3

Audit Report No. 42, 1999-2000

Magnetic Resonance Imaging Services

—effectiveness and probity of the policy development processes and implementations

Introduction

Background

3.1 Radiology departments in Australia began to use Magnetic Resonance Imaging (MRI)[1] scans as a diagnostic tool in the 1980s. Until the 1998 Budget measure, however, Commonwealth funding for MRI services was restricted to 18 publicly owned MRI units through a Health Program Grants (HPG) arrangement under the *Health Insurance Act 1973,* although 54 MRI units existed in the public and private sectors.[2] This funding program, which

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1 A **MRI** machine is basically a superconducting magnet, cooled down with liquid helium, which exerts a powerful magnetic pull. A patient having an image taken of some part of his or her body is placed inside the magnet and subjected to radio waves. The patient's body takes in the energy of the waves, the machine is turned off, the body gives out the energy, and the machine captures this as an image. This results in extremely clear images of soft tissue and bone, which allow doctors to diagnose illnesses more accurately. MRI is not invasive and has the potential to replace surgical testing procedures. ANAO, Report no. 42, 1999–2000**,** *Magnetic Resonance Imaging Services—effectiveness and probity of the policy development processes and implementations,* Commonwealth of Australia, May 2000, p. 14.

2 AHTAC, *Review of magnetic resonance imaging,* October 1997, p. 10.

commenced in the 1991–92 financial year, provided grants to the States for the purchase of MRI units and accounted for about 80 per cent of recurrent costs. The total cost to the Commonwealth of the HPG arrangements was about $20 million per annum.[3]

3.2 States were also able to purchase services from privately owned units. MRI scans were provided, on the basis of a specialist referral, free of charge to private (non-refund) patients, hospital outpatients and Medicare hospital in-patients. People living in rural areas, however, often had to travel some distance to a funded MRI centre, if they did not wish to pay the full fees, even though an unfunded MRI unit was closer.[4]

3.3 On 12 May 1998, the Government announced, in the 1998–99 Budget context, a measure to constrain growth in diagnostic imaging expenditure under the Medicare benefits arrangements and fund increased access to MRI services. This followed the 1997 review by the Australian Health Technology Advisory Committee (AHTAC) which had recommended extending publicly funded MRI services.[5]

3.4 The Government anticipated that improved MRI access would provide MRI services:

- in rural and remote regions;
- for paediatric use; and
- as another means of diagnosis.[6]

3.5 The announcement was underpinned by an Agreement between the Government and the diagnostic imaging profession, following a period of intense discussion and negotiation with representatives of the Royal Australasian College of Radiologists (the College).

3.6 The Government concluded its Agreement with the College on 6 May 1998, when it was agreed that Medical Benefits Schedule (MBS) rebates would be provided for MRI services from 1 September 1998, provided those services met certain clinical and eligibility requirements.

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3 ANAO, Report no. 42, 1999–2000, pp. 15–16.

4 AHTAC, *Review*, p. 12.

5 AHTAC, *Review*, pp. 12, 69.

6 ANAO, Report no. 42, 1999–2000, p. 16.

3.7 A key eligibility requirement was that benefits would only be paid in relation to 'equipment [MRI machines] which is in use in hospitals or practices...[and]...which has been either ordered or leased under an unconditional and enforceable contract at 7.30pm EST on Tuesday, 12 May 1998 but are still to be delivered at that time'.[7]

3.8 Contracts lodged with the Health Insurance Commission (HIC) for MBS rebates indicated the following pattern of orders for MRI machines, with the surge of orders occurring in the space of five days in May:

7–13 January 1998	3 machines ordered
February 1998	none ordered
5–31 March 1998	8 machines ordered
2–29 April 1998	6 machines ordered
7–12 May 1998	33 machines ordered[8]

3.9 In early June 1998, the Department of Health and Aged Care (DHAC) received the first allegation of significant orders being made for MRI units prior to the Budget announcement. As a measure of control over orders of MRI units, DHAC advised the Minister for Health and Aged Care, on 7 August 1998, that statutory declarations be used as part of the assessment of MRI services for Medicare benefits.

3.10 In November 1998, following its receipt of an anonymous allegation about backdating of MRI orders, the HIC began investigating allegations of irregularities in MRI orders, completing its preliminary review in February 1999.

3.11 Questions were raised about the Budget MRI measures on 8 February 1999 at a Senate Estimates Hearing in Parliament. The issues covered included the negotiation process and the number of eligible machines. There were accusations that some radiologists ordering machines prior to 12 May had access to information that MRI machines installed, ordered or leased by Budget night would be eligible for MBS rebates.

3.12 The sudden increase in the number of applications for eligibility for MBS rebates exceeded the expected numbers of registered public and private machines —namely those machines actually installed and operating at the time. The HIC acknowledged in its

7 ANAO, Report no. 42, 1999–2000, p. 92.

8 ANAO, Report no. 42, 1999–2000, p. 88.

December 1999 report that ‘there are some unresolved questions arising from the fact that so many contracts were said to have been entered into prior to 12 May 1998’.[9]

Scope of audit

3.13 On 18 October 1999, the Minister for Health and Aged Care requested the Auditor-General to inquire into and report on 'the probity of the processes surrounding the negotiation of the Agreement between the Government and the diagnostic imaging profession'.[10] In initiating the audit, the Minister 'agreed that the Audit Office could extend its normal powers to get right to the heart of the matter'.[11]

3.14 The audit by the Australian National Audit Office (ANAO) became Audit Report No. 42, 1999–2000**,** *Magnetic Resonance Imaging Services—effectiveness and probity of the policy development processes and implementations.* It reviewed the effectiveness and probity of the processes involved in the development and announcement of the proposal to improve access to MRI services as announced in the 1998 Budget.

3.15 The audit also:

- Examined government negotiations with the diagnostic imaging profession;
- Assessed the administrative and monitoring arrangements related to the registration of ‘eligible providers’ and ‘eligible equipment’ for claims under MBS; and
- Examined the adequacy and timeliness of action taken by the DHAC in response to unanticipated or inappropriate MRI submissions.[12]

Audit findings

3.16 ANAO stated that ‘one of the key concerns arising in relation to this audit was whether there was a leak of Budget information which led to this pre-Budget rush of orders’.[13] Evidence seemed to

9 ANAO, Report no. 42, 1999–2000, p. 89.
10 ANAO, Report no. 42, 1999–2000, p. 12.
11 D. Borthwick, *Transcript*, 3 November 2000, p. 83.
12 ANAO, Report no. 42, 1999–2000, pp. 12–13.
13 ANAO, Report no. 42, 1999–2000, p. 21.

indicate that the meeting of 6 May 1998 had some influence either directly or indirectly, on the sudden surge in orders for MRI machines in the space of four days.[14] In respect of this key question, ANAO reported:

> Statements have also been made by College representatives who attended the meeting on 6 May 1998 with the Minister that, although the Minister did not reveal what measures would be in the Budget, there was discussion of the option to include machines on order as at Budget night. All but one have stated that this was initiated by the Minister (the other has indicated this was initiated by the Minister or the departmental official present) within the general context of College concerns about restrictions on sites. They have also indicated that the College expressed concerns regarding the enforceability of such a measure. On the other hand, the Minister, the Minister's adviser and the departmental officer present, dispute the radiologists' recollection of the meeting. They do not recall the specific matter of machines on order being discussed.[15]

3.17 In ANAO's view, 'no substantive conclusion about inappropriate disclosure of budget sensitive information could be expected on the basis of such contradictory evidence…much under oath or affirmation'.[16] ANAO considered, however, that:

> …on the balance of probabilities, the evidence does at least suggest that negotiation and consultation with the College representatives and open debate on supply control issues created an environment where some participants may have deduced, or actually become aware, that the Commonwealth was giving consideration to the inclusion of machines on order in the Budget measure. Nevertheless, the audit was not able to conclude whether, or to what extent, the actual surge in orders was based on reliable information, or informed or partly informed speculation.[17]

14 ANAO, Report no. 42, 1999–2000, pp. 104–106.
15 ANAO, Report no. 42, 1999–2000, p. 22.
16 ANAO, Report no. 42, 1999–2000, p. 22.
17 ANAO, Report no. 42, 1999–2000, p. 22.

3.18 ANAO found that overall patient access to MRI services improved as a result of the Agreement.[18] Of the 65 MRI units which ultimately became eligible for MBS rebates, only 17 units (25.7%) were located in non-metropolitan areas.[19] While this was an improvement from the previous zero funded MRI units in non-metropolitan areas[20], the desired distribution of machines, as recommended by the AHTAC in its 1997 review, was not fully realised.[21]

3.19 Expenditure for MRI services had also exceeded expectations. ANAO highlighted that, at the time of its audit, the anticipated cost containment in MBS rebates had not been achieved. MRI rebate expenditure for 1998-99 'was some $4 million over the anticipated level. Projections for 1999–2000 suggest expenditure of $6 million over target.'[22] Furthermore:

> …prior to the reduction in eligible machines to 66, there was considerable potential for expenditure to exceed targets by larger amounts if all 111 machines registered had remained eligible. This is particularly important given that, under the Agreement, the Commonwealth assumed the financial risk for MRI volumes above the designated ceiling for scans.[23]

3.20 At the public hearing, ANAO made the following comments about the MRI Agreement negotiations, DHAC's identification and management of the following aspects:

> [In Audit Report No. 42]…we make the point that we believe the department's approach to risk management was uneven. We readily acknowledge that high level risks were addressed but we felt that insufficient consideration was given to risk identification and management for some aspects of the policy development process.…the graph on page 88,…shows the machines on order, and ask the question: does that suggest tight risk management processes? It seems to me the answer is: we think they could have done better. So while we are not

18 ANAO, Report no. 42, 1999–2000, p. 37.

19 ANAO, Report no. 42, 1999–2000, p. 22; J Blandford (Chair), *Report of the Review of Magnetic Resonance Imaging*, 8 March 2000, p. 20.

20 DHAC & HIC, Submission no. 3, p. 15.

21 ANAO, Report no. 42, 1999–2000, p. 22; Blandford, *Report of the Review*, p. 21.

22 ANAO, Report no. 42, 1999–2000, p. 112. For further details, see paragraphs 3.90–3.91.

23 ANAO, Report no. 42, 1999–2000, p. 112.

> universally saying the department has not applied risk management, we are saying there is certainly scope for improvement.[24]

3.21 Prior to attending the negotiations, members of the Task Force were not asked to declare any potential conflict of interest, pecuniary interest, or intention to buy MRI machines. There were no agreed procedures or arrangements in place to address potential conflicts of interest. In addition, there had been an appalling lack of adequate documentation by DHAC of its negotiations with the College and of its oral advice to its Minister.[25]

3.22 ANAO emphasised that its findings and conclusions—which since the audit was tabled have remained unchanged[26]—showed:

> The MRI measure has also resulted in the unexpected outcome of exposure of the Commonwealth to risks of fraud through backdating of contracts or otherwise misrepresenting the nature of the contracts. These matters have been the subject of the HIC investigation…[27]

3.23 The Committee examined the following issues at its public hearing on 3 November 2000:

- Policy development—MRI options
  - ⇒ Adequate documentation of ministerial advice and negotiation processes
  - ⇒ Probity arrangements for the negotiations
- Accountability and monitoring of MRI measures
  - ⇒ MRI Agreement
  - ⇒ Conditional contracts
  - ⇒ Statutory declarations
- Risk management
  - ⇒ Constraining growth in diagnostic imaging expenditure and achieving net savings
  - ⇒ MBS payments for diagnostic imaging services
- The quality of the administrative processes supporting the implementation of the MRI Budget measure

24 I McPhee, *Transcript*, 3 November 2000, p. 63;

25 ANAO, Report no. 42, 1999–2000, pp. 20, 68–71.

26 McPhee, *Transcript*, 3 November 2000, p. 62; A. Greenslade, *Transcript*, 3 November 2000, p. 84.

27 ANAO, Report no. 42, 1999–2000, p. 112.

⇒ Administrative outcomes achieved

- The HIC investigation.

Policy development

3.24 The responsibility for providing policy advice to the Minister for Health and Aged Care rests with DHAC. In developing its advice, DHAC engages in discussions and consultations, taking into consideration its responsibilities for implementing the health policy once the Government has made a decision. Policy development operates within a variety of contexts, ranging from open public debates to the development of policy proposals for Cabinet consideration or inclusion in the Commonwealth Budget.

> However, there can be tensions between maintaining a strict 'need to know' approach in a new policy area and at the same time ensuring that the final outcome is both practical and acceptable to those parties with an interest in its implementation, which often depends on consultation, even if necessarily restricted.[28]

3.25 As noted in the ANAO report:

> While openness in policy development provides real benefits in allowing better targeting and acceptance of the policy measure…, it also carries risks, particularly where parties consulted may gain an unfair advantage over others in the community due to the knowledge gained through the consultation process.[29]

3.26 Agencies responsible for policy development require a sound risk management strategy to safeguard the integrity of sensitive information in any discussions or negotiations with interested parties. It should develop and implement a risk management strategy to preserve the integrity of sensitive information—in this way protecting the interests of all concerned. Documentation is essential and careful risk management 'underpins achievement of planned policy outcomes'.[30]

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28 ANAO, Report no. 42, 1999–2000, p. 58.
29 ANAO, Report no. 42, 1999–2000, p. 58.
30 ANAO, Report no. 42, 1999–2000, p. 59.

Adequate documentation

3.27 ANAO found that DHAC had not always made or maintained official records on significant briefings of, and decisions made by, the Minister in relation to the development of some elements of the policy on MRI, specifically about the merits, risks and alternative options in relation to the inclusion of machines on order.[31]

> Such documentation is generally accepted as a key element of sound administration and accountability. Official records were not taken or maintained of some significant briefings of, and decisions by, the Minister. As a consequence, there is limited departmental documentation on the development of the key elements of the MRI supply measure.[32]

3.28 In addition, no record was kept of meetings between the Commonwealth and the College and there is no record of what was agreed (other than drafts of the Agreement in the latter stages of negotiation).[33] ANAO commented that such practices were 'not consistent with good administrative practices'.[34]

> In this situation, the pressure on the Department to progress sensitive consultations over a short time period actually demanded greater discipline in record keeping and accountability as part of a sound control environment which is integral to robust and successful corporate governance. The latter also provides management with some assurance that required actions will be undertaken particularly in periods of stress accentuated by, for example, time pressures and multiple demands being placed on the same people.[35]

3.29 It was therefore difficult to establish a clear audit trail throughout this period, resulting in ANAO being unable to draw any substantive conclusions about some aspects. It stated:

> The audit methodology has been significantly influenced by one of the findings in this audit report—that Commonwealth documentation and maintenance of

31 ANAO, Report no. 42, 1999–2000, pp. 20–21, 25–27, 67–68, 71.
32 ANAO, Report no. 42, 1999–2000, p. 20.
33 ANAO, Report no. 42, 1999–2000, p. 25.
34 ANAO, Report no. 42, 1999–2000, p. 27.
35 ANAO, Report no. 42, 1999–2000, p. 72.

> documents in this instance have not been of a standard that adequately supports accountability for policy development and implementation.[36]

3.30 Instead ANAO tried to reconstruct documentary evidence, through its powers under section 32 of the *Auditor-General Act 1997*. Critical aspects of evidence were obtained by reviewing archived emails; consulting documents held in the private sector and through extensive oral evidence from key parties under oath or affirmation.[37]

3.31 During the public hearing, the Committee explored why there was a lack of departmental documentary evidence on the MRI negotiations. DHAC agreed with the Committee that its standard of record keeping was of an unsatisfactory standard.[38] Inevitably there is speculation about these matters as shown in the following exchange:

> **Ms GILLARD** [*Member for Lalor*]—This is a question I asked the auditor before but, as I understand it, when the Audit Office comes in and there is an unsatisfactory documentary record, are you able to say whether or not any documents were removed or destroyed?
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> **Mr Borthwick** [*Deputy Secretary, DHAC*]—To the best of my knowledge, there were no documents that were deliberately removed or destroyed. However, I think the Audit Office might be able to comment on it. I think some officers' personal records, such as notes, went missing, but they were personal notebooks, time had moved on and the issues were no longer relevant. I might leave it to the Audit Office to respond to that question.
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> **Mr Greenslade** [*Executive Director, ANAO*]—We found no evidence that documents were deliberately destroyed to hide evidence.
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> **Ms GILLARD**—So you found no direct evidence that documents were deliberately destroyed, but it is a possibility, isn't it, when there is such an unsatisfactory record? Either they were not kept or they were subsequently removed—there are two possibilities.

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36 ANAO, Report no. 42, 1999–2000, p. 13.

37 ANAO, Report no. 42, 1999–2000, pp. 13–14.

38 Borthwick, *Transcript*, 3 November 2000, p. 82.

> **Mr Greenslade**—Yes.
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> **CHAIRMAN** [*Mr Bob Charles, Member for La Trobe*]—Wouldn't it be highly unlikely in a department for documents to be purposely destroyed?
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> **Mr Borthwick**—The point is that it is highly unlikely and the nature of this audit commission, where they had unfettered access to all of our staff and interviewed them under oath, if need be, would have revealed whether there had been some action to destroy documents. There was no such action.
>
> **Ms GILLARD**—I accept there is no direct finding of that by the Audit Office.[39]

3.32 In their joint submission to the Committee, DHAC and HIC declared that:

> there were some aspects of the policy process leading to the introduction of MRI onto the MBS that should have been better documented. In particular, it is noted that [it] is desirable to have formal minutes of meetings where negotiations were taking place and a record of outcomes of key meetings with the Minister.[40]

3.33 When asked by the Chairman why the radiologists kept much better records of meetings and agreements, DHAC responded: 'Our processes were not up to mark. Everything the Audit Office says about that reflects deficiencies in that process by the department.'[41] Since then, DHAC said, the processes have been extensively improved:

> …in terms of not just this particular area of the department but at a departmental wide level in terms of making it very clear what responsibilities are of officers for record keeping, filing and all those basic bureaucratic skills.[42]

3.34 Although DHAC believes its record keeping has since improved, this improvement does not detract from the Committee's conclusion that DHAC had been remiss and its documentation of

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39 Various, *Transcript*, 3 November 2000, pp. 82–83.

40 DHAC & HIC, Submission no. 3, p. 9.

41 Borthwick, *Transcript*, 3 November 2000, p. 82.

42 Borthwick, *Transcript*, 3 November 2000, p. 82.

all that had occurred during the negotiation of the MRI Agreement had been appalling.

Probity arrangements

3.35 Linked to the issue of inadequate documentation was another of ANAO's major findings—the lack of 'formal record or minute of the Department's intentions' in its probity arrangements with the College MRI Taskforce, with whom DHAC was negotiating MRI arrangements. DHAC informed the Committee that it fully expected the Taskforce members to discuss the MRI measures with its constituents and therefore excluded Budget sensitive information from the discussions.[43] 'Taskforce members were not required to sign any confidentiality agreement prior to the commencement of the negotiations process.'[44]

3.36 Confidentiality arrangements once established would have bound both parties. Instead, there was ambiguity about what was to be treated in confidence and what could reasonably be discussed more openly.

3.37 ANAO stated that one of its key concerns was whether a leak of Budget information led to a pre-Budget rush of orders. The most significant interactions between the Commonwealth and the profession in connection with this matter occurred in the final stages of negotiations. 'Statements have been provided that the Commonwealth's consideration of the option of including machines on order as at Budget night was discussed with the College Task Force on MRI prior to the Budget.'[45] The recollections of most participants do not support this view. ANAO found DHAC had kept no record of these discussions.[46]

3.38 In addition, DHAC did not document the voluntary declarations made by the Taskforce members of their potential conflicts of interest, pecuniary interest and / or intention to purchase MRI machines.[47] Yet, as ANAO found, 'five of the eleven radiologists involved in the negotiations were associated with practices that allegedly ordered nine machines prior to the Budget'.[48]

43 DHAC, Submission no. 4, p. 2.
44 ANAO, Report no. 42, 1999–2000, p.68.
45 ANAO, Report no. 42, 1999–2000, p. 21.
46 ANAO, Report no. 42, 1999–2000, p. 21.
47 ANAO, Report no. 42, 1999–2000, p. 69.
48 ANAO, Report no. 42, 1999–2000, pp. 21, 87.

3.39 DHAC acknowledged that 'there should have been better measures put in place for handling conflicts of interest and confidentiality requirements'[49] in its discussions with the College. DHAC subsequently accepted that it should have requested formal statements of interest and identified process for handling conflicts of interest from the Taskforce members.[50] DHAC said at the public hearing:

> The ground rules should have been a lot clearer in terms of dealing with the profession....we were expecting the College to go back and talk to all their members about the aspects of the Agreement because we were expecting them to sign on the bottom line. It is quite clear there was some confusion on that point and we were not clear enough in terms of setting out those requirements.[51]

3.40 Since then, in the light of ANAO's comments and recommendations, DHAC has tightened its procedures and adopted a number of measures including the development of a Deed of Confidentiality and a Conflict of Interest Declaration.[52]

3.41 ANAO found that record keeping practices of departmental Taskforce members did not compare well with those of College Taskforce members who were not subject to the same accountability disciplines as DHAC. The ANAO used the notes kept by College Taskforce members to provide some record about decision making and the sharing of information.[53] ANAO was also able to verify that by late March / early April 1998, College members knew the Government was considering controlling the supply of MRI services through a site freeze[54], which was understood to mean:

> ...a freeze on eligibility of machines beyond a certain point in time which was generally, but not exclusively, understood to be installed machines. In essence, the type of control which was implemented.[55]

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49 Borthwick, *Transcript*, 3 November 2000, p. 63.

50 DHAC, Submission no. 4, p. 2; Borthwick, *Transcript*, 3 November 2000, p. 63; ANAO, Report no. 42, 1999–2000, p. 70.

51 Borthwick, *Transcript*, 3 November 2000, p. 63.

52 DHAC, Submission no. 4, p. 3.

53 ANAO, Report no. 42, 1999–2000, p. 71.

54 ANAO, Report no. 42, 1999–2000, p. 79.

55 ANAO, Report no. 42, 1999–2000, p. 79.

3.42 ANAO concluded in its report:

> Whatever the basis for this purchase activity, it would be reasonable to conclude that, if this fact were known in the profession, it would also have had some influence on other radiologists considering purchasing MRI machines.[56]

Committee comments

3.43 The Committee found it disturbing that DHAC was so lacking in rigour in its probity arrangements, given the professional and financial interests involved. As a result of this neglect of probity arrangements, it was possible for persons privy to confidential information to subsequently make commercial decisions based on that information in a short space of time. ANAO described the negotiations as 'information which gave them [radiologists] a privileged position'.[57]

3.44 The Committee believes there are several possible explanations for the increase in MRI orders prior to the Budget announcement:

- In the normal course of professional development, there were legitimate business reasons for ordering MRI units;[58]
- The AHTAC Report of October 1997 had recommended that MBS funded scans be increased to the equivalent of '10–12 units working at full capacity';[59]
- There was a leak—therefore ordering a MRI unit presented minimal risks;
- There was sufficient firm belief formed during the negotiations—therefore some were willing to take a calculated risk;
- There were unsubstantiated speculations—upon which some were willing to gamble; or
- Contracts were apparently backdated.[60]

3.45 DHAC denied there had been a leak and chose to believe that the radiologists:

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56 ANAO, Report no. 42, 1999–2000, pp. 21, 91.
57 McPhee, *Transcript*, 3 November 2000, p. 78.
58 ANAO, Report No.42, 1999–2000, p. 90.
59 AHTAC, *Review*, p. 69
60 ANAO, Report No.42, 1999–2000, p. 89.

> …were taking a commercial gamble that these machines would be put on the MBS. I think, with the benefit of hindsight, that we did not fully appreciate that that is what they were doing.[61]

3.46 In light of subsequent events, DHAC acknowledged:

> That is why the Minister initiated this wide audit inquiry and agreed that the Audit Office could extend its normal powers to get right to the heart of the matter, because we, too, were concerned by that rush of orders.[62]

3.47 In its analysis of why a large number of MRI scanners were purchased between 7–12 May 1998, ANAO examined several scenarios. Its conclusion was 'some participants may have deduced, or become aware, that the Commonwealth was giving consideration to inclusion of machines on order'[63] in the Medicare Benefits Schedule. Other possible explanations, however:

> …do not rule out prior knowledge or strong suspicion of the likely inclusion of contracts signed before Budget day as part of the MRI Budget measure.…The HIC report acknowledges that there are some unresolved questions arising from the fact that so many contracts were said to have been entered into prior to 12 May 1998.[64]

3.48 The Committee concluded that as ANAO was unable to determine from its audit whether some radiologists 'may have deduced, or actually become aware that the Commonwealth was giving consideration to the inclusion of machines on order in the Budget measure',[65]its own view would be equally speculative. The Committee notes that DHAC did not face up to the magnitude of the deficiencies in its negotiation processes. The Committee believes that DHAC's probity arrangements need to be improved, taking into account all the possibilities. Reforms need to be made to ensure that in the future there is full accountability and a definite audit trail for all programs.

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61 Borthwick, *Transcript*, 3 November 2000, p. 64.

62 Borthwick, *Transcript*, 3 November 2000, p. 83.

63 ANAO, Report no. 42, 1999–2000, p. 85; McPhee, *Transcript*, 3 November 2000, p. 81.

64 ANAO, Report no. 42, 1999–2000, p. 89.

65 ANAO, Report no. 42, 1999–2000, p. 90.

3.49 Given the allegations sent to DHAC from 1 June 1998[66], the HIC investigation started in November 1998, the growing public concerns and the Senate Estimates interrogations on 8 February 1999, the Committee is puzzled that DHAC did not become alarmed until August 1999, when the Minister sought immediate advice about imposing an application cut-off date for MRI eligibility, in order to limit the units being ordered.[67] The Committee also noted that DHAC did not share the allegations made to it with HIC at the time they were made[68], thereby raising questions about the effectiveness of communication between the two agencies and their monitoring of risk management and accountability.

Accountability and monitoring of MRI measures

MRI Agreement

3.50 The negotiated Agreement, as finalised after the 6 May 1998 meeting, was endorsed by the Government and the arrangements announced as part of the Budget. On Budget night the Minister wrote to the President of the College, advising that:

> In order to attract Medicare benefits, [MRI] services must be provided with equipment which is in use in hospitals or practices at 7.30pm EST on Tuesday, 12 May 1998. This requirement will be relaxed to allow Medicare benefits to be paid for services provided with equipment which has been either ordered or leased under an unconditional and enforceable contract at 7.30pm EST on Tuesday, 12 May 1998 but are still to be delivered at that time. As well, providers may need to satisfy other eligibility criteria such as siting and accreditation / quality assurance system requirements as recommended by AHTAC.[69]

3.51 ANAO drew attention to several aspects of the endorsement of the MRI Agreement:

66 ANAO, Report no. 42, 1999–2000, p. 104.
67 ANAO, Report no. 42, 1999–2000, p. 106.
68 ANAO, Report no. 42, 1999–2000, p. 35.
69 ANAO, Report no. 42, 1999–2000, p. 92.

- The Minister had not attached a copy of the Agreement with his letter dated 12 May 1998.
- The College President did attach a copy with his response.
- The DHAC file copy contained annotations such as 'we never agreed to this'.
- No copy of the Agreement, signed by both parties, exists.

⇒ There is therefore no agreed version of the Agreement.[70]

3.52 The Committee believes that proper adherence to well founded risk management strategies would have been prudent and would have resulted in a signed certified Agreement. The Committee notes that DHAC failed to do this. As ANAO noted: 'Such uncertainty makes it difficult to monitor / review such agreements adequately'.[71]

Conditional contracts

3.53 The Committee questioned DHAC about conditional contracts which had been entered into around Budget night 1998. As noted above, the Budget announcement allowed MRI machines which were 'either ordered or leased under an unconditional and enforceable contract at 7.30pm EST on Tuesday, 12 May 1998 but are still to be delivered at that time' to be eligible for MBS rebates. Given that 33 machines were ordered between 7–12 May 1998, this wording is significant. The Minister's letter went on to outline the expected increase:

> They expand significantly the range of services funded from the existing 18 public hospital MRI units to some 60 Australia wide, give greater choice, and assure quality while continuing a managed approach to the funding and delivery of this specialised medical service.[72]

3.54 DHAC had sought advice on appropriate phrasing 'of the concept of machines on order upon which the MRI Regulations could be premised' from the Australian Government Solicitor on 8 May 1998. Specific advice on the actual phrasing, however, was not provided.

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70 ANAO, Report no. 42, 1999–2000, p. 93.
71 ANAO, Report no. 42, 1999–2000, p. 93.
72 ANAO, Report no. 42, 1999–2000, p. 92.

3.55 To give effect to this Budget announcement, the Government approved in late August 1998, amendments to the *Health Insurance (1997-1998 Diagnostic Imaging Services Table) Regulations* and consequent amendments to the General Medical Services Table and the *Health Insurance Regulations*. The amended regulations specified that eligible MRI machines included equipment which 'although uninstalled, [had] been purchased or leased before that time on that day under a contract, in writing, that did not contain an option to cancel the contract' as at 7.30 pm EST on 12 May 1998.[73]

3.56 In contrast to the Government's expectation, by September 1998, when the new arrangements were to commence, 71 applications had been submitted. By October 1999, this had increased to 111 applications.[74] This was nearly double the number of MRI units Australia-wide anticipated in the Minister's letter.

3.57 Ultimately the DPP was asked to advise on the possibility of prosecuting in relation to a number of matters involving MRI purchases. Some of the matters related to allegations of backdating of contracts and some related to contracts that were expressed to be conditional.[75]

3.58 In relation to the contracts expressed to be conditional, the DPP concluded that the term '*option to cancel the contract'* is not a usual term used in the law of contract and there was uncertainty as to how it would be interpreted by a court. Legal Counsel formed the opinion that contracts which were expressed to be '*subject to finance*' or even '*conditional order on Government rebate for MR procedure*' could not be said to constitute an option to cancel the contract.[76]

3.59 The DPP determined that it would be unlikely that the prosecution could 'prove that an offence had been committed beyond reasonable doubt.'[77] The Director advised that further investigation would not change his view and his decision.

3.60 Having examined the evidence fully and questioned DHAC about the way in which it had admitted the phrase 'option to cancel', it still remains unclear to the Committee why this phrase was

73 Health Insurance (1997–1998 Diagnostic Imaging Services Table) Amendment Regulations 1998 (no.1) 1998 No 267–Reg 4 http://scaleplus.law.gov.au/ 18 June 2001

74 ANAO, Report no. 42, 1999–2000, p. 104

75 Borthwick, *Transcript*, 3 November 2001, pp. 71–73; ANAO, Report no. 42, p. 89.

76 HIC, Media Release—Magnetic Resonance Imaging Investigation (27.9.2000), p. 1.

77 HIC, Media Release—Magnetic Resonance Imaging Investigation (27.9.2000), p. 1.

selected. This lack of clarity is inexplicable to the Committee. Furthermore, the Committee questions the wisdom of allowing the phrase 'option to cancel' to be included when clearly this was contrary to the Government's intent as specified in the Minister's letter of 12 May 1998.

3.61 The Committee is concerned that where orders were subsequently cancelled in terms of the contract, this could be seen as a decision to withdraw from the contract because the buyers could no longer profit, as they had earlier assumed they could. DHAC believed 'it would be a logical thing for them to cancel the contract if they had an opportunity in terms of the contractual arrangements to do so'.[78]

3.62 Questioned about this aspect, ANAO responded that the situation was a difficult one to comment on as 'we are not privy to sufficient information to help you draw a conclusion'. ANAO added that it would 'prefer to put the emphasis on the preventative approach to avoid the situation occurring, rather than trying to recover downstream.'[79]

3.63 The Committee endorses this view. It firmly believes that DHAC should not have admitted the use of the option phrase since its acceptance, together with the original absence of a cut-off date meant that many more MRI units were seeking registration. Given that the Agreement stated that the Government would assume the financial risk for MRI volumes above the designated ceiling, it appears that some radiologists may have assumed minimal risks—and some might have made sizeable gains—in entering into these conditional contracts.

3.64 Central to this discussion are the 26 units which were ordered but not installed by the time the cut-off date was imposed in October 1999 as a means of addressing the surge in the number of MRI units. The cancellation of these 26 contracts could be seen as the reaction by those radiologists on being excluded from MBS rebates since their machines were ordered after 10 February 1998.

3.65 The Committee inquired whether the additional machines which became ineligible for registration at 18 October 1999 as a result of the ministerial freeze, were eventually installed and operating. DHAC told the Committee it was unable to provide any further information on the machines caught in the freeze, as these were no

78 Borthwick, *Transcript*, 3 November 2000, p. 81.

79 McPhee, *Transcript*, 3 November 2000, p. 79.

longer lodging claims, although 'there are some examples of machines moving from one location to another'.[80]

3.66 Given the public concern about probity issues in relation to the surge in the number of MRI machines, it seems basic for DHAC to monitor matters associated with these probity issues and track the cancellation of contracts caught in the Ministerial freeze. The Committee is concerned that DHAC could not tell if these MRI units are in private operation, not delivered or completely cancelled. This inability could hamper plans for future distribution of MRI units on an equitable basis.

Statutory declarations

3.67 Faced with an increasing volume of claims, DHAC tried to control supply by requiring that claim applications for MBS eligibility be accompanied by statutory declarations regarding contractual arrangements for the purchase of MRI machines. Advice was sought from the Australian Government Solicitor on 6 August 1998 to assist in developing the supply control arrangements.[81] DHAC was focused on addressing fraudulent claims rather than on limiting the number of eligible MRI machines.[82] By 30 September 1998, 71 applications had been submitted, one month after registration commenced.[83]

3.68 ANAO found that there was considerable variation in specific aspects of the contracts and in the statutory declarations, thus making it difficult 'to establish whether the machine had already been approved and to match statutory declarations with contracts'.[84] In effect, the statutory declarations were not effective control mechanisms.

3.69 DHAC did not focus on this aspect until the DPP tried to proceed to prosecution using the statutory declarations.[85] The department admitted: 'The fact that it would not stand up in the prosecutions was only known to us when the DPP advised us of that'.[86]

80 Watzlaff, *Transcript*, 3 November 2000, p. 67.

81 Borthwick, *Transcript*, 3 November 2000, p. 70; ANAO, Report no. 42, p. 97.

82 ANAO, Report no. 42, 1999–2000, p. 99.

83 ANAO, Report no. 42, 1999–2000, p. 104.

84 ANAO, Report no. 42, 1999–2000, p. 103.

85 Morauta, *Transcript*, 3 November 2000, p. 71, HIC, 'Media release: Magnetic Resonance Imaging Investigation', 27/09/2000, p. 1.

86 Morauta, *Transcript*, 3 November 2000, p. 71.

3.70 DHAC made it clear during the public hearing, however, that it still does not believe that the use of statutory declarations was a flawed process which did not legally assist with the control of supply and probity matters.[87] DHAC took the view that statutory declarations supported the purchases since:

> …prima facie these were contracts. Even though there was backdating on some of the contracts, the prior negotiations and prior exchange or whatever it was amounted to contracts that were entered into prior to Budget night.[88]

3.71 The failure of DHAC to understand the weakness of these specific statutory declarations as a control mechanism leads to Committee's concerns that DHAC may have not adequately learned from this experience.

3.72 Another of the Committee's concerns centred on the HIC claim processing whereby officers tended to accept the statutory declarations at face value. HIC indicated to ANAO that it had gained the impression from its discussions with DHAC that the statutory declaration arrangements were sufficient to address the problems of excessive orders and backdating.[89] Consequently, 'the registration procedures for eligibility of equipment generally resulted in applications being accepted, since the application was made by way of statutory declaration'.[90]

3.73 Total applications received numbered 111 by October 1999 when a cut-off date was being set.[91] Despite the continuing growth in the number of machines submitted for registration, DHAC did not address the risks involved in HIC's processing of machines on order because it continued to believe the statutory declarations dealt with possible fraudulent claims in an effective manner.

3.74 The Committee endorses ANAO's conclusion on this matter:

> Earlier and clearer guidance as to what constituted a valid statutory declaration or contract, what was invalid and a mechanism to address those cases that were unclear or

87 Borthwick, *Transcript*, 3 November 2000, p. 77.
88 Borthwick, *Transcript*, 3 November 2000, p. 72.
89 ANAO, Report no. 42, 1999–2000, pp. 101, 103.
90 ANAO, Report no. 42, 1999–2000, p. 104.
91 ANAO, Report no. 42, 1999–2000, p. 104.

ambiguous would have assisted timely processing of applications.[92]

3.75 The Committee accepts that during this period, DHAC was mainly focused on policy development and its advice to the Minister on extending access to MRI scans. Nevertheless, in the Committee's view, once the policy had been determined, DHAC should have focused on the sound processes needed to achieve outcomes and sought legal advice to facilitate these processes. DHAC should also have developed clear guidelines and provided staff training on managing legal risks. Post-events, DHAC needs to review its processes for developing Budget initiatives so that probity, confidentiality and legal arrangements for future Budget initiatives are of a satisfactory standard.

Recommendation 2

3.76 **The Committee recommends that the Department of Health and Aged Care develop clear guidelines—informed by appropriate legal advice—to assist its staff (a) in the negotiation and management of valid contracts; and (b) in their assessment of existing statutory declarations and contracts.**

Recommendation 3

3.77 **The Committee recommends that in its development of clear contract guidelines, the Department of Health and Aged Care base its guidelines on the *Better Practice Guide on Contract Management* issued by the Australian National Audit Office in 2001.**

Risk management

3.78 The Committee focused on how DHAC had managed emerging risks. ANAO maintained that DHAC should have developed a suitable strategy with safeguards covering all possible risks, such as a large number of orders placed before Budget night. Because MRI numbers exceeded DHAC expected numbers, one of its key supply controls was undermined, 'thereby placing at risk the

92 ANAO, Report no. 42, 1999–2000, p. 103.

Agreement target for MRI scans; and exposing the Commonwealth to potentially fraudulent claims'.[93]

> As well, more consideration could have been given to attendant benefits and risks for delivering the key supply measure and to the provision of information relevant to the Minister's assessment of departmental advice. This conclusion applies both to advice at Budget time and to subsequent advice concerning emerging problems with respect to machines on order.[94]

3.79 The Committee accepts that this advice is retrospective. ANAO did acknowledge, however, that 'the Department was under considerable pressure with tight timetables at this time, as well as the need to ensure the full cooperation and agreement of the profession.'[95]

3.80 DHAC maintained at the public hearing and in its submission that 'proper consideration was given to assessing and managing risks associated with the development and implementation of the new MRI arrangements'.[96] It highlighted the fact that 'specific steps were taken to address the possibility of non bona fide orders of MRI units'.[97] To differentiate genuine orders, DHAC advised the use of the term 'firm orders' to refer to equipment which had been either ordered or leased unconditionally in an enforceable contract.[98] Again the Committee expressed disquiet at DHAC's apparent lack of appreciation of the dimension and nature of the flaws in its approach to the MRI Budget announcement and its handling of its implementation.

Constraining growth in diagnostic imaging expenditure and achieving net savings

3.81 During the public hearing, it was established that 65 MRI machines were operating and receiving Medicare benefits. Of these machines, 59 were installed and operating prior to the

93 ANAO, Report no. 42, 1999–2000, p. 21.

94 ANAO, Report no. 42, 1999–2000, pp. 20–21.

95 ANAO, Report no. 42, 1999–2000, p. 21.

96 DHAC & HIC, Submission no. 3, pp. 7–8; Borthwick, *Transcript*, 3 November 2000, pp. 62–63.

97 Borthwick, *Transcript*, 3 November 2000, p. 59.

98 DHAC & HIC, Submission no. 3, p. 7.

12 May 1998, the day of the Budget announcement.[99] Three of these machines were ordered prior to 10 February 1998, that is prior to the date the Ministerial freeze came into operation.[100] Another three machines were ordered in the Ministerial freeze period but were exempted from the Ministerial freeze because of their non-metropolitan location.[101] As a result, there was a net addition of six machines operating in Australia.

3.82 Between 10 February 1998 and Budget night, a further 46 machines were on contract but had not yet been installed.[102] It was these machines that were ultimately caught in the Ministerial freeze.[103]

3.83 DHAC, however, did not see a need to introduce a cut-off date for registration, although it feared a blow-out by August 1998 of 'between 100-110 MRI machines on stream in the next 18 months'[104], instead of the anticipated 60 scanners.

3.84 ANAO found that the initial monitoring/auditing Agreement between DHAC and HIC did not cover the risks of more machines on order and claiming eligibility. The Agreement was not formally amended at any subsequent stage even though DHAC became increasingly aware, after the 1998 Budget, of emerging problems with respect to MRI orders, and briefed the Minister on this, but not the HIC.[105] Yet, in its advice to the Minister, DHAC did not discuss the risks associated with the department's preferred option of including, in the Budget measure, machines on order.[106]

3.85 The HIC understood its role was to monitor the number of services and detect inappropriate ordering and over-servicing.

> It was not aware of the need to audit risks related to contracts; the importance of detailed checking of the contracts beyond what it would see as normal administrative requirements; nor that numbers of

99 R. Watzlaff, *Transcript*, 3 November 2000, p. 65.

100 Watzlaff, *Transcript*, 3 November 2000, p. 66.

101 Watzlaff, *Transcript*, 3 November 2000, p. 65.

102 In total, 52 units were contracted for and caught in the ministerial freeze. Of these 6 'escaped' because one was ordered pre-10 February 1998 and the other 5 were in non-metropolitan areas. Watzlaff, *Transcript*, 3 November 2000, pp. 65–66.

103 Borthwick, *Transcript*, 3 November 2000, pp. 72–73. ANAO, Report no. 42, p. 89.

104 ANAO, Report no. 42, 1999–2000, p. 98.

105 ANAO, Report no. 42, 1999–2000, p. 101.

106 ANAO, Report no. 42, 1999–2000, p. 76.

> machines claiming eligibility beyond a certain level may indicate that some of the Department's risk treatments had not been effective.[107]

3.86 The Committee believes that this open-ended approach to risk management was inadequate and resulted in expenditure on diagnostic imaging exceeding by five per cent, the seven per cent growth anticipated.[108] As ANAO stated: 'At the time of this audit, the anticipated level of control over growth in diagnostic imaging outlays had not been achieved'.[109]

MBS payments for diagnostic imaging services

3.87 During the public hearing, the Committee was told that all eligible scanners including those subsequently excluded, had been able to register for and were paid MBS rebates.[110] Each eligible MRI service attracted a MBS fee of $475 in the first two years, rising to $529 in year 3 [2000–2001].[111] The expansion program was limited to 403 000 MRI scans over the full three year period, at a cost of $164 million. In addition, the MRI Agreement acknowledged that 'An excess demand above [403 000 MRI scans over three years] cannot be funded within global arrangements… Accordingly, the Government will assume the financial risk for MRI volumes above the designated ceiling'.[112]

3.88 In response to the Committee's query, DHAC replied:

> In 1998-99, 107 768 scans were performed. This was 7 768 scans in excess of the anticipated volume. In accordance with the DI Agreement, the Government financed these scans at a total cost of $3 272 192. However, expenditure on MRI was $4 343 506 more than anticipated, because the average benefit turned out to be $421.24 instead of the anticipated $410.53. The anticipated benefit was calculated on the assumption that 80% of scans would be out-of-hospital, however the actual proportion of benefits

107 ANAO, Report no. 42, 1999–2000, p. 101.

108 ANAO, Report no. 42, 1999–2000, p. 111.

109 ANAO, Report no. 42, 1999–2000, p. 111.

110 Borthwick, *Transcript*, 3 November 2000, p. 64; Watzlaff, *Transcript*, 3 November 2000, pp. 65–68.

111 ANAO, Report no. 42, 1999–2000, p. 94.

112 ANAO, Report no. 42, 1999–2000, p. 94.

> paid at the out-of-hospital rate turned out to be greater than 95%.[113]

3.89 Furthermore, the number of MRI scans continued to exceed the anticipated volume. In 1999–2000, 163 537 scans were performed—15 537 above the Agreement level. As a result, the cumulative overspend at 30 June 2000 was $56m and cumulative expenditure was $1.95 billion.[114] DHAC told the Committee that:

> The Government financed these scans at a total cost of $6 535 982. With an average benefit of $420.67, instead of the expected $410.53, expenditure on MRI was $8 037 012 more than originally anticipated.[115]

3.90 DHAC defined '*cumulative overspend*' as 'the total overspend in the Diagnostic Imaging (DI) Agreement, from the beginning of the DI Agreement until the period specified'.[116] This amount included most services attracting Medicare rebates through the DI Services Table—not just MRI scans. Expenditure on MRI services 'formed only 6.3% of expenditure under the DI Agreement in 1999–2000'.[117] This MRI portion in 1999–2000 was the $6 million overspend detailed by ANAO in its report.[118] DHAC provided the following table to the Committee as a means of explaining the cumulative overspend more clearly:

Table 3.1 Expenditure and overspend arising from the DI Agreement: 1998–2001

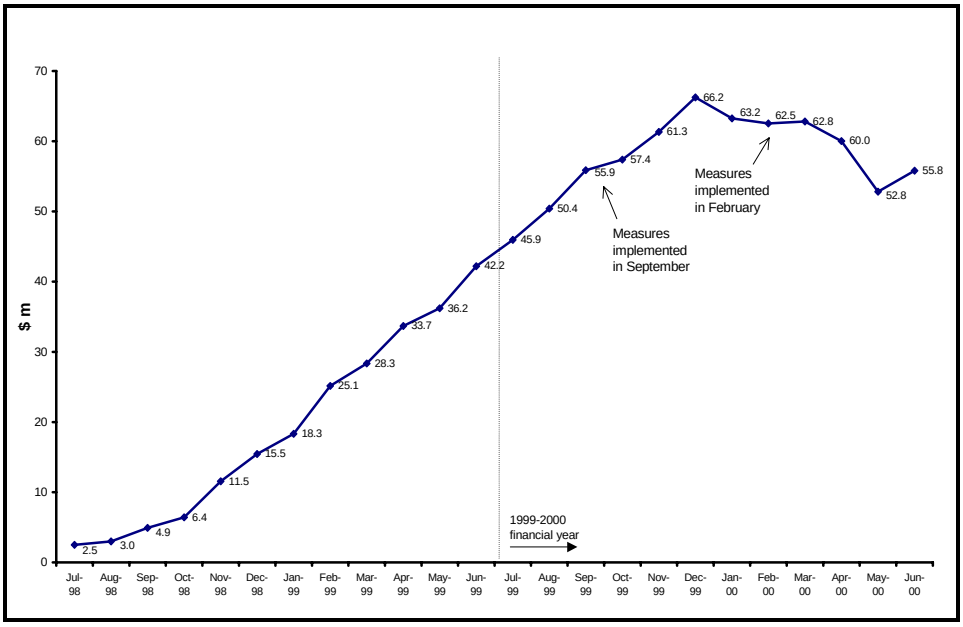
	Anticipated expenditure ($m)	Actual expenditure ($m)	Overspend ($m)	Cumulative overspend ($m)
1998-99	915.3	957.5	42.2	42.2
1999-2000	975.0	988.6	13.6	55.8
2000-01	1,032.2	1,029.6	-2.6	53.2

These figures are for the DI Agreement only—they exclude Nuclear Medicine Agreement expenditure.

Source: DHAC, Submission no. 13, p. 2.

113 DHAC, Submission no. 10, p. 1.
114 DHAC, Submission no. 10, p. 2.
115 DHAC, Submission no. 10, p. 2.
116 DHAC, Submission no. 13, p. 1.
117 DHAC, Submission no. 13, p. 1.
118 ANAO, Report no. 42, 1999–2000, pp. 19, 112.

Figure 3.1 Cumulative overspend in Diagnostic Imaging Agreement 1998–1999 and 1999–2000



Source DHAC, *Annual Report 1999–2000*, October 2000, p. 112

3.91 As shown in Figure 3.1, expenditure on total diagnostic imaging in the first year of the Agreement was almost $42.5 million over the target specified in the 1998 Agreement—namely, about five per cent higher than anticipated. ANAO had reported this amount as almost $46 million,[119] since at the time of the report, the final actual figures had not been calculated. DHAC explained:

> …the anticipated expenditure on MRI was offset by savings in the rest of the diagnostic imaging table.…There was a small wedge above that, which was unanticipated, that amounted to $9.81 million over the first two years. That is the amount that was unanticipated at the time the measure was put in place and which was drawn directly from the public purse, as opposed to what was paid for by the radiologists by taking reductions in rebates in the imaging table.[120]

3.92 DHAC informed the Committee that the savings made by 30 June 1999 was '$76.9m on the 1996 forward estimates' and $171.9m by 30 June 2000, were the MRI Agreement not negotiated.

119 ANAO, Report no. 42, 1999–2000, pp. 111.

120 L. Morauta, *Transcript*, 3 November 2000, pp. 67–68.

This made a cumulative savings of $248.8m.[121] In comparison, total expenditure on MRI rebates was $114.2m for the period September 1998—when MRI benefits were introduced—to 30 June 2000.[122]

3.93 The Committee expressed concerns about conferring a financial benefit on machines which may have been obtained as a result of backdated contracts or through other irregular means. In response, DHAC explained:

> As for the exclusion of individuals, unless these are some of the established cases of overservicing or criminal conduct or something of that kind, there is no gateway by which we could reject an application from a radiologist.[123]

3.94 Responding to a question taken on notice, DHAC submitted to the Committee that 19 MRI machines which had been installed and were attracting Medicare rebates during the period 1 September 1998 to 31 October 1999, lost their eligibility status as a result of the revised cut-off date. The revised cut-off date of 10 February 1998 came into effect on 1 November 1999.[124] Approximately $8.2m was paid in Medicare benefits to these 19 machines during the period when they were considered eligible for payments.[125] Individual levels of rebates ranged from $56 791 to $1 291 972.[126] Total expenditure on MRI benefits totalled $114 191 958 for the period September 1998 (when MRI benefits were introduced) to June 2000.[127] DHAC, however, is not able to determine whether rebates for individual units were able to cover capital costs.[128]

3.95 The Committee was informed by HIC that MBS rebates are 'a flat fee' encompassing 'within it a notional component for capital as well as recurrent costs'.[129] Because of the way rebates are paid, HIC is not in a position to recover moneys paid out for those services which had already attracted MBS payments.

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121 DHAC, Submission no. 10, p. 2.
122 DHAC, Submission no. 10, p. 2.
123 Watzlaff, *Transcript*, 3 November 2000, p. 76.
124 DHAC, Submission no. 2, p. 2.
125 DHAC, Submission no. 2, p. 3.
126 DHAC, Submission no. 2, p. 4.
127 DHAC, Submission no. 10, p. 2.
128 DHAC, Submission no. 2, p. 4.
129 Morauta, *Transcript*, 3 November 2000, p. 80.

3.96 DHAC said a number of measures had been implemented subsequently to restrict the growth rate of MBS claims for MRI services. These are:

- The cut-off date by which the unit was ordered or installed;
- The siting of a MRI unit within a medical practice or radiology department of a hospital;
- MRI services are to be delivered by an eligible specialist in diagnostic radiology who has been accredited;
- The requirement for a specialist referral for MRI services;
- The establishment of the MRI Monitoring and Evaluation Group.[130]

3.97 The change in the regulatory environment retrospectively on 1 November 1999, however, means that some MRI scanners are no longer able to offer MBS subsidised services after that date. Those radiologists no longer eligible for MBS rebates:

> …are either billing for services that are not covered by the MBS but [are] private services, and there is quite a range of those, or they might be billing just a small amount—in other words, not what they would otherwise wish to bill because there might be a free MRI service.[131]

3.98 DHAC pointed out that it is possible for some private MRI market to exist 'because of the narrow indications that are on the MBS and because of public hospital in-patients services'.[132] The Committee accepts that there is a private market for MRI services.

3.99 In response to further questioning by the Committee, DHAC stated: 'The profession bore the cost of the higher-than-anticipated average benefit level.'[133] Because the average benefit was $421.24 instead of $410.53—and over 95 per cent of benefits paid at the out-of-hospital rate, the cost of scans totalled $104 383 761 instead of $101 811 440. 'This, in effect, meant that there was $2 572 321 less funding available from the DI Agreement's agreed funds for the other modalities.' DHAC explained that an important principle of the DI Agreement was that savings in some areas of diagnostic imaging should be used to pay for increased expenditure in other areas.[134]

130 DHAC, Submission no. 4, pp. 3–4.

131 Borthwick, *Transcript*, 3 November 2000, p. 80.

132 Morauta, *Transcript*, 3 November 2000, p. 81.

133 DHAC, Submission no. 10, pp. 1–2.

134 DHAC, Submission no. 11, p. 1.

Committee comments

3.100 The Committee is firmly of the opinion that agencies involved in sensitive negotiations should develop systematic procedures to circumvent any future occurrence of a similar nature.

3.101 First and foremost, all agencies responsible for policy development and policy advice, should develop and implement a risk management strategy which anticipates all possible eventualities within a sensible time frame. In doing this, consideration should be given to all relevant issues and to the assessment of risk as well as to what would be considered acceptable risks. Sensible plans of action have to be clearly thought through to deal with levels of risk and other unusual developments. Throughout the process, officers involved should focus on accountability as well as outcomes.

3.102 Where stakeholders and peak interest groups are consulted and involved in policy development, clear written requirements have to be drafted so that all are aware of the confidentiality level of the information being considered and their obligations and responsibilities to protect this information. Potential conflicts of interest have to be considered so that all are aware of their accountability responsibilities and the penalties for any breaches.

3.103 Thought also needs to be given to the implementation of the policy once a government has made a decision. For instance, it would have been sensible for DHAC to advise the Minister, from the beginning, that only MRI scanners negotiated or leased before or on 10 February 1998 and installed by Budget night would be eligible for MBS rebates, instead of giving this advice some 18 months later and seeking to impose the cut-off date retrospectively.

3.104 The Committee believes that all agencies which are involved in contract management or are considering it, should integrate the ANAO *Better Practice Guide to Contract Management* into their policy and practices.

The quality of the administrative processes supporting the implementation of the MRI Budget measure

3.105 The Committee acknowledges that without the Agreement and the subsequent development of the Regulations, MRI services would have remained limited and expensive. Problems arose because implementation did not focus on:

> …the number of MRI machines, and perhaps it should have been, with hindsight; it was directed to what the number of services was that could be clinically justified. It was not directed at the number of machines. The risk management was all in terms of the number of clinical services.[135]

Administrative outcomes achieved

3.106 Following the Agreement, the rate of growth in MRI services was rapid in the first six months (from just over 2000 services in September 1998 to 10 000 in February 1999 and 14 000 by March 1999), before settling to a slower growth.[136] 'The data indicates a statistical association between the increase in eligible machines and the number of services (up to October 1999, at which time the eligibility date was changed).'[137] ANAO concluded:

> …one of the key concerns arising in relation to this audit was whether there was a leak of Budget information which led to this pre-Budget rush of orders.[138]

Cut-off dates

3.107 On 13 September 1999, the Minister, faced with increased claims, set 11 October 1999 as the cut-off date for registration. At that time, there were 111 units registered. Of these, 65 were deemed eligible for MBS rebates—59 were actually installed and operating by 12 May; 3 units had been ordered prior to 10 February; and 3 more were in non-metropolitan areas.[139] The remaining 46 units

135 Borthwick, *Transcript*, 3 November 2000, p. 64.
136 ANAO, Report no. 42, 1999–2000, p. 108.
137 ANAO, Report no. 42, 1999–2000, p. 108.
138 ANAO, Report no. 42, 1999–2000, p. 21.
139 Watzlaff, *Transcript*, 3 November 2001, p. 65.

under contract were 'frozen out'[140], despite having been processed as lodging eligible statutory declarations with HIC, by 12 August 1999.[141] At the time of the public hearing—3 November 2000, a total of 83 machines were eligible for MBS benefits.[142]

3.108 The public announcement of a cut-off date was followed by the lodging of a further 13 applications.[143] When claims continued to grow—in excess of the predicted level and in excess of what was required to meet Australian needs—DHAC advised the Minister to alter the cut-off to 10 February 1998, effective from 1 November 1999. An exception was made, however, for those 17 scanners in non-metropolitan regions.[144]

Committee comments

3.109 DHAC's original risk management strategy failed. All MRI scanners assessed as eligible for benefits, received them. Once paid, these benefits could not be recovered, even though the machines were ineligible because of the cut-off date. The large number of machines on order exceeded that anticipated by DHAC. The Minister was not kept informed as he should have been. ANAO stated in its report that it was the Minister who insisted that something be done as soon as he found out that new machines were still being registered.[145]

The HIC investigation

3.110 As noted in paragraph 3.49, HIC which was processing the claims, backed by statutory declarations, was not informed about allegations of back-dating and other complaints.[146] It was not till HIC itself received an anonymous allegation in November 1998 that any investigation began.[147]

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140 Watzlaff, *Transcript*, 3 November 2001, p. 66.

141 ANAO, Report no. 42, 1999–2000, p. 106.

142 This total comprises the original 18 units operating prior to 1997 together with the 65 units eligible under the DI Agreement. Blandford, *Review*, p. 20.

143 ANAO, Report no. 42, 1999–2000, p. 106.

144 Watzlaff, *Transcript*, 3 November 2000, p. 66; ANAO, Report no. 42, pp. 106–107.

145 ANAO, Report no. 1999–2000, 42, p. 106.

146 ANAO, Report no. 42, 1999–2000, pp. 105, 115.

147 ANAO, Report no. 42, 1999–2000, p. 105.

3.111 ANAO found that it took three months before HIC's first interview was conducted in March 1999. Apparently, not all the relevant documents had been passed on to HIC which experienced difficulty internally, extracting the relevant data from its own records.

> This was because the statutory declarations provided by applicants did not have to include details of the contract and it was therefore necessary to examine the contracts accompanying the statutory declarations; and because the relevant documents were not filed by the HIC in a systematic way.[148]

3.112 HIC did not complete its investigation and present its report to the Minister till 23 December 1999, well after the Minister had requested an audit from ANAO and asked Professor Blandford to review MRI services.[149] The complexity and scope of the HIC investigation increased proportionally as the number of registrations grew until the cut-off date for registration was imposed. Each interviewee had to be given 14 days notice and the interviews themselves were complex. Some parties had to be interviewed more than once. For each of the 19 cases referred to the DPP, a detailed briefing had to be prepared.[150]

3.113 ANAO indicated in its report that HIC underestimated the scope and complexity of its investigation. This affected its project plan, project management procedures, its costing and resourcing:

> …the evidence indicates that the widening scope of the investigation was not responded to promptly enough in terms of adequately matching resourcing to the task.[151]

> **…**there were no formal reviews of progress of the investigation which provided justification for additional resources, an increase in the Budget and a change in the milestones.[152]

3.114 The delay in presenting the HIC investigation report to the Minister meant that it was not till 23 December 1999 that the

148 ANAO, Report no. 42, 1999–2000, p. 117.
149 ANAO, Report no. 42, 1999–2000, p. 120.
150 ANAO, Report no. 42, 1999–2000, p. 117–118.
151 ANAO, Report no. 42, 1999–2000, p. 119.
152 ANAO, Report no. 42, 1999–2000, p. 120.

Minister announced that 19 MRI contracts had been referred to the DPP for possible legal action.

3.115 After extensive investigation, on 27 September 2000, the DPP advised that:

> …there is insufficient evidence to meet the test in the Prosecution Policy of the Commonwealth that there be a prima facie case with reasonable prospect of conviction for a prosecution to proceed.[153]

Conclusion

3.116 Having considered the evidence presented, the Committee believes that lessons have been learnt from the whole MRI exercise.

3.117 The Government's stated aim in negotiating the 1998 MRI Budget measure was to improve public health by facilitating increased access to an important diagnostic tool, while constraining the growth in Government funding, and achieving a better distribution of MRI services across Australia. The MRI Budget measure, however, did not fully constrain cost growth or achieve the desired distribution, and was accompanied by serious concern about probity questions.

3.118 The importance of careful planning and of comprehensive consideration of all likely issues involved in such an exercise cannot be emphasised enough. DHAC states that it realises the importance of:

- full and accurate record keeping;
- comprehensive risk analysis;
- ensuring that stakeholders are fully briefed on the confidentiality of information being shared;
- documenting possible conflicts of interest and having procedural measures to address these;
- developing risk management strategies which anticipate all likely variations and at all levels of the organisation;

153 HIC, Media Release, 27 September 2000, p. 1.

- keeping the HIC fully informed; and
- having processing procedures which are fully accountable.

3.119 Despite the comments made in DHAC's *Annual Report 1999–2000*[154], the Committee remains concerned that DHAC still seems to deny the magnitude of the problems associated with the MRI Budget measure and its implementation. **The Committee would have more confidence in improved future performance by DHAC if DHAC frankly recognised and addressed these major flaws.**

154 DHAC, *Annual Report 1999–2000*, 1999–2000, pp. 5, 114.