2

THE ACCOUNTABILITY FRAMEWORK

Introduction

2.1 One of the key features that has arisen as part of this and previous inquiries is the growing extent to which executive government is applying commercial-in-confidence status to all or parts of government contracts. Previous inquiries have concluded that this trend is reducing parliamentary accountability and the public's 'right to know'.

2.2 Alternatively, some groups, such as the Industry Commission (IC), suggest that contracting out requires agencies to clearly specify the services to be delivered and the division of responsibilities between agency and contractor, thus leading to enhanced accountability.

2.3 This chapter will examine the extent to which government outsourcing may be leading to less public accountability. In particular, this examination will focus on the application of commercial-in-confidence status to government contracts and its impact on parliamentary scrutiny.

2.4 The Auditor-General, as an independent officer of the parliament, is a key part of the accountability framework and plays a vital role in assisting the parliament in its scrutiny of executive government. The Committee has previously recommended that the Auditor-General should have the power to access contractors' premises in conducting his important audit function. The role and powers of the Auditor-General and his impact on government contracting will be examined. The evidence shows that Auditor-General access provisions in government contracts create no disincentives to business.

The Commonwealth government accountability framework

2.5 The Commonwealth government accountability framework consists of a number of features which seek to provide accountability to the parliament and through it to the public. Key elements of the accountability process include:

- government ministers who hold to account their departments and who in turn are held to account by the parliament;
  - ⇒ parliamentary accountability includes information gained through question time, estimates committees and scrutiny of executive government by standing and select committees of the parliament;
  - ⇒ scrutiny work conducted by the Joint Committee of Public Accounts and Audit;
- public service accountability to the parliament through the provision of
  - ⇒ Annual Reports; and
  - ⇒ Portfolio Budget statements;
- administrative law remedies achieved through legislation such as the Freedom of Information Act and the Ombudsman Act; and
- the scrutiny function performed by the Auditor-General as an independent officer of the parliament.

2.6 The focus of this inquiry is the adequacy of the accountability processes that apply to government contracts. An examination of the Commonwealth Government Gazettal requirements is particularly relevant to understanding the core source of information on government contracts.

Gazettal requirements

2.7 Financial Management and Accountability Regulation 7 provides for the Minister for Finance and Administration to issue the Commonwealth Procurement Guidelines (CPGs). The CPGs include reporting requirements that are applicable to all agencies that come under the *Financial Management and Accountability Act 1997*.

2.8 Goods and services, exceeding $2 000 in value, must be notified on the *Purchasing and Disposals Gazette*. The *Gazette* is provided electronically and consists of two websites. The first is the Government Advertising Website (www.ads.gov.au) where open government business opportunities are

reported. The second is the *Gazette Publishing System* (*GAPs*) where all contracts and standing offers exceeding $2 000 in value are reported (www.contracts.gov.au).

2.9 Reporting requirements are set out in the *Commonwealth Procurement Guidelines, Core Policies and Principles* (CPGs) and in the *Mandatory Reporting Requirements Handbook*.[1] Responsible government officers are required to notify agency agreements or Commonwealth contracts in the *Gazette* within six weeks. The details to be notified include:

- ministerial portfolio, department or agency, division or group, branch or office and postcode of branch or office;
- description of the goods or services sufficient to identify the nature and quantity of the procurement;
- department or agency reference;
- for contracts arranged, the purchase order number, total estimated liability (Australian currency) and date;
- for standing offers or similar arrangements, the total estimated value (Australian currency) and period of offer;
- where applicable, the identifying period contract reference number or the relevant standing offer used to acquire the supplies;
- for each supplier (including each party to a standing offer or like), its name, postal address, postcode, State, country and, from 1 July 1998, its Data Universal Numbering System (DUNS) number;
- name and telephone number of the contract officer for inquiries about the notification; and
- the Australian and New Zealand Standard Commodity Classification (ANZSCC) code for the goods or services to be procured.[2]

2.10 Government agencies are **not** required to report:

- payments of monthly or other accounts payable under an existing, previously reported contract;
- transfers or funds to other agencies, divisions within an agency or trust funds within an agency which are not in return for goods and services;

1 Department of Finance and Administration, *Commonwealth Procurement Guidelines, Core Policies and Principles*, March 1998, p. 14; Office for Government Online, *Mandatory Reporting Requirements Handbook*, Version 2.

2 Department of Finance and Administration, *Commonwealth Procurement Guidelines, Core Policies and Principles*, p. 14.

- grants to outside bodies or state government purchases;
- tax payments, including fringe benefits tax;
- salaries of Commonwealth public servants;
- payments of travelling allowances or other allowances to public servants;
- petty cash reimbursements for offices who paid for suppliers from their own funds; However, if the cost of those suppliers is $2 000 or more, details of the contract must be published whether the officer purchases suppliers openly as an agent of the Commonwealth or in their own right as far as the supplier is concerned;
- refunds to customers for a prior payment made for a product or service; and
- supplies procured and used overseas, for example overseas posts using caterers.[3]

2.11 An exemption provision exists for the reporting of contracts and standing offers. The CPGs state that if 'the Chief Executive of an agency decides that details of a contract or standing offer are exempt matters under the *Freedom of Information Act 1982* (FOI Act), he or she may then direct in writing that the details are not to be notified in the *Gazette'*.[4] The FOI exemptions are contained in Part IV of the FOI Act and include such matters as:

- documents affecting national security, defence or international relations;
- documents affecting enforcement of law and protection of public safety;
- documents affecting financial or property interests of the Commonwealth; and
- documents relating to business affairs.

3 Office for Government Online, *Mandatory Reporting Requirements Handbook*, Version 2, p. 11.

4 Department of Finance and Administration, *Commonwealth Procurement Guidelines, Core Policies and Principles*, p. 15.

Administrative law implications

2.12 Previous inquiries have examined the impact of contracting out on the quality of accountability. Some groups suggest that with the increased separation between government and contractor there is a consequent loss of accountability. The Administrative Review Council (ARC) stated:

> In the Council's view limited access to information about services that are contracted out threatens government accountability to the community. There is potential for a diminution or loss of accountability both in relation to the services provided to individual recipients and in relation to broader questions of public interest.[5]

2.13 It is also argued that accountability is eroded if the lines between government and citizen are weakened, and therefore it becomes more difficult to allocate responsibility. Seddon states:

> If services are provided to citizens by a contractor rather than by public servants, there is no direct relationship between government and citizen. The contract is between government and contractor. If the contractor fails to perform as required by the contract the citizen has no contract rights against the contractor because the citizen is not a party to the contract. The privity principle holds that only the parties to a contract can enforce it.[6]

2.14 In contrast to these views, the Industry Commission (IC) suggested that contracting out can lead to enhanced accountability through the need to specify more clearly the services to be delivered.[7] This view was supported in evidence to the inquiry. Some government agencies maintained that while they have outsourced services, they have not outsourced accountability. The Department of Family and Community Services stated:

> …we find that the contracting process and the purchaser provider process, properly handled, have sharpened very much our definition of the outputs that we have to buy at various stages of our production process. Sometimes that is external but sometimes

5 Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, CanPrint, Canberra, 1998, p. 52.

6 Seddon, N., *Government Contracts, Federal, State and Local*, The Federation Press, Sydney, 1999, p. 34.

7 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report No. 48, AGPS, Melbourne, 1996, p. 5.

> it is internal. I think it has heightened, in some senses, our accountability as managers to have to define those outputs, to specify performance indicators and to monitor them.[8]

2.15 Seddon notes the view by some groups that contracting leads to enhanced accountability through the development of detailed measures and outcomes, but he cautions that if 'these standards, specified in the contract, are hidden, then the supposed enhanced accountability is destroyed.'[9]

2.16 Groups that have suggested that contracting out has led to less accountability have done so from a different perspective to the IC. For example, it is suggested that contracting out weakens administrative law and, therefore, may diminish a citizen's rights. In particular, it is suggested that the Ombudsman's powers and FOI powers have been affected.[10] With respect to the Ombudsman's legislation and FOI, Dr Seddon stated:

> …the legislation does not extend to investigating what a company is doing; it can only extend to what a public agency is doing. It is the same with FOI, freedom of information. Of course, you cannot get access to documents in the hands of a private company; you can only get access to documents in the hands of government, so as soon as you contract out you detract or erode those two very important forms of public accountability.[11]

2.17 In regard to FOI, DoFA reported that the Government has announced that the FOI Act 'will apply to requests by individuals for access to and correction of personal information about themselves held by a contractor on behalf of the Government.'[12] The Attorney-General's Department advised that the Government is developing amendments to the FOI Act to ensure the effectiveness of rights of access to information held by contractors in relation to services provided to government. It is intended that these FOI amendments will be introduced in the Spring 2000 sitting.[13]

2.18 In regard to privacy considerations, the Government has introduced legislation to strengthen privacy protection in the private sector. This legislation will require contractors handling personal information, as part of performing their obligations under a contract with the Commonwealth,

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8 Dr David Rosalky, Department of Family and Community Services, *Transcript*, p. 201.

9 Seddon, N., *Government Contracts, Federal, State and Local*, The Federation Press, Sydney, 1999, p. 330.

10 Dr Nick Seddon, *Transcript*, p. 123.

11 Dr Nick Seddon, *Transcript*, p. 123.

12 Department of Finance and Administration, *Competitive Tendering and Contracting, Guidance for Managers*, March 1998, p. 17.

13 Correspondence from the Attorney-General's Department, 10 July 2000.

to comply with the Information Privacy Principles in the *Privacy Act 1988*.[14] The Attorney-General, the Hon Daryl Williams, MP, as part of his second reading speech introducing the Privacy Amendment (Private Sector) Bill 2000 stated:

> Another area where special issues arise is where government services involving personal information are outsourced to the private sector. In these circumstances, it is important to ensure that personal information is given the same level of protection it would receive if it were held by government and that, in specified circumstances, the contracting government agency remains ultimately responsible for the acts and practices of its contractors.[15]

2.19 In relation to the Commonwealth Ombudsman, the Administrative Review Council (ARC) concluded that 'the Ombudsman should be able to investigate complaints against government contractors and should be able to deal directly with the contractor in resolving a complaint.'[16] The ARC, therefore, recommended that 'the jurisdiction of the Commonwealth Ombudsman should extend to the investigation of actions by a contractor under a government contract.'[17]

2.20 On 30 March 2000, the Ombudsman advised the Committee that the government had not yet responded to the ARC's proposal. The Ombudsman concluded that 'the simplest and most efficient option would be to adopt the ARC's proposal, perhaps by a single inclusive expansion of jurisdiction to include all government contractors'.[18]

2.21 A possible reason for not extending the powers of the Ombudsman to examine government contractors relates to potential costs to contractors. Mulgan commented that the 'main reason given for resisting the general extension of the Ombudsman's jurisdiction is the cost imposed on private contractors in terms of staff time taken to deal with investigations.'[19]

2.22 It is the issue of possible cost implications which led the Senate Finance and Public Administration References Committee to recommend, as an interim measure, the 'extension of the Ombudsman's jurisdiction on a

14 Correspondence from the Attorney-General's Department, 10 July 2000.

15 Attorney-General, the Hon Daryl Williams, MP, Second reading speech introducing the Privacy Amendment (Private Sector) Bill 2000, House of Representatives, 12 April 2000.

16 Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, CanPrint, Canberra, 1998, p. 45.

17 Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, p. 46.

18 Mr Oliver Winder, Commonwealth Ombudsman's Office, *Transcript*, p. 188.

19 Mulgan, R. 'Contracting Out and Accountability', *Australian Journal of Public Administration*, Volume 56, No. 4, December 1997, p. 113.

case-by-case basis for sensitive areas of service delivery.'[20] The Senate Finance and Public Administration References Committee indicated that it would monitor usage of the Ombudsman's services and determine at a later stage if it was necessary to extend the Ombudsman's jurisdiction to cover all contracted out government services.[21]

2.23 The Ombudsman noted that the recommendation of the Senate Finance and Public Administration References Committee has not been implemented. Further, the Ombudsman stated some reservations with the recommendation:

> I have some difficulty in seeing how this easily could be achieved. Would it be by amendment of the area's legislation? What would be a sensitive area? How easily would legislation be amended, particularly if this is post hoc because problems have arisen when contractual arrangements may have been locked in for some time.[22]

2.24 The Ombudsman rejected claims that contractors are opposed to having the Ombudsman review their administration, and that this would increase costs for both themselves and the Commonwealth.[23] The Ombudsman commented that a range of service industries such as banking and insurance have complaint review arrangements, and most large contractors welcome advice on how they can improve client service.[24] In regards to the costs of investigations, the Ombudsman stated:

> We are not going to be investigating contractors every day. In the vast majority of cases, we would operate as we currently do and decline to investigate unless and until the complaint arrangements of the agency and the contractor have been exhausted. But we will, as we currently do, review these arrangements from time to time to see if they can be improved.[25]

2.25 The Ombudsman, therefore, recommended that the ARC's proposal should be implemented by a simple inclusive expansion of jurisdiction to include all government contractors much in the same way as used in Queensland legislation. The Queensland *Parliamentary Commissioner Act*

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20 Senate Finance and Public Administration References Committee, *Contracting out of Government Services, Second Report*, Senate Printing Unit, May 1998, p. 47.

21 Senate Finance and Public Administration References Committee, *Contracting out of Government Services, Second Report*, May 1998, p. 47.

22 Mr Oliver Winder, Commonwealth Ombudsman's Office, *Transcript*, p. 188.

23 Mr Oliver Winder, Commonwealth Ombudsman's Office, *Transcript*, p. 188.

24 Mr Oliver Winder, Commonwealth Ombudsman's Office, *Transcript*, p. 189.

25 Mr Oliver Winder, Commonwealth Ombudsman's Office, *Transcript*, p. 189.

1974 states that 'if administrative action of an authority or body that is not an agency is taken under functions conferred on or instructions given by an agency, the action is taken for the purpose of this act to be action of the agency.'[26]

2.26 The Ombudsman, in supporting legislative change to ensure that his jurisdiction is extended to deal with the actions of contractors, commented that if necessary provision could be made for considering exemptions.[27]

Conclusions

2.27 Under the existing accountability framework, contracting out of government services can lead to less accountability. From a performance and outcome perspective, the Industry Commission, for example, suggests contracting out leads to enhanced accountability through the need to more carefully specify performance and outcomes. But this only holds if the contractual information is public.

2.28 Accountability, however, is not just defined from the perspective of performance. Accountability also includes administrative remedies such as a citizen's access to information through Freedom of Information (FOI). The FOI Act is expected to be amended in late 2000 to allow individuals to access personal information about themselves held by a government contractor. The Committee supports this measure. In relation to privacy, the Government has introduced legislation which will require contractors handling personal information, as part of performing their obligations under a contract with the Commonwealth, to comply with the Information Privacy Principles in the *Privacy Act 1988*.

2.29 The Ombudsman legislation, however, does not provide the Ombudsman with the powers to investigate the actions of a government contractor. In 1998, the Administrative Review Council recommended to the Government that the jurisdiction of the Commonwealth Ombudsman should extend to the investigation of actions by a contractor under a government contract. The Government has not yet responded to this recommendation.

26 Mr Oliver Winder, Commonwealth Ombudsman's Office, *Transcript*, p. 193.

27 Mr Frederick Buck, Commonwealth Ombudsman's Office, *Transcript*, p. 192.

2.30 In 1998, the Senate Finance and Public Administration References Committee, noting possible cost implications, recommended, as an interim measure, the extension of the Ombudsman's jurisdiction on a case-by-case basis for sensitive areas of service delivery. This recommendation has not been implemented and the Ombudsman indicated that there were difficulties in having a case-by-case approach.

2.31 The Committee is persuaded by the Ombudsman's argument that legislative change is needed to expand the jurisdiction of the Ombudsman to include all government contractors. The Committee notes that Queensland legislation extends the jurisdiction of the Queensland Ombudsman to include government contractors.

2.32 At the same time, there is little evidence to suggest that extending the powers of the Ombudsman will lead to significant cost increases for both contractors and the Commonwealth. The Committee does not expect that this additional power will lead to the Ombudsman investigating, and tying up contractor resources, at every opportunity. The Ombudsman's approach to handling complaints is to decline to investigate unless and until the complaint arrangements of the agency and the contractor have been exhausted.

2.33 The Committee also accepts the point that most large contractors welcome advice on how they can improve client service. Therefore, the Committee recommends that the *Ombudsman Act 1976* be amended to extend the jurisdiction of the Ombudsman to include all government contractors.

Recommendation 1

2.34 **That the *Ombudsman Act 1976* be amended to extend the jurisdiction of the Ombudsman to include all government contractors.**

Commercial-in-confidence status

2.35 One of the issues that has arisen as part of this and previous inquiries is the extent to which government agencies are avoiding public scrutiny of their contractual dealings by classifying parts or all of a contract as commercial-in-confidence. In addition, the *Gazettal* exemption provisions suggests that secret contracts exist which are totally removed from public scrutiny.

2.36 Evidence to the inquiry suggested that commercial-in-confidence status can be valid but greater checks and balances are required. The Canberra Business Council stated:

> There is genuine commercial-in-confidence and there is misuse of commercial-in-confidence. I cannot justify misuse of commercial-in-confidence, but I do think there are sometimes issues of genuine commercial-in-confidence that are not appreciated or understood by people who have a need or desire to get particular information. It is a balancing act. As long as you have a competent, fair, unbiased Auditor-General, the system can work well.[28]

2.37 The Australian National Audit Office (ANAO) stated:

> From our perspective, it is probably too easy at the moment for agencies to claim commercial-in-confidence. We think the weighting should come back the other way, but I would still say that there would be instances where we have to be very careful with that information.[29]

2.38 The ANAO in addressing the application of commercial-in-confidence to government contracts supports a reverse onus of proof test. That is, 'information should be made public unless there is a good reason for it not to be.'[30] The ANAO indicated that this would 'require the party that argues for non-disclosure to substantiate that disclosure would be harmful to its commercial interests.'[31] The Senate Finance and Public Administration References Committee also addressed this issue and unanimously supported the ANAO in the need for a reverse of onus of proof test. The Senate Finance and Public Administration References Committee stated:

> The committee is firmly of the view that only relatively small parts of contractual arrangements will be genuinely commercially confidential and the onus should be on the person claiming confidentiality to argue the case for it. A great deal of heat could be taken out of the issue if agencies entering into contracts adopted the practice of making contracts available with any genuinely sensitive parts blacked out. The committee accepts that some matters are legitimately commercially confidential.[32]

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28 Mr Peter Grills, Canberra Business Council, *Transcript*, p. 42.

29 Mr Warren Cochrane, Australian National Audit Office, *Transcript*, p. 97.

30 Australian National Audit Office, *Submission*, p. S134.

31 Australian National Audit Office, *Submission*, p. S134.

32 Senate Finance and Public Administration References Committee, *Contracting out of Government Services*, Second Report, Senate Printing Office, 1998, p. 71.

2.39 In 1980, the principal of reverse onus of proof arose in *Esso Australia Resources Ltd v Plowman*. In this case, public utilities refused to disclose certain information to the Minister for Energy and Minerals. Mason CJ responded with what is now referred to as the *John Fairfax* rule:

> The courts have consistently viewed governmental secrets differently from personal and commercial secrets…the judiciary must view the disclosure of governmental information 'through different spectacles'. This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.[33]

2.40 Some groups in evidence to the inquiry supported the view that contracts should be made available to parliamentary committees with, if necessary, commercially sensitive information deleted. The Department of Immigration and Multicultural Affairs suggested that this approach has been satisfactory.[34] The Department of Family and Community Services suggested that once a contract has been struck then the 'price should be publicly available and the product that one is getting for it.'[35]

2.41 Some groups suggest that 'parliament should have an unfettered right' to examine government contracts.[36] Dr Seddon, however, warned that accountability will be compromised if the parties to a contract agree on confidentiality clauses. He indicated that if there was agreement to keep something secret ' then the contract is the operative set of rights and duties between the parties, and it is a breach of contract to let the information out if the contract says you cannot.'[37] Dr Seddon suggested that the solution to this problem 'is either through legal means, such as legislation that provides that government contracts will be published with appropriate safeguards; or by adopting a policy that makes it clear to potential contractors that the government intends to publish and that it will only agree to commercial-in-confidence clause where it is genuinely needed'.[38]

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33 Cited in Corcoran, S. & MacPherson, K.I., 'Disclosure and the Public Interest: Confidentiality Claims in Outsourcing Agreements', *The Australian Law Journal*, Volume 74, No. 4, April 2000, p. 263.

34 Mr Vincent McMahon, Department of Immigration and Multicultural Affairs, *Transcript*, p. 257.

35 Dr David Rosalky, Department of Family and Community Services, *Transcript*, p. 204.

36 Dr Nick Seddon, *Transcript*, pp. 124–125.

37 Dr Nick Seddon, *Transcript*, p. 121.

38 Dr Nick Seddon, *Submission* No. 14 to Senate Finance and Public Administration Committee inquiry into Government Contracts – Notice of Motion by Senator Murray, p. 2.

2.42 As part of this debate, it is relevant to examine confidentiality clauses used by the Department of Employment, Workplace Relations and Small Business (DEWRSB), in its Employment Services Contract. What becomes commercially confidential is part of the contractual agreement between the contractor and DEWRSB. DEWRSB stated:

> … there is a separate clause, clause 14, which deals with confidential and personal information. Basically, clause 14.1 provides that the Job Network member cannot disclose any information that is confidential to the Commonwealth, and clause 14.2 provides that the Commonwealth cannot disclose any information that is confidential to the provider unless there is agreement.[39]

2.43 Through this contract, DEWRSB and the contractor essentially determine what is confidential and what will be available for parliamentary scrutiny. DEWRSB suggested that it was satisfactory for the parliament to know the total cost of the Job Network and the outcomes being achieved for that money.[40] DEWRSB, however, argued that parliament did not need, as part of its accountability and oversight responsibilities, more detailed pricing information. DEWRSB stated:

> You do not need to have the specific contract price provisions for individual providers to do that. Parliament will be able to have how many outcomes are being achieved in every category and how much public funds are being used to achieve those outcomes. I think that is what parliament requires.[41]

Conclusions

2.44 Accountability and parliamentary scrutiny is being eroded through the application of commercial-in-confidence to all or parts of government contracts. The reporting requirements for the *Purchasing and Disposal Gazette* provides for Chief Executives to exempt contracts from notification if there are any matters in the contract that would be exempt matters under the Freedom of Information Act. This includes such matters as trade secrets and national security. Whether or not a Chief Executive has a

39 Mr Brian McMillan, Department of Employment, Workplace Relations and Small Business, *Transcript*, p. 148.

40 Dr Peter Shergold, , Department of Employment, Workplace Relations and Small Business, *Transcript*, p. 141.

41 Dr Peter Shergold, Department of Employment, Workplace Relations and Small Business, *Transcript*, p. 142.

genuine reason for exempting a contract from notification, the point is the parliament and the public have no way of telling because the contract is essentially secret.

2.45 The Department of Employment, Workplace Relations and Small Business (DEWRSB) advised the Committee that its confidentiality provisions in the Employment Services Contract preclude the release of information if one of the parties to the contract claimed confidentiality. DEWRSB indicated that all parliament needed to perform its scrutiny of the executive was the total price of the contract and some outcome information. The Committee rejects this advice and maintains that the parliament and its various committees will determine what information is needed to scrutinise executive government.

2.46 The Committee's position is that it, like all parliamentary committees, must have an unfettered right to contractual information. In the event that the Committee requested confidential information from DEWRSB then it is likely that if executive government felt strongly about the release of Job Network information, it would invariably claim public interest immunity. In this event a stand off between the Committee and executive government would exist.

2.47 In view of these examples, the Committee agrees with the findings of previous inquiries that contracting out does lead to a loss of accountability. The solutions to this problem have been less than effective. The prominent response is a reverse onus of proof test which would require all information to be made public unless there is a good reason for it not to be. It would then be up to the party seeking confidentiality to show why release of information would be harmful to its commercial interests. The Committee supports this principle but suggests that it creates more questions than answers. Giving effect to the reverse onus of proof test is complex and there are a range of possibilities. The next section of this Chapter will discuss the options that exist and propose an alternative strategy.

Accountability options

2.48 There have been a number of attempts to give effect to the reverse onus of proof test relating to government contracts, and improve the level of accountability. This discussion will examine three strategies that have been proposed for improving the transparency and the level of accountability applying to government contracts. They are:

- the Victorian Parliament, Public Accounts and Estimates Committee inquiry into commercial in confidence;
- a Senate resolution by Senator Andrew Murray; and
- recent initiatives in the ACT Legislature.

2.49 The Victorian Parliament, Public Accounts and Estimates Committee (PAEC) in its recent report, *Commercial in Confidence Material and the Public Interest*[42] 'found that the wide interpretation and common usage of the term commercial in confidence throughout the public sector has resulted in a broadening of the scope of commercial confidentiality beyond that which is legally warranted.'[43]

2.50 To address this, the PAEC, as part of a unanimous report, recommended a disclosure framework consisting of legislation to 'require specified information about all tender documents and the resulting contract to be made publicly available once the tender has been awarded (overriding any confidentiality clauses), unless application is made at that time to restrict publication'.[44] The PAEC suggested the internet as the most effective way of providing free public access to government contracts.

2.51 In addition, the PAEC recommended that all government contracts contain 'a standard clause which states that the contracts are subject to legal requirements concerning disclosure and are *prima facie* public.'[45] In relation to scrutiny by parliamentary committees, the PAEC recommended that where information is withheld, the 'reasoning behind the decision must be provided in writing by the relevant Minister to the committee'.[46] Where the Minister's reasoning is found to be inadequate, the parliamentary committee could refer the matter to the Ombudsman who would provide independent advice.

2.52 On 12 April 2000, General business notice of motion 489 by Senator Andrew Murray was referred to the Senate Finance and Public Administration References Committee for inquiry and report by 26 June 2000. Senator Murray's motion sought to achieve enhanced

42 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, March 2000.

43 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, p. xxii.

44 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, p. 115.

45 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, p. 89.

46 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, p. 79.

transparency of government contracting by having all agencies post an indexed list of their contracts on the internet. In addition, this list would indicate which contracts contain confidentiality provisions.

2.53 While the Senate Finance and Public Administration References Committee agreed with Senator Murray's concerns about increasing use of confidentiality applying to government contracts, it could not agree on a strategy for addressing this concern. The Senate Finance and Public Administration References Committee indicated that it would reserve its judgement until the Auditor-General had completed a proposed performance audit into the use of confidentiality provisions in government contracts.[47] The Senate Finance and Public Administration References Committee stated that:

> …Senator Murray's motion not be proceeded with, until such time as the Auditor-General has briefed the committee on the results of his audit. The committee is of the view that it would be unwise for the motion to go ahead immediately, given the lack of clarity of some of the terms used and the potential cost to agencies of retrospectively checking on the status of contract provisions in potentially 100 000 contracts.[48]

2.54 On 14 and 30 August 2000, Senator Murray amended his motion taking into account the results of the Senate Committee's report. The dollar limit at which a contract would be assessed was increased from $10 000 to $100 000. Clause three of the motion now specifies that the Auditor-General be requested to provide to the Senate within six months a report indicating that he has reviewed a number of contracts with confidentiality clauses. In addition, clause four proposes that the Senate Finance and Public Administration References Committee be responsible for considering the Auditor-General's report. The full text of Senator Murray's motion 489 is at Appendix D.

2.55 On 8 March 2000, Mr Paul Osborne presented, in the ACT Legislative Assembly, the Public Access to Government Contracts Bill 2000 to make public, as far as possible, the terms of government contracts. The purpose of Mr Osborne's Bill is to clarify and restrict the ACT Government's use of commercial-in-confidence clauses to withhold information. This follows the ACT Government's initial refusal to disclose the Bruce Stadium

47 Senate Finance and Public Administration, Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts, Senate Printing Office, June 2000, p. 31.

48 Senate Finance and Public Administration, Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts, p. 33.

contractual information. Mr Osborne's Bill proposes that the government make public within 21 days the details of all contracts by making them available on the internet or in government shopfronts.

2.56 The Osborne Bill recognises that there may be genuine commercially sensitive information. Part 3, section 10 of the Bill sets out confidentiality clauses which seek to determine reasons for confidentiality. On 1 March 2000, the Opposition Leader in the ACT Legislative Assembly, Mr Jon Stanhope proposed an amendment to the *Financial Management Act 1996* that would restrict the use of clauses that prevent or impede disclosure of information in government contracts to the Legislative Assembly. The Amendment Bill determines that when a genuine need to protect the privacy of information that is commercially sensitive to a company is identified then the onus must be on the relevant minister to certify that such a provision is reasonable and necessary and the contract must then be referred to the ACT Auditor-General.

2.57 The following sections will discuss the merits of codification of commercial-in-confidence material and the use of independent assessment to rule on disputes over commercial-in-confidence. The final section will outline the Committee's preferred accountability framework for government contracts.

Codification of commercial-in-confidence issues

2.58 Some strategies for improving accountability of government contracts have called for codification of what constitutes commercial-in-confidence. The PAEC recommended that 'protocols should be developed for government departments and agencies to follow before the classification of commercial in confidence is applied to material and that these protocols be signed off at ministerial level.'[49] Part 3, section 10 of the Osborne Bill indicated that confidentiality would apply if the release of information would result in:

- the unreasonable disclosure of personal information;
- the disclosure of a trade secret; or
- the unreasonable disclosure of information with commercial value; or
- the unreasonable disclosure of information about the business affairs of a person; or

49 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, p. 118.

- that it is required by, or gives effect to, an obligation of confidentiality that arises from another source.

2.59 The Administrative Review Council in its report *The Contracting Out of Government Services* recommended that guidelines should be developed and tabled by the Attorney-General setting out the circumstances in which Commonwealth agencies will treat information provided by contractors as confidential.'[50] The Senate Finance and Public Administration References Committee indicated that the task of codification would be difficult and was not convinced that codification would be helpful.[51]

2.60 Evidence to the inquiry suggested that the FOI exemptions could provide the basis for assessing commercial-in-confidence. Dr Seddon stated:

> They are open to some criticism but the exemption provisions in the FOI legislation strike the balance that is required between open government and the need to keep some things secret. The exemption provisions include confidential information. The difficulty there, of course, is that the legislation can be used by simply again putting a rubber stamp 'Confidential' on everything and then you can get an exemption under the FOI Act. I think the answer is that there should be a public interest override, namely, that the relevant body, AAT or whoever it is, has the ability to release the information, even though it has been agreed that it should not be through a contractual clause imposing confidentiality.

2.61 The Australian National Audit Office warned against codifying commercial-in-confidence commenting that it 'needs to be judged on a case-by-case basis, in particular, the possibility of unfair prejudice of the commercial interests of any body or person.'[52] In particular, the ANAO stated that 'a strict codified test to determine whether an issue could be regarded as commercial-in-confidence may not always produce a reliable conclusion.'[53]

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50 Administrative Review Council, *The Contracting Out of Government Services*, Report No. 42, p. 73.

51 Senate Finance and Public Administration, Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts, p. 33.

52 Australian National Audit Office, *Submission*, p. Submission 57, page 2.

53 Australian National Audit Office, *Submission*, p. Submission 57, page 2.

Independent assessment of claims for commercial-in-confidence

2.62 A key feature of some of the strategies for examining disputes between parliament and agencies over the use of commercial-in-confidence in contracts is the use of an independent arbiter. For example, the PAEC recommended that 'a contract which includes a confidentiality clause…must be submitted to the Ombudsman for approval prior to being signed off by the relevant agency'.[54] The Senate Finance and Public Administration References Committee in its second report, *Contracting Out of Government Services*, suggested that where the 'parliament insists on a 'right to know' such legitimately commercially confidential matters, the most appropriate course to achieve this would be the appointment of an independent arbiter such as the Auditor-General'.[55]

2.63 The Murray resolution proposed that all contracts that were identified as commercial-in-confidence should be referred to the Auditor-General who would report on whether the confidentiality claim is appropriate. The Senate Finance and Public Administration References Committee considered that this task would be beyond the present capacity of the Auditor-General because potentially there could be '100 000 contracts to consider every six months.'[56]

A preventative framework

2.64 One of the key messages from the ANAO is the need for preventative measures which will ultimately change agency culture and attitudes towards confidentiality of government contracts. The ANAO commented that 'possible preventative measures could include the Parliament, through Committee reports sending a strong signal that transparency of contractual arrangements is an important element of open and effective government.'[57]

2.65 One of the problem areas identified by the ANAO is the application of commercial-in-confidence to the entire contract rather than to selected clauses.'[58] In 1996, the Industry Commission (IC) questioned why all parts

54 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, p. 118.

55 Senate Finance and Public Administration References Committee, *Contracting out of Government Services*, Second Report, Senate Printing Office, 1998, p. 71.

56 Senate Finance and Public Administration, Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts, p. 18.

57 ANAO submission to the Senate Finance and Public Administration, *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*, May 2000.

58 ANAO submission to the Senate Finance and Public Administration, *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*, May 2000.

of a government contract should be confidential. The IC suggested that while there may be the need for some parts of a contract to be confidential there was little reason for applying confidentiality to the entire contract. In discussing this point, the IC noted that in 1993 the NSW Public Accounts Committee (NSW PAC), in its *Report into the Management of Infrastructure Projects*, 'argued for the release, to the public and the Parliament, of a wide range of information, including the price payable by the public, the basis for changes in the price payable by the public, details on significant guarantees of undertakings, details of the transfer of assets and the results of cost-benefit analyses.'[59]

2.66 The NSW PAC indicated that information it did not consider suitable for disclosure included 'the private sector's internal cost structure or profit margins, matters having an intellectual property characteristic, and any other matters where disclosure would pose a commercial disadvantage to the contracting firm.'[60] Based on this and other evidence, the IC, as part of its report, recommended that:

> Recognising the balance between commercial confidentiality and accountability, governments should make public as much information as possible to enable interested people to assess contracting decisions made by agencies. Of particular importance is information on the specifications of the service, the criteria for tender evaluation, the criteria for the measurement of performance and how well the service provider has performed against those criteria.[61]

2.67 Consistent with the previous views, the Senate Finance and Public Administration References Committee concluded 'that only relatively small parts of contractual arrangements will be genuinely commercially confidential'.[62] Similarly, the Victorian Public Accounts and Estimates Committee commented that 'it is unlikely that much of the material for which such exemptions have been claimed, would stand up to serious scrutiny as being legitimately commercially confidential.'[63]

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59 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies, Report No. 48*, AGPS, Melbourne, 1996, p. 95.

60 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies, Report No. 48*, AGPS, Melbourne, 1996, p. 95.

61 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies, Report No. 48*, AGPS, Melbourne, 1996, p. 95.

62 Senate Finance and Public Administration References Committee, *Contracting out of Government Services*, Second Report, Senate Printing Office, 1998, p. 71.

63 Public Accounts and Estimates Committee, Parliament of Victoria, *Commercial in Confidence Material and the Public Interest*, 35th Report, March 2000, p. 71.

2.68 Part of the ANAO's approach is an emphasis on the need for an attitudinal change by government contract managers in assessing what constitutes commercial-in-confidence. Contract managers should, for example, refrain from applying commercial-in-confidence to all parts of a contract. In addition to this point, the ANAO suggested that contract managers should be given the following guidance in relation to accountability:

- a statement that it would normally be expected that Commonwealth contracts would be subject to full public scrutiny;
- in preparing Commonwealth contracts, APS managers are expected to have regard to the interests of public accountability and aim for open and transparent contractual arrangements unless that is not in the Commonwealth's best interest;
- where it would unfairly prejudice the commercial interests of any body or person, individual clauses would be excluded from public scrutiny but the remainder of the contract would be expected to be disclosed when required;
- agency chief executive officers (or their delegates) should be able to demonstrate why disclosure of selected contract clauses would prejudice commercial interests; and
- any other circumstances that should be taken into account in determining possible commercial prejudice, eg intellectual or other property rights, privacy considerations, organisation or individual reputations.[64]

The JCPAA's preferred option for contract accountability

2.69 The Committee agrees with the Australian National Audit Office (ANAO) that claims of commercial-in-confidence should be dealt with on a case-by-case basis. Guidelines that seek to define commercial-in-confidence would be difficult to draft in the first place and may need constant revising. Invariably such guidelines would be subject to different interpretations and dispute. It is likely that more questions than answers would result. Therefore, the Committee does not support codification of commercial-in-confidence. The focus should be on the agency claiming commercial-in-confidence to argue that case. The Committee has never recommended the codification of commercial-in-confidence issues.[65]

64 Australian National Audit Office, Submission 57, p. 3.

65 Senate Finance and Public Administration, *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*, p. 33. Recommendation 6 of JCPAA Report 372 proposed the development of guidelines for the process of scrutinising the

2.70 In regard to the FOI exemptions, the Committee supports Senate practice that these exemptions are not sufficient grounds for refusing to provide documents to the parliament.[66]

2.71 The use of independent arbitration between the parliament and the executive government should only be sought in exceptional circumstances. If a parliamentary committee is conducting an inquiry or some form of scrutiny of a government contract then it should have an unfettered right to that contract. If all or parts of the contract are commercial-in-confidence then the committee will have to negotiate with the agency as to how that information will be scrutinised. The first option will be an in-camera hearing at which the agency will need to demonstrate why the contract must remain confidential. This is the most preferred option as the committee maintains control and is performing its scrutiny function.

2.72 If an agency refuses to discuss, on the grounds of public interest immunity, the features of a contract in an in-camera hearing then arguably it may face another level of scrutiny. The committee should then request the Auditor-General to examine the contract and report back subject to section 37(3) of the *Auditor-General Act 1997*. This section restricts the Auditor-General from reporting to parliament information that could be contrary to the public interest.

2.73 The Committee's scenario is very specific and relates to the scrutiny of an individual government contract for the purpose of inquiry. The Committee does not support calls for an independent arbiter who will spend almost all their time testing claims of confidentiality of government contracts. In the event that the Auditor-General would be required to undertake this role, the costs would not be insignificant. The Auditor-General's targeted performance audit program is a far more effective way of scrutinising executive government.

2.74 The parliament and its committees must become more focused and efficient in how they scrutinise the use of contracts by the executive government. For example, the Auditor-General is more cost effective in conducting performance audits of government contracts rather than spending his time testing the confidentiality of all contracts. Parliamentary committees of the Senate and House of Representatives should seek to factor into their forward work programs more scrutiny of government

commercially sensitive issues of government business enterprises, not the codification of what constitutes commercial-in-confidence.

66 Evans, H. *Odgers' Australian Senate Practice*, Department of the Senate, Canberra, 1999, p. 475.

contracts. This could be done as part of annual report inquiries or reviews of Auditor-General performance audits.

2.75 This type of action will send a more persuasive message to executive government that the parliament is taking its role in scrutinising government contracts very seriously. If there was a concerted effort by parliamentary committees to engage in this type of accountability then invariably executive government would respond to the pressures.

2.76 In addition, the Committee supports a series of preventative measures, suggested by the ANAO, that would help to change the culture and approach of contract managers towards accountability. In particular, contract managers must accept the premise that government contracts should be subject to full public scrutiny. If there are concerns, then a cogent assessment and decision must be made that parts of the contract should be commercial-in-confidence. The Committee agrees with previous inquiries that there are no persuasive reasons that an entire contract must be withheld from public scrutiny. The public should at least have access to the specifications of the service, the criteria for tender evaluation, and criteria for measurement of performance.

2.77 Where an agency determines that parts of a contract are commercial-in-confidence, and should be withheld from public scrutiny, then the Chief Executive Officer (CEO) must issue a certificate detailing on what grounds information is to be withheld. This could include such things as intellectual property and a contractor's internal cost structures. At the expiry of the contract, the agency would need to review the details in the certificate and determine whether the confidentiality ruling is still valid. The Committee believes this exercise would encourage contract managers to give serious consideration to their determinations. The CEO, if they are performing their responsibilities effectively, should ensure quality control and scrutiny of requests made by their contract managers for commercial-in-confidence. It is expected that contract managers would be less likely to apply commercial-in-confidence indiscriminately under this arrangement. At the same time, Chief Executive Officers could, at any time, be held to account for their decisions and will need to explain to the parliament, through its committees, why they have issued a confidentiality certificate.

2.78 The Committee's accountability framework for government contracts is set out in the following recommendation. It is directed to all CEOs who under the *Financial Management and Accountability Act 1997* are responsible for the efficient, effective and ethical use of their resources. The Committee has identified the following **key findings** applying to government contract accountability:

- all contract management staff must have the highest regard for public and parliamentary accountability, and accept, in the first instance, that all government contracts will be subject to full public scrutiny; and
- if it can be shown that public access to a government contract is not in the Commonwealth's best interest then a claim can be made to exclude certain clauses of a contract from public access but not the entire contract.

2.79 As indicated in the last dot point, the Committee accepts that there will be cases where certain information in a contract may need to remain confidential. In these cases, the parliament should be given reasons. Therefore, the Committee recommends that all CEOs under the *Financial Management and Accountability Act 1997*, should, whenever claiming commercial-in-confidence, issue a certificate giving reasons why parts of a contract are to be withheld. In responding to this recommendation, the Committee expects responses from all agency CEOs indicating whether they accept the recommendation and will implement it. Those agencies that reject the recommendation will need to state this and give reasons.

Recommendation 2

2.80 **That all CEOs under the *Financial Management and Accountability Act 1997* should, whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract and why these parts are to be withheld.**

Contract registers

2.81 On 26 May 2000 the Committee wrote to 17 agencies seeking a complete list of their contracts as at 1 June 2000. The purpose of the exercise was to determine how efficiently and effectively these agencies could produce such a list.

2.82 In 1997–98 the Auditor-General in his report, *Management of Commonwealth Guarantees, Indemnities and Letters of Comfort*, found that 'relatively few agencies have adopted contract registers as an adjunct to a main control document registry system for the management of the Commonwealth's guarantees, indemnities and letters of comfort.'[67] In view of this the ANAO recommended that 'agencies actively consider the implementation of a

67 Auditor-General, *Management of Commonwealth Guarantees, Indemnities and Letters of Comfort, Report No. 47*, 1997–98, p. 25.

contract register system, which among other benefits would be an aid to effective records management of their guarantees, indemnities and letters of comfort.'

2.83 Agencies were given a four week period to send the Committee a list of their contracts as at 1 June 2000. Only four agencies could meet this deadline. Some agencies indicated that they were in the process of enhancing their contract register or were designing and implementing a register. The Department of Family and Community Services (FaCS), for example, indicated that its purchasing is devolved to the Branch/State level and the information for its contract list 'was largely provided manually by these elements.'[68] On the positive side, FaCS indicated that it is improving its systems and will soon have an effective contract register. FaCs stated:

> ...we are currently developing a networked electronic contract register, which will link to our SAP financial management system. I would therefore envisage that similar information will be more readily available in the future.[69]

Conclusions

2.84 The Committee maintains that contract registers are essential not just from an accountability perspective but also for financial management purposes. It is clear that some agencies had difficulty responding to the Committee for a list of their contracts as at 1 June 2000. It is essential that these agencies have contract registers which are effective. It is pleasing to note that the Department of Family and Community Services was forthright in its assessment of its current contract management information, and, as a result, will be seeking to improve this with the development of networked electronic contract register.

2.85 In June 1998, the Auditor-General found that relatively few agencies had adopted contract registers. In view of this, the Committee recommends that all agencies, if they have not already done so, must establish a contract register.

Recommendation 3

2.86 **That all agencies must establish and maintain an effective contract register.**

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68 Department of Family and Community Services, *Submission*, 14 July 2000, p. 2.

69 Department of Family and Community Services, *Submission*, 14 July 2000, p. 2.

Exempt contracts

2.87 During the inquiry, the Committee requested 17 agencies to provide, for the 24 month period prior to 1 June 2000, a list of those contracts, exceeding $2 000 in value, which had not been reported in the *Gazette* because the Chief Executive Officer has determined that they are exempt matters under the *Freedom of Information Act 1982*. If there were any such contracts, the Committee sought the name or description of the contract and the value.

2.88 Only three agencies reported that their Chief Executive Officer had exempted contracts from notification in the *Gazette*. These are effectively secret contracts in that the public and parliament have no way of knowing that they exist. One agency requested that its exempt contracts be taken confidentially and the other two had no objection to publication.

Conclusions

2.89 The Committee does have a concern that there are government contracts which are secret. It is recognised, however, that there may be national security and other reasons why even the minimum reporting details of a contract should in the first instance not be notified on the Gazette. With the passing of time, however, the nature of these contracts could lose their confidential status and could then be reported. The Committee suspects that agencies would not bother taking this action.

2.90 **The parliament must not be restricted from knowing what contracts have been exempted and their value. Therefore, the Committee, as part of its power to review and change Annual Report Guidelines, will require agencies to indicate in their Annual Report if they have exempted a contract or standing offer from being reported in the Purchasing and Disposal Gazette.** Annual Reports of agencies stand referred to relevant committees of both the Senate and House of Representatives. It is up to these committees, if they so decide, to scrutinise these exempt contracts by seeking a contract list with values and if necessary seeking explanation by the agency at an in-camera hearing.

The Gazette Publishing System (GAPs)

2.91 As part of the Committee's request for agencies to provide a list of their contracts as at 1 June 2000, various comments by agencies were made in relation to the Gazette Publishing System (GAPs). The Department of

Health and Aged Care, for example, indicated that in preparing its contract list there 'were some instances of multiple entries'.[70] This will happen if an agency reports the initial contract details, including the total price, and then reports individual payments.

2.92 The Mandatory Reporting Guidelines specify that agencies 'must not report payments of monthly or other accounts payable under an existing, previously reported contract.'[71] These guidelines also specify that the person organising a government contract must arrange for its gazettal within six weeks. The Department of Immigration and Multicultural Affairs discussed the volume of work required and the need for quality control in entering information on to GAPs:

> A very significant number of items are generated by the Department for gazettal. It has been estimated that approximately 500 items are required to be gazetted each month. The current gazettal process involves a weekly download of financial information from the accounting system SAP. This information is then manually checked for errors and omissions prior to being uploaded to the Gazettal system. This is proving a very time consuming task and there have been some errors in our gazettal process.
>
> In order to assist in preventing such errors, a letter clarifying the gazettal procedure is being circulated to all departmental corporate areas. In addition training is being organised for the appropriate staff.[72]

2.93 The Department of Communications, Information Technology and the Arts (DoCITA) indicated that in the 24 month period prior to 1 June 2000 'many contracts have not been reported due to a problem with the functional capability of the Department's financial systems.'[73] As a result, DoCITA could not report its contracts to Transigo. DoCITA redesigned its systems from early 1999 such that the 'necessary functionality to provide GAPs reporting was introduced with effect from 1 May 2000.'[74]

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70 Department of Health and Aged Care, *Submission* 72, p. 1.

71 Office for Government Online, *Mandatory Reporting Requirements Handbook*: Government Procurement, Version 2.0, p. 11.

72 Department of Immigration and Multicultural Affairs, *Submission*, p. *Submission* 63, p. 2.

73 Department of Communications, Information Technology and the Arts, *Submission* 74, p. 1.

74 Department of Communications, Information Technology and the Arts, *Submission* 74, p. 2.

2.94 The Department of Veterans' Affairs (DVA) indicated that its 'initial compilation to meet the Committee's request indicated inconsistencies in our contract recording protocols.'[75] Therefore, DVA, in order to assist staff to meet their reporting obligations, prepared a set of guidelines to improve the scope and consistency of data reported.

2.95 The Senate Finance and Public Administration References Committee found that the GAPs system provides no details on contract expiry date, whether a contract had been discontinued, or whether a contract continues across a financial year.[76] The Australian National Audit Office (ANAO) reported that the 'mandatory detail field for 'description of contract' has not been completed in such a way as to be very informative'. The ANAO concluded that GAPs 'functionality and reporting could be enhanced.'[77]

Conclusions

2.96 The Committee's investigations have shown that there is double entry reporting of contract information. This will inflate the number of contracts reported and the total value of goods and services purchased by Commonwealth agencies. There seems to be no evaluation of the accuracy of data entry to the Gazette Publishing System (GAPs). It would be unwise to assume that all contract details are entered, and secondly whether entered information is correct.

2.97 Evidence from the Departments of Immigration and Multicultural Affairs, Communications, Information Technology and the Arts, and Veterans' Affairs shows that these agencies had difficulties in complying with their GAPs contract reporting obligations. Fortunately these agencies have indicated that they are taking ameliorative action to improve their reporting processes. It is possible, however, that other agencies could be facing similar problems

2.98 The Committee, therefore, recommends that the Auditor-General conduct a review, as part of an existing or potential performance audit, of agency compliance with reporting requirements of the GAPs. As part of this review, the Auditor-General should suggest ways in which GAPs can be modified to improve the accuracy and usefulness of the information provided on GAPs.

75 Department of Veterans' Affairs, *Submission* 73, p. 2.

76 Senate Finance and Public Administration, Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts, p. 26.

77 Australian National Audit Office, Submission No. 2A to the Senate Finance and Public Administration, Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts, pp. 1-2.

2.99 Agency CEOs should not wait for the Auditor-General to conduct this inquiry. They now have the incentive to examine for themselves their agencies' performance in complying with GAPs reporting requirements.

Recommendation 4

2.100 **That the Auditor-General conduct a review, as part of an existing or potential performance audit, of agency performance in complying with the reporting requirements of the Gazette Publishing System (GAPs).**

The Auditor-General

Access powers

2.101 The *Auditor-General Act 1997* provides the Auditor-General with significant powers to scrutinise executive government. Under section 32 of the Auditor-General Act, the Auditor-General can direct a person to produce any documents in the custody or under the control of the person. Under section 33 of the Act, the Auditor-General may, at all reasonable times, enter and remain on any premises occupied by the Commonwealth, a Commonwealth authority or a Commonwealth company.

2.102 The Auditor-General's powers, however, do not extend to accessing the premises of government contractors to inspect contract documents. This issue arose, for example, when the Auditor-General conducted a performance audit of the New Submarine Project.[78] In view of this, the Committee recommended, in *Report 368*, that the Minister for Finance and Administration make legislative provision to enable the Auditor-General to access the premises of a contractor for the purpose of inspecting and copying documentation and records directly related to a Commonwealth contract.[79] Defence maintains that the 'Audit Act as currently drafted and Commonwealth access provided under Defence contracts can furnish the ANAO with adequate visibility of contractors' accounts.'[80]

2.103 The Committee's recommendation is still under consideration by government. In the meantime, the Auditor-General has been encouraging government agencies to include suitable access clauses in government

78 Auditor-General, *New Submarine Project, Department of Defence*, Report No. 34, 1997–98.

79 Joint Committee of Public Accounts and Audit, *Review of Audit Report No. 34, 1997–98, New Submarine Project, Department of Defence*, June 1999, p. 43.

80 Department of Defence, *Submission*, p. S492.

contracts. These clauses 'give the agency and the ANAO access to contractors' premises and the right to inspect and copy documentation and records directly related to the contract.'[81] The ANAO reported, however, that these access powers are not being taken up. For example, 'an examination of 35 contracts business support process, across eight APS agencies, found that only two of those contracts referred to possible access by the Auditor-General.[82]

2.104 The Department of Finance and Administration (DoFA) advises agencies to consider Auditor-General access provisions on a case-by-case basis. DoFA states:

> Agencies will need to consider, on a case-by-case basis, the level of access the agency and the Australian National Audit Office require to a provider's records, information and assets (including premises) to adequately monitor the provider's performance. This can then be stated in the contract.[83]

Are Auditor-General access powers a disincentive to business?

2.105 During the Committee's review of the New Submarine Project, the Department of Defence (Defence) claimed that the power of the Auditor-General to access contractors' premises could raise Defence's net cost of doing business. This issue was examined as part of the current inquiry.

2.106 The majority of organisations indicated that Auditor-General access to contractors' premises would not be a problem or hindrance to business. The Canberra Business Council indicated that it accepted the need for government accountability measures provided confidentiality is respected.[84] Ballistics Innovations commented that the Auditor-General was welcome to access its premises provided intellectual property was protected.[85] The National Furnishing Industry Association of Australia indicated that there would not be a problem with the Auditor-General having access to contractors' premises.[86] The Indo-Chinese Employment Service stated:

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81 Australian National Audit Office, *Submission*, p. S133.

82 Australian National Audit Office, *Submission*, p. S133.

83 Department of Finance and Administration, *Competitive Tendering and Contracting, Guidance for Managers*, March 1998, pp. 16–17.

84 Ms Helen Leayr, Canberra Business Council, *Transcript*, p. 42.

85 Mr Robert Stearn, Ballistics Innovations, *Transcript*, p. 70.

86 Mr Mike Radda, National Furnishing Industry Association of Australia, *Transcript*, p. 79.

> No, we do not have any objection to that. The way I look at it is that, if the issue is to ensure management accountability and to promote public confidence in the tendering process, any mechanism that ensures that those things happen would be rightly welcome. The way I see it is that the current mechanism for ensuring management accountability is adequate. With the monitoring visit, the quality assurance conducted by the department is a way of ensuring that those things happen.[87]

2.107 AusAid indicated that its contractors comply with Auditor-General access provisions and no complaints have been received. In addition, AusAid confirmed that it had not encountered a problem with contractors inflating their prices to absorb alleged costs of complying with accountability.[88] Similarly, the Departments of Employment, Training and Youth Affairs; Communications, Information Technology and the Arts; Foreign Affairs and Trade; Centrelink; Family and Community Services; and Environment Australia all indicated that they had not met any resistance from their contractors and there was no evidence to suggest that prices were inflated because of ANAO access clauses in their contracts.[89]

2.108 The Office of Asset Sales and Information Technology Outsourcing, in response to a question that contractors may be reluctant to do business with government or they may inflate their prices because of ANAO access provisions, stated:

> We do not see any evidence of that. What they want is to understand what it means. That is fair, and we talk them through. They then go in this thing with a full understanding. We have not seen any evidence of people not wanting to do business with us because of it, nor have we seen a reduction in the competition because of it. I think it is now generally understood and generally accepted in the contracting that we do. You do not get a tender response which says, 'We do not want to comply with this clause,' and then we negotiate with them to comply. They simply accept the clause.[90]

87 Mr Hoang Vu Nguyen, Indo-Chinese Employment Services, *Transcript*, p. 82.

88 Mrs Catherine Fettel, AusAid, *Transcript*, p. 22.

89 Mr George Kriz, Department of Employment, Training and Youth Affairs, *Transcript*, p. 157; Mr Peter Gotzinger, Department of Communications, Information Technology and the Arts, *Transcript*, p. 119; Mr Keith Hardy, Department of Foreign Affairs and Trade, *Transcript*, p. 219; Mr Alan Welburn, Centrelink, *Transcript*, p. 234; Dr David Rosalky, Department of Family and Community Services, *Transcript*, p. 202; Mr Andrew McKinlay, Department of Environment and Heritage, *Transcript*, p. 161.

90 Mr Ross Smith, Office of Asset Sales and Information Technology Outsourcing, *Transcript*, p. 175.

2.109 The Australian Council for Infrastructure Development has indicated that it welcomes greater transparency of government contracts. The Council's Chief Executive, Mr Dennis O'Neil, is reported to have commented that it is usually governments rather than business that are insisting on secrecy. Mr O'Neil stated that 'it was understandable and right that auditors needed to verify certain information.'[91]

2.110 As part of this discussion, it is relevant to note that 'the United States Code of Federal Regulations provides for the Comptroller General of the US (the Auditor-General equivalent) to have access to, and the right to examine, any contractors' records relating to acquisition contracts.' The ANAO states that this means that 'contractors must make available their official records, materials and other evidence for examination, audit or reproduction until three years after final payment under contract.'[92]

2.111 Both Australian Business and Master Builders Australia, however, indicated that Auditor-General access to contractors premises was not warranted. Australian Business stated that there 'are other mechanisms to ensure that the Commonwealth gets good value for money, and in the contract there could well be requirements for essentially open-book examination, which many contractors are willing to do rather than to provide the Auditor-General with unlimited access to a contractor's premises.'[93] Australian Business suggested that this access could have financial implications for a contractor:

> It is essentially a matter of privacy, commercial-in-confidence. It could destroy that contractors' business by the exposure of intellectual property that that contractor has developed and values highly. Competitors could get such an advantage from an Auditor-General's report that that contractor could no longer be viable.[94]

2.112 Similarly, the Department of Defence (Defence) suggested that when additional accountability requirements are placed on contractors 'that is when you start getting prices increased for dealing with the Commonwealth.'[95] Defence suggested that contractors may raise questions about Auditor-General's access including:

- what is the purpose of Auditor-General access;

91 Reported in the *Australian Financial Review*, 14 July 2000.

92 Australian National Audit Office, *Submission*, p. Submission 57, p. 1.

93 Mr Wilhelm Harnisch, Master Builders Australia, *Transcript*, p. 8; and Air Vice Marshal Brian Weston, Australian Business, *Transcript*, p. 26.

94 Air Vice Marshal Brian Weston, Australian Business, *Transcript*, p. 26.

95 Mr Michael Roche, Department of Defence, *Transcript*, p. 272.

- is the Auditor-General able to do the equivalent of an efficiency audit;
- what protections are there for data taken from contractors; and
- will the Auditor-General publish sensitive data.[96]

2.113 The ANAO confirmed that its investigations and reporting has not led to any disadvantage of a government contractor. The ANAO stated that in its 'experience, we have found that, almost without exception, the relevant issues of principle can be explored in an audit report without the need to disclose the precise information that could be regarded as commercial-in-confidence.'[97] Defence responded to this statement with the comment that this was merely an 'assurance'.[98] In respect to the ANAO's reporting obligations of sensitive information, Defence, during a public hearing on 31 March 2000, stated:

> Because it is not dealt with in the legislation, there is no real limit on the documentation and material he might seek. It has been a while since I read the Auditor-General's Act, but I would bet there is very little control over what he does with the data in terms of reporting on it. There is a whole heap of stuff there that he would have access to that would be considered to be very much commercial-in-confidence.[99]

2.114 The *Auditor-General Act 1997* does indeed place restrictions on what the Auditor-General can report. Section 37 specifies that sensitive information must not be included in public reports. Possible reasons for non-disclosure are set out in section 37(2) and include such matters that 'would prejudice the security, defence or international relations of the Commonwealth', and matters that 'would unfairly prejudice the commercial interests of any body or person'. So the ANAO's commitment to discuss issues in principle without the need to disclose commercial-in-confidence issues is not merely an 'assurance', it is law.

2.115 In a submission dated 13 July 2000, Defence did acknowledge the safeguards under section 37 of the Auditor-General Act. Defence, however, maintained that private contractors could still be disadvantaged. Defence stated:

> The *Auditor-General Act 1997* does not place any obligation on the Auditor-General to provide the Chief Executive of a private sector

96 Mr Michael Roche, Department of Defence, *Transcript*, p. 270.
97 Australian National Audit Office, *Submission*, p. S134.
98 Mr Michael Roche, Department of Defence, *Transcript*, p. 272.
99 Mr Michael Roche, Department of Defence, *Transcript*, pp. 271–272.

> organisation, with a special interest in a proposed report, with the opportunity to comment on that report (Section 19). Instead, the Auditor-General may give a copy of the proposed report to any person who, in the Auditor-Generals' opinion, has a special interest in the report [Section 19(3)].[100]

2.116 The ANAO noted that the provision, under section 19(3), to give a proposed report to a person with a special interest is a discretionary power. However, the concept of natural justice which operates in common law is not like the discretionary power under section 19(3). The ANAO states:

> Natural justice operate in common law (that is, outside statute law). Legal advice is that it applies where an ANAO report, or part of it, might adversely affect the reputation or interests of a person identifiable in the report. Natural justice requires the ANAO to give such a person an opportunity to comment on the proposed report, or the relevant part, and to consider the person's comments before completing the report for tabling in Parliament. Unlike the discretionary power in section 19(3) of the Auditor-General Act, referral of draft reports or relevant extracts under natural justice is a legal requirement. The ANAO frequently refers draft reports or relevant extracts to persons, such as contractors, who are referred to in reports.[101]

2.117 Defence also raised the concerns about section 36(3) of the Auditor-General Act which states that 'a person who receives a proposed report under section 19 must not disclose any of the information in the report except with the consent of the Auditor-General.' Defence commented that it was unclear whether section 36(3) would prevent a recipient of an ANAO report under section 19(3) from disclosing any information in the report to legal counsel or the Attorney-General for the purpose of seeking a ruling.[102] The ANAO confirmed that section 36(3) permits the Auditor-General to allow a person who receives a report under section 19(3) to disclose any information in it. The ANAO stated:

> This provision [section 36(3)] could be used to allow a person to seek legal counsel in such a situation. Similarly the ANAO does not object to a person who receives a report or extract under natural justice from seeking advice from legal counsel.[103]

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100 Department of Defence, Defence Materiel Organisation, *Submission*, 13 July 2000, p. 3.

101 Australian National Audit Office, *Submission* 75, p. 2.

102 Department of Defence, Defence Materiel Organisation, *Submission*, 13 July 2000, p. 3.

103 Australian National Audit Office, *Submission* 75, p. 2.

2.118 Defence indicated that if private sector organisations were brought under section 33 of the Auditor-General Act then legislative changes would need to establish the purpose of access. In making this comment, Defence referred to sections 15 to 18 of the Auditor-General Act which relate to performance audits. The ANAO refuted any suggestion that it was seeking access to contractors premises for the purpose of auditing contractors. The ANAO stated:

> The purpose of the access is to support the Auditor-General's existing mandate to audit Commonwealth agencies. The need for this access is heightened by a trend to have Commonwealth activities performed by the private sector on contract. The responsible Commonwealth agencies need to have access to the contractors' premises to ensure that the activities are being performed properly. The ANAO needs access to the contractors premises to check that the agency is giving effect to its supervisory responsibilities.[104]

2.119 Section 37(1)(b) of the Auditor-General Act provides for the Attorney-General to issue a certificate to the Auditor-General stating that disclosure of information would be contrary to the public interest. Defence claims that the Attorney-General is unlikely to be regarded as 'sufficiently distanced from government.' Therefore, consideration should be given to allowing appeal to an 'independent body such as the Administrative Appeals Tribunal'.[105] The ANAO noted that such a proposal would need to be considered by the Attorney-General's department as the government's principal legal adviser. The ANAO, however, commented that 'if the government decided to introduce such a measure, the ANAO would see no objection in principle to that.'[106]

Conclusions

2.120 In *Report 368*, the Committee recommended that the Auditor-General have power to access contractors' premises, and rejected Department of Defence (Defence) claims that this power would raise Defence's net cost of doing business.

2.121 The Auditor-General must have the power to access contractors' premises when the need arises. It is an essential part of the accountability process and is another tool in protecting the Commonwealth's interests. The

104 Australian National Audit Office, *Submission* 75, p. 1.

105 Department of Defence, Defence Materiel Organisation, *Submission*, 13 July 2000, p. 3

106 Australian National Audit Office, *Submission* 75, p. 2.

overwhelming evidence to this inquiry from both industry and government agencies is that Auditor-General access to contractors' premises is accepted by contractors and has not led to them raising their prices. As a comparison, the equivalent of the Auditor-General in the US, the Comptroller General does have the power to access contractors' premises.

2.122 Defence remains the prominent agency that rejects the need for the Auditor-General to have access to contractors' premises. This is based on the grounds that it could raise the cost of contractors doing business with Defence, and that there are sufficient access powers that currently exist.

2.123 Defence noted that in proposing to widen access powers of the Auditor-General to include private sector contractors, it is necessary to set out the reasons for access. The ANAO has categorically stated, and the Committee accepts, that the purpose of access is not to conduct a performance audit of a private sector contractor. The purpose of access is to support the Auditor-General's existing mandate to audit Commonwealth agencies.

2.124 Defence, in its submission of 13 July 2000, raised a range of concerns about certain provisions in the *Auditor-General Act 1997*. These concerns were positively responded to by the ANAO. For example, Defence claimed that section 19(3) of the Act does not place any obligation on the Auditor-General to provide a private sector organisation with a copy of a proposed audit. The ANAO responded that while section 19(3) was discretionary, natural justice, operating under common law, provides a legal requirement to provide a person with access if a report might adversely affect the reputation or interests of a person identifiable in the report.

2.125 The Auditor-General Act prevents the Auditor-General from releasing sensitive information in public reports. The ANAO stated that, 'almost without exception, the relevant issues of principle can be explored in an audit report without the need to disclose the precise information that could be regarded as commercial-in-confidence.' The Auditor-General is fully aware of his responsibility to protect the commercial interests of government contractors – this is a legislative requirement. Defence should ensure that its contractors are made aware of this.

2.126 In conclusion, the Committee reaffirms the need for the Auditor-General to have access to contractors' premises as previously stated by the Committee in Recommendation Five of *Report 368*[107]. There is little evidence to suggest that this will have a negative impact on contractors.

Recommendation 5

2.127 **The Committee reaffirms the need for the Auditor-General to have access to contractors' premises as previously stated by the Committee in Recommendation Five of *Report 368* which stated:**

- **The Committee recommends that the Minister for Finance make legislative provision, either through amendment of the Auditor-General Act or the Finance Minister's Orders, to enable the Auditor-General to access the premises of a contractor for the purpose of inspecting and copying documentation and records directly related to a Commonwealth contract, and to inspect any Commonwealth assets held on the premises of the contractor, where such access is, in the opinion of the Auditor-General, required to assist in the performance of an Auditor-General function.**

107 Joint Committee of Public Accounts and Audit, *Report 368, Review of Audit Report No. 34, 1997-98 New Submarine Project, Department of Defence*, CanPrint, Canberra, June 1999, p. 43.