

Chapter 4

Sanctions for failure to comply with BER Guidelines

Background

4.1 In its Interim Report the committee noted that it would seek clarification of the sanctions available to the Commonwealth Government in the event that Primary Schools for the 21st Century (P21) projects do not comply with the Building the Education Revolution (BER) Guidelines. The committee is also interested in the willingness of the government to apply the sanctions.

4.2 The Commonwealth has entered into bilateral agreements with each of the states and territories in relation to the delivery of P21 programs in government schools. Separate agreements are in place with each of the Block Grant Authorities (BGAs) responsible for delivering P21 programs in non-government schools.

4.3 In answer to a question taken on notice during a 2009 estimates hearing of the Senate Education, Employment and Workplace Relations Legislation Committee, the Department of Education, Employment and Workplace Relations (DEEWR) indicated that the bilateral agreements entered into between the Commonwealth and the states and territories specifically require that funding for BER projects be expended for the purposes of the program and in accordance with both the bilateral agreement and the BER Guidelines. DEEWR also stated:

The Bilateral Agreements allow the Commonwealth to withhold or suspend payments to a state/territory if it has not fulfilled its obligations under that Bilateral Agreement...Further, at the completion of the Bilateral Agreement, any funds not spent in accordance with the Bilateral Agreement or not acquitted to the Commonwealth's satisfaction must be repaid to the Commonwealth within 20 days or as directed by the Commonwealth in writing...¹

4.4 When subsequently asked what sanctions apply to BGAs who fail to comply with the guidelines and agreements, DEEWR indicated that these agreements allow the Commonwealth to 'withhold or suspend' payments. DEEWR also noted that these agreements contain a 'further power' such that, in the event that the authority fails to comply with a requirement set out in the agreement, the authority *may* be required to repay a specified amount of the funding received.²

4.5 At the time of completing the Interim Report, the committee felt that the answers given to the committee relating to sanctions had raised issues that required further clarification. This applied particularly to the possibility that there was a 'further

1 DEEWR Answer to Question No. EW717_10, 22 October 2009 (received 11 December 2009).

2 DEEWR Answer to Question No. EW1026_10, 11 February 2010 (received 1 April 2010).

power' in the agreements with the BGAs that may not be in the agreements with the states and territories. This led the committee to be concerned that the Commonwealth might be lacking any real power to ensure that state and territory education authorities are achieving value for money, as well as lacking any real sanctions if they are not.

Developments since the Interim Report

4.6 The Minister for Tertiary Education, Skills, Jobs and Workplace Relations, Senator the Hon. Chris Evans, and the Secretary of DEEWR, Ms Lisa Paul, have both now given an assurance that there is in fact no material difference between the Commonwealth's agreements with the BGAs and with the state and territory education authorities.

4.7 This matter was the subject of substantial discussion during the supplementary estimates round in October 2010.³ The key elements of that discussion are summarised below.

4.8 In response to questioning from Senator Mason, departmental officials identified the following relevant clauses in the bilateral agreements with the state and territory education authorities as allowing, respectively, for monies to be withheld/suspended, and for monies to be repaid in the event that BER guidelines have not been followed (emphasis added):

5.1 Funding

1. Subject to sufficient funds being available for the Program, and compliance by You with this Agreement the Commonwealth will provide You with the Funding in the manner specified in Item A of Schedule 2.
2. The Schedules may be updated by Us at any time during the term of this Agreement including to add BER Program Elements.
3. Without limiting the Commonwealth's rights, **the Commonwealth may withhold or suspend any payment in whole or in part if:**
 - (a) **You have not performed Your obligations under this Agreement;** or
 - (b) You have outstanding or unacquitted money under any arrangement (whether contractual or statutory) with the Commonwealth.
4. If the Commonwealth exercises its rights under subclause 5.1 3, You must continue to perform Your obligations under this Agreement, unless the Commonwealth agrees otherwise in writing.

5.4 Repayment of Funding

1. If:

- (a) at any time, an overpayment or mistaken payment occurs, including where an invoice is found to have been incorrectly rendered after payment;
- or

3 *Proof Estimates Hansard*, 21 October 2010, pp 66–71.

(b) at the Completion Date (or if this Agreement in [sic] terminated earlier, the date of termination) some or all of the Funding has not been:

(i) spent in accordance with this Agreement; or

(ii) acquitted to the Commonwealth's satisfaction,

then this amount must be repaid to the Commonwealth within 20 business days of a written notice from the Commonwealth, or dealt with as directed in writing by the Commonwealth.⁴

4.9 Departmental officials then identified the following relevant clause in the agreements with the BGAs as providing equivalent powers (emphasis added):

10 Failure to Meet Conditions of the Agreement

10.1 If You do not comply with a requirement set out in this agreement (in this clause 10.1 "the Relevant Requirement") within the period required by or under this agreement or guidelines or within such further period as We allow, any or all of the following consequences apply:

a. You must, if We require, pay to Us such amount as We specify (not being more than the total of the Funding paid by the State to You);

b. We may require that any other amount or amounts of Funding paid to the State for You and the Schools are to be reduced by an amount or amounts totalling:

(i) Any amount We require You to pay to Us under 10.1 a; or

(ii) in any other case the total amount of the Funding paid by the State to You;

c. We may delay the making of any further payment (or a part of a further payment) to the State for You or for a School until You comply with the Relevant Requirement.⁵

4.10 When asked why the two agreements do not contain identical wording, Ms Paul responded: 'We consider that we have used different language to achieve the same thing.'⁶

4.11 DEEWR has not released the legal advice that underpins Ms Paul's assertion that the clauses are equivalent. In answer to estimates question on notice EW0099_11 requesting a copy of the advice, the department responded:

4 Please note that copies of the agreements had previously provided to the committee as Answer to Question on Notice No. 27 and can be viewed from the following web page:
http://www.aph.gov.au/Senate/committee/eet_ctte/primary_schools/submissions.htm

5 Please note that copies of the agreements had previously provided to the committee as Answer to Question on Notice No. 27 and can be viewed from the following web page:
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6 Ms Lisa Paul, Secretary, DEEWR, *Proof Estimates Hansard*, 21 October 2010, p. 67.

The legal advice provided to the department is subject to legal professional privilege. The disclosure of this legal advice could adversely affect the Commonwealth's position in its potential dealings with the States and Territories in respect of the repayment of any monies under the Bilateral Agreements.⁷

4.12 Ms Paul maintained this position in the face of direct questioning at the supplementary estimates hearing.⁸

4.13 The committee notes that, although claims that *disclosure* of information could adversely affect the Commonwealth's dealings with the states and territories have in the past been accepted by the Senate and its committees on a case by case basis, the claim that the advice is subject to legal professional privilege has **not** been recognised by the Senate or any similar body as an acceptable public interest immunity claim.⁹

4.14 The Minister for Tertiary Education, Skills, Jobs and Workplace Relations unequivocally stated during the estimates hearing:

...the bottom line is this: the Commonwealth has sought advice and it is confident that the agreement it has entered into gives it the capacity to seek those costs if we want to pursue them. You have accepted the fact that it gives us the capacity to withhold funds, and we have withheld funds in relation to New South Wales already. I think that is a sign that we take this issue very seriously. I have confirmed with the New South Wales government that we have withheld those funds while Mr Orgill does his work and while we gain satisfaction about the use of those funds. The Commonwealth's commitment in this area is not in question; we are determined to ensure that the agreement is honoured and that we get performance from the Commonwealth's funds. Our advice is we have both the capacity to withhold, which we have done, and we have the capacity to claim back under the contract.¹⁰

4.15 The Minister further confirmed:

I am saying to you that the advice the department has got is that the agreement is enforceable, and that includes the agreement's commitment to

7 DEEWR, answer to question on notice, June 2010 (received 6 October 2010) – see http://www.aph.gov.au/Senate/committee/eet_ctte/estimates/bud_1011/answers/EW0099_11.pdf

8 Ms Lisa Paul, Secretary, DEEWR, *Proof Estimates Hansard*, 21 October 2010, pp 94–99.

9 Harry Evans, ed., *Odgers' Australian Senate Practice*, 12th edition, Department of the Senate, 2009, p. 59. See <http://www.aph.gov.au/Senate/pubs/odgers/pdf/odgers.pdf>

10 Senator the Hon. Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, *Proof Estimates Hansard*, 21 October 2010, p. 68.

value for money. That is what the agreement provides. Our advice is that our position is sound and that we have the capacity to enforce that.¹¹

4.16 The committee wrote to Minister Evans in November 2010, requesting the legal advice be provided to the committee that leads him to the conclusion that there is no material difference between the Commonwealth's agreements with the BGAs and with the state and territory education authorities and that, in each case, monies can be withheld, suspended and required to be repaid in the event that BER guidelines have not been followed. However, the Minister declined to provide the advice:

As was made clear in the 21 October 2010 estimates hearing, my Department's view is that the disclosure of the legal advice could prejudice the Commonwealth's position in future action it may wish to take because the advice goes to the interpretation of the bilateral agreements and the funding agreements. This is the basis of my Department's response to the Budget round estimates question.

Although I acknowledge the view of the Committee, it is still the view of the Australian Government that disclosing the legal advice regarding repayment of BER funding in this instance would compromise its position in any future dealings to recover money from state and territory governments.¹²

4.17 The committee disagrees with the Minister's decision and accordingly moved the following motion in the Senate on 9 February 2011:

That the Senate:

(a) notes that:

i. the Australian Government has entered into separate bilateral agreements with the states and territories and with Block Grant Authorities (BGAs) in relation to the expenditure of funding granted under the Building the Education Revolution (BER) program;

ii. the language in the agreements with the states and territories differs from the language in the agreements with the BGAs with respect to the Australian Government's ability to withhold, suspend or recover monies in the event that the funding is not expended for the purposes of the program and in accordance with the BER Guidelines; and

iii. the Minister for Tertiary Education, Skills, Jobs and Workplace Relations indicated at a Senate estimates hearing in October 2010 that the Commonwealth has obtained legal advice that confirms that, notwithstanding the differences in language in the agreements, under each

11 Senator the Hon. Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, *Proof Estimates Hansard*, 21 October 2010, p. 70.

12 Correspondence from Senator the Hon. Chris Evans, Minister for Tertiary Education, Skills, Jobs and Workplace Relations, to Senator Chris Back, Chair, Senate Standing Committee on Education, Employment and Workplace Relations, dated 26 November 2010.

of the two types of agreements the Commonwealth has the power to withhold or recover monies; and

(b) orders that there be laid on the table by the Minister for Tertiary Education, Skills, Jobs and Workplace Relations by no later than 4.00pm on Thursday 10 February 2011 a copy of the legal advice relied on by the government to reach this conclusion.

4.18 This request was refused by the government in a document tabled in the Senate on 10 February 2011 by the duty Minister, the Minister for Small Business, Senator the Hon. Nick Sherry. The document contained the following statement:

[T]he Government will not produce the legal advice.

The public interest immunity ground for not producing this document is that it contains legal advice which is confidential, and disclosure of this legal advice has the potential to prejudice the Commonwealth's position in future dealings with State and Territory Governments, including in relation to recovery action.

I draw the Senate's attention to the Procedure Committee's third report of 2009 which recognises that potential to prejudice the Commonwealth's position in future proceedings is an established ground for a public interest immunity claim in relation to legal advice.

4.19 The committee disagrees with the government's decision. While the government has identified a public interest immunity ground, the committee does not believe the immunity should be claimed in the circumstances, for the reasons outlined earlier in this chapter.

4.20 The role of Parliament is to hold the government to account, to seek information from the government about its actions and monitor the expenditure of public money. Clearly the efforts of the committee and the motion passed by the Senate on 9 February 2011 are designed to give effect to the role of Parliament as outlined above. Refusal by the government to release the information requested can be construed as a clear indication that the balance of power has shifted from the Parliament to the government.

Recommendation 6

4.21 The committee recommends that the government accedes to the will of the Senate, in accordance with the motion of 9 February 2011. The committee recommends that the government review its decision to refuse to release the legal advice that leads it to conclude that there is no material difference between the Commonwealth's agreements with the Block Grant Authorities and with the state and territory education authorities (and that, in each case, monies can be withheld, suspended and required to be repaid in the event that Building the Education Revolution guidelines have not been followed).

4.22 Despite consistent and repeated efforts, the committee still has not received satisfactory detail about the sanctions available to the Commonwealth Government in

the event that P21 projects do not comply with the BER Guidelines, or detail about the willingness of the government to apply any such sanctions.

Recommendation 7

4.23 To avoid any doubt, the committee recommends that when the Department of Education, Employment and Workplace Relations establishes agreements with the states and territories and the Block Grant Authorities for the delivery of future programs, consistent language be employed in both sets of agreements.

4.24 The committee now turns to the BER Implementation Taskforce's reports to provide a better understanding of the P21 program's costs relative to its returns.

