the framework division. We produce these booklets—as of this week, we have produced 10 of them. We have found that getting them across at senior levels in departments is quite successful. Senior levels of departments understand them; they know what is in them. We are finding that getting them understood down at the grassroots level is a very difficult task. The confidentiality guidelines are really no exception to that. Perhaps that reflects to some extent the size of the organisation. Some departments have a very devolved contracting arrangement—contracts are let and negotiated across Australia by a wide range of people—and it takes a long time for those departments to turn around cultures across the country. None of this is intended as an excuse; it is merely by way of explanation. Your point about directing it towards us is absolutely right: it is our task to get agencies to push that message out and down across the network. Now that we have produced yet another book on this subject, we are here hopeful that agencies will have another opportunity to look at it. As I said, we will get all the agencies together at the back end of April and we will no doubt be laying it on the line that we are looking for them to push it through. At the end, pushing it down into agencies is fundamentally the responsibility of the agencies.

**Senator MURRAY**—When I look at the publications that you produce and the reports produced by the Auditor-General, I am of the opinion that there is really very little disagreement between you. I think you are rowing in the same direction in the same boat. It is not as if there is quarrel of any kind. So my next question is: do you think the Senate, through its estimates process, needs to get more involved and more aggressive in this area? I ask you this because it is my sense that senators have recognised that there is a bedding-in process—there has been a two to three year process whereby, as you put it, cultural change in very large organisations and the implementation phase have to be completed. Speaking personally, and not for other people, my patience is at an end: it is time for implementation. Would it assist if the Senate became more vigorous in this matter in the formal estimates process, in the various committees? I ask this deliberately, because, if the committee were to agree to write to all other chairs and bodies to be more active in this area, we would need to know what your thoughts on that are.

**Mr Hawley**—I think anything you could do on that would be useful. In the first audit we did, which I think was tabled in May 2001, we did write to a lot of Senate committees asking them to tell us what the problem is, because there was a lot of talk about the issue of people withholding confidential information in contracts. We got some response to that. What I do not have a feel for—and I wonder whether the committee has—is whether that has now in fact decreased, whether when people come up to Senate estimates, or whatever, they are quite open about their contractual commercial information. I do not have a feel for that. I do not really know what the impact is. I know what the impact has been within the Commonwealth—that is, the numbers are dropping and people are trying hard to get right. But I do not know whether the Senate committees are finding the same impact—that is, that people are not withholding information any more. That might give you some way that you might want to deal with it if it has still not changed their behaviour in a committee for instance, but I do not know.

**Senator LUDWIG**—I am happy to volunteer an answer. My experience is—and I must say that I have missed you writing to legal and con, but I assume that you did; I will take that on face value, but I will go searching for it—that with the departments and agencies who come before us there has been no discernible difference in the times or the number of contracts about which they claim confidentiality. In fact, in my way thinking, there seems to have been an increase. But that is anecdotal. That is always a problem in the sense that we ask for certain information at some estimates hearings and other information at others. There is a differing emphasis, depending on which estimates we are looking at—that is, whether it is additional estimates, supplementary estimates or budget estimates. So it depends on which estimates we are looking at as to what type of information we might be seeking. My recollection over the last couple of years is that there has been no discernible difference in the number of times that departments have said, ‘This matter’s confidential,’ ‘This contract is confidential,’ or ‘The material contained within the contract is confidential.’ One example—and perhaps you could help me with this—is the Attorney-General’s Department. Have you audited its contracts of late?

**Mr Hawley**—We are up to about the third or second audit, I think, so it would be some time ago. It would be at least a year old now, if not more.

**Senator LUDWIG**—This is an unusual one, in a sense—I have not seen this style recently: the digital reform agenda and the review were contracted out to the Attorney-General’s Department and, as such, step out from what I would have ordinarily thought of as a way of doing a review. But it is the government’s prerogative to make this choice. It raises probity issues. I asked the Attorney-General about that issue on, I think, 13 October and have received a response, which seems to indicate that probity issues had been examined, but there were also issues relating to how they managed that probity issue, management plans and the like. The next difficulty I will have, I suspect, is trying to obtain copies of the contracts. I have no doubt that I will be told—and I will come back and tell you what happened—that they are confidential. I have already asked what other Phillips Fox contracts might exist with other agencies, and I was informed that that was covered by legal professional privilege and I could not ask that. I will ask that question the other way around. I will ask each agency to tell me whether they have contracts with Phillips Fox, which is a different way of obtaining the same information. To my way of thinking, it is not that protected, but the A-G’s Department seems to think it is. As to obtaining the original contract that enlivened the digital reform agenda, through the Attorney-General’s Department and Phillips Fox, I suspect I will be met with commercial-in-confidence issues, and maybe for a good reason, too. But I would like to be confident that that is in fact the case. How can I be confident about that?

**Senator MURRAY**—Before you answer, I will add to that, because this is the direction in which I wish to go in my questioning. In Senator Ludwig’s specific example, senators have two choices left to them: one is to go back to the Senate to try to get the Senate to force a minister to do something, which is inevitably a very difficult exercise; the other is to sit there and go through the Finance checklist and ask each of the questions related to the Finance checklist as per their publications and make the officer answer with respect to their claim for confidentiality. But that, of course, is a very time-consuming situation, and you are not able to do it with the document next to you so that you can verify whether the answer is accurate. So it leaves a senator in a very difficult investigatory position. The reason I interrupted was to get your thought or your response. One way I thought that this matter could be addressed—but I am fearful it might be a little bureaucratic—is that where a public officer declined to give evidence on the

basis that something is commercial-in-confidence, the committee would be entitled to automatically refer that contract to the Auditor-General for specific inclusion in the department's next review, so it would be reported on. The Auditor-General would then be able to say, 'You were told a porky pie; it wasn't commercial-in-confidence and they should've answered you.' But I am a little fearful about (a) the time that would take and (b) the bureaucracy of it. Perhaps you could now answer Senator Ludwig's remarks, with that qualification.

**Mr Hawley**—I do not know how the example you have used was listed on the Internet and I do not know whether anybody looked at the list. The great thing about that is that, when you ask for a contract, it should be on the Internet and there should be a classification about that. The first thing is that you should be able to say that at least they are being consistent—that is, it has been commercial-in-confidence ever since it was established—and then there should be some reasons for that. That would be my first test. If that were not on there, you would say: 'Well, it's not confidential on the Internet. Why is it now confidential to us?' If it is confidential on the Internet, there should be some reasons on the Internet which you can then test. On that particular contract, I do not know. But that would be my first test, which is the test we go through anyhow.

You are absolutely right, Senator Murray: we go through those Finance tests and we ask, 'Is there specific information, yes or no, and has it got what is necessary for it to be commercial-in-confidence?' We work through that. I do not know whether we would want the role of looking at every contract that you were refused! We have taken the Auditor-General's view on this. We do get some legal advice just to get some idea of whether we are in the right ballpark, but we have not yet gone, and we do not want to go, to the agency and say, 'You get your own legal advice.' We have not tried to get this fight going between us. All agencies have accepted that they will take the Auditor-General's view.

**Senator LUDWIG**—I will just take up what Senator Murray said. His suggestion could potentially lead to the department being inundated with a number of requests, and I think it would be fair to say that there would be too many for you to handle in just doing a check, but I think the suggestion does have merit in that what I have been listening to is a one-sided argument. I have only the auditor and the department before me; I do not actually have the truant—in other words, I do not have before me the person who is not complying or not complying fairly. The truant seems to be in your sights, but we seem to be the people who miss out as a consequence.

It would be helpful if you would take Senator Murray's suggestion away and consider how we could work through a less onerous task for you. There could be a system in place where, for some of these contracts which we are told are commercial-in-confidence, there was at least a way of assuring that they were in fact what they say they were, and fairly so. That might take a preliminary officer's examination in the first instance, or there might be another way checking. You might say, 'Well, of the number you refer, we'll do one or two or we'll select one for an audit of the department.' You would not take all of them. I am just thinking as I go, but it would be good if you could think up a way of doing that. Or maybe Senator Murray and I could consider it further.

**Senator MURRAY**—In my head are two possibilities; I think the first would not be effective and the second would be more effective. The first possibility is to let senators know the steps they themselves can take to verify with the witness whether the witness has gone through those

steps—is it properly listed on the Internet; is it qualified on the Internet in the way that you have just outlined; if it is qualified, does it meet the Finance guidelines? The steps go on. Most senators questioning officers are probably not aware of those steps, so the committee could provide those. But that still does not put you in the position of the auditor, where they can physically see the contract and verify the two. That is the greater need. If there were some mechanism whereby we could tag on to your annual audit a verification process where there was a difficulty from an estimates point of view, that would be helpful.

**Mr Hawley**—Yes, I have taken a note of those two points and we can work on them. Having lived with this issue for a few years now, I should say that if the department has gone through the right process and negotiated as ‘confidential’ and agreed to it being confidential—I am not a lawyer but as I understand it from the law of confidence—then it has been agreed as confidential and it will go through those other things that Senator Ludwig was talking about. If we went through that process and the right processes had been gone through in the department, I think all we could say would be—as we say in our audit reports—that, in our view, it was not appropriately classified. But whether that helps you getting the information—

**Senator MURRAY**—It does, because the Senate has accepted at large—certainly through this committee—the Finance guidelines. There is no resistance to the view that some things are confidential.

**Senator LUDWIG**—Yes. Do not mistake me: if it is legitimately confidential, I suspect that is where it ends; but sometimes you do not know whether you are met with a legitimate claim or not.

**CHAIR**—Page 13 of the report, in the summary, comments:

The ANAO found that, in all agencies, the determination of what information should be protected as confidential was made at the time the contract was placed on the Internet listing instead of when the contract was being entered into. As a result, the reasons that a contract was listed as containing confidential information were based on the views of the staff compiling the list and often did not reflect the information that was in the contract.

That is a very telling observation and criticism. I am interested in the practical side of how we change that. Will it always be possible for the determination to be made at the outset or in the early stages of the development of the contract? Certainly we know, for instance, that tendering information is very often—almost exclusively—said to be commercial-in-confidence, and there is an understandable reason for that. Would you like to expand a little on that comment in the report tell us where you think we might be able to head to get that fixed up?

**Mr Loudon**—We have been thinking of a number of avenues to encourage agencies to adopt within their guidelines for tendering that this is the process. At this stage we believe that what is happening in agencies is that the confidentiality issue is being treated as a separate policy issue to that of how you undertake the whole procurement. So one of the avenues would be to look with agencies at improving their documentation and to say, ‘The steps that you go through in relation to negotiating a contract are these, and this one is an important step and not an afterthought.’ That obviously is not in all of the documentation, and so the people who rely on, ‘This is how you undertake a process,’ are not being guided. That is one avenue.

Another avenue is that we are looking at talking with agencies about what they do in relation to their own training; how they train their contracting officers. We have already made some preliminary contact with the Australian Public Service Commission, APSC, in looking at the contract management courses they provide under contract and whether we can get our material into that as an integral component: 'If you are undertaking contracting in the public sector or the APS, this stuff has to be done as part of that.' You do not need to have all of that in it; you just need to say, 'This is where it is and these are the key steps; go and seek further information.' We are also broadening our contacts with agencies. We have a procurement discussion forum where these issues are raised; we have the Chief Financial Officers' Forum, which we are using more to push the messages down.

They are some of the avenues that we are looking at to broaden our communication strategy to get the message out. But also, when somebody is given a task for a contract over \$100,000, they are told, 'These are the instructions; this is where you get guidance.' This information has to be in that guidance. At the moment they receive the task, and I suppose it is to that that we are trying to move our attention. One of the reasons for having the forum is to gauge what the practical measures are. As a policy department, we are reliant on getting that message back into the chief executive's instructions or other documentation that agencies use. They are just some of the small steps, but none of them is going to solve it overnight.

**Senator MOORE**—I have to admit to a degree of frustration; I am not an auditor so I am speaking from some other experiences. Did I hear you correctly, Mr Loudon, that your department's guidelines on this issue are not already core documents in the training provided by the PSC on contracting?

**Mr Loudon**—Our documents have been coming out over time; as they come out we are hoping that they are adopted. They are not automatically updated, I believe, but we are working with them to broaden the information that is provided within the training. They are not continuously updated, is what I am told, but we are looking to ensure that we have good communication with the APSC so that we can say, 'This is important to get up.' We are happy and willing to review the material, which is quite important to us, to raise the level of information available within training courses.

**Senator MOORE**—Isn't one of the key issues in the whole of the discussion that the people who are doing this work and those who are responsible for this work have not effectively got the message in implementing the policy expectations that we have? We have spoken about the need for training. One of my questions was: what training is available? I skimmed through the PSC training calendar and saw there was a course for contracting. In my naivety, I felt that this issue, which has been part of the core expectations of people doing contracting, would have been on the agenda; I have not seen the guidelines. I would have thought that it would be quite straightforward for departments that had decided to invest the time and resources in their staff to send them to training to then expect that, as a result of the training, they would have a kit that would tell them how to do the job.

I would expect your guidelines on confidentiality and this particular aspect of the job of people doing contract work should be part of that training. I am not sure why the linkage is so tenuous rather than just a clear expectation, and that could be something we could look into elsewhere. From the very opening statement by Mr Watson then followed by Mr Hawley and Mr

Hutson the policy seems clear, and it does not seem to me that for people who would be expected to have this knowledge this is a particularly complex or onerous part of the task. If you were designated at the level where you would be looking at contracts worth \$100,000 or above, this should be quite a straightforward part of your work. If you have been selected to do that job in any department, then you should be fully trained to do it. I expect that there should be some kind of training that everyone has to do—I am trying to think of the right word but my brain is not working.

**Senator MURRAY**—Module?

**Senator MOORE**—Yes, a training module that is an essential part of the training for someone who is working in this field. This would pick up Mr Watson's concern about people moving through the jobs. With devolution, mobility and people moving in, it should be a prerequisite for people working in this area to have completed such modules. Only then can they be accountable if they do it wrong. Is there any reason—apart from just the fact that no-one has any ability to direct anymore—that it is not core documentation in the training?

**Mr Loudon**—The training, I believe, looks at not just the Australian public sector; it is a national curriculum. That is one of the issues where it is one of the references, but our view is that they could put more information into it. One of the reasons we contacted them as we moved through the process—after the government had responded to the report—was to look at what more we could do in that area. One of the issues is that it is multijurisdictional and, therefore, they try to cater for all of the different jurisdictions in which that training is provided. The other area is that the other training, for which we do not have access to materials, is very much what the departments themselves are doing. We have been a little reluctant to bite into that, with our own resource limitations of being able to look at people's materials, encourage them to use our stuff—

**Senator MOORE**—So your reluctance is not your reluctance because the need is not there; it is because there could be a resource impact in doing that.

**Mr Loudon**—It is obvious from the reports that more could be done. We are doing that, within our ability.

**Senator MOORE**—Mr Hawley, in the audits done by you, did the various departments list for you the training they had provided to their contract staff?

**Mr Hawley**—I think each of the reports has talked about the training.

**Senator MOORE**—And it all varies?

**Mr Hawley**—Yes, and we have not validated the training; we have not gone and said, 'Well, just show us what you actually do teach them.'

**Senator MOORE**—Coming up in each of your audits on this issue is the need for coordination and some kind of quality training across the board, and you have recommended that each time. But it seems that in audit 5, even though we have got the message, they have not done

anything about it. In the responses—I particularly enjoy reading the departments' responses in these audit reports—they all accept what you have said—

**Mr Hawley**—Yes.

**Senator MOORE**—and they are all going to review their systems and try and do better, in various forms of words. Then when you do audits 6 and 7 the same will happen.

**Mr Hawley**—Possibly.

**Senator MOORE**—Audits 1 to 5 have created an expectation, based on history, that 6 and 7 would follow that basis.

**Mr Hawley**—When we do audit No. 7, which will start in February 2005, we will be doing follow-up—as we are doing now—of agencies that we have already looked at. At the moment we have tried to take greenfield and, hopefully, change some behaviour as we audit. We have six little chaps to go and we hope that the message gets picked up by them—a lot of them basically do not have any contracts—then we will get into some of the agencies that still are struggling.

**Senator MOORE**—Mr Hutson and Mr Loudon, is it mainly Canberra based people who will come to the forum you will run in April?

**Mr Loudon**—They will be, purely because of where we are. We have been getting an increasing number of people from interstate at some of our events, but it is just more difficult. Mainly they are Canberra based.

**Senator MOORE**—With the funding for such activity, each individual agency would have to determine that it would be worth their while to send people to such a session. You call it a forum, as opposed to a formal training session. It is more an exchange of ideas so that people can improve their reviews. Is that right?

**Mr Loudon**—Yes. The whole idea is to push a couple of messages. We are doing it in conjunction with the ANAO so that we can move away from the listing as being the issue to it being more about confidentiality and the issue of training. In that way we can move the discussion away from, as it was, the need for guidance in how to do it to what the underlying messages are. That is what we are trying to do. The reason that it is quite useful to hold such sessions in Canberra particularly is that we can target the larger procurement units, who hopefully will attend. We are trying to get mid-level senior public servants to attend; they can then have an influence on their agencies' operations. That is part of our agenda.

**Senator MOORE**—Have you held a couple of these forums in the past?

**Mr Loudon**—We are conducting forums on different issues. My branch runs regular procurement discussion forums, which are quarterly; usually between 30 and 50 public servants attend them. We also present on procurement issues at the Chief Financial Officers' Forum that Finance runs.

**Senator MOORE**—Can we get a list of which departments turn up?

**Mr Loudon**—To those?

**Senator MOORE**—Yes.

**Mr Loudon**—We can give you an indication; it varies considerably.

**Senator MOORE**—It just seems to me that this being one of the few coordinated activities is an important element. It would be interesting to see over a period of time who are consistent in attendance at such fora and then possibly to have a look at whether that reflects in their performance and who, for whatever reason—and we would never like to impugn reason—do not show. It is just part of an ongoing frustration, which Senator Forshaw has seen me show before, about the fact that this is common expectation across agencies and there does not seem to be enough sharing between them; I think they could all improve their performance if they did work together in that way.

There is one other thing that I want to confirm for my own knowledge, because it is not my area. The kinds of tasks that we are talking about and that we are expecting agencies to do are not particularly onerous. It is not particularly demanding to expect people who are doing this kind of contract work to meet all the expectations so that, when they are audited, there is not the need to say that these things need improvement. I am trying to establish whether this is a straightforward, reasonable request of the workers at this level.

**Mr Hawley**—I think, going to the principles here, they are very simple. Even the lawyers now understand that we have excluded them, because all this is discussed beforehand. They like the breach of confidence—that is where they normally get involved—but we are saying, ‘Let’s get all that up-front—

**Senator MOORE**—So it is the exception.

**Mr Hawley**—as opposed to afterwards.’ It is not as easy where you are a contract manager dealing with a big organisation through which you are trying to get some work. You might come to a stumbling block when you say, ‘We don’t want that to be confidential, even though you’ve asked for it.’ Some pressure can be put on. Negotiating with them would be quite hard because the big firms all bring their own lawyers in. So if you were dealing with some of the big defence stuff you would be pushing it uphill to try to get some change. I think the majority of contracts would be easy, but one or two would be very tough nuts to crack.

**Senator MOORE**—In the process there would be procedures that people would follow. If you got to a point where that happened, there would be an arrow saying, ‘This is what you do next and this the person to whom you go to get help.’

**Senator MURRAY**—I want to refer to negotiating behaviour because, by the nature of things, at times the contract manager will be faced with people who are perhaps a lot more expert, a lot more experienced and a lot tougher than they are. That is just the reality of things. One of the outs for anybody negotiating commercial-in-confidence in terms of the Auditor-General’s views and the finance guidelines is that it might be commercial-in-confidence for the duration of the contract but, once the contract is let, it no longer is. So, faced with that ultimatum, if you like, from the supplier, that is effectively a halfway house. I wondered if in your audit you started to

see a change in behaviour so that contracts as a whole were not commercial-in-confidence forever and regarded as such, but were recognised as being fully capable of scrutiny at the end of the contract.

**Mr Hawley**—I cannot think of an example. I will look down the table for guidance on that.

**Ms Hinchcliffe**—It will become more apparent as agencies start to pick up the template clauses that are in the finance guidelines because we ask that agencies put a time frame onto the confidentiality, so that there is a specific period or event after which the information would no longer be confidential.

**Senator MURRAY**—Still on the sample basis where you find a circumstance such as I quoted you back from your own report—where five out of 30 contracts only were legitimately commercial-in-confidence from your perspective—I wonder whether you should put a recommendation to the Auditor-General's review that those contracts which you did not consider to be legitimately commercial-in-confidence should, at their termination, no longer be confidential? Once someone has accepted in law, even if it is invalid to do so, that something is classified commercial-in-confidence it is a bit difficult to undo it, but you can come to a view as to how it should be at the end of the contract. That is quite important from an accountability point of view, being able to go back over the history and examine issues.

**Mr Hawley**—That might give us another angle to these audits which we are getting and which, as you have already noticed, are a bit similar. That would be a good thing to talk about.

**Senator MURRAY**—You would also need to discuss with Finance just what that means with respect to legality. That is another way of getting around what I sense is a very slowly shifting ship. Do you have any instinctive reservations, Mr Hutson?

**Mr Hutson**—No, Senator. It seems to me that the point you are making is right—that at some stage even the information which is confidential at one point would become less significant at a later point in time and that you should have a time limit on that.

**Senator MURRAY**—Your guidelines say that, but they do not say that there is a process whereby somebody will make that call. That is my concern. Your guidelines, if I recall them correctly, say that call is supposed to be made up-front when the contract is being constructed. What I am suggesting is that that call could be made as a result of an Auditor-General's audit of that specific contract—or by anyone else against certain criteria, I would assume—in the middle or at the end of the contract.

**Mr Hutson**—That would depend upon what the nature of the agreement was up-front—if they agreed up-front that certain information would be held in confidence in perpetuity. You could certainly imagine some intellectual property that might well fall into that category, or at least as long as the copyright runs. Even though, as history goes along, you might find that the value of the intellectual property has diminished to the point where it has effectively become public information, in law you would still be bound by your agreement that it was commercial-in-confidence up-front.

**Senator MURRAY**—I know it is contestable, but in law your protection is that parliament does not accept that anything is confidential.

**Mr Hutson**—Of course.

**Senator MURRAY**—We do, as a convention, but in law we do not. The parliament is entitled to ask for anything and examine anything—that is its specific remit. I would have thought that a disclaimer up-front when a contract is negotiated was a very important protection against the idea that something should be confidential in perpetuity. Obviously the Senate is never going to insist that everything is exposed to it, because there are things which should probably be confidential. I am really looking for the ability of the Auditor-General to make a call on those contracts they specifically examine, not generally.

**Mr Hawley**—I think, quite honestly, in most of the contracts we have looked at most people would say that it was just a mistake—I hear what you are saying, Senator—and, therefore, there would be no reason why they could not have put in that contract, ‘Whilst we’ve agreed this for whatever reason, at the end of the contract it’s void.’ We could ask those questions when we go through the contract. It makes a lot of sense that, in the actual contract template, you have this discussion so if you have agreed it is confidential, as Ms Hinchcliffe was saying, then you can actually then talk about how long it should be confidential for, which is what the clauses were showing you.

**Senator MURRAY**—What I am really suggesting is that either the Auditor-General or the finance department come back to us and say, ‘Look, if you could devise a disclaimer which would apply up-front and would say that unless the contract very much conformed with finance guidelines and unless the Auditor-General had verified it to have complied, then it would be open at the end of the contract.’ Something like that might give you the protection you need with respect to what Finance needs to protect whilst giving us the openness that the Auditor-General is looking for. It is a request, through the chair, for you to come back to the committee.

**Mr Hutson**—To be honest, that is a question I would want to think about because of the law and because of the volume of cases we might then be asking the Auditor-General to deal with.

**Senator MURRAY**—I am only really referring to those contracts that the Auditor-General specifically looks at. I do not envisage this exercise for others because I think the volume of work is just too great. I would like it; but I do not think you can do it.

**Mr Hutson**—That is right.

**Mr Hawley**—Legality is the only thing that would be a worry to me. Unless you negotiate this law of confidence before it comes in, before it is agreed that it is confidential, it might be more difficult for us to say something like that.

**Senator MURRAY**—That is why, through the chair—if the chair is happy for it—I am asking you to give what I have requested some thought and to come back to the committee with some observations.

**CHAIR**—In your consideration of whether or not it is appropriate that contracts be either in whole or in part deemed to be commercial-in-confidence contracts, do you come across situations where you might consider that the detail should be made available—say, on a confidential basis to the parliament as distinct from publicly either on the Net or through a public hearing? Let me make this comment before you respond. I am a member of the Joint Public Works Committee, and we are charged with looking at and giving approval to public works contracts in excess of \$6 million. That is the statutory provision. We look at those proposed projects in the very early stages—that is, before they have gone to tender—because for the work to proceed it has to be given the approval of the committee unless it is exempted by the parliament, and that happens in fairly rare circumstances.

For instance, the Department of Defence or another department will come to us and say: ‘You know we have a budget of \$12 million. We’re going to build this building or do this refurbishment or whatever and this is how we see that it will be spent.’ We will be given in a fair amount of detail their estimates of the cost breakdown of the project in a confidential hearing, and there is a very good reason for that—that is, they have not even gone to tender yet. Our job finishes when we give the approval. I am trying to think of an example—and I cannot recall one specifically—but I can well imagine a case where at some subsequent time you would have an estimates committee hearing examining why this thing went over budget by X amount of dollars or why particular problems occurred. They would ask at the hearing, ‘What was in the contract?’ and the department would say, ‘It’s commercial-in-confidence.’

**Senator MURRAY**—There was one in the Northern Territory, a defence housing contract.

**CHAIR**—I find that an interesting irony. I can remember, for instance, in a committee I chaired looking at the nuclear reactor project. A contract had been entered into between ANSTO and the Argentinean company INVAP. I think we recommended that the Audit Office look at this. We were denied access to virtually any detail. We could not get detail on the contractual obligations, even on a confidential basis, to the committee. I appreciate that things being given to the committee in confidence does not always stop a senator from breaking that confidence, but we know that people should respect that. That is a longwinded way of asking you this. It seems to me that there could well be degrees of commercial confidentiality where it may be legitimate for the parliament or the committee to know and yet it may be considered that the information should not necessarily be put on the web site. Do you have a comment about that?

**Mr Hawley**—We did talk about some of this. In the first report we did we talked about how the Senate estimates committees would have to form another committee to discuss things. I suppose you could give something to a committee in camera but in Senate estimates you cannot; you have to form another committee. All this stuff you are obviously familiar with. We had some discussions about that but we have always felt that if the process is followed properly and you come to a view on commercial-in-confidence that can be reasoned properly through the committee then the committees probably would accept that—if it has been through the proper processes. What the committees used to get upset about—a few years ago, as I understand it—was somebody just saying, ‘This is commercial-in-confidence.’ When asked why they would say, ‘We do not have any real reason for this. We just think it should be.’

The whole idea of the finance guide is so that at the end of the day when they sit in front of you they can say, ‘Yes, it is commercial-in-confidence. We have given some profit margins here.’

We don't want our competitors to know about it because we are actually tendering for another job just down the road and if they got information on this then that would actually change how they would do the next tender.' With that sort of argument, most people would say, 'I understand.' That was what that framework was trying to suggest.

**CHAIR**—In the case of the one with ANSTO, and I do not want to get sidetracked here, what we were particularly interested in—one aspect of it—was what the penalty clauses and so forth were. That has become somewhat relevant in that project. I have a couple of other issues I wanted to mention. In the letter from the department of finance in regard to ASIS and ASIO and the arrangements that have been made there, you state:

The distribution and publication of any material stemming from this examination will be cognisant of section 37 of the *Auditor-General Act 1997*, which provides for the results not to be publicly reported if they contain sensitive information.

Can you comment on that? What does it really mean? Does it mean that you will not be able to report at all or that you may be able to report?

**Mr Loudon**—Pretty much that same perspective is also in the most recent audit report—No. 31—regarding the matter of ASIO and ASIS.

**Mr Hawley**—I have to apologise. I know that it is probably near the end of the thing but I have just picked up what they call swimmer's ear so if I do not listen intently I miss things. I actually thought the question was being directed elsewhere so I switched off a bit and now it has come back to me. My apologies for that.

**CHAIR**—What has happened is that all the parties have agreed.

**Mr Hawley**—We have written to the directors-general of both of them saying that we are coming in to look at them during this period. We will have a view for you by September. How we report that view is something we have to discuss. I have given you an answer. Whether it was to the right question I do not know.

**CHAIR**—But that report may not actually be public.

**Mr Hawley**—I have no idea. I have not even been in. I have no idea what these contracts are going to look like, which is what you want me to have a look at. I have a feeling that processes will probably be all right, although—

**CHAIR**—I can appreciate the nature of this.

**Mr Hawley**—I think that they will all have individual names and I will not be able to talk about that. But I think I will be able to talk in principles. I think we have only used section 37 or the equivalent in the old audit act once. That is, we have only once not been able to report on things we have found because of security reasons.

**Senator MURRAY**—Of the two components, one is the Internet registration, if you want to call it that, and the other is the commercial-in-confidence checklist. They would not do the

Internet one but they would do the commercial-in-confidence checklist, and you would examine that.

**Mr Hawley**—That is what we are going to do in the next few months.

**Senator MURRAY**—That is a great advance because you want them to comply with the integrity of the system.

**CHAIR**—Do you have any idea of the frequency of the Audit Office's audits on ASIO and ASIS?

**Mr Hawley**—It would rather—I hate to say—depend on what we find. If we go in there and find that none of this stuff that we have all been talking about is actually working in those two organisations, we could get some guidance on that and come back to look at it again.

**CHAIR**—I might at this stage indicate that we did receive correspondence from the Clerk of the Senate dated 22 March. This was following a request from the committee that he provide a comment as he has done in the past. The Clerk raised a couple of issues which you might have a look at. Ladies and gentlemen, thank you for your appearance here today, your cooperation in this hearing and your ongoing work in ensuring compliance with the Senate order so we can improve things even further.

Resolved (on motion by **Senator Murray**):

That the correspondence from the Clerk of the Senate on 22 March and the letter from the Department of Finance and Administration on 18 February 2004 from Mr Hutson be received as evidence to the committee and authorised for publication.

**Committee adjourned at 5.22 p.m.**