COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Reference: Contract management in the Australian Public Service

WEDNESDAY, 29 MARCH 2000

CANBERRA

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JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Wednesday, 29 March 2000

Members: Mr Charles *(Chair)*, Senators Coonan, Faulkner, Gibson, Hogg, Murray and Watson and Mr Andrews, Mr Cox, Mr Georgiou, Ms Gillard, Mr Lindsay, Ms Plibersek, Mr St Clair, Mr Somlyay and Mr Tanner

Senators and members in attendance: Senators Gibson and Hogg, Mr Charles, Mr Cox and Ms Gillard

Terms of reference for the inquiry:

To inquire into, and report on the management of Commonwealth contracts focusing on:

- the adequacy of contract specifications including the design and framing of the initial contract documentation;
- the adequacy of mechanisms for ensuring management accountability and facilitating Parliamentary scrutiny of contracts, including the method by which the Auditor-General is given access to the accounts of contractors;
- quality assurance and performance monitoring of contracts—adequacy of documentation of contract deletions, side agreements, and amendments;
- risk allocation and risk management
- levels of accreditation and expertise of contract management personnel; and
- the extent to which corporate memory is being preserved in agencies to a level sufficient to protect Commonwealth interests.

WITNESSES

Committee met at 10.07 a.m.

COCHRANE, Mr Warren, Group Executive Director, Performance Audit Services, Australian National Audit Office

GREAVES, Mr Andrew Mark, Executive Director, Business Assurance Services, Australian National Audit Office

MEERT, Mr John, Group Executive Director, Performance Audit Services, Australian National Audit Office

CHAIRMAN—The Joint Committee on Public Accounts and Audit will now take evidence as provided for by the Public Accounts and Audit Committee Act 1951 for its inquiry into contract management in the Australian Public Service. I declare open this public hearing. The search for excellence in contract management is arguably one of the most pressing challenges for the Australian Public Service. With the move to greater outsourcing of programs, public service agencies must equip themselves with a range of skills, knowledge and experience to ensure that contract management is efficient and effective. This inquiry will examine the adequacy of contract management across the Australian Public Service. The emphasis will be on the resources, skills and knowledge that agencies bring to bear in providing good contract management. A key objective of the inquiry will be to identify better practice approaches that can be applied across government agencies.

The committee will examine the performance of Commonwealth agencies in delivering efficient and effective contract management. Some of the key areas the JCPAA will focus on include the adequacy of contract specifications, the adequacy of accountability mechanisms and access by the Auditor-General to contractor premises and records, quality assurance and performance monitoring of contract risk allocation and risk management, levels of accreditation and expertise of contract management personnel and the extent to which corporate memory is being preserved.

Today the JCPAA will take evidence from the Australian National Audit Office, the Department of Finance and Administration, the Department of Communications, Information Technology and the Arts, Dr Nick Seddon, Department of Employment, Workplace Relations and Small Business, Department of Education, Training and Youth Affairs and the Department of the Environment and Heritage. I refer members of the media who may be present at this hearing to a committee statement about the broadcasting of proceedings. In particular, I draw the media's attention to the need to fairly and accurately report the proceedings of the committee.

I welcome representatives of the Australian National Audit Office to today's hearing. We thank you for your submission. Do you wish to make a brief opening statement, before we start to ask questions?

Mr Cochrane—Thank you, Mr Chairman. If I may, I will table the opening statement—it is only a very brief document—and highlight verbally a couple of points. First of all, between them the people you have from the Audit Office here today cover the main areas that have

pretty vast experience in auditing contract management in the APS, in that our performance audit powers and high level performance audit resources are directed to the major complex contracts that the Commonwealth has, both in material terms and in high risk terms. Those areas are covered by Mr Meert and I. Mr Greaves appears in the capacity of looking after our financial control and administration area, which does broadly based reviews of business support processes across the Commonwealth. They include contracts like cleaning, stationery and photocopying—the run of the mill contractual obligations that the Commonwealth is entering into. It is with that experience that we have made our submission to this inquiry.

In broad terms, our submission basically says that, from our viewpoint, the Commonwealth has reasonably good tender processes in that they are well evolved but still not without risk. Obviously, through the bulk of our audit experience the performance management of contracts is still evolving and still has to come some way before we would be satisfied that the contract management is always commensurate with the risk of the contracts that we have been examining. As you would expect from the ANAO, our submission makes it clear that we are champions of a transparent and accountable practice in contract management. We feel that agencies, in the first instance, have that responsibility to be accountable but equally that the private sector, in contracting with the public sector, must recognise that the accountabilities of dealing with the public sector are often more demanding.

As for the commercial in confidence and access issues, we have dealt with them in many of our reports. Clearly, we feel that with commercial in confidence issues there should be an open and transparent process and that if anything is excluded from the public gaze it should be by very rare exception—and certainly not whole contracts but only clauses and so forth. We are perfectly willing to talk about that as we go through today. On the access issues, we have made it pretty clear from the Audit Office's viewpoint, particularly in our Defence audits, that there have been some tensions. Most of the time those tensions are resolved but the JCPAA, in report No. 368, picked up on those access issues and made recommendations about strengthening the legislation in that regard, which the Audit Office supports, so we see that very much being in the hands of government now. Mr Chairman, I will leave it for the committee members to ask what questions they might want to.

CHAIRMAN—Thank you, Mr Cochrane. Are my colleagues happy to accept the written statement being incorporated into the *Hansard* transcript? There being no objection, it is so ordered.

The document read as follows—

CHAIRMAN—Mr Cochrane and colleagues, as I read departments' submissions to this inquiry I gained the clear impression that they believe that they are doing everything to a state of high quality and excellence. If we were to bring down a report saying that all was well in terms of contract management in the Australian Public Service and that there was no need for further reform, oversight or change, would you support such a report and its recommendations?

Mr Cochrane—That is a very black-and-white question. I think I would be inconsistent with the bulk of the audit office reports on particularly the high risk contract if I said all was well and that we would support such a view. What our work does say—as we started on—is that the tender processing, not without risk, is well evolved. Certainly there has been a substantial improvement over recent years in that area. In contract performance management, though, it is clear from our reports that particularly in the more complex high risk contracts there is still some way to go before the Commonwealth could claim a level of expertise that is commensurate with the risks of those contracts, for whatever reason. We could go into some of the reasons later on. So I would be a bit hesitant to make such a black-and-white statement. What I would say, though, is that our experience with most departments is that, when we have made recommendations in audit reports about improving contracting practices or tender practices, the departments have been receptive. They are learning organisations. But it does so happen that we are in an environment where, more and more, Commonwealth business is being outsourced and contracted. I think the APS is going through a learning experience. It would be quite silly of me to suggest that that learning experience is over.

CHAIRMAN—In your submission and in other submissions and other discussions, you very frequently, and perhaps daily and even more frequently, talk about risk management. It is a two-word term that appears more and more frequently in terms of auditing of agencies' performance. One of the thing that interests me when we talk about risk sharing is: do we—and by 'we' I mean all off us, both the bureaucracy and us representing the parliament in this respect—recognise well enough that if you are going to manage risk you have to accept that there will be some failures?

Mr Cochrane—Yes. I think that goes to the heart of having a rational and systemic approach to risk management in that risk management does not equate to being risk averse. There is always going to be the likelihood of some problems. In my view, though, it very much depends on the board of management or the management of an agency or a minister deciding what parameters of risk they are willing to accept and be able to justify in a public environment. More and more so, it really is part of good governance to say, 'Yes, I am prepared to accept a degree of risk in entering into this contract. I can't cover every eventuality but I am happy that there may be some problems but those problems are not worth the additional 20 per cent, in an 80/20, context of making sure that everything is covered.

CHAIRMAN—One could say—could one not?—without much fear of contradiction that, say, 20 years ago the entirety of the public sector was so risk averse that efficiency and performance suffered, probably dramatically, as a result of trying to cover all the bases and make sure that nothing ever went wrong. Today's devolved environment creates in that context new challenges because government and indeed the parliament require higher efficiencies and better effectiveness of delivery from agencies. But I just wonder if we, the parliamentarians—take all of us and the committees—and you as the audit office really put too much pressure on

agencies in this risk management profile situation by constantly bringing to the public attention, in sometimes very major headlines, every failure. Is that reasonable? Are we asking the impossible?

Mr Meert—I think in December last year the newspapers highlighted some 30,000 overpayments in Centrelink. I think in terms of total quantum of payments it represented 0.003 per cent or something. I do not think the Audit Office ever says you should go for zero tolerance. What we are trying to push with management is to say, 'When you contract out, what is your expectation? Say you allow for an error rate, what is it?' So at least the contractor and the client know. And then you need to monitor it. It goes to the heart of the contract management or performance management. So we are not saying, 'Be 100 per cent accurate.' The Public Service is not 100 per cent accurate. 'Risk management' are the two words that are generally bandied about. Risk management is what is the level of service you expect. In simple terms, if it is a computer for example, there will be a number of errors but what is your tolerance. As the tolerance decreases you pay more. That is just a business situation. So it is a trade off, and that is where management comes in. We do not try to second-guess management, but there is still a culture of risk averseness, I believe, in general—that is, that you do not accept any failure at all and there is little chance to look back at the systemic issues, whereas I think what we are trying to say is if there is a failure look at the systemic problems. If there is a systemic problem then fix it; if there is not, then it may well be that the errors are within tolerable levels. For some things you may not accept any errors because it impacts on people and their ability to have a licence.

CHAIRMAN—If, perhaps, the contracting agency says up-front when they let the contract what areas of the contract they expect inherently there will be some risk with, perhaps it might be easier to deal with when they are dealing with us, a Senate committee, or you or whatever. A case in point might be the Collins class submarine contract. If you take the weapons control system, the combat control system as a segment of that overall contract, one might have dealt differently with that very high risk segment of the contract rather than completely specifying the outcomes that were to be achieved, the methodology on how to achieve it, and the time frame in which it had to be squeezed. The Commonwealth might have been better served to have had a more flexible pricing regime around that segment of the contract than just saying, 'It's fixed price and it must be this, and this is the way it must be—structured—and this is when it has to be delivered.' Does that make sense?

Mr Cochrane—It does in the context that one of the things we are finding repetitively in these sorts of contracts is that the treatment in the contract of specific items is not always dealt with in the sense that it is a high risk area of a particular contract. A contract might be dealt with as a contract, as an entity, without actually going through on a systemic risk basis and saying, 'There are some touchy points in this contract that we need to pay extra attention to or we need to bring in extra expertise on to negotiate the particular clauses of the contract.' With the Defence case and the Collins submarine, I know we have the benefit of hindsight when we look back on that, but in some ways it would have been pretty easy, I think, to actually have said, 'Yes, those combat systems and software systems were a high risk, leading edge element of the contract and maybe there should have been separate provision in that contract for that area.' It is very important. I think in some cases, too, when we get to those contracts, it is the basic contract management principles that let the Commonwealth down on occasion, and I mean by

the proper monitoring of the progress payments and what is actually being delivered to a point in time—not only with the Collins submarine but with several other contracts that we have looked at, so it is a combination of keeping the eye on the basics but also making special allowance for the more difficult aspects of the particular contract.

CHAIRMAN—In your better practice advice to departments and agencies, do you point out that you might treat different portions of contract differently, depending upon the degree of risk that is assessed by the department or agency at the time they let a contract?

Mr Cochrane—We actually do point out that there must be a systemic risk analysis on the contract. Mr Greaves' area is the author of that particular guide.

Mr Greaves—This relates to the general guidance that we provide to agencies rather than specific guidance on specific contracts. We are developing a better practice guide at the moment that in fact treats that issued, consistent with the findings of our FCA audit on the contracted business support processes, where we found that it was really after designing the contract that a lot of things fell down in terms of management. But that presupposed that organisations had, before they entered into the contract, undertaken an appropriate risk management exercise and then had considered the things that flowed from that, which in particular relate to the relationship that you have with the contractor and the pricing structure—the point you raised. So our better practice general guidance that will be coming out later this year in about June will actually treat those issues of relationship and it will go to whether you look at a traditional relationship or move to a partnering and alliance relationships.

Most of those decisions are risk based decisions and risk managed decisions, and we will be looking at the pricing regimes that go along with those relationships in terms of cost-plus pricing. Then we will be looking at things like risk sharing or who actually accept the risks. The guide will then proceed to look at implementation issues, the issues of transitioning in to a new contract arrangement where it has previously been delivered in-house. We will talk there about the policies and procedures that need to be put in place so that you do have effective monitoring during the life of the contract.

We will then treat performance monitoring and review, the type of performance measures you need to have in place in terms of quality, time, cost, et cetera, and the reporting structures you need to be able to report those to the right people at the right time to pick out failures in contract performance. Lastly, the guide will treat the succession planning and the transition out, which is another area that we have found of concern in our review.

Mr COX—Mr Cochrane, you said earlier that you had some tensions with Defence. Are there any other agencies that you have had tensions with about the audits you have done on their outsourcing?

Mr Cochrane—I think it is fair to say that from time to time we have a minor skirmish over access to a contract or whatever that is usually resolved in the field after a discussion with an agency so that it is clearly understood what the particular powers and responsibilities are. It is fair to say that agencies have entered into a new world of this level of outsourcing and contracting that is going on, and often they will come to us and say that they are particularly

sensitive about a contract for whatever reason it might be, and it is really a matter for us to give them some assurance that we are not going to publish particulars of a contract, on the front page of the *Canberra Times*, for whatever reason they think they might. I think there is a mental model that is slowly creeping in about the sensitivity and confidentiality of contracts.

Mr COX—I was not aware that the audit office had control of the editorial policy of the *Canberra Times*.

Mr Cochrane—That is right. I am not sure sometimes—

Mr Meert—I can guarantee that we don't. I have not found any problems really with access, or with agencies baulking at an audit. On the contrary: a lot of agencies are now asking us for opinions when they get into contracts, just to get that assurance. Either that, or they are getting probity advice for their large contracts. So that I think that the process of setting up a contract, as Warren said, has really evolved, and that process is getting reasonable. The issue is really, still, determining what it is you want, how much you are going to pay for it, and then how you are going to monitor the performance so that, when something goes wrong, you have got a process of recovering from that—or at least either seeing it is going to happen or recovering from it. So it has just moved on a step.

Mr COX—You have done a fair bit of audit activity with the Office of Asset Sales and Information Technology Outsourcing. Have you had any conflict with them, either in terms of doing audits or in terms of their responsiveness to your recommendations?

Mr Cochrane—I think it is on the public record now that, in a number of the reports we have published regarding the contracts that OASITO have entered into and the undertakings of OASITO, the recommendations were not simply agreed; they were agreed in principle or with qualification. For several reports, about six or seven in a row, the recommendations were never agreed. That is not to say that they were not implemented, though. I have to be fair and say that for the most part those recommendations have been implemented, but I guess OASITO regards itself as being on the leading edge of dealing with the commercial sector in a lot of ways, and that adds to some of the complexities of the relationship.

Mr COX—Are they pushing the boundaries in terms of the way they are managing their relationships with the commercial sector?

Mr Cochrane—I do not know that I could really say what boundaries we are talking about. To me, they are not doing anything differently to anyone else. A contract is a contract. It is an understanding between two parties to produce a certain outcome for a certain price. To that extent, whilst they may deal with the bankers, solicitors and so forth, the basic principles are still the same. To add to that, one of the basic principles is that they are still part of the public sector.

Mr COX—So they have a view that they know more about it than the Audit Office does?

Mr Cochrane—Yes, sometimes.

Mr Meert—They would not be the only ones with that view.

Mr COX—We have been talking to a number of people from the private sector who have had contracts in the course of this inquiry, and most of them have not had any difficulty at all with the concept of the Auditor's office having access to their books and to their premises, perhaps with the exception of some of the Defence contractors. Do you think that there might be an unhealthy relationship—I would not call it a coincidence—between Defence because of their views on that subject and their contractors?

Mr Cochrane—Even in the Defence case, instances vary. We are currently doing an audit on the landing platforms for the two ships we bought from America which are being refitted. I was in Newcastle a few months ago talking with the managing director in the Forgacs dockyard. It was a very amicable, very open door relationship. There was no trouble at all with the Audit Office being there. The previous problems we had with the ASC, which were well highlighted in our reports, were perhaps more at the exceptional end of the relationship. Having said that, that is why we have an ongoing discussion about where the access powers should be in the legislation. For 99.9 per cent of the time, people are going to say, 'Sure, come in and have a discussion about this.' It is in the other cases where they lock us out that there probably is need for a power. From the Audit Office's point of view, we do not tend to go around flashing the Auditor-General Act at people, but, having said that, that is because the majority of people do the right thing.

Mr COX—The American contractor that you mentioned is used to your American equivalent having a right, through legislation, to audit his activities.

Mr Cochrane—It is an Australian contractor in Newcastle working on some ships that we brought from America. In the USA it is standing practice with the defence agency, or the defence department, to give full access both from the defence department's point of view and the American General Accounting Office's point of view, so that everyone has access. It is such a large and important part of public expenditure, as it is in this country.

Mr COX—Can you give us some details of the legislation provisions in the US, their ambit and scope?

Mr Cochrane—I would have to take that on notice. I am quite happy to get the committee a copy. I will arrange that.

Mr COX—In terms of the defence department's attitude, do you think that they may find it convenient that the audit trail stops at the door of the contractor and that, therefore, it becomes highly ambiguous as to whether any malfeasance is theirs or the contractors, and they are quite happy to have a situation where there is a lack of accountability?

Mr Cochrane—From their point of view, what they have said to us formally and privately is that they are more worried about what it might mean to the contractor if they have to go over additional hurdles in terms of openness and accountability requirements, that their contracts might become more costly. Additionally, defence have said to us that it is a whole of

government question and, therefore, it is a matter for the minister for finance to look at in the context of some legislative framework.

Mr COX—They certainly seem, from this side of the table, to be the principal obstacle to anything being done.

Mr Meert—I have not had any problems on my side. We generally get access to private sector records. In some cases they are far more onerous than what is kept in the public sector. The legislation—the Audit Act—is pretty well known and tested. In terms of getting access to records, there is no problem with it. It is just if the premises issue comes up.

Mr COX—You would say that the Audit Act is the place to put in a legislative requirement?

Mr Meert—You can put it in, so you can have model access clauses, which we have got. We can suggest to agencies, as can anybody, 'When you write a contract, put in a model access clause that includes access to premises.' We would recommend that even if it was in the legislation because we think it is a good idea for the contractor to be fully aware that there are accountability requirements, including access by an external auditor, being us. We would still promote that. If you do not have it in your contract you still have the problem, whereas if it is in legislation but not in the contract you do have access anyway.

Mr Cochrane—I think it is fair to say that in the defence cases we have made our position clear that it has limitation in audit scope in at least one instance. We were supportive of this committee's own report No. 368 in terms of the recommendation made about amendments to the legislation. As I said at the beginning, in our view it is probably a matter for the government to respond to that recommendation.

Mr COX—Defence have not been putting those clauses in their contracts as a matter of routine, have they?

Mr Cochrane—No.

Mr COX—Has the Office of Asset Sales and Information Technology Outsourcing been doing so?

Mr Cochrane—No, they have not. But, having said that, there are number of audits that we have done over there, particularly in the Telstra 1 and 2 sales, where the contractors have seen it as in their best interests to be cooperative with the Audit Office in supplying records and background materials. As I say, in 99 per cent of the cases that that is the way of the world but it is more the exceptions that cause the issue.

Senator GIBSON—Is this a problem with agencies not going ahead and putting such clauses in contracts? Is this a problem of communication between ANAO or this committee and the agencies, and their understanding of the need to do it? Where is the gap?

Mr Cochrane—I do not think it is; one, because the Auditor-General has written to every portfolio head and, two, in your own case the JCPAA's reports are on the table and I know

agencies read them and take note of the recommendations. I do not know whether there is an issue of communication between departmental executives and contract managers. I cannot comment on that. But certainly we have not seen any instances where any agency managers have said, 'This is part of my rule now—that we are going to have this clause in our contracts.' I cannot say I have seen that in any agency.

Mr Greaves—In relation to the audit we did on business support processes, we noted that most of the contracts that we examined did not have the access clauses, and that we should find out the reason why. It did come down to, largely, a communication issue within the agency. The contract managers themselves were not aware of the need. And this goes back to having comprehensive policies and procedures that are promulgated within departments.

Senator GIBSON—So you are really saying to us, or you said it a minute or two ago, that even if the legislation is changed it is important to have those clauses in the contracts anyway so that the contractor and the agency project managers both understand the requirement for that.

Mr Cochrane—Yes. I think as a matter of rule people do check off any contract requirements against any legal requirement that may exist. That would certainly formalise the process, yes.

Mr Meert—The tension always comes in a contract for access when there is a possibility of either some negative finding about performance which will impact on the company and its future ability to get jobs or else some legal issue. So it is probably there as a safety net. But I think it is really important to let contractors know that that is a provision.

Senator GIBSON—So you are really suggesting that that is something this committee can take up and try and publicise the need for all agencies to put those clauses in all contracts so that we avoid those potential problems even with Defence?

Mr Meert—Yes. And that would be access to premises and to records.

Senator GIBSON—Yes, they are the two issues.

Mr Cochrane—I think it is particularly important, given the context of this inquiry in that more and more of the Commonwealth's business is being put out or outsourced and contracted. We are talking about core activities that were subject to full public scrutiny by the parliament and by the public. So, unless we are making some effort to keep it within that concept, we are going to increasingly find that more and more public business becomes private business, so to speak.

Senator HOGG—That raises the issue that you have raised in your opening statement today and also in your submission about commercial in confidence. One of the difficulties that the Senate estimates process is confronted with is that agencies roll up with something that has been outsourced and claim commercial in confidence. Thereby they claim that it is impossible to release the details and of course the scrutiny of the parliament is removed. Where does commercial in confidence begin and end? I know it is like asking, 'How long is a piece of string?' but where does it begin and where does it end?

Mr Cochrane—Let me start at the board level first and say that the Audit Office's view is very much along the lines that the Senate Finance and Public Administration References Committee put out in its inquiry into contracting out of government services, and that was to say, and I will quote it:

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 the contracts adopted the practice of making contracts available with any genuinely sensitive parts blacked out. I guess that is our view in the sense that on occasion there will be contracts that have clauses that contain sensitive pricing calculations, or they may contain some detail that really goes to an intellectual property question or whatever. In that sense, first of all, the Audit Office should never be locked out from seeing those contracts, and certainly if they are to be excluded in a public forum the onus is really on the managers to say what is the basis for that exclusion, and it should only be—

Senator HOGG—Why should they not be subject to the scrutiny of the parliament through the estimates process?

Mr Cochrane—We think in the main there should be—

Senator HOGG—Sorry; could I just say that part of the problem is that you cannot go in camera in Senate estimates, so you cannot look at that material that may be commercial in confidence.

Mr Cochrane—I guess even the parliament has recognised that there will be occasion when there is something that may be commercially damaging to some parties, and to draw on that I am really going to the Auditor-General Act itself which puts a responsibility on the Auditor-General to ensure that there is nothing in his reports that actually will create a problem with national interest or public interest, including those areas where there may be some commercial damage to some parties. So I guess in that legislation the parliament is saying to us, 'There will be occasion where that will occur.' Our experience is that, one, it is a very rare occasion, and two, we agree with the rationale that the Senate has already published in that report on contracting out of government services that, on those rare occasions, there should be a very clear justification for excluding whatever clause in a contract.

Mr Meert—You have two issues: one is access and one is what you do with it. Even for us there is no dispute about access, but it is really how we report it. So when you deal with commercial in confidence, once you get over that, you have really got to decide whether you want access, and, once you do, what do you do with the information.

Mr Greaves—We have a case in point at the moment where we are auditing the air travel arrangements of the Commonwealth, and the travel service providers are very sensitive about the point of sale rebates that they provide to each agency because the pricing structure is where they get their competitive advantage over other travel service providers. We had the difficulty initially of getting access to that information. There was some resistance until we explained

exactly what it is we want to do with it and what our powers are. Beyond that, there is still a tension now about what gets disclosed in our public report about those levels of rebates.

Senator HOGG—But surely at the end of the day it is the right of the parliamentary committee, whether it be this committee or another committee of this parliament, to scrutinise public expenditure. And I do not think there is a right for information to be withheld commercial-in-confidence or otherwise. How do we overcome that difficulty without disturbing the circumstances that you have just described?

Mr Cochrane—It is obviously not for Senate committees, but the in camera question for this committee is a valid way through that. But in the sense of resolving the issue of commercial-in-confidence against the higher 'is it in the public interest for it to be known?' that is a matter for the parliament, but it still is a careful balancing of the right to know against what is in the public interest. Is it in the public interest to cause commercial damage on occasion? If the law was too black and white either way, I think we would cause someone some damage. 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.

CHAIRMAN—Following on from what Senator Hogg was inquiring about, if for instance—this is another hypothetical, but they are useful sometimes—Telstra go along to a Senate estimates and somebody demands of Telstra full disclosure of their e-commerce plans over the next three years, I would think Telstra would baulk. If the Senate then threatened them with—I don't know, what can you do?

Senator HOGG—I would like to know.

CHAIRMAN—Jail, or whatever, they would still baulk. It is an extreme hypothetical, but it would be true to say that a reasonable person would understand that that would be very sensitive information that you could not get from a private sector company even from the floor of an AGM.

Mr Cochrane—It is a good hypothetical, because I think most people would understand that scenario. I guess in a lot of ways, too, a lot of people could be hurt if those plans did become publicly available, just simply through whatever possible impact you had on the share price of Telstra in making that information public. So in those sorts of extreme examples—it is probably an extreme example, too—we do have to balance those issues very carefully.

Mr Meert—I think it is interesting, because what you have shown is that that would be a business process which is three years in the future, so by making it public, you could really have an impact on the business. It would be a harder argument to sustain that it would be commercial-in-confidence if, at the end of the three-year process, you looked at it in retrospect. Once you have let out a business contract and it has gone, I think it is harder to sustain commercial-in-confidence.

Senator HOGG—Right, that is the sort of issue I was trying to get to. Is there some sort of defining point? Once the contract has been let, does that negate the claim of commercial-in-confidence—not in every circumstance, but in the vast majority?

Mr Meert—It depends, and that is why you almost need to have a series of questions that you ask yourself. It is not all of the contract either that is commercial-in-confidence. It might be sections of the contract. If you have a company which spent millions of dollars developing some process which they then have intellectual property rights to and that process gives them a competitive advantage for the next round of contracts, you could at least understand an argument that says, 'I don't want to make that public because it's going to give everyone my commercial advantage.' But the rest of the contract may not fall in that commercial-in-confidence. Again, you might then ask yourself, 'For my purpose, do I need that bit of the contract? Or can I look at it with that bit taken out?' We found in most of our audits, when we look at it, you are commenting on the administrative process and you may not need to actually make that bit public. So there are a number of questions you need to set out to—

Senator HOGG—So do you have a series of questions at this stage that could be used as some sort of litmus test as to whether something should be commercial-in-confidence, given that you run up against it almost ad nauseam, I would imagine?

Mr Cochrane—Our main litmus test is probably the Auditor-General Act itself. It does ask us to consider that question in preparing a report that is going to be made public. I think the point that we make in our submission is that, other than the rare exception, as Mr Greaves was describing before, it is really exceptional for us to run into a situation where there is that tension. Having said that, we would look at the potential for commercial damage to any of the parties involved and weigh that against the public interest. That is a case by case judgment in an exceptional situation.

CHAIRMAN—Could you give us a simple yes or no if we ask you to codify what those exclusions from baring all might be?

Mr Cochrane—I think we could perhaps give you some ideas, but I do not know whether it could be a comprehensive or legally sound document. If there is something that clearly causes potential commercial damage because it has an intellectual property, it is a commercially sensitive pricing strategy or there is some other aspect of national security or whatever involved, that is clearly the sort of thing we will look at.

CHAIRMAN—But if you can in more detail codify that issue will you respond to us?

Mr Meert—Yes.

Mr Cochrane—I would be quite happy to.

CHAIRMAN—I have one last quick question. In your submission, in discussing the levels of accreditation and expertise of contract management personnel, you say:

If they are not to be disadvantaged, public sector managers need a level of market knowledge and technical skills that are at the same level, or above those prevailing amongst the private sector service providers.

To the best of my memory, when Master Builders Australia, the Royal Australian Institute of Architects and the Institution of Engineers Australia appeared before this committee in our first set of public hearings on this inquiry, some or all of them said that the level of expertise that was necessary no longer existed in the Commonwealth Public Service. Can you comment on that?

Mr Cochrane—I would probably be more forward looking than backward looking. We have certainly made the point in our submission that we are losing a lot of corporate knowledge as we outsource in various areas, but that corporate knowledge is really on specific Commonwealth service delivery issues. What we are trying to build as the APS—and it is evolving—is expertise so that, rather than have direct management of a project, we can actually manage that project through the contract or outsourced arrangement. I think the expertise is building up but slowly, possibly too slowly to meet the risk that is often involved in the major and long-term contracts that the Commonwealth is entering into. Again and again, particularly in the major departments like Defence and in the blood plasma vaccination contract on the health side, we are just not seeing the level of skill that is needed to deliver on those contracts properly. Having said that, I think sometimes Commonwealth managers do not employ the skills necessary for an accountant's advice or a solicitor's advice. Just as you would in the private sector, you go out and contract an expert to help you build your contract. The need to do that is not always recognised.

CHAIRMAN—You talk about corporate knowledge, which is one of the reasons we put that in the terms of reference for the inquiry. Isn't it really more critical— rather than corporate knowledge within the public sector—that agencies have technical expertise available, whether it be in terms of engineers, architects, project managers, systems engineers, people with IT qualifications or a range of skills, or whatever is required for that particular contract, both in framing the contract specifications and the contract document, and in managing the contract after it is signed and is in progress? Isn't it the skills that are more important than the corporate knowledge of the Australian Public Service?

Mr Cochrane—It is a difficult balancing act, again. In setting up the contract, the skills are important. There is no doubt that where those skills are not available, agencies should be bringing in those skills on contract, on a retainer or whatever. Where the corporate knowledge becomes important is that ultimately someone still has to evolve policies and program delivery. More and more so the corporate knowledge and having the direct hands-on experience in being able to deliver certain parts of programs and advise on policy for those programs is leaving, and what we have in its place is a contract. If you want to take it in a non-program sense— and this is an issue that is becoming more common in American companies— if we take the IT area, for example, more and more companies that have outsourced their IT services are slowly recognising that that could potentially cause some difficulties in the long term, because they are losing so much of their own ability to be able to fill that gap if anything goes wrong.

CHAIRMAN—We are going to have to finish there. Thank you very much for your submission and your frank and open answers to our questions. We look forward to receiving the information you have promised us.

[11.07 a.m.]

LOUDON, Mr Mike, Branch Manager, Corporate Contracts, Department of Finance and Administration

SAAVE-FAIRLEY, Ms Louise, Branch Manager, Competitive Tendering and Contracting Branch, Department of Finance and Administration

WRIGHT, Dr Diana, General Manager, Resource Management Framework, Department of Finance and Administration

CHAIRMAN—Welcome. We thank you for your submission. Would you like to make a brief opening statement or shall we start asking you our usually penetrating questions?

Dr Wright—I do have a very brief opening statement.

CHAIRMAN—Fine. Please proceed.

Dr Wright—Since the introduction of the Financial Management and Accountability Act in 1998, Commonwealth procurement has occurred within a devolved management environment, with individual chief executive officers being responsible for their agencies' operations. Agency CEOs are entrusted to manage the resources of the Commonwealth in an efficient, effective and ethical manner, with the objective of delivering value for money for the taxpayer. In this devolved environment, the Department of Finance and Administration's role is to promote best practice in contract management, to ensure the Commonwealth's interests are addressed and to achieve best value for money outcomes. The department offers guidance for contract managers and provides a framework for procurement activities. While agencies are ultimately responsible for Commonwealth procurement, it is through this guidance and framework that the department seeks to facilitate the efficient, effective and ethical use of public moneys.

CHAIRMAN—Thank you for that. In your submission, Dr Wright, discussing the adequacy of mechanisms for ensuring management accountability and facilitating parliamentary scrutiny of contracts, including a method by which the Auditor-General has given access to accounts of contractors, you said:

> Agencies may consider including provisions in contracts that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny of the contract and its management.

The Auditor-General has told us in his submission and today in the public hearing:

> ANAO experience has shown that agencies have not fully embraced these opportunities. For example, 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. None of the contracts reviewed, entered into since the ANAO's advice concerning standard access clauses, contained the recommended provisions.

Would you have any idea why agencies have been so apparently reluctant to pick up even your own department's advice?

Dr Wright—No. The department's advice is covered in the current Commonwealth procurement guidelines—it is on page 21—about access to records by the Australian National Audit Office. The ANAO issued advice to agencies in September 1997 that it suggested use of these clauses for appropriate access by the ANAO to records. It may be that what is required is appropriate access. Sometimes records are not actually held with the contractor so the expectation would not be in every case that this clause would be applied. So 100 per cent coverage would not necessarily be expected to date. Otherwise, in terms of where to from here, the recommendation of JCPAA report 368, the department of finance has been in discussion with Prime Minister and Cabinet on the response to that because the Auditor-General Act is their responsibility. A recommendation is currently with government and will be provided to the JCPAA shortly.

CHAIRMAN—Very good. We will look forward to receiving advice, and we trust it will be positive. Thank you for that. In discussing quality assurance and performance monitoring of contracts, in discussing the whole of government role your submission says, I believe, on page 15:

> The Department considers current policy to be appropriate for the purposes of quality assurance and performance monitoring of contracts in the Commonwealth.

The Auditor-General, ANAO, has reported to us on numerous occasions, and confirmed such advice today, that in ANAO's view performance monitoring of contracts is at times less than adequate. As I read your submission I felt, 'Well, DOFA thinks that everybody is doing everything so great we can't improve.' ANAO is certainly not of that view. If we thought that was the case, we might as well not bother holding the hearing.

Dr Wright—That is a fairly broad question, Senator.

CHAIRMAN—I am not a senator. Dr Wright, I am a representative of the people!

Dr Wright—Mr Chairman, that is a fairly broad ranging question. It would help me to answer it if you could perhaps be more specific or perhaps repeat the question.

CHAIRMAN—It just seemed to me that you are saying, 'We're happy with the department's performance monitoring contract,' but let us take Collins class submarines as a good example. The performance monitoring of the combat control system was obviously less than adequate. It appears that the system, if it is ever delivered, will be deficient and is years behind. I would have thought that the performance monitoring there was deficient. In terms of over the horizon radar, JORN, we are now 4½ maybe five years late into the contract. Performance monitoring of the software development was obviously deficient because the subcontractor that was writing code wrote code that would not even fit in a 24-hour clock, so it is all being rewritten, line by line, so that it will work. I would have thought they were clear and obvious deficiencies.

Dr Wright—That is a specific case. Perhaps if I could answer in more general terms. From the Department of Finance's role in setting some policy framework, we provide a range of advice on entering into contracts and the sorts of resources that should be engaged to ensure successful implementation and delivery of contracts. And if I could bring that back to our department, within the department itself during contract development—RFT stages throughout—we access a range of professional advisers, from probity advisers through to business advisers and legal advisers, who help us to ensure that we have a successful outcome. In addition, in the contracts themselves we adopt usually a balanced scorecard approach to reporting on performance which uses an annual business plan which is developed by the provider and not only looks at financial performance but also addresses aspects of customer and stakeholder satisfaction, internal business processes and innovation, and, as I said, is linked back to the business plan. So there are a range of performance measures. It is not just looking at the financial performance which is only one view and tends to be looking backwards rather than forwards.

Senator GIBSON—Dr Wright, I want to follow up on the provisions with regard to access to contract information into premises by the ANAO. I noted your comments earlier about your looking at the recommendations of this committee in a previous report which relates to that. But one of the points that ANAO made with us this morning was that, even if legislation is changed to make that a requirement, it still is, in their view, very desirable that individual contracts state that ANAO will have access to information through the contract. My query to you is: can this committee help? It appears to us—at this point in time, anyway—that perhaps there is a communication problem down through the Commonwealth agencies about the desirability of heading in that direction. Do you agree with that or not?

Dr Wright—What I can say is that, in light of this issue being raised by the ANAO and the JCPAA and the government considering its response, we are at this time reviewing the *Commonwealth Procurement Guidelines: Core Policies and Principles*, which is available in hard copy and on our web site. We are looking at, once we have the government's response signed off, making that much more explicit to mirror the government's response so it is there more clearly and in more detail.

Senator GIBSON—A question I put to ANAO representatives this morning was whether this committee can help in publicising the need or the desirability of heading in that direction.

Dr Wright—The department's perspective is that access by the ANAO to records is appropriate. It needs to be cost effective from the contractor's perspective as well as the Commonwealth's. In some cases, as I said earlier, the information is not necessarily held by the contractor. It remains within the agency and therefore is freely available. So there may still be a need for that to be case by case, not necessarily across the board.

CHAIRMAN—On page 13, you describe the government information technology and communications contracting framework version 3, GITC3, which is:

... a set of standard contractual conditions agreed between the government and industry.

To what extent are agencies using GITC3 when purchasing IT? Do you know? I mean outside of DOFA.

Dr Wright—We follow up specifically on any cases that are drawn to our attention where agencies might not have used this capability. I do not have any numbers on that incidence. I am not sure whether we could get them or not. We can look at that. But if any incidences are brought to our attention then we follow up on those. On the other side of the equation, we certainly have had very good feedback from those agencies that do use the capability. Additionally, a number of states also use that capability from the Commonwealth.

CHAIRMAN—You are right. As an ex-contractor, I well recognise that there can be dangers inherent in the standard contract form where one size does not necessarily always fit all. If the standard document tends to transfer too much risk to the contractor leaving no risk assumed by the purchaser, you run a risk of paying higher prices or getting reduced outcomes or not getting the range of tenders that you would otherwise have had from which to choose. Do you keep testing your model to determine the degree to which industry is happy with those standard terms and conditions and do you take into account their criticisms if, for instance, a document required unlimited liability or that sort of ridiculous condition?

Dr Wright—To follow up on the last question, I have just been advised that the buyers list of the endorsed suppliers which is part of GITC3 is accessed in excess of 800 times a month. That is in terms of usage. In relation to GITC3 itself, it is not one individual, set-form contract. It allows agencies to pull together a contract that is suitable for their purposes. So they do have flexibility, for example, in terms of intellectual property or liability. It is not a one-size-fits-all. It was developed in conjunction with Attorney-General's to make it flexible. Our understanding at present is that it does meet requirements. It has only been in operation for about 18 months so it is fairly new. But, as I said, it is not one-size-fits-all and there is the ability for agencies to take an approach that is suitable for their purposes. For example, on risk management it is not fixed.

CHAIRMAN—We hope to talk to some IT contractors later in this inquiry without prejudicing their right or desire to continue doing business with the Commonwealth. I am sure you won't mind if we test that—not by way of over-criticism as we have none—simply to test the degree they are happy with the contract terms, recognising that there will always be some balancing question where the agent that has the money will have different objectives than the agent that is trying to get it.

Dr Wright—We certainly do meet quite frequently with industry, and if there are any specific concerns we are happy for industry to talk directly with us.

CHAIRMAN—As a general question along the same lines, do you encourage other departments and agencies to use, where possible, standard terms and conditions of contract?

Dr Wright—Agencies are required to use GITC3 for those industries that are defined by that system. I am not aware of any use for other purposes. It really is custom made for—

CHAIRMAN—I think you misunderstood me.

Dr Wright—Have I? Sorry.

CHAIRMAN—Standardised terms and conditions of contract in general. I am not talking about IT.

Dr Wright—In that case could you repeat the whole question, please?

CHAIRMAN—Do you—and if you do, how do you—encourage agencies to use government developed standard terms and conditions of contract?

Dr Wright—There is one way in particular where we have sought to facilitate agency use of these sorts of things. For example, we actually run a CTC panel which has some 32 providers on it, and that panel uses standard terms and conditions and allows agencies to easily pick up the services that they want without creating a contract from the ground floor up.

CHAIRMAN—As I recall, both the Master Builders Association of Australia and the Royal Australian Institute of Architects, when they appeared before the committee and in their submissions, were and are of the view that in general terms increasingly the Commonwealth appears to be attempting to transfer all the risk in terms of building contracts to the contractor or to the architect or to both, and that part of that is exemplified by the fact that whereas bills of quantity, in addition to specifications and drawings, used to be part and parcel of contracts, their use is now infrequent. They have thrown all the risk, if you like, on a contractor to meet the intent of the detailed specifications and the drawings, and of having the huge tender costs associated with that as well.

Dr Wright—The policy position on risk management is available on the CTC web site—ctc.gov.au. It is the Commonwealth's position that risk and liability be managed under common law arrangements. Some contractors will seek to limit liability, and that is really for the agency to negotiate with the supplier. The Commonwealth's position really is that risks should be managed by the area most capable of controlling that risk. It could be the Commonwealth or it could be the supplier. In the case where there may be an unwillingness by the supplier to carry the total risk, there is provision—and it is provided in our guidance—to negotiate a cap to the liability. But that is shifting the risk more to the Commonwealth than to the provider. So it certainly is a one size fits all. There is the ability to tailor that according to the nature and size and complexity of the contract, and where the main areas of risk are.

CHAIRMAN—I recognise that you no longer have responsibility, except in an oversight role, for contract management throughout the APS. But I was not specifically asking about liability. We are talking about transfer of risk—a hypothetical. The example I give is this: I draw a cube and write, beneath it, 'A building' and then I put it out for tender and say to contractors, 'I want a building. Tell me how much?' One says, 'I can build a cube for $5' and one says, 'I want $20 million.' Obviously the contracting agency—that is, the Commonwealth—has transferred 100 per cent of the risk for the building to the contractor because he has been unable or unwilling to specify what it was that was wanted, but ultimately he will decide and the contractor has to supply whatever it is. There might be limits to legal monetary liability in the contract document itself, but all the risk has been transferred to the contractor. It is that that the Master Builders Association and the Institute of Architects were talking about when they said

that increasingly, in terms of buildings built for the Commonwealth, the Commonwealth appears to be transferring risk to the private sector.

Senator HOGG—And the risk is forcing the price up. That is the significant thing. Rather than the Commonwealth having the capacity to take some of the risk, we are getting a more expensive product.

Dr Wright—That is a very challenging hypothetical to answer. All I can say is that in each circumstance the responsibility for delivering an appropriate contract and efficient, effective and ethical use of resources rests with the CEO of that agency. There are examples across the Commonwealth where there have been strategic alliances entered into with the construction industry with specifications being developed in partnership. That is one way of ensuring that there is value for money and minimisation of risk for all parties concerned. Given that hypothetical, I do not know that I can give you a more specific answer.

Mr COX—In your submission you talk about the GITC3 head agreement. You say:

> The Head agreement allows for a centralised approach to hold performance guarantees and insurance policies for each supplier, so avoiding the need to put in place multiple guarantees and insurances with customers … the agency may approach the Contract Authority (represented by the Department of Finance and Administration) to seek an increase in the level of guarantee.

Are those guarantees liabilities of the Commonwealth or liabilities of the contractor?

Ms Saave-Fairley—Essentially the liability is a guarantee of performance, so it is to protect the Commonwealth. Essentially the liability would be on the company.

Mr COX—What period are these IT contracts for?

Ms Saave-Fairley—It would really tend to vary, depending on what the nature of the contract was.

CHAIRMAN—Minimum or maximum?

Ms Saave-Fairley—No. I am not sure on that.

Mr COX—Is it two years or five years?

Dr Wright—It would vary. It may be that they are evergreen provisions in those contracts. It would depend on whether it was for a specific project or for something that was ongoing. Particularly with the IT industry, it could be for some software development, rather than buying a box.

Mr COX—Let's say it was to manage a function for a Commonwealth agency, a payment system or some fairly large activity. What sort of periods are most of those things let for?

Dr Wright—That does not come under GITC3, so are you asking a more general question?

Mr COX—A more general question.

Dr Wright—It is a more general question on the period of contracts across the Commonwealth. Again, I think they vary. There would be most likely some quite long-term contracts in Defence, for example, whereas others would be for two to three years. Within the department they tend to range from three to five years, but with a provision either for foreshortening the contract if there is underperformance, or lengthening the contract if there is good performance.

Ms GILLARD—I want to ask some questions about the expertise of contract management personnel across the various agencies. I raised a local example from my electorate last time this committee met about a contract management problem. I have a couple of questions, but I noticed in your submission that there has been a change in terms of the wording of a Commonwealth procurement circular. There has been a change from mandatory to best practice in terms of the requirements that all persons undertaking procurement functions meet appropriate Commonwealth competency standards. Can you explain why that was done and, given its move from being mandatory to best practice, what circumstance are going to be missed because of that move from mandatory to best practice?

Dr Wright—I think the principle that we are applying here is that a lot of the expertise that you need for developing an RFT, negotiating a contract and then actually managing a contract will vary over time and can be quite specific as to the nature of expertise. Our view is that some of that is best sourced on an as required basis, rather than trying to maintain a very high level of skills which may only be occasionally used within, for example, our agency. In addition, we have set up this CTC panel to provide assistance to agencies, including ourselves, so that we can access legal, probity or business advice and assistance with performance assessment and those sorts of things. It really reflects the changing nature of business. For example, to try and maintain a commercial legal cell when you only let one contract a year, would not be a sensible approach. So it reflects the changing nature of skill requirements and how long you need them for, so that you can target your needs more appropriately.

Ms GILLARD—Under your model, you would see people who are routinely engaged with contract management having the necessary competencies, but in some agencies where contract management is an unusual circumstance, those people themselves would not have the necessary competencies but could rely on the panel to assist them. Is that how you envisage it working?

Dr Wright—It is also linked backed to devolving responsibility to agencies under the FMA; that they have responsibility to define and meet their own specific needs. In terms of specific procurement skills, there are whole range that are required and it is a case by case basis as to what you need in the short term and the long term and the nature of the contract. Some contracts would just require very good management skills, not necessarily specific procurement skills. So, it really depends on the nature, complexity and scope of the contract.

It is the intention of the guidelines to provide agencies with the scope to meet those in the best way that they see fit. It could be by having people with qualifications, by bringing in people or by a mix. It will change over time depending on where you are in the contract cycle.

Ms GILLARD—So in your model the call as to what competencies are required would be left to the agencies?

Dr Wright—Yes.

Ms GILLARD—Given some of the evidence that we have had before this inquiry and also the example in my electorate, I am concerned that there is insufficient expertise on the contract management side, particularly when we go back to some of the chairman's comments on the question of risk. That may or may not actually manifest itself in the contract terms but, in the example I am thinking of, it manifested in the contract negotiations. It has also been raised with this inquiry that there are circumstances where the first negotiating position of the Commonwealth, in terms of contract conditions and particularly risk and liability, is that they want the contractor to take absolutely everything, so they start at a complete extreme. Therefore the contract negotiations take a lot of time, are quite vexed and where they end up is very far from that position, which only makes you think that that was not a rational starting point for the negotiations. I am concerned with the devolution of even the call about what competencies are required for these things, that that sort of problem is going to become more common rather than less.

Dr Wright—That is one of the reasons why we are established the CTC panel so that agencies could buy in those sorts of skills—for negotiation, legal services, business advice—which would go to the heart of the concern that you have. If you have those services delivered by a professional company for whom that is an ongoing and core requirement, then you are much more likely to get a really good outcome, rather than trying to deliver on it by calling on someone with a skill that they use only once a year or every two years. So it is about access to resources such as the CTC panel. The panel is not mandatory. There are 32 providers on it. So that would be our recommendation as a way to go to make sure that you get high-quality skills in those areas.

Ms GILLARD—Under your current system, though, you would not necessarily know whether or not there was a problem with a particular agency's contract management unless they opt in to access the expertise of the panel?

Dr Wright—We would not have any specific information on individual agencies. Certainly for those agencies that do a lot of procurement and have an ongoing need, so they wish to ensure there are skills within their particular agency, there are not only the new Public Service training package, which contains a core component on procurement, but also—as agencies like Defence have—standing offer arrangements for complex and strategic procurement. Such agencies have developed capabilities in house to meet their specific and ongoing needs because they do this sort of thing more frequently than other players would.

Ms GILLARD—So there are things available, but in reality an agency could be in continuing trouble with its contract management and nothing in the current system, in the absence of it opting in and accessing these things, would bring that to light, from DOFA's point of view?

Dr Wright—Certainly we field quite a large number of agency inquiries from agencies and we point them in the direction, depending on their need, of the panel, courses available such as those available at Deakin University, the Public Service course or the Paccer training course provided in Victoria. But it really is up to each agency to decide on what its needs are. Our role is to facilitate and promote. This information is available on our web site. We hold fora where we provide agencies with information as to what we do. We have a range of publications. So we certainly do our best to make sure that people are aware of the tool kits available to them.

CHAIRMAN—In this area of skills, both the Institution of Engineers and the Institute of Architects have said to us in submissions, and have said out in public as well, that they are concerned at loss of specific technical skills within both the Commonwealth and the states, I guess. But the Auditor-General has expressed to us on a number of occasions in different inquiries concerns about increasing loss of corporate memory within the APS. In questioning ANAO this morning about whether that corporate memory was more important or skill level was more important, the matter arose to do with your response that if you need the skill you go and buy it. Nobody is saying that is not appropriate. But ANAO responded that in their view retention of an adequate amount of corporate memory is necessary within the Commonwealth, as increasingly the private sector is finding. IT is one of the best examples because of the emerging nature of technology and how fast it is moving, that companies have tended to outsource all their IT requirements but then have tended to lose from inside the company the knowledge of what the heck it is that the company needs to know anyway as the output from its information technology services. The point ANAO was trying to make and I put to you now is this: if you have not retained within the agency—and let us just take DOFA, because that is what you are here to talk about—the appropriate level of internal corporate knowledge of the services you supply and the procedures you go through, are you confident that you can instruct those outside contractors in what it is you really need and can monitor their performance adequately? It is a tough question.

Mr Loudon—In our own environment it depends on the nature of the contract and the technical complexity of the area that you are talking about being contracted. You raised IT, which is highly technical and very fast moving. We have outsource provision in relation to our infrastructure. We utilise a number of different contractors and suppliers in relation to software development et cetera to assist us to meet our business needs. Particularly where there is a high level of technical oversight required, we seek independent advice to those specific suppliers. So we may have people who help us oversight provision of certain activities. So it depends upon the mix, the nature and the complexity. In relation to the management of the contract in IT, we use people who have an understanding of the business, some corporate knowledge in relation to the activity of the department, as well as people who have obviously an understanding and some experience in either systems or IT itself. IT is obviously a fast moving industry and we try to utilise a mix of provision, external and internal, to assist us.

CHAIRMAN—So you are happy at DOFA that you have retained enough corporate memory to be able to manage these outsourced contracts properly?

Mr Loudon—Yes.

Mr COX—Do you think that other agencies have a similar capacity?

CHAIRMAN—From your point of view?

Dr Wright—I am afraid we are unable to comment for other agencies.

Senator HOGG—Referring to what the chairman was asking at the start, you said in your submission:

> Agencies may consider including provisions in contracts that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny of the contract and its management.

You used the word 'proper' parliamentary scrutiny. What do you mean by that?

Dr Wright—Could you refer me to the page, please.

Senator HOGG—On page 14, paragraph 4.1 you refer to 'proper parliamentary scrutiny'. Does your department have a view on what constitutes proper parliamentary scrutiny? It may well be different from the view that is held on this side of the table.

Dr Wright—I do not think I can elaborate on that sentence.

Senator HOGG—I think it is a very important sentence because it really gets to the heart of what this inquiry is about. Take it on notice, go away and give us an answer.

Dr Wright—Perhaps I could seek to clarify my initial response. There are a range of mechanisms in parliament for scrutiny to occur. Clearly that sentence is intended to address the whole range. Questions can be asked on the floor; there are ANAO reports which come through the JCPAA, which can then choose to look at the significant issues; and there are Senate estimates committees, where a whole range of questions can be asked and are asked on performance and contract management. Contracts and departments need to be able to address those questions.

Senator HOGG—With the greatest respect, Dr Wright, that is a fairly bureaucratic answer, which I would expect.

Dr Wright—Thank you, Senator.

Senator HOGG—I am looking for the real answer, so can you take it on notice and tell us what proper scrutiny is? It is important that this committee has some idea of what you mean by that. Agencies may consider including things which allow for proper scrutiny by parliamentary committees or whatever it might be. I would like to know what the proper scrutiny is. It gets to the issue of commercial-in-confidence; it gets to a whole range of issues. If your department has a view on what constitutes proper scrutiny, this committee would be very interested in hearing it, seeing that you used it in that part of your submission. I have no more questions.

Dr Wright—Thank you. We will take that on notice.

CHAIRMAN—Dr, perhaps you could advise us as to what improper parliamentary scrutiny is.

Dr Wright—I was afraid you might ask that.

CHAIRMAN—I knew you were.

Senator HOGG—Again, I think that is an excellent question.

Dr Wright—I do not think I can add anything to my initial answer and will take Senator Hogg's question on notice.

Senator HOGG—I would appreciate that and am looking forward with interest to your non-bureaucratic answer to it.

CHAIRMAN—I have got to say that, if every one of our reports were perfect too, we would be delighted, but they are not. Thank you for your submission and for coming and answering our questions. We look forward to any further advice that you may care to give us or that we have asked for and you have promised to give us. Good one Hoggy!

Senator HOGG—I'll make a senator of you yet!

Dr Wright—Sorry, wrong committee! I have done too many of these.

CHAIRMAN—We are generally pretty friendly, Dr Wright.

Dr Wright—Given the frequency of our interactions.

CHAIRMAN—You have got to admit that, to a large extent, we are after the same sorts of things.

Dr Wright—Indeed.

CHAIRMAN—We are not really the enemy. Besides, we are responsible.

Senator HOGG—Unlike certain Senate committees.

Ms GILLARD—Unlike Senator Hogg.

[11.58 a.m.]

BLEWITT, Mr Arthur, Chief General Manager, Corporate and Coordination, Department of Communications, Information Technology and the Arts

BUETTEL, Mr Rohan, General Manager, Legal and Parliamentary, Department of Communications, Information Technology and the Arts

GOTZINGER, Mr Peter, Manager, Contracts Unit, Department of Communications, Information Technology and the Arts

MARSDEN, Mr Lennard, General Manager, Corporate Services, Department of Communications, Information Technology and the Arts

CHAIRMAN—Welcome. Thank you for your submission. Do you have a brief opening statement you would like to make? I emphasise the word 'brief'.

Mr Blewitt—We have a paper which is slightly more than brief. Perhaps we could hand it up to you as a supplementary.

CHAIRMAN—Are my colleagues happy to incorporate the paper in the *Hansard*? There being no objection, it is so ordered.

The paper read as follows—

CHAIRMAN—Thank you very much. You are ready for us to ask you questions?

Mr Blewitt—Yes, we are.

CHAIRMAN—One of the things that we have been looking at is not exactly your overall responsibility of course, but your department title has the words 'Information Technology' in it. We understand that DOFA has used a standard GITC3, a set of standard contractual conditions agreed between government and industry. Does your department use that same standard contract?

Mr Buettel—Yes, we do.

CHAIRMAN—And your experience in industry acceptance of the contract? Do they like it?

Mr Gotzinger—We have had no problems with industry accepting it. Many conditions can be negotiated within that GITC3, but we have never met any more resistance with GITC3 than we have with the other standard contracts we use.

CHAIRMAN—One of the things that we have heard—from a number of organisations that have appeared before the committee and given submissions to the committee already—is that in their view there has been a winding-down of technical expertise within agencies, and the Audit Office is concerned at a potential growing reduction in corporate memory. Those are two of the issues this committee is trying to deal with. Can you tell us how you construct to make sure that you have retained technical expertise within your organisation and also the corporate knowledge to be able to manage contracts on behalf of a public agency, despite the fact that you may be outsourcing some of the skills?

Mr Blewitt—I think this comes from two levels. Firstly, we probably get most of our corporate memory through the management structure. For most of the IT outsourced contract we have, for example, the broad management is handled by a Senior Executive Service officer who has broadly been involved with the department for a number of years and has been involved closely in project management in IT as well.

The second issue of specialist skills is somewhat more difficult because of the competitive market in which we currently are. In the outsource process, we made sure that we managed to secure the services of an existing couple of staff members who had specialist IT skills, for example, and we have managed to retain those people to date. The corporate memory process is probably largely driven through the management structure. Specialist skills we seek very hard to retain, through individual arrangements with people that we need, to keep the relationship proper.

CHAIRMAN—Do you build buildings?

Mr Blewitt—No.

Mr Buettel—With the exception of the National Museum.

Senator HOGG—That is a pretty big exception.

CHAIRMAN—It just slipped my mind. The Master Builder's Association of Australia and the Institute of Architects and, I think, the Institution of Engineers have all talked about a loss of technical expertise—$155 million—and they have also talked to us and given submissions to us about what is apparent to them as a transfer of risk from the public sector to the private sector, particularly in their industry, in building construction; for example, by writing contracts that have a detailed specification and a set of drawings but no bills of quantity; so that the contractor in a short period of time has to come up with a fixed price and each of the contractors in turn does a complete estimate of all the materials and labour required on the job. Can you comment on that with respect to $155million worth of construction project?

Mr Gotzinger—The new National Museum uses a different approach, an alliancing approach, to the traditional contracting approach. There is a lot more risk sharing in that approach. It is a lot more performance driven on both sides; the department is a lot more driven and so are the contractors.

CHAIRMAN—Can you tell us how?

Mr Gotzinger—I am not on the particular project team that is running it. I am on the peripheral, so I do not know the exact details, but we could obtain those and table them.

Mr Blewitt—The alliance process involves directly all of the key players in the construction of the museum: the architects, the service providers and the engineering processes, which are of course all contracted privately. Under the alliance arrangement where there is a sharing of risk and benefit, they are in this as a team together. I think the key expertise, if you like, would normally be around that table that is negotiating it, more or less as a board or management.

CHAIRMAN—We would like some definitive information on the type of contract and how it is managed so we can have a look to assure ourselves that in fact we are not attempting to transfer all the risk down the line, which probably ends up—I expect you would agree—costing the Commonwealth money.

Mr Blewitt—Yes. As you would know, the National Audit Office has recently done a significant audit on that, so we will refer you to that as well.

Mr COX—I want to ask you about the Networking the Nation program. You have got 167 contracted projects. Who are the main contractors? Is it mainly Telstra, or are there a range of people who are putting those services in place?

Mr Marsden—With the Networking the Nation program, the grants are given to groups. So Telstra or a like carrier may provide the services of that group but we do not actually contract directly with Telstra. It is a matter for that particular group who they have to provide that service for them.

Mr COX—It is happening in the regions according to this. It is referred to as the Regional Telecommunications Infrastructure Fund. Are there any other carriers apart from Telstra who are providing any of those projects?

Mr Marsden—We will have to come back to you on that.

Ms GILLARD—I think you heard the discussion before about expertise of contract management personnel and the downgrading of the requirement for particular competencies from mandatory to best practice. What do you do in your department to ensure that persons who are engaged in contract management have the appropriate expertise and skills?

Mr Blewitt—Perhaps if I could comment and then ask Mr Buettel to provide some comments: firstly, we do have an experienced contract unit there which comprises three people who have got considerable experience. Some of them have done some of the accreditation program previously, and one is undertaking a graduate diploma in procurement. Importantly, it is within the organisation's corporate legal area. So as well as having contract managers who know what they are doing, we also have a couple of senior lawyers who oversee any major contract variations and changes.

The other aspect we put a lot of effort in is training delegates and line managers about contracts. I think something like 200 people have been through some internally run, but managed by the Australian Government Solicitor and ourselves, programs that help keep up that contract understanding at least, with the skills set being largely at the top.

Finally, we have had a very tight control on contractual management because of the number of contracts and consultancies we are involved in. So it is run very tightly with a central control via our legal unit. Therefore, delegations beyond that are quite well controlled.

Mr Buettel—The only additional comment I would make is that, when recruiting staff to the contracts unit, we look at whether they have a thorough knowledge of Commonwealth procurement practices, policies and procedures, together with practical experience in arranging Commonwealth tenders and contracts. We take into account any accreditation that they have and their level of expertise in contract management.

Ms GILLARD—Will it make any difference to your approach that there has been a move from there being a mandatory requirement to a best practice requirement?

Mr Buettel—When recruiting, we are really judging on the basis of the skills and expertise of the individual. They may be shown through having gone through a formal competency based assessment process, but we would not knock out individuals on the basis that they have not gone through those processes. We would be looking at what their experience is and what work they have actually done.

Ms GILLARD—You would have heard earlier the evidence from the Department of Finance and Administration that they make available a number of tools for people involved in contract management, whether that be access to their panel, material on the web site or training, et

cetera. That was referred to before. What use would you make of the sorts of things that are made available through the Department of Finance and Administration?

Mr Gotzinger—We are aware of those. We are aware of DOFA's web site and the information on it, including endorsed suppliers, the CTC panel and their service for providing advice to purchasing people. We make use of that quite often. We are also aware of their advice in relation to training. We were talking to DOFA yesterday about training and were provided with some advice on that also.

CHAIRMAN—John, don't you want to ask about the Senate estimates and Telstra?

Senator HOGG—No. I think we have done enough damage there today. I do note, though, that your submission states that payments may be withheld where there is an unsatisfactory part of the contract. What has the experience of that been in the last couple of years? Is it a normal practice or is it something that is there but never used?

Mr Buettel—Under our standard contracting arrangements, payment is normally made only for work performed and accepted as satisfactory by the department. We would have a handful of cases each year where there are disputes between us and other parties. Generally, the disputes centre around meeting milestones in terms of the time or in terms of payment. Usually, we would attempt to solve the dispute by negotiation.

Senator HOGG—I was prompted by the chair on another issue—I don't think I needed to be prompted—and that is the issue of commercial-in-confidence. It is one of the issues that is of concern to the committee. Do you have any difficulties in dealing with outsourcing in terms of commercial-in-confidence when it comes to scrutiny by the parliament where you have outsourced—say, that you cannot give out the information to a parliamentary committee, whether it be this committee or some other committee, because of commercial-in-confidence reasons?

Mr Buettel—I am not aware of any situations where the issue has arisen for our department. I am not sure whether any of my colleagues are aware of any situations.

Mr Marsden—I am aware of one situation. I think it goes back to June last year in the Senate hearings. I was asked a question which went to the heart of the IT outsourcer Advantra's costing model for how they put their contract together. We took that on notice and went back to Advantra. Initially, they were reluctant to give that but in the end, through discussions, we actually released that information to the Senate. That is the only time I am aware of where we could not give the answer there and then and had to take something on notice.

Senator HOGG—So it was an issue but, at the end of the day, it was not an issue.

Mr Marsden—It was resolved. It took some weeks, but it was resolved and information given to the Senate.

CHAIRMAN—One of the things that we are always interested in is departmental internal audit procedures. I would be interested in knowing whether your internal audit is by agency or across the whole of the department.

Mr Marsden—The internal audit contract is across the core department and what we call the departmental agencies. By that I mean the National Archives of Australia, ScreenSound and the National Science and Technology Centre—those agencies that report directly to the portfolio secretary. It does not go across portfolio agencies because all those are governed by their own legislation and therefore have their own audit committees and governance structures.

CHAIRMAN—So each of the three arms of your department has it own audit committee?

Mr Marsden—The three arms of the department—that is, the departmental agencies—use the department's audit committee. They also use the department's audit contract. If at any point in time they become a prescribed agency, then they will be required to set up their own audit committees. At this point in time they are not prescribed agencies so they use ours.

CHAIRMAN—And your internal audit procedures are designed to pick up project management problems—deficiencies in either contract letting or contract administration—to the point that your department secretary gets advance notice that there is a problem, and you can deal with these problems?

Mr Marsden—Yes. Every two years we do a risk assessment as part of our audit program across the department and the departmental agencies. Through that risk assessment, we compile the audit plan which we update every 12 months. It picks up those sorts of issues. For example, the museum was mentioned by us earlier in this hearing. We did an audit of that very early in the process to try and satisfy ourselves that those things were being covered.

CHAIRMAN—And?

Mr Marsden—It was, at that time that the audit was being done, and we believe that it still is.

Mr COX—You say in your submission that you make provision for the Auditor-General to have access to the records and the premises of consultants—but is fairly specifically consultants. Do you include that requirement in every other contract that you let?

Mr Gotzinger—Yes, we do. The reason that we mentioned consultants specifically is because that in numbers is the vast bulk of our work. But we have a standard clause that we include in all of our contracts.

Mr COX—You do not have any resistance from other people you are contracting with to the Auditor-General having that ability?

Mr Gotzinger—No. To date we have not met any resistance.

CHAIRMAN—Thank you very much for your submission and thank you for coming and talking to us today. We will appreciate that further advice.

Proceedings suspended from 12.18 p.m. to 1.32 p.m.

SEDDON, Dr Nicholas Charles (Private capacity)

CHAIRMAN—Welcome. Do you have anything to say about the capacity in which you appear?

Dr Seddon—I appear as a citizen with some knowledge of contract.

CHAIRMAN—We have received your submission, for which we thank you. Would you like to make a brief opening statement, or shall we ask you questions about your submission?

Dr Seddon—I have nothing to add to my submission, except that I mentioned the misuse of commercial-in-confidence.

CHAIRMAN—I was about to ask you about that.

Dr Seddon—I would simply add that, apart from the accountability and open government aspects of the misuse of commercial-in-confidence, there is a practical aspect to it, which is that it simply imposes costs. If a department or an agency has to be concerned about commercial-in-confidence, then it must adopt certain measures to make sure that whatever is confidential is kept in locked cabinets, et cetera. One of the things that came out clearly in the Hughes aircraft case was that it is not okay to allow other people in the organisation to see confidential information—that is, the duty of confidentiality is personal, not organisational. There was a breach of confidentiality in the Hughes aircraft case when information was provided to other parts of the Commonwealth relating to the prices that had been tendered in the tender process. It is just a point that it does impose costs and it is a nuisance. I have seen a Defence contract where Defence has tried to minimise these kinds of costs by saying to the contractor, 'For goodness sake, don't put commercial-in-confidence on everything you send us. Put it only on those things where it is really necessary.' That was actually in a contract to try to minimise the burdens imposed by the presence of confidential information.

CHAIRMAN—Thank you for that. I will come back to the Hughes aircraft case. You imply that there is a misuse of commercial-in-confidence and the press has tended to elevate this as an issue in recent times. Are there many examples in the Commonwealth jurisdiction of misuse of commercial-in-confidence?

Dr Seddon—I cannot give you examples from the Commonwealth, but I certainly can from Victoria, where whole contracts, not just bits of contracts, were said to be commercial-in-confidence. That was quite commonly done under the previous administration in Victoria. I have also seen examples from South Australia where whole contracts are said to be commercial-in-confidence, but when you look at the contract itself, which I have done, the stuff in there is mundane, run-of-the-mill, boiler plate, et cetera. All of it is supposedly commercial-in-confidence. I have seen prison contracts from South Australia where a whole contract was said to be commercial-in-confidence but I could see nothing in it that was sensitive, needed to be protected, was a trade secret or even related to security. Obviously, in a prison contract, you would say that it is fair enough to keep security secret, but not even that was in the contract.

CHAIRMAN—But you cannot think of Commonwealth examples? We are, after all, interested in the Commonwealth public sector.

Dr Seddon—I cannot give you an example from the Commonwealth, except to note that the Senate Finance and Public Administration References Committee dealt with this issue and said that it is an issue at Commonwealth level. They made a point about it in the second report. I am sure you are familiar with that report. The Administrative Review Council in its report on contracting out also made a point of focusing on the problem of overuse or overinclusion of commercial-in-confidence.

CHAIRMAN—The Audit Office tell us that, in their view, there really should be a reverse onus of proof with respect to commercial-in-confidence. That is to say, we assume that there is nothing about contractual relationships between the Commonwealth and private parties that is commercial-in-confidence unless it is specifically notated and there is very good reason for it. Can you comment on that?

Dr Seddon—That idea has been pushed in a number of quarters. It reflects the general law position on confidentiality, which was dealt with in a High Court case called Commonwealth and Fairfax. There is also another High Court case called Esso Resources and Plowman where those sentiments were expressed by Justice Mason for the court—it was not just his own personal view. He said that when you have information in the hands of government then the normal rules that apply to confidentiality in the private sector have to be looked at 'through different spectacles', to use the expression that Mason employed. On the face of it, that was that such information should be out in the public domain unless the government can show some reason for not letting it out. So yes, reverse onus is reflected in the law.

The difficulty with it is that if you have got a contract then contract trumps the general law on confidentiality. What I mean by that is that if you have got an agreement between two parties and they have said, 'We are going to keep this 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. There is no principle of the law of contract which says there are some limits to what you can keep secret except illegality. If you use a contract to hide criminal activity and things of that sort then there is no problem, it is not enforceable. Apart from that, there is no limit that the law of contract imposes on the ability to keep things secret, so it is a very easy device just to put a clause into the contract saying, 'Everything here is in confidence.' That can be overridden by FOI legislation because legislation trumps the common law, and contract comes from the common law.

CHAIRMAN—If we ask you as an expert on public administration—

Dr Seddon—I would not claim to be that.

CHAIRMAN—As a knowledgeable person in public administration, if we ask you to codify under what circumstances a commercial-in-confidence should be respected, could you?

Dr Seddon—Yes. I would go straight to the FOI Act and say that the exemptions provide a reasonable balance. 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. That exists in Victoria. There is a public interest override in the FOI legislation in Victoria, section 50 subsection (4) of the act. That does not exist at Commonwealth level. Victoria is unique in that respect. That subsection has proved to be extremely valuable in promoting open government because it is a section that was used successfully against the Kennett government in revealing, for example, the prisons contracts. It was the public interest override that got those contracts out into the open in the end. That only happened in 1999. The entire contract was revealed to the public, except for a very small part dealing with security, which I think was fair enough to keep secret.

CHAIRMAN—A hypothetical which I also posed to the Audit Office this morning. If at Senate estimates committee the question was asked of Telstra would they please submit their five-year forward plan for e-commerce, would that be a reasonable request? Would Telstra be justified in saying, 'That information is absolutely commercial in confidence'?

Dr Seddon—I would think so. To start with, Telstra's status is sort of ambivalent in a way because in form it is a private sector company even though in many respects it is still regarded as a public organisation and is still just over half owned by the government. That certainly raises difficult questions about GBEs, and GBEs in particular that are almost wholly independent of government. The more you get over into that end of the continuum, the less the public imperative of open government and so forth applies. They are a commercial body, they are doing commercial things, and I would say that in that particular instance they would be justified in saying, 'We, like BHP, do not have to reveal that information.' But there is a difficulty with that because they are governed by legislation, they are quasi-public still, they are a utility in a sense, so it is not an easy question.

Mr COX—We have already expressed some views on that in a previous inquiry into the Financial Management and Accountability Act as to what the relative obligations of a Telstra are. You might like to have a look at that at some point in the future. I was very taken with your breakdown of contracts into four types although I thought there were probably not enough. I did not really think that buying a teabag was the same as buying an Anzac ship and I would have broken it down into three. One is procuring things like teabags, which you buy off the shelf, another is contracting things that are reasonably well defined, and the third is Defence projects, where you chase leading edge technology and there is a high degree of technical risk.

Your fourth one is selling goods or services—surplus assets or spectrum licences. But there are some surplus assets that have been sold—like the Commonwealth's uranium stockpile and things like that—that did not have an obvious public use and, if they were sold overseas, would therefore not have been too many implications for anybody else, other than Australian uranium producers. Looking at the sort of assets that governments have sold does raise a few other issues that you might want to break that heading down into. They would be issues that are quite simple and do not entail any ongoing issues, like getting rid of a Commonwealth building, and selling

assets where there are distinct competition policy issues, for example, and there might be some other subcategories if one thought about it. But I thought your categorisation might be very useful to this committee in terms of giving departments advice about that.

Dr Seddon—I agree that it is a rough categorisation. I have put broadly that they can be divided into four categories, but I agree that those categories could certainly be refined. Perhaps that was a rather glib thing to say about teabags and Anzac ships but the point I was making was that it is about a purchase of goods. An Anzac ship is a good, even though you might not think of it in that way.

CHAIRMAN—You said:

I will not embark on a discussion of the difficult and elusive topic of accountability. I note that this Term of Reference does not mention *government or ministerial* accountability which have certainly become problematic with the increasing use of contract to achieve public outcomes.

Notwithstanding the fact that you did not want to develop it in your paper, I would like you to develop it now if you would not mind.

Dr Seddon—Those are the sort of concerns that were raised in the Senate Finance and Public Administration References Committee's second report, by the Administrative Review Council and also to some extent in the joint report by the Australian Law Reform Commission and the Administrative Review Council on open government, which was a review of the FOI legislation.. The broad point is that contract does diminish the citizen's rights to some extent. We have seen this, for example, in the Ombudsman's jurisdiction, and one ombudsman, Phillippa Smith, made a lot of effective protests about the erosion of her jurisdiction due to contracting out. That is simply because 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.

There are other examples that I am sure you are aware of where from time to time even parliament has been denied, or at least an attempt has been made to deny it, information about contracts because of supposed commercial in confidence. That seems to me to be absolutely unacceptable. Perhaps measures can be taken to ensure that, if it genuinely is commercial in confidence—that is, there is an item in there that does need to be kept secret, such as a trade secret—special measures may need be taken, because obviously if you are going to reveal it to members of parliament that is a very large body of people.

Senator HOGG—Could I just interrupt there? If something should be classified in that way, who determines that in your view, and by what criteria do they determine it?

Dr Seddon—One way of doing that, and this was suggested by the Senate Finance and Public Administration Committee, is that, if there is a dispute about that, then the Auditor-General could act as umpire. The Auditor-General therefore sees it and then says, 'Yes, this should be kept secret so you must get a copy of the contract with this bit excised from it.'

Senator HOGG—By what criteria would that be determined?

Dr Seddon—In the end it is subjective. The law on this is ill defined. There is not a definition of what a trade secret is. There is no definition of what is commercial information which, if released, would cause—I cannot remember the exact words of the FOI legislation—harm to the company or cause a disadvantage, which I think is the word that is used. None of that is defined. In the cases on this, the tribunal or the judge has to make a subjective decision which is purely fact specific. It depends on the particular piece of information. Fairly obviously things like commercial know how which gives a company a competitive edge are things which are legitimately protected. With that sort of thing the company has every right to say, 'I want to keep this under wraps'. Scientific information, the results of research, things of that kind, come within this sort of category. I mentioned the prisons contracts in Victoria. The information to do with prison security fairly clearly had to be kept secret. So I cannot give you a definition of that; nor can the courts as they do not define it. I came across something recently in an American web site, I think, where they made some attempt to define it, but it was in terms of information which is proprietary in nature and which provides that particular organisation with some competitive advantage in the market—something along those lines.

CHAIRMAN—In your last long paragraph, I think it was, you said or implied there are limits on parliament's ability to scrutinise contracts. Were you aware of the fact that we have an unlimited ability to scrutinise any contract of the Commonwealth?

Dr Seddon—Yes. I think that is the correct approach but, as I understand it, there have been occasions where, in committee hearings, the senators or whoever have been told, 'No, sorry; you can't have that', and then there has been a bit of a fight. This is mentioned again in the Senate—

CHAIRMAN—But that is the Senate. That is not JCPAA. To the best of my understanding, we have an unfettered right on behalf of the parliament to all contracts.

Dr Seddon—I would agree with that.

CHAIRMAN—As a matter of practicality, having access to those contracts does not necessarily sometimes do us any good because we do not know where to look for what it is we need to look for, if that makes sense.

Dr Seddon—Yes. But you can get advice on that.

CHAIRMAN—I suppose so. I should not be making statements because you are, but at times that has been problematic.

Dr Seddon—I agree absolutely that parliament should have an unfettered right. There are practical difficulties with that because, as I said, it is a very large body of people who are then seeing this information. One of the things that we should keep in mind—and I am sure people have made submissions to you along these lines—is that we are still locked into the Westminster system and the tradition of secrecy. We are only slowly sloughing that off with FOI legislation, all of the talk about open government and so on. If you go to other places, it is

routine that public contracts should be openly available. I am sure you are familiar with this. People have probably made submissions to you about what goes on in the United States. Even in Western Australia—and I am not sure whether they have implemented it—the Commission on Government recommended that all public contracts should be published. There are some exceptions, and the exceptions are always little bits of the contract which have to be protected. That is all. It is not the whole thing. It would be very rare indeed for a whole contract to contain sensitive information. New Zealand is another place where there is a far more open government stance on the publication of contracts. There are a number of other jurisdictions, particularly the United States, where it is just accepted that public contracts have to be made openly available.

CHAIRMAN—I go back to your submission, where you state:

... *government* or *ministerial* accountability ... have certainly become problematic with the increasing use of contract to achieve public outcomes.

If the object of public administration in the first place is to achieve an outcome, not simply a process, I do not understand why bodies like us cannot achieve effective openness and require governments to be accountable, notwithstanding that some of the physical work is done by those in the private sector, as long as we are holding government to account for the outcomes, which are or are not achieved from the expenditure of public funds.

Dr Seddon—But it may be that the outcomes themselves are not published because they are actually embodied in the contract as performance outcomes. The private sector contractor has to do this, this and this. If you do not know what the contractor has to do, then you do not know whether they have achieved those outcomes. Therefore, it seems to me that what the contractor has to do under the contract must be made public.

CHAIRMAN—But don't you achieve the same result if you require the purchaser—that is, the government department or agency through its CEO—to publish outcomes for that activity?

Dr Seddon—Yes, as long as they are sufficiently precise. You probably do not want to hear about jail contracts, but I just happened to be looking at them recently. Just to illustrate, there are a whole lot of performance indicators in those. They include really awful things like self-mutilations, suicides and all that. The contractor gets paid according to how they keep control of those things. You need to have the details about how many self-mutilations, suicides, attempted suicides and deaths there have been. You need to know that.

CHAIRMAN—Do we have that available for the private sector prisons?

Dr Seddon—Yes. I am talking about the prisons that have been privatised.

CHAIRMAN—How about the public sector prisons?

Dr Seddon—As far as I know, that information is published for public sector prisons, but in the private prisons they are performance indicators. Therefore, initially at least, they were completely secret. The Kennett government actually published those contracts in 1997, but they were completely bowdlerised. They had no pricing information and no performance standards

information. You could read the contract, but all the important bits were missing. Then an FOI case got all that information out.

CHAIRMAN—I would have thought, perhaps rightly or wrongly, that between JCPAA and Senate estimates committees the accountability mechanisms were pretty open and transparent. I am not aware of any circumstance like that that is current or even recent in Commonwealth history, are you?

Dr Seddon—Are you saying that you can get all of these indicators of performance and so forth without publishing the contracts? Is that what you are suggesting?

CHAIRMAN—I am suggesting that we hold the executive to account for outcomes.

Dr Seddon—Right.

CHAIRMAN—And sometimes they are very intensely questioning, notwithstanding that perhaps the internal administration of a contract—every detail about it—is not published.

Dr Seddon—Yes, I think that is possible. But I suppose I am coming from the point of view of a lawyer. My first port of a call if I wanted to find out whether a contractor has done the job is to look at the contract. It is possible to find out by other means, but my view is that the instrument that has been chosen to achieve public outcomes is a contract. I have got no objection to that. The next question is: how do we know whether it has worked? The first thing that I would have thought should be available, not just to the Auditor-General, to this committee and to parliament generally but also to the general public, is the terms of that contract. That is what I am arguing.

CHAIRMAN—Let me pose another issue. This is not a hypothetical. Let us take a contract between the Department of Employment, Workplace Relations and Small Business and a job provider under Job network. Is it important that we know every detail about that contract or is it important that we know the outcomes from that program, that is, how many people were dealt with, how many got jobs, how many were in them three weeks, six months or 12 months later and trends over time?

Dr Seddon—As a citizen, I would like to know that I have access to both. If I were in your position I would also like to know that I have access to both. I would occasionally want to do an audit of the actual contracts themselves. Those particular contracts are quite difficult contracts. They involve providing human services to citizens. I have made the point in my submission to you that that particular type of contract is very difficult to measure in terms of performance. Obviously one measure is: how many people are they placing in jobs and in training programs? But another measure which I think is terribly important in that particular contract is: how are they actually dealing with these people who are looking for jobs and who are obviously in some difficulties? It is a very sensitive and difficult job to do, and my view is that that contract does not do that side of the thing—that is, the human relationship aspect of it—particularly well.

I have not seen the second round of contracts. I saw the first round one where there was a code of a conduct that had to be observed, but there was nothing in the contract to enforce that

code of contuct. A particular company that was providing services to a job seeker could not be pulled up for saying, 'You're in breach of the code of conduct, and such and such is the result.' There was no result. There was no contractual consequence of being in breach of the code of conduct. They may have tightened that up—as I said, I have not seen the second round of those contracts—but that is an illustration of the difficulty. If I were in a position of authority, I would want to know whether both sides of that contract were being done properly. I would not be content just with global figures from the department.

Mr COX—Would you recommend, then, that there be specific penalties for a breach, say, of the code of conduct to an individual?

Dr Seddon—This is where a contract starts to run out of steam. It is in imperfect instrument, it is a crude instrument, and devising a way of making the code of conduct enforceable is very difficult. To start with, it depends upon subjective assessments of how the service provider has behaved vis-a-vis a job seeker, and of course stories will differ. The job seeker says, 'I was treated badly.' The service provider says, 'Yes, but he threatened me.' You get all sorts of stories of that kind so you do not know quite what the true story is. It is extremely difficult to measure that part of performance. If you can do it—I hesitate to mention this, but the prisons contract has got exactly the same problem—then I think the best mechanism is to say, 'Okay, you get less money.' You do not put a penalty on them; you just say, 'If your level of service is not as high as it ought to be under the contract then you get less money under the contract,' just as much as they get less money the less they perform the other half of the contract, which is placing people in jobs.

Mr COX—That is effectively a financial penalty, isn't it?

Dr Seddon—Yes, it is. It is just that lawyers have got a particular view about penalties—they say, 'Don't impose penalties under a contract, it is better to just dock their pay.' I agree.

Mr COX—Can you elaborate on that?

Dr Seddon—The usual way of doing it in a contract is to have a liquidated damages clause, which means they actually pay you damages for breach, whereas in docking the pay they just simply do not get so much under the contract as they would be entitled to if they had performed properly.

Mr COX—So it gives you more power in that situation rather than having to pursue them?

Dr Seddon—Exactly right.

Mr COX—But there are a lot of things in a human services contract. If people simply are not providing the quantum of services that they should be, then it would be relatively easy to incorporate those sorts of remedies and they would not, hopefully, be subject to the same level of dispute as, say, trying to regulate a code of conduct and whether people were treated decently or not. But the essence of your submission as I have taken it is that, at the moment because there is no provision to deal with those failures to provide those human services in the contract and

because it is very difficult to calculate what the financial cost of it is, then the contract is fairly ineffective in being able to be enforced.

Dr Seddon—That part of the contract is arguably window-dressing and does not get enforced. That is quite often true in contracts—you have clauses which do not get enforced because they are unenforceable, essentially, so they just sort of drop out of the picture. That is quite a common phenomenon in contracts. I would imagine it happens in IT contracts quite a lot.

Ms GILLARD—The problem with contract compliance in a model like the Job Network model is the person who is really experiencing the loss and damage, which is perhaps the poorly assisted job seeker, is not actually the party to the contract so you have got that 'who is bearing the burden as opposed to who has got the rights' sort of problem.

Dr Seddon—That is another aspect of accountability in the sense that, in the past if a job seeker had a problem of that kind, they would go to the department and there would be a direct line of responsibility there. If necessary, they could go to the Ombudsman. That direct line has been broken by the existence of a contract.

Ms GILLARD—I would agree with you absolutely about the public interest overriding FOI legislation. I also agree with the publication of contracts given the likelihood that they will contain performance measures and the fact that once they are in contracts the Victorian experience has shown that you then get a commercial-in-confidence argument running to protect the very performance measures you need to know or you do not know how to go about the necessary inquiries to see whether or not there is a problem. So I agree with that.

Having looked at your submission, what would you say the Commonwealth could do to improve contract management from its point of view? Is that a training question or is it a resources question? If the purpose of this inquiry is for us to come up with a series of recommendations to improve the Commonwealth's performance in relation to contract management, have you got any suggestions as to what those recommendations should include?

Dr Seddon—That is a very big question.

Ms GILLARD—It is.

Dr Seddon—I have stressed in my submission training of public servants who are now contract administrators. I have to confess to a sort of conflict here because I do quite a lot of training. I have mentioned that in my submission so it is not as though I have hidden that. My experience from doing the training is that public servants who are administering contracts have no idea what they are handling. They are handling a legal thing which can turn around and bite. It does not happen that often in the spectacular way that it happened in the Hughes aircraft case and the Amann aviation case. Two cases were disasters for the Commonwealth.

What I have suggested—and I think it is just one sentence—is that we do not know the extent to which the Commonwealth has to settle disputes where there has been some foul up because a public servant did not know what they were really letting the Commonwealth in for. It might

have happened out of perfectly good motives; they may have been thinking, 'Let's get on with this project,' and said something to the contractor which does have legal ramifications. The Commonwealth gets itself into some difficulty.

The Commonwealth then settles—that is how most disputes are dealt with—and it is probably not in favour of the Commonwealth. We do not know about the extent of that. You only hear the awful stories when they go to court, and most cases do not go to court. One of the things that I am talking about is that an ordinary conversation, a meeting, a fax, a letter—any of those things—can alter the contractual relationship. As I said, it may be through enthusiasm and through a desire to get on with the project that a public servant does something which legally turns out not be a very good idea.

One of the reasons for this vulnerability is that the commercial relationship between the Commonwealth and a provider is not just a contract; it is also estoppel—the Trade Practices Act, the law of negligence, the law of restitution; I have listed those things. The Hughes aircraft case is a good illustration. I mention this in the submission. The Civil Aviation Authority or Airservices Australia was sued for breach of contract, estoppel, a breach of the Trade Practices Act and negligence. It was found in breach of the Trade Practices Act and in breach of contract and the other two items were not pursued. That illustrates the range of legal remedies that can be brought to bear in a commercial relationship. So that is what I mean by legal risk in my submission. If you get into a contract, then you are in legal risk—there are legal risks. Legal risks in their worst manifestation are litigation but they have more subtle manifestations when things have gone wrong, and the Commonwealth may have to settle because it realises that it is not in a very strong position.

Ms GILLARD—So, in terms of one of the key training deficits, you would say that it is not the actual written contract but it is about having people understand the legal significance of the events leading up to the contract and events afterwards in terms of waiver or estoppel.

Dr Seddon—Absolutely. If they are administering a tender, they need to know what the law is about tenders, what the things are that can go wrong in tenders. If they are administering a contract, they need to know the sorts of things that can give rise to legal problems as they work their way through the contract. As I said, it can happen quite casually. I have mentioned the problem of contract variations. That can happen on the run casually. A mere conversation could change a contract. That means the Commonwealth's obligations are changed by a conversation that might have taken place between a quite junior person and the contractor's representative on the other side. The contractor's representative has assumed that the junior Commonwealth person had the authority, they go off and make the change and that is it—you are stuck with it.

Mr COX—As there has been a rapid escalation in the amount of Commonwealth business that is done by contract, it is quite possible that in the pipeline there are a whole lot of legal ramifications of that type that we are yet to see emerge. Would you agree with that?

Dr Seddon—I do not know. My view is that, despite all the things that I have said, the Commonwealth does reasonably well. It does not get into litigation that often. I think that sometimes the Commonwealth does not fight as hard as it might. Perhaps in some circumstances it should not give way as readily as it does. But I cannot make any prediction

about how many awful legal problems are lying in wait. I cannot predict that but I can tell you that things go wrong because of a lack of knowledge of what I call 'legal awareness'. My prescription for that is that every public servant who has to administer a contract should be legally aware: they are handling a legal thing and legal things can turn nasty.

Mr COX—Is it possible to include in a contract specification of precisely who has the power and authority to make variations to it, to avoid some of that?

Dr Seddon—Yes, you can include such a clause and it is commonly done, but it does not work if in fact somebody else has been allowed to represent the Commonwealth. In other words, there could be drift from what the contract says, which is a very common thing to happen. Let us assume that the contract says that only X can approve variations. Okay, X goes away for two months and Y has been doing it, but nothing has been changed in the written contract. In fact, what has happened is that the contract has been varied on that particular procedure. Y is now allowed to represent the Commonwealth. If the Commonwealth turned around and said, 'You should not have acted on Y's say-so, because it says in the contract that you can only act on X's say-so,' the contractor would say, 'Well, that is not what you led us to be believe. We are getting into what we call estoppel here. You led us to believe that Y was okay. We did not make a formal change to the contract. We trusted you. We didn't think we had to.' The Commonwealth then is in a very weak position to argue that anything that Y approved was not authorised.

Mr COX—There was an incident about 20 or 30 years ago where an Army major, with absolutely no authority, gave away the Anzac rifle range in Sydney for peppercorn rent. It was subsequently discovered to be worth several million dollars.

One of the things that we are currently looking at as well as part of our general function is what is required to be included in departmental annual reports, which I guess is the head of accountability for the old way of doing things. There is probably rather less in that process about the new way of doing things through contracts. One of the first things that comes to my mind from what you have been saying is that we should perhaps require that departments declare how often they have had to make commercial settlements on contracts that they are administering. Are there any other sorts of statistics that you think would be helpful from a public accountability point of view to include in departmental annual reports?

Dr Seddon—Yes, variations. They should document what variations have been made and the dollar effects of those variations.

CHAIRMAN—One of the things you said I will simply agree with, and that is that there are many times that contract terms and conditions are not necessarily in force, and that may be of advantage to both parties in terms of getting the job done and achieving the outcome. I simply note that I spent about 25 years in contract management in one form or another in two industries and I never payed liquidated damages once. One wonders what they are worth.

Mr COX—Dr Seddon, can we have a copy of your book to include in the evidence?

CHAIRMAN—He will sell it to you!

Dr Seddon—You mean my book on government contracts?

Mr COX—Yes.

Dr Seddon—You want to me to give it to you.

Mr COX—I want it to enter it in the evidence.

CHAIRMAN—We can afford to buy a copy. We are not broke.

Dr Seddon—The publisher gives me some free copies and I have only got about three left.

CHAIRMAN—We are happy to purchase a copy. Thank you very much both for your submission and for coming to talk to us. It has been most useful.

[2.21 p.m.]

BURSTON, Mr John, Group Manager, Systems Group, Department of Employment, Workplace Relations and Small Business

CORRELL, Mr Bob, Group Manager, Targeted Employment Assistance, Department of Employment, Workplace Relations and Small Business

GIBBONS, Mr Wayne, Deputy Secretary, Department of Employment, Workplace Relations and Small Business

McMILLAN, Mr Brian, Group Manager, Corporate Legal, Parliamentary and Audit Services Group, Department of Employment, Workplace Relations and Small Business

MILLIKEN, Ms Marsha, Assistant Secretary, Job Network Group, Department of Employment, Workplace Relations and Small Business

RIGGS, Ms Leslie, Group Manager, Job Network Group, Department of Employment, Workplace Relations and Small Business

SHERGOLD, Dr Peter, Secretary, Department of Employment, Workplace Relations and Small Business

CHAIRMAN—Ladies and gentlemen, thank you for coming here today. Dr Shergold, we thank you for your submission. It was comprehensive, and you have brought along a large crew. I assume we have quite a number of questions. I have about eight written down myself. Would you like to make a brief opening statement or shall we start?

Dr Shergold—I am happy to start almost immediately. Before we begin, though, I would table for the committee about 20 documents—they probably represent about half a metre of archives—which are the encyclopedic guide to contract management in my department. I do not anticipate that you will want to read them cover to cover, but I do envisage that during questioning we will want to refer to the documents. I hope we have guessed correctly which documents we will want to make reference to.

The previous witness may have inadvertently misled you. In a part of the evidence that I heard, it was suggested that there were no sanctions within the Employment Services contract for breaches of the code of conduct. I think that is what I heard said. Just to bring your attention to the fact that it is not the case, in the Employment Services contract for 1998-99, the sanctions that prevail are set out clearly in section 7 and schedule 2. In Job Network 2, that has been tightened, and you can see that under section 8 and schedule 2 of the *Employment Services Contract 2000-2003*.

CHAIRMAN—We thank you for that. Dr Shergold, in our second set of public hearings, we interviewed both Drake and the Indo-Chinese Employment Service and, quite frankly, we took two fairly different sets of evidence. Drake said to us quite strongly that, in their view, the department—the government—was shifting risk by requiring the contractor to take all the risk

and therefore taking no responsibility itself for defining what sorts of numbers the contractor might expect to have to find jobs for, whereas the Indo-Chinese Employment Service said they were quite delighted with the contract. Drake said that there were very differing procedures in place for performance monitoring in different locations, whereas the Indo-Chinese Employment Service deals only in Victoria. They have a number of outlets but deal with only one project manager in Victoria so had no problem whatsoever. Could you comment on those differences briefly. I do not make too big a point of that, quite frankly.

Dr Shergold—I am happy to do so, and I understand that one-sidedness is in the eye of the beholder. I have just been sitting in the back rows listening to evidence which suggests that the Commonwealth is not tight enough in the management of its contracts whereas Drake, in its submission and the evidence given before you, clearly thinks the opposite. Perhaps there is a degree of one-sidedness, and that is clearly based upon the expectations of government and even more upon the expectations of parliament that, in an outsourcing situation, the department is accountable for the expenditure of public funds and for the use of taxpayers' money. That means that the contracts are necessarily stringent. In Job Network 2 we are talking about $3 billion of taxpayers' money.

The other thing I should say is that no-one is forced into a contract. If you believe the contract is one-sided, there is quite an easy way to avoid that, which is not to tender for the business or to go into these contracts with eyes wide open. I think it is a very fair and equitable contract on the basis that we do need to ensure that the requirements of parliament for accountability and scrutiny are met. If Drake have found that somewhat arduous and if they are concerned, for example, about privacy legislation, FOI legislation or the access of the Auditor-General, I am sorry, but it is a necessary part of outsourcing the delivery of government services.

Mr COX—They certainly did not say to us that they were concerned about the access of the Auditor-General. They said the opposite.

CHAIRMAN—No, they did not say that at all.

Dr Shergold—Your second question, Chairman, was about the consistency of quality assurance and quality monitoring across the different regions. I am willing to take that on board, but it is clear that the framework for that monitoring is very consistent, that the guidelines are provided, that in every instance there are two departmental officers who are involved and that the outcomes are monitored by the national office. I would have thought, although things are continuing to improve, the level of consistency that we now have in monitoring performance across a very large Job Network is high.

CHAIRMAN—We understand that it is absolutely critical that you monitor performance with those contracts and that there is a critical nature to that performance, that being to make sure there is no fraud. That is to say that, when you pay for outcomes—a number of individuals who have been given a job—that you are paying for people to really get a job. We understand the critical nature of that. I think the criticism was that one project manager in one location required confirmation from the employer, via a copy of pay slips, and a project manager in another location required different sorts of confirmation evidence. Your department might have a look at that. Again, I do not think it is a major issue. It was something we wanted to bring up.

Mr COX—I thought it was slightly more major than that, in that one required documentary evidence and one of them did not.

CHAIRMAN—It was different documentary evidence, I thought.

Mr COX—No; I think one of them only required oral—which was a concern.

CHAIRMAN—You could be right.

Ms Riggs—Maybe I could help the committee a little. Before any provider, anyone holding a Job Network contract, lodges a claim for a job matching outcome, we do require that they have indeed verified with the employer that the job for the person on behalf of whom they are lodging a claim has indeed fulfilled the minimum requirements of at least 15 hours over five consecutive days. We do not require that the contract holder get that confirmation in writing. We ask that they make a phone call. We do a random sample as part of what we call 'post-payment verification' of somewhere in the order of five to seven per cent of those claims in order to assure ourselves, particularly when we start to look at risk profiles, that providers are legitimately making claims. At that point we do in fact ask for a greater level of confirmation that the job has indeed been secured and been held. One of the ways in which that greater level of confirmation can be provided is by something signed by the employer. But in other circumstances we go to the employer ourselves, again with a phone call.

I have to say that Drake itself had some issues about its differing levels of risk management or risk aversion around the country too in Job Network 1. That may have been informed by the fact that our contract managers in different places might have differently presented the guidelines. I cannot vouch for every word that every member of the staff of the department nominates—they might have presented them a bit differently—but I think some of the problem may arise in the difference between lodging the claim in the first instance and the post-payment verification sampling.

CHAIRMAN—I do not want to belabour Drake and the Indo-Chinese group, but back on risk management again, Dr Shergold, in answering the first question, you said that, yes, our contracts are tough and, if it appears that we have transferred risk to the contractors rather than accept any risk on behalf of the Commonwealth, that is fine, because there will always be someone who will sign a contract. Would you disagree that, if it were a Job Network contract, and you required unlimited personal liability insurance from each of the contractors, you would get a fair tender outcome?

Dr Shergold—Chair, I do not wish to suggest that the comprehensiveness which I have described as the toughness of the contracts suggests that we have moved all risk to the providers. Indeed, I do not believe that to be the case—which is why, as a department, we have to place such a strong emphasis on risk management. In my view, it is a pretty fair balance of risk between the Commonwealth and the provider. If indeed it was too unbalanced, I do not believe that we would have people in a very competitive manner vying to win the contracts for Job Network or indeed for Work for the Dole.

CHAIRMAN—Talking about risk management, one of the things that interests ANAO and us—both of us have talked about it a lot—is the fact that we understand that, in order to manage risk, you have to take risks. Otherwise we go back to the risk-averse public sector whence we came, and I do not think anybody proposes that. To what degree do we in our scrutiny process, and other groups like Senate estimates committees in their scrutiny processes, make you more risk-averse because of our scrutiny process than otherwise you might have been?

Dr Shergold—There is a temptation for public servants having to appear before parliamentary committees such as this to become remarkably risk averse. That is not risk management. I think in our contract management the essential element is to take a prudent approach to risk—to identify risks in advance and to find out what likelihoods of risks occur and how serious those risks are. That is the structured approach to risk management which is taken in the department, in particular as it applies to contract management. Again, my impression is that it depends upon the level of prescription that you wish to put into the contract. When contracts were essentially about process—you will do this followed by that followed by the other—obviously it needed a very significant amount of risk management, and perhaps greater risk aversion. The major advantage that we have, I think, with Job Network for example, is that payments are based upon outcomes, and it is essentially a matter for the individual providers the approach they take to reach those outcomes as long as the code of conduct is not breached. That makes it significantly easier to administer the risk involved in Job Network, and I think it is one of the reasons that the administrative costs of administering Job Network are significantly lower, for example, than the costs of administering the old CES. It is essentially because our key interest is in the outcomes that are being achieved, and obviously then assuring ourselves that the data we are receiving is correct, that there is no fraud and that the outcomes are being achieved within the framework set out in the code of conduct.

CHAIRMAN—One of the major issues of this inquiry is of course public accountability. In that regard, as you would be aware, we have recommended in an earlier report that the Auditor-General be given legislative access to contractor records and contractor premises if necessary if Commonwealth goods are held therein. I note that in your submission, paragraph 44, you say that the department's standard form of contract provides for departmental access to premises and records related to the contracted services. You would be aware, of course, that the Auditor-General has recommended a certain form of words be included in all contracts that would allow him and his officers access only on a needs be, if absolutely necessary, basis to the contractor records, and I wonder why the department has not elected to include that form of words in its contracts.

Mr McMillan—It is correct that the precise form that the Auditor-General has suggested has not been used, but the effect of it is in fact in the current employment services contract 2000-03. Our monitoring and access clause is clause 12. We require, under 12.1(c), the provider to allow the department—

at all reasonable times, unhindered access to the Provider's employees and to the premises where, or from which, the Services are being provided;

That is a reflection of the Auditor-General clause as well as clause 12.1(a), which requires the department to have 'at all reasonable times'—again, that is the phrase that the Auditor-General suggested should be used—'unhindered access' to records, both the ones that are described in

the contract and other records, and allows us to copy them. The necessity for prior notice and taking account of security procedures, which is again part of the Auditor-General's model clause, appears in our clause 12.2. There are two other points that I should make. Our clause 12.5 specifically defines DEWRSB in a broader way than the other clauses. That definition in the access clause is:

... "DEWRSB" includes other persons authorised by DEWRSB or any person authorised by law.

In our view, if there were a specific need for the Auditor-General's powers to be exercised, that would be the clause under which that power could be exercised in concert with the department. May I also draw to your attention our note 2 to clause 14, which reminds providers:

... the Commonwealth Auditor-General is given the power ... to obtain information from parties with whom DEWRSB contracts.

The objective that we had was to ensure that what we thought was appropriate for the department was in the contract and, as I have indicated, we sought to draw upon the Australian National Audit Office's model clause to cover off the issues, as I have described.

CHAIRMAN—It might surprise you to learn that we would rather that you had used his words, and I speak easily on behalf of my colleagues, I think. Let me pose a hypothetical to you. I am getting good at these today. You have a high-level employee in your department who is responsible for a section of the operation which in fact is perpetrating fraud upon the Commonwealth. It is that individual in your department who has access to the contract or records and of course seeks not to exercise that access, even though the Auditor-General or his representative might want such access. You could say you are going out on a very long limb, but it seems to me that it would be much more direct to simply say to the contractor, 'The Auditor-General has access to your records and to your premises.' I might tell you that we have not yet talked to a contractor who has said that they would mind that at all.

Mr McMillan—That would be the view we would take. The effect of what we have provided is the same.

CHAIRMAN—Then why didn't you use the same words?

Mr McMillan—Because we wanted to ensure that the issues that we needed to cover were covered in our contracts. There are some other access issues which we have included, as you will see if you look at the entire clause.

CHAIRMAN—That is fine, but because we happen to be responsible for accountability you will not mind if we ultimately decide to disagree, will you?

Dr Shergold—No, but I must say that I think our note saying that the Auditor-General has powers to obtain information from parties with whom agencies contract—and that includes departmental access to premises and records related to contracted services—does in effect provide the same thing. I am willing to be advised if the Auditor-General thinks that those words are not sufficient.

Senator HOGG—Does that include subcontractors as well?

Mr McMillan—Yes, we would cover that, because we are covering the premises at which the services are delivered. So if they are delivered through subcontractors' premises, those premises are covered. We are covering records pertaining to the delivery of the services. So we are covering that as well.

Senator HOGG—Do you have any legal opinion that would uphold the views that you have expressed here today?

Mr McMillan—It is my opinion— and I am a lawyer.

Senator HOGG—I understand that. I am talking about independent legal—

Mr McMillan—The opinion that I have, to which I just referred—

Senator HOGG—Yes, I am I aware of your opinion; I am talking about independent legal opinion.

Mr McMillan—is shared by my colleague from the Office of the Australian Government Solicitor, who was responsible for the drafting of the detail of the contract.

Senator HOGG—Thank you.

Mr COX—I have a few questions to ask you about the Job Network program. Did you at any time have any call as a department to initiate any audit into Employment National?

Dr Shergold—There was a quality audit undertaken of Employment National during the previous contract.

Mr McMillan—Vice-Chair, are you are referring to audits specifically, or are you referring to investigations as well?

Mr COX—If you did any investigations, that would also be interesting; yes.

Mr McMillan—Yes, we have done a number of investigations in relation to Employment National.

Mr COX—What caused you to initiate those investigations?

Mr McMillan—I would not want to be held to complete accuracy at this time. May I check this and advise the committee if there is any matter of detail which I have not covered—because I am relying on recollection? But what caused us to examine particular transactions in which Employment National had been engaged were allegations that claims were being made by Employment National that were not payable. That is what caused us to investigate a number of incidents where that allegation was made.

Mr COX—Who made the claims?

Mr McMillan—There were different claimants, shall we say. One which I can call to mind specifically was an employee of Employment National. If the committee want that sort of detail, I would really need to take that on notice and give a summary of that information, in so far as that is possible for that to be done without prejudicing the investigations.

Dr Shergold—There is one other matter that I am aware of, which was brought by the Privacy Commissioner in respect of Employment National, which was about an alleged breach in regard to the protection of personal information; and that is one that the department is continuing to investigate. There may be some others. If there is a specific one you have in mind, I would not mind your letting us share it and then we might be able to respond.

Mr COX—The one that had been suggested to me most closely corresponds with the circumstances that Mr McMillan has described. You said there was an audit done in the previous contract of Employment National: was that a general audit, or was it an audit as opposed to an investigation?

Ms Riggs—I, like Mr McMillan, would have to take the detail of this on notice. We undertake from time to time what we call quality audits. These are audits of the processes of the organisation in respect of their adherence to the code of conduct rather than in relation to financial matters in the contract between ourselves and the providers. I cannot enumerate the EN sites that might have been the subject of quality audits, but the secretary is right in having referred to there being at least one quality audit of an Employment National site.

Mr COX—That would have been some time in the last year or some time this year?

Ms Riggs—It would have been I think early in 1999.

Mr COX—Could we get some more detail on that?

Ms Riggs—Certainly.

Dr Shergold—In terms of the specific issue that you are focusing on, which is I understand the case that Mr McMillan referred to, that is actually still ongoing even though it refers to a matter which is alleged to have occurred during Job Network 1. To the extent that we can provide that information we will certainly do so.

Mr COX—One of the things that is very prominent in the press after yesterday is the Work for the Dole scheme. Is it intended that there will be an arrangement introduced to link Work for the Dole to the Job Network in any way?

Dr Shergold—I think that really goes to matters of public policy, which is for a government to decide.

Mr COX—There has not been any decision to do that?

Dr Shergold—Let me repeat, it is a matter for the government to decide what links may be drawn between Work for the Dole and the Job Network programs. I am sure they will give consideration to that in relation to responding to the welfare review when it is completed.

Mr COX—Your minister has told the *Sydney Morning Herald* that there will be. I am interested to know whether he has conveyed that to you or not.

CHAIRMAN—What does this have to do with this inquiry, with respect?

Mr COX—I am interested in the Job Network and contracting out.

Dr Shergold—The minister is a minister and can say as he wishes to the *Sydney Morning Herald*; I am a public servant and I am not at liberty to respond on a public policy question before this committee.

CHAIRMAN—Let us go back to the inquiry.

Mr COX—Can you give me an indication as to which decisions in the design of the Job Network may have been policy decisions and which may have been administrative decisions?

Dr Shergold—Yes, I can do that. The decision as to the timing of the contract, the budgetary decisions and the framework for the tender are policy decisions for the government to take. In this respect the decisions became public because the tender documentation, the request for tender, is the public expression of the government's policy decisions. It is then for the Public Service to conduct the tender on behalf of the government itself with the public servant—in this case, myself—as the decision maker. Once the decisions are made, it is then a matter again for the government as the policy decision maker to decide how to respond to the outcomes of the tender process that I present.

Mr COX—You said that the government as a policy issue designed the framework. Which aspects were the framework? Was the notion of a managed market a policy decision?

Dr Shergold—Everything that is essentially set out in the request for tender is the public expression of the government's policy. It is then for the public servant to ensure that that process is driven through with probity and integrity.

Mr COX—So the government decided that there would be a managed market, the length of contracts, the spread of providers and the size of providers to be accepted?

Dr Shergold—No. You have to be careful, because for some of those the answers would be yes and for some they would be no. The answers can be easily found in the request for tender. On certain things, there were government decisions that were taken—for example, the length of the contract. On certain things, there were no government decisions taken—for example, how many providers would win business, because that came out of the tender process itself for which I was responsible. There were no decisions, for example, about how many people should win business or what sort of organisation should win business. That was not a matter of public policy. All the public policy is set out in the document.

Mr COX—So it was a matter of your decision that Employment National was unsuccessful and that a large range of small providers were successful?

Dr Shergold—Correct, it was the outcome of the tender process.

Mr COX—Is the Community Support Program the subject of your administration?

Dr Shergold—Yes, it is. The Community Support Program is administered by my department but, again, we do it through a contracting arrangement. In this instance, the contract is with Centrelink to administer the program.

Mr COX—I understand that the Community Support Program is spending per client about a quarter of what intensive assistance the Job Network provides. Is that correct?

Mr Correll—The arrangements with the Community Support Program are quite different from the arrangements under Job Network. Under the contractual arrangements in the Community Support Program, the payments are made to the community support provider when they initially take on a participant and then at subsequent six-monthly intervals with that participant. It is not, therefore, the same type of outcomes payment arrangement that applies under the Job Network arrangements, although there is a provision for the payment of an outcome payment should an employment outcome be achieved under CSP.

The key difference here is the very nature of the Community Support Program, which is dealing with job seekers who have very severe barriers to employment. They are job seekers who are assessed, therefore, as not being able to be assisted at that time through intensive assistance. So the primary objective is to attempt, through referral to other types of services, to enable that job seeker to overcome those barriers to a point where they can return into intensive assistance in Job Network.

Mr COX—One of the issues we have been discussing with almost every agency today has been the qualifications of people administering contracts. From the department's perspective, I understand there is an issue in relation to the Community Support Program that agencies that are providing the Community Support Program are not required to provide those clients with any specified level of professional support. Is that the case? If they have major social problems, it is not necessarily required that they will be dealt with by a professional social worker.

Mr Correll—That is a matter I would like to take on notice to check the precise detail in the contractual arrangements of the professional qualifications involved.

Mr COX—I have one more area that I wanted to explore in relation to the Job Network code of conduct and that relates to an organisation called Job Futures. I understand there was an exchange of correspondence with the minister in relation to Job Futures on the subject of them providing clients with advice about union membership. Are you aware of that exchange of correspondence and could you tell us what the outcome was?

Dr Shergold—Yes, I am aware of the exchange of correspondence, not least because it was an exchange of correspondence between the department and Job Futures, not between the

minister and Job Futures. Again, it comes back to the fact that the department is contract managing this tender process. There was concern expressed, including by the Privacy Commissioner, about what appeared to be some arrangements that Job Futures had entered into to provide job seekers with information about union membership. That would not have been a problem, but then to have a spotter's fee if they translated that into union membership would clearly have been utterly and totally unacceptable in terms of the contract into which Job Futures had entered, let alone if, as the Privacy Commissioner had concerns about, it meant that confidential information was being provided for a purpose which was not intended under Job Network. There was an exchange of correspondence. There was a meeting with Job Futures. I am delighted to say that it is absolutely clear that they will not proceed with such a process now and for that reason the contract of Job Futures is secured.

Ms GILLARD—I think you may have been present for some of the discussion we had before about contract scrutiny—leading to contract management questions, I suppose, because contracts are in the public domain. I am aware that through the tender process a great deal of material is accessible about the contractual arrangements in Job Network 2. But obviously one of the things that is kept confidential is the question of price that is paid for both job matching and job search training, and of course we have got the tender minimums for intensive assistance but not the actual price being paid. I would be interested in your explanation as to why that material continues to be confidential after the completion of the tender round.

Dr Shergold—Because it is clearly commercial-in-confidence information. We do not need it in order to ensure public or parliamentary scrutiny of whether the contract is being met. It is the commercial information of what different providers have tendered for in different regions and would clearly have a very significant impact upon any future tenders. It is highly confidential information although, as you have indicated, there are some minimum prices that have been established.

Ms GILLARD—You could take a different view of that, though, could you not? You could take the view that there are two levels of competition that one would want to create in the Job Network system. The first level of competition is the competition between Job Network providers as they tender for the work as it becomes available. The second level of competition is to get unemployed persons seeking assistance as rational consumers to have the best possible market information about what is going on with the Job Network providers that are in their area, so that they have performance information and price information when they make their decision about who they would go to for their employment services assistance. I can understand that you would say the publication of that material could distort people's bids for the next round but it is not entirely clear in what way it would distort those bids—whether people would distort up or distort down in order to be more competitive for the provision of future work. Which is a long way of saying there are lots of tender arrangements where people are aware of price in the earlier tender round. It is not handed down in tablets of stone that in tender systems one must not know the outcome of the earlier tender round. There are times when that does happen.

Dr Shergold—If the job seeker was paying for the service that they received from the Job Network provider or if the employer was paying for the service they received from the Job Network provider then, of course, being able to compare the prices for which the Job Network providers had contracted would be a matter of enormous relevance. But in effect because they

are paying nothing for that service, their sole concern should be on performance. And we are making the performance outcomes of those providers ever more transparent. I cannot see how it would be of advantage, either to job seekers or to employers, to know the price at which the Commonwealth had accepted contracts.

Ms GILLARD—I would put this scenario to you: I participate in another parliamentary committee, the House of Representatives Education, Employment and Workplace Relations Committee; I am not one of these exalted senators. We have been inquiring into the question of mature age unemployment, and obviously the examples that have been brought to that committee are examples arising under Job Network 1. I accept that. But that inquiry—I am sure the department is tracking it—has received evidence from mature age unemployed people that they were referred to or approached a Job Network provider, had an initial contact and never had any further contact. That is, they were of the view that they were parked because they were viewed as a hard case while the Job Network provider concentrated on providing its services to what it viewed as easier cases, in pursuit of outcomes, because obviously there is a financial incentive for reaching an outcome. It may be of relevance to an unemployed person who views themself as having been parked that there is X fee payable, say in respect of intensive assistance, and some of the moneys within that fee can be used for training, or indeed for wage subsidies to maximise their chances of securing a job. So I guess I am looking at it through their eyes as to what best empowers them to be a rational and perhaps demanding consumer of employment services, given all of the economic theory which we are taught these days that markets are good and markets depend on rational consumers.

Dr Shergold—To be a rational and demanding consumer in the Job Network, the information that you require is about the service that can be provided by the Job Network provider. That may range from something as simple as the location of the provider and if it is most convenient through to the outcomes that that provider is achieving, and those we are now starting to make public or we made public for the first time last year. That I would have thought is what the rational and demanding consumer would want to know—not whether organisation X gets paid $550 for a job matching placement and organisation Y gets paid $620 for a job matching placement. The fact is that, to have a competitive market, that is commercial information that needs to be kept in confidence.

Mr COX—It might become more competitive if that information were in the public domain. And there is another issue of another demanding and rational entity in this area, and that is the parliament. Are you suggesting that the parliament has no interest in the price in taxpayers' dollars that the Commonwealth is paying for a particular service?

Dr Shergold—No, I think it is very important that parliament know what is the amount of taxpayers' money that is being used in the delivery of services and what outcomes are being achieved for that money. And that is and can be provided. 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.

CHAIRMAN—Dr Shergold, do you accept the fact that this committee has the statutory responsibility with respect to public sector accountability?

Dr Shergold—I do.

CHAIRMAN—Thank you. If this committee wants to assure itself that there has been no fraud or that there is no fraud or favouritism with respect of individual providers in the Job Network system, why would we not want to make ourselves aware of the details of that information?

Dr Shergold—I think that is very important. It is why, of course, through the tender process we had a probity adviser involved in every decision that was made to make sure there was no fraud, no systemic bias, in the decisions that were made in terms of the quality and prices that were considered. That is what Blake Dawson Waldron did.

CHAIRMAN—Okay, but that is them and not us.

Dr Shergold—Yes, but that is the probity assurance.

Mr COX—Whom does the probity adviser work for, Dr Shergold?

Dr Shergold—The probity adviser is an independent lawyer who monitors the whole process and then provides a written report on the tender process to ensure that it was conducted with probity and integrity.

Mr COX—To whom?

Dr Shergold—It is provided through me to government.

Mr COX—To you?

Dr Shergold—Through me to government.

Mr COX—Would you have any objections to making those probity reports available to us?

Dr Shergold—That would be a matter for the minister to decide.

CHAIRMAN—I beg your pardon; I think we can decide.

Dr Shergold—Chair, I am happy for you to convey to my minister that once the probity report is completed—and it has not been completed at this stage—you would wish to have it tabled.

Ms GILLARD—I wish to follow up the issues I was raising with you before. It is my understanding from reading the Job Network 2 material that, with tenderers who had succeeded in being allocated intensive assistance places but had not succeeded in being allocated job matching places—because it is inherent in providing intensive assistance that they must also provide job matching—they were allocated job matching places at a price which was at—I

forget the actual terminology that was used—an average price across the employment services district.

Dr Shergold—That is absolutely correct.

Ms GILLARD—Are those prices publicly available?

Dr Shergold—No, but the basis on which the prices were calculated in that instance are set out in the request for tender.

Ms GILLARD—But not the price itself?

Dr Shergold—Not the actual price because the prices depend on the average which has been reached in a competitive process. It is not set on a price which has been established.

Ms Riggs—There is a complex array of variables in that decision and in the outcome too because, while some providers will have received the job matching places at the tied price, others will have it at their own bid price, so in fact it is not quite as clear-cut. That is a very good description of the outcome, but it is not always clear-cut. If their bid price was lower, they receive them at their bid price not at the tied price.

Ms GILLARD—I see.

Ms Riggs—It was where their bid price was higher.

Ms GILLARD—But they would not have failed to succeed if their bid price was lower?

Ms Riggs—There may have been quality price variables that would have changed that equation.

Dr Shergold—Or they may have set conditions which were not met.

Ms GILLARD—In the ordinary course, though, it would be pretty unlikely that your quality of service was sufficient that you would get intensive assistance places but that you would have missed out on job matching places with a lower bid because the quality was not right.

Ms Riggs—But we measured quality of service for each of the services independently.

Ms GILLARD—So you did, right.

Ms Riggs—So in fact it is possible that you could have been, based on the performance assessment model, a high performer in respect of intensive assistance and only an average performer in respect of job matching.

Dr Shergold—And of course quality was rated much higher than price in the process.

Ms GILLARD—As you would be aware from our earlier discussion, I am not in agreement about the broad question of confidentiality in respect of price.

Dr Shergold—I understand.

Ms GILLARD—It seems to me that it gets harder and harder to maintain the commercial-in-confidence argument when you are talking about averaging across a region which has multiple players and where the average cannot possibly tell you what any individual player bid because, by definition, an average is an average and substantial numbers of people would be above it and substantial numbers would be below it. I find it impossible to accept that there is a public policy reason which would keep the average confidential, but I suspect we are going to disagree about that question.

Finally, in terms of assisting unemployed people to be rational consumers, can you chart what information is put out directly by the department or I understand some is put out by Centrelink offices? What material is there currently out there to assist an unemployed person to make the best possible choice about the employment services agency that they will use in their area?

Dr Shergold—There is information available on things such as location, whether the Job Network provider has particular skills in terms of serving, for example, Aboriginal people, or language skills that are available, so that is known.

Ms GILLARD—That is the list Centrelink gives you when you ask. Is that what you are referring to there?

Dr Shergold—Yes, that is available through Centrelink and job seekers can find that information themselves from Australian Job Search. What the government did, in a pretty bold move last year, was for the first time to put out what I refer to as the 'NRMA guide to Job Network providers' which gave a star rating for providers on each of the services in their regions. Whether we will continue it in exactly that format I do not know, but there is certainly an intention, as Job Network 2 gets going, that job seekers will be able to see what the relative performance of Job Network providers may be in terms of the services that are being delivered.

Ms GILLARD—What you are contemplating there is some form of information pack or advice after you have outcomes at the first milestone stage?

Dr Shergold—So that you will be able to see, for example, what level of outcomes are being achieved by Job Network providers that you may wish to choose between.

CHAIRMAN—Dr Shergold, I think you can understand that one of the issues we are interested in in this inquiry is the issue of commercial-in-confidence.

Dr Shergold—I do.

CHAIRMAN—It is an issue which is now spread through the community and, for whatever series of reasons, there seems to be a broad impression that increasingly governments are hiding behind this short phrase. That being the case, this morning we asked ANAO their view of this

issue. Their response was essentially that commercial-in-confidence should be used only by exception, that is, everything should be open and accountable except where it can clearly be justified that the commercial-in-confidence issue is one that is clearly in the public interest. Can you tell us why it is absolutely in the public interest that these numbers are confidential?

Dr Shergold—I will attempt to do so. It is in the public interest to implement government policy, and the government policy in this instance is, in an iterative manner, to move towards a fully competitive framework for the delivery of employment services. I think it is clear that if 200 competing providers, or let us say 400 competing tenderers had a complete exchange of information on the prices which had been agreed, we could expect to see the emergence of oligopolistic pricing policies amongst the leading Job Network providers. That would not, I think, be of advantage in terms of the policy outcome that the government is seeking to achieve, which is competition.

Ms GILLARD—What stops them exchanging information about price now?

Dr Shergold—I think if you interviewed most of the 200 providers, I suspect that the great majority would wish the prices at which they have won tenders to be kept confidential.

Ms GILLARD—But, in terms of the public policy rationale that you just advanced, if I ran a job agency and you ran a job agency, what would prevent me from discussing with you at some point during this Job Network 2 period what prices you are being paid.

Dr Shergold—I will allow myself to be corrected after the event if I am wrong, but I do not believe there is anything in the contract that says a Job Network provider should not tell others or advertise what are the prices at which it has won the government business. But I do not expect to be killed in the rush by Job Network providers who would wish to do that.

Ms GILLARD—No, but if the public policy reason for not advertising price is that you are worried about cartel style behaviour, then I am putting to you that cartel style behaviour could emerge in any event under the current system if principal providers in a region chose to collude.

Dr Shergold—I have seen the range of prices at which different providers have contracted. Bear in mind that those who have sought the tender have set different prices for different services in different regions. They do not simply have a set price. There is a very extensive competition going on now on price as well as quality. I would not want to see that lessened in any way.

Mr COX—If everybody knew that you could get a very high price in a particular region, then the simple laws of economics would suggest that people would flock to that region to provide that service and the price to the Commonwealth would be bid down.

Dr Shergold—I suppose that would be useful if we had a situation in which large areas of Australia did not provide us with a competitive market for the delivery of employment services. I remember a couple of years ago it was being suggested that that may end up being the case, which was why you would need Employment National as the provider of last resort. I think our experience now, after Job Network 2, is that in the vast majority of employment service areas

there is very high level of competition. In most instances, as I would remember, there were at least twice the number of tenderers as were actually able to win the contract and often significantly more.

Mr COX—Can I ask you two questions about that, since you made the decision or are ultimately responsible for the decision. I know that you are not responsible for Employment National or for the money that has been put into it, but more than $100 million of taxpayers' money has probably been lost in it. What was the reason that it failed? Or why did you choose not to give it the business?

Dr Shergold—First of all, I do not think that one would want to accept the proposition about the large amount of taxpayers' funds that have been lost in Employment National because it is clear from the position put by government that that is not the case.

In terms of why Employment National failed, that is something that I, as the decision maker, can talk about and will do so with some care. It was essentially on the basis that although they were very effective and had high performance in terms of job matching—which, if you think about it, was the old CES work—they did not have good relative performance in terms of intensive assistance. Intensive assistance is of course the high budget end of the Job Network. They also had some problems with quality control in terms of the tenders they provided. That meant that some of the tenders did not conform, and they set conditions on their tender, as all providers were allowed to do. For example, they set a condition that unless they got a certain amount of work in a region they did not want that work at all. When they did not get that amount of work, even though they may have won business otherwise, by their own condition they excluded themselves from it. So, on the basis of performance in intensive assistance, conformance and the conditions that they themselves set, the outcome from the tender process was that while they increased their share of job matching business they significantly lost their share of intensive assistance business.

Mr COX—There is one other issue that has been raised with me, and that is the question of competitive neutrality, since some of the organisations that were successful were charitable or non-profit organisations. They certainly operate under different commercial imperatives but they also operate, at least at the moment, under slightly different tax situations. Was there any effort, given that they were relying effectively on some Commonwealth tax expenditures, to equalise their situation vis-a-vis the purely commercial provider?

Dr Shergold—No, the competitive neutrality framework required us to look at the prices at which organisations tendered, taking into account what they anticipated to be the impact, for example, of the goods and services tax and the reduction in wholesale sales tax. They tendered on the basis of post new tax system prices, and that was the basis on which decisions were made. I think it would be too simplistic to suggest that non-profit organisations are necessarily at a competitive advantage, particularly in terms of what the commercial part of their operations is. While it is indeed true that some of the non-profit organisations won a greater share of business, so did a number of very important private sector providers. Indeed, they increased their share of the market almost exactly. It was the public sector provider that shrank. The relative strength of non-profit organisations and private sector organisations is almost equal in Job Network 2.

Mr COX—Thank you.

Senator HOGG—Who determines the commercial-in-confidence or confidentiality, in your view? What criteria should they use? If there is to be some form of commercial-in-confidence or confidentiality given to certain matters, when does that lapse? In other words, when would it be able to be tested in the public arena?

Mr McMillan—We are looking at two separate sets of information here. One set of information is the information that the tenderers would have provided when they tendered. That is covered by the confidentiality provisions in the *Employment services request for tender 1999*, and those provisions continue in effect. The fact that the tender is concluded does not mean that we can publish anything which they gave us in confidence. That is the point. If they have nominated that the material is in confidence and we have accepted it accordingly, then it is to be treated by us as in confidence.

Senator HOGG—In effect, you then become the arbiter based on their demand that something be commercial-in-confidence. There is no independent arbiter. Should there be?

Mr McMillan—That depends upon the circumstances. It may be that a member of the public will seek access to some of this information under the Freedom of Information Act 1982. That is in our possession. What we would normally do in those circumstances is decline to give access on the grounds that the documents are exempt under the Freedom of Information Act because they are provided to us in confidence. There may be other grounds for exemption. In the event that the applicant for the material takes the matter further, then that would be arbitrated. Indeed, we have a particular case about that topic current at the moment.

The second point, and it may be of some assistance in relation to the earlier discussion about exchange of pricing information, is that in the current employment services contract—and I will give the committee the reference to this if it is of assistance—we have provided for our capacity to publish any information that we have concerning the provider's performance as a provider of employment services. That is clause 11. It is on the basis of that agreement that the NRMA rating to which the secretary referred is published. However, 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.

In those circumstances, in answer to your question, if some particular piece of commercial information that was confidential to the Commonwealth was desired to be published, it would be open to the Commonwealth to decide whether to give permission to do that. Likewise, if the Commonwealth wanted to publish a Job Network member's confidential information, then it would be open to the Job Network member to give permission. I think that answers your question. It is in effect the owner of the information that decides its confidential nature, and that is what we have endeavoured to cover in the contract.

May I perhaps make one other point, although I do not want to embark on the discussion of this, but exchanges of pricing information may have a number of different purposes, and I

would assume that relates to your issue about whether the Job Network members could exchange information. The first thing would be to determine that that was information which they and not we held to be confidential, and of course the purpose for which they might be doing that might be of interest under the Trade Practices Act 1974, but I am not sure I want to get into that.

CHAIRMAN—Are you saying that under the terms of that contract for Job Network 2 that anything the contractor decides is confidential is confidential?

Mr McMillan—Yes, indeed.

Dr Shergold—Other than the particular clause which is contained in the contract in terms of the public release of the outcome information on performance.

Senator HOGG—So in effect you can construct a contract which puts in a whole range of confidentiality things which will exclude it from the purview of the parliament.

Mr McMillan—Senator, I am not sure that I agree with that. The contract covers material that is confidential. If the material is confidential, we say in the contract how it is to—

Senator HOGG—My worry about it is who determines it is confidential. That is my worry.

CHAIRMAN—That is the issue.

Senator HOGG—And the criteria by which it is determined as being confidential.

Mr McMillan—That is, as I said earlier, a matter for the owner of the information.

CHAIRMAN—Under your contract.

Senator HOGG—It is excluded.

Mr McMillan—It is for the owner of the information generally. In the event that the Commonwealth—

CHAIRMAN—In terms of the contract that you are letting. Not all contracts, with respect, Mr McMillan.

Dr Shergold—But the contract, let me repeat, which is the public statement of government policy.

Mr COX—So it is the government's policy that the government will not show its information and the contractor will not show theirs, so it is a little government—

Dr Shergold—What I am saying is that the request for tender document is itself a reflection of the government policy in regard to this tender.

Mr McMillan—Exactly. Perhaps I should also point out that the same policy is reflected in the Freedom of Information Act. In the event that something is confidential and is in the possession of government, it is exempt from production under the Freedom of Information Act. It is not that, because of this contract, we have determined that there is a range of information that will be confidential. Rather, I am making the point that we have information that is confidential. Some of it is confidential to us, the Commonwealth. Some of it is confidential to people with whom we have a contractual relationship. This contract asks: what can be done about it? To take a hypothetical situation, this committee may ask for a particular piece of information that in our hands was confidential. Under the contract, we could ask whether we had permission to give that away, to eliminate the confidentiality, on particular conditions. Maybe that would be agreed; maybe it would not. That is a question that arises whenever a question of production of confidential information arises.

CHAIRMAN—So the contractor can decide what is confidential and, if an issue arises that concerns this committee about public accountability, the contractor could then evade scrutiny by claiming confidentiality?

Dr Shergold—I am not sure I would put it in that way.

CHAIRMAN—I am quite certain I just did!

Senator HOGG—I think it was very well said, too. Who determines what goes on around here—the parliament or those contractors?

CHAIRMAN—We are finding out.

Dr Shergold—The decisions are made by the public service, the policy which sets the framework for the tender is decided by government—the executive—and parliament wishes to assure itself of accountability. In this instance, I think the level of accountability with regard to Job Network is quite unprecedented—the fact that for different providers you are now able to see exactly the outcomes that are being achieved.

Senator HOGG—With the greatest of respect, I do not care what you think. I care about what we have to do in our elected role as politicians to ensure transparency of the whole process. It is not a matter of what you think, with the greatest of respect. It is a matter of what we have available to us and what we should have available to us. What has been done, you cannot undo, but it leaves a chill in my spine that you are saying these things to the committee.

Dr Shergold—It is absolutely not my responsibility to tell you what can and cannot be seen. The contract is set by government policy. It is government policy that sets it and, on that basis, there are certain requirements in terms of commercial-in-confidence.

Mr COX—So Peter Reith has determined this level of commercial confidentiality?

Dr Shergold—I would not describe the government simply in terms of the minister. The minister is part of a collective. That is how governments do it.

Mr COX—So it is a collective conspiracy?

Senator GIBSON—Dr Shergold, isn't it true that in any commercial tendering process, be it in the private sector or with the government, the prices that people tender are never made public because it gives people an unfair advantage for the next round?

Dr Shergold—That is entirely the case. The government's policy in terms of having a competitive Job Network would be significantly undermined. Many of the providers who have presently tendered would be deterred by the fact that what would normally be commercial-in-confidence information would in this instance not be treated as commercial-in-confidence.

Senator GIBSON—Well, that is the normal commercial world.

Ms GILLARD—But the confidentiality clause that has just been read to us is not limited to the question of price, is it? It protects contractor information other than price if the contractor defines that information as confidential.

Dr Shergold—It protects the basis on which someone has tendered for business, and that would be the normal commercial arrangement. What is different is that we wanted to ensure that, when tenderers tendered, they knew that what might otherwise have been commercial-in-confidence information—for example, the outcomes that they were achieving—was in fact explicitly available to be made public. That is why the first clause that Mr McMillan referred to is included in the contract.

CHAIRMAN—We thank you for your submission and for your information today.

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

That documents presented by the Department of Employment, Workplace Relations and Small Business be taken as evidence and included in the committee's records as an exhibit.

Dr Shergold—Chairman, can I take it that it is your view that, following my discussion with the minister, the committee would find it helpful if the probity review undertaken of Job Network be made available?

CHAIRMAN—No, I was only asking as a matter of principle—that was all. It was not a specific question, Dr Shergold.

[3.48 p.m.]

SEDGWICK, Mr Stephen Thomas, Secretary, Department of Education, Training and Youth Affairs

BURMESTER, Mr William Peter, First Assistant Secretary, Corporate Services Division, Department of Education, Training and Youth Affairs

KRIZ, Mr George Jiri, Chief Lawyer, Legal, Business Assurance and Investigations Branch, Department of Education, Training and Youth Affairs

CHAIRMAN—We have received your submission, for which we thank you. Do you have a brief opening statement you would like to make?

Mr Sedgwick—No, we are happy to take questions.

CHAIRMAN—One of the things this committee is interested in—and the Auditor-General constantly talks about—is risk management. You discuss risk management in your submission. We understand—I think we do—that, in the devolved market in which we find ourselves, the Commonwealth is operating differently today from how it might have been 20 years ago when almost all services were in-house and there was a very risk adverse nature and enough personnel and procedures to try to mitigate risk altogether. To what extent do this committee and committees like this, including Senate estimates, impinge on risk taking as part of the risk management process with our procedures in public scrutiny?

Mr Sedgwick—That is a fascinating question, Chairman. Thank you very much. This is an old one that I think we have had in other contexts when I did something else. There is a lot that you can do to encourage risk aversion in the public service just as there is a lot that you can do to encourage proper risk management in the public service. By 'you' I mean the whole of the parliamentary process. In circumstances in which we have an assessment of issues and performance which takes account of risk and reflects on whether risk management procedures were properly followed and acknowledges that from time to time something will go wrong because that is the nature of risk management, if the committee acknowledged that there was a risk and it went wrong but it appears to have been managed properly and it was 'one of those things', then the committee has got great potential to reinforce a positive approach to risk management. If the approach is that nothing should ever go wrong at any time, then the committee will reinforce risk aversion. It is simply a question then as to what taxpayers are prepared to pay for, what the cost of that might be and what its consequences are.

CHAIRMAN—We did have something to say about Pacific Cruise Lines Ltd.

Mr Sedgwick—Indeed.

CHAIRMAN—You would not find that that had been inappropriate?

Mr Sedgwick—This department no longer has responsibility for that sort of function.

CHAIRMAN—But you did then?

Mr Sedgwick—Yes. Our response in those circumstances was to say that there were a couple of risks that were not managed as well as they should have been, and we acknowledged that when we came here. Both you and the ANAO were gracious enough to acknowledge that, and that does help in terms of the way we manage things.

CHAIRMAN—To what extent do you use internal audit procedures to manage your risks and to make sure internally, to the best that you can without overexpending Commonwealth funds, that procedures follow probity and ethics and to try and mitigate fraud and that sort of thing?

Mr Sedgwick—That is a many layered onion. The first point of responsibility for the management of risk is the line manager. When we are dealing with a program, it is the line manager's responsibility to correctly articulate what the risks might be and to establish a risk management plan in respect of that. Our audit people and the business assurance people that Mr Kriz represents are able to assist in those processes. We have a compliance regime which requires every program manager to submit their risk management plan, their fraud control plans and all of those things to a central area in the department so that we have got a central check that the thing is being done. Our audit process at this point is advisory.

In the process, though, of conducting their own auditing activity in respect of the financial accounts and, at times, dealing with the evaluation of the programs, our audit people do have the capacity to check to see whether or not the procedures that had been identified in the risk management framework as being appropriate to manage the risks are actually being carried out. So they and our business assurance people are available at the beginning for the front end process but they are not responsible. It is the line manager who is actually responsible for making the decision. We have a compliance process whereby the line manager needs to report centrally about what they are doing in respect of the management of risk, and then there is always the capacity for our audit people to check on behaviour.

CHAIRMAN—Would Mr Kriz like to add to that?

Mr Kriz—No. I think that explains it broadly. There was one additional issue. In relation to fraud risk, we do have a bit more stringent central control on managing fraud risk—the possibility of theft of Commonwealth funds as opposed to lack of proper delivery, if you like. We do follow up, without being asked by the line areas, on their compliance with the risk assessments which they prepare and which we clear at the front end. We actually do that and we report to the audit and fraud committee which has external members on it—external to the department and external to the Public Service. We report our findings to that committee and the line managers are aware of that. So we are basically going in a bit deeper in relation to fraud risk.

CHAIRMAN—When you start to structure a new contract, in other words before the tender process and before you have got a line manager and all that sort of stuff, is it at senior manager level that you determine what areas of the contract might be subject to risk and what sorts of risks, and structure the contract accordingly?

Mr Sedgwick—The process you follow will depend on the nature of the contract, obviously. If you are dealing with something that is big, new and complicated, the project team which is working this policy framework up would typically consider the policy risk in working out what the policy framework should be. As you are moving into implementation, as you are going away from the broad structure of the policy framework that the contract is trying to implement, you are then going into a lot of operational kinds of stuff about what the risks are in designing a contract that enables us to deliver the policy framework that we are actually seeking. It is at that point that your policy advisory function, your program managers, become involved in the process of identifying what the risks might be.

Again, depending on what the nature of the thing is, you figure out whether you need to have something other than the standard contract—we use a lot of standard contracts in the department—how you write your policy guidelines, how you design the monitoring framework to go with the contractual framework, what kind of performance information you would want, how often you would want it and what kind of follow-up it would have in the field—all those kinds of things. When you are dealing with the nitty-gritty of implementation of a contractual framework, it is built in at the point when you are trying to figure out basically what it is that you are tendering.

CHAIRMAN—You said you use a lot of standard contracts.

Mr Sedgwick—We do.

CHAIRMAN—Do those get discussed with the contractor supply base that you deal with or might potentially deal with?

Mr Sedgwick—Again, it depends on what the contract is. The way that the standard contract tends to work is that there is a central core which is fairly well the department's standard terms, and then there is a series of schedules to the contract which have got the detail of what this particular contract is about: this is a contract for the delivery of a report about X by when, with payment schedules according to certain dates on the one hand; or it is a contract to provide services to young people in schools in respect of careers information, or whatever it might be. So it is in the design of the schedules that the tailoring of the management framework and the deliverables would be worked through. The extent to which they are negotiated between the contractor and ourselves as opposed to simply being imposed depends entirely on the circumstances of the case. If it is something like the New Apprenticeships contract, for example, where somebody is being contracted to provide a certain range of services, those services are specified. There is a tender and you are contracted to provide certain levels of service in certain places, so it is not a negotiation. In others, where you are dealing with a report, you may have a bit of conversation about deadlines and quality and what happens if we disagree and all that kind of stuff. So it is horses for courses.

CHAIRMAN—Do you still build buildings?

Mr Sedgwick—No, we lease everything, I think.

Mr Burmester—There is a small amount of refurbishment and refit that we undertake, but it is fairly small.

CHAIRMAN—The reason I ask is that some of the people in the private sector who have given us submissions have talked a bit about their view that some Commonwealth departments are attempting to mitigate risk by transferring all the risk to the contractor, leaving the contractor exposed, and perhaps the Commonwealth paying more money for contracts than if the risk were shared more equitably. How do you approach that issue?

Mr Sedgwick—I think it is a general issue. If you provide the service in-house, you still bear the risk. It is internalised. I suspect we have actually got better at identifying and managing risks in the environment in which we work at the moment than when we did a lot of these things in-house, because we tended to manage risk when it occurred rather than attempt to plan and manage it up-front. You are basically making a judgment about the best place to manage the risk. There is a likelihood that, if you put the risk with the party that has got the best capacity to manage it, you will minimise the cost of managing it. It is not certain—it depends on the market in which you work—whereas in the old days we just assumed that we could manage all the risk ourselves. Again, there are no black-and-white answers on that.

Mr COX—While we are close to that comment that the chairman made about building buildings and leasing them, I note that your lease bill for a little over four years is about $167 million. Is that something that has been devolved to you or a policy decision that you will lease buildings?

Mr Sedgwick—We now lease rather lower numbers. If you have got four years worth of numbers, you have obviously got the CES in those numbers.

Mr COX—Yes.

Mr Sedgwick—We are now down to—what is it?

Mr Burmester—I think it is about 56 separate leases, separate locations. The way the leases are managed is through a single real estate contract, with one company that arranges the leases, renewals and so forth managing the properties.

Mr Sedgwick—And we tend to lease typically outside Canberra—we are very small at the bulk of these places. We have got two buildings in Canberra, from recollection. The stuff outside Canberra can be as low as a one- or a two-person office, so we have got parts of space in other complexes. For us it is an efficient option.

Mr COX—So the main bulk of your leasing costs is your headquarters in Canberra?

Mr Sedgwick—Should be.

Mr Burmester—I have not got this year's figures.

Mr COX—Would you have the option to buy it if you wanted to or is it a government decision that you will lease it?

Mr Sedgwick—I am not sure I know the answer to that. We are certainly in leased premises. I have forgotten what the government framework is now. We will look into it and give you an answer, if you like.

Mr COX—Thank you, and if it is possible to make an estimate of what it would cost to own it that would be helpful.

Mr Sedgwick—That is an imponderable, I think.

Mr COX—I have never seen a lease arrangement that was cheaper than the government continuing to own a property that it was going to need for eternity.

Mr Sedgwick—I am not aware that we are in a sale lease-back arrangement, actually. I think we are in a straight lease.

Mr Burmester—The Canberra buildings were never owned by the department; they were leased from their construction.

Mr COX—You own the old White Industries buildings?

Mr Burmester—No, we are in Mort Street; 14 and 16 are now our national office leases.

Mr Sedgwick—The attachment that you derive your $167 million figure from: I have just been informed there is a footnote, two, to that attachment which sets down the ongoing DETYA component of it, which is $16.7 million basically a year, by the look of that.

Mr Kriz—It is footnote 2 which should be in the submission, just under the table.

Mr Sedgwick—So we are reasonably small scale.

Mr COX—So it is not a big issue for you.

Mr Sedgwick—Yes.

Ms GILLARD—One of the issues before this inquiry has been the question of training and skill level in terms of staff that manage contracts. I was wondering if you could tell us how your department ensures that there are appropriate skill levels. To give you a bit of background about that, this committee recommended in an earlier inquiry that the decision made in a Commonwealth procurement circular to change from mandatory to best practice the requirement that all persons undertaking procurement functions meet appropriate Commonwealth procurement standards should be reversed immediately. We took that view in an earlier inquiry. I would be interested to see if you have any comments on that policy shift from mandatory to best practice.

Mr Sedgwick—Our business these days is heavily dominated by contract management functions. It is simply not feasible for us to have a central cell that does all of the contract management functions; we simply cannot work that way. So our approach has been to say that risk management expertise and contract management expertise, procurement in the broad, are a core function of a manager in a department. We have set about trying to create a set of cultural—legalistic is the wrong word—expectations and a set of requirements on the way that managers work that require them to have that range of skills. We have supported that with a training environment that has quite deliberately gone out to provide risk management and contract management training, for example, for a larger number of people. In the last 18 months to two years we have had 500 people go through both sets of training. We have modelled some of that behaviour as well.

If you take the risk management stuff, we manage risks at three levels in the organisation—the corporate level, the division level and the level of the project—so our highest level decision making body in the department went through the same training process and with the same outputs in terms of the risk management plan for the department at its highest levels, as did the line contract manager. We believe that we need to continue to support line managers in that function by providing that breadth of training experience in procurement and contract management and risk management. We back it up with manuals that are available both in hard copy and on line. We have a bunch of trained guerillas whose job is to go around the place and spread the word, with every expectation that in the event that we discover pockets that need to be sharpened up the message will be delivered and reinforced pretty quickly. So we are pretty serious about it. That does not mean that we will never have a case where something goes wrong; that is just not life. But if this is our core business—or a very substantial element of our core business—then we have to make sure that our people are properly supported. That sort of answers your question in a backhanded way, I think.

CHAIRMAN—On page 13 of your submission you indicated that the department's standard contracts contain a clause which allows the Auditor-General access to the records and premises of contractors. Do all of your contracts contain that standard clause?

Mr Sedgwick—As far as I am aware.

Mr Kriz—Yes, we operate on the basis that all line areas have to use the standard contracts or they have to come to my area, and I or one of the other lawyers in the place works up a contract for them, or we get one of the panel firms that we have to develop that contract. This will be one of the standard things that are put in now.

CHAIRMAN—Have you had any resistance to that clause from those that tender to you?

Mr Kriz—None that I am aware of. I might mention that there would have been an ability under our contracts, even before we put this provision in, to in fact allow the ANAO in to the premises in any event, because the secretary could always authorise an officer from the ANAO to enter premises. We have put it in basically to make it clearer to the contractors and put them on notice that the ANAO does have this ability and, hopefully, to encourage greater compliance and have less of a problem with people trying to rip off the Commonwealth.

CHAIRMAN—You might not be aware that in an earlier report this committee did recommend that provisions of access be legislated; that then would not cause you or your contractors any problem?

Mr Kriz—No. We have it in there now. I believe that it is a possibility that the ANAO has that power now, in any event, under their legislation. That is another avenue that would be available now, but that is sort of beside the point because what we are trying to do is to be up-front with our contractors. We want to make it clear and put it within the contract: nobody can be under any misapprehension that they have not been warned and that we are serious about ensuring that money does not disappear.

Mr COX—With the schools funding, do you actually provide that under contractual arrangements or just as grants?

Mr Sedgwick—The vast bulk of it is grants. I need to test with some colleagues this statement, but there are some cases where there is more of a contractual character in it. If you have got some curriculum material that is being prepared or something of that kind and you are using the school system to do some of the work, then some of the money which appears under the school's outcome may in fact have been contracted; but the vast bulk of it is grant money.

Mr COX—Would that be Civics? What else would you be preparing?

Mr Sedgwick—Civics, or maybe even some of the literacy stuff; and strategic results projects, for example—things where a school or a group of schools will have made an application to trial some way of being able to teach kids, and we would have a contract in that context. I think that is all under the school's outcome.

Mr COX—So there is a capacity to bypass the state school systems in terms of funding, by using contracts direct with schools? Or would you do it with an education department?

Mr Sedgwick—The kinds of things I am talking about are relatively small-scale stuff—a couple of hundred thousand dollars to trial an approach to literacy for indigenous parents—so I do not know whether formally it is a contract or an MOU or whether a government school has even got a contractual capacity; I am not sure of that. But we do not use it for general funding arrangements: we just use it for doing particular things.

CHAIRMAN—Thank you very much for your submission and thank you for your responses.

[4.15 p.m.]

ALLEN, Mr Rodney John, Finance and Supply Manager, Australian Antarctic Division, Department of the Environment and Heritage

ALLESTER, Ms Josette Mary, Director, Cash Management and Procurement Section, Department of the Environment and Heritage

GORDON, Ms Lesley, Assistant Director, Management, Bureau of Meteorology, Department of the Environment and Heritage

McKINLAY, Mr Andrew, Assistant Secretary, Finance Branch, Department of the Environment and Heritage

CHAIRMAN—Welcome. Thank you very much for your submission and for coming today. Would you by any chance have a brief opening statement, or shall we start asking you our penetrating questions?

Mr McKinlay—I have a brief opening statement. As explained in our submission of 25 November, the department is split into three distinct operational areas, each with its own management structure. They are the department's Canberra based operations, the Antarctic Division and the Bureau of Meteorology. I am the general spokesman for the department and will be specifically responding on behalf of the Canberra based elements. Mr Allen will be speaking on behalf of the Antarctic Division, and Ms Gordon will be speaking on behalf of the Bureau of Meteorology. Ms Allester is here as our technical expert.

CHAIRMAN—Thank you. One of the issues we are interested in is the degree to which departments and agencies use standard terms and conditions of contract. Could you tell us whether you do and the extent to which you do? Does that occur across the department and your agencies or is it localised?

Mr McKinlay—We generally across the entire department use standard form contracts as a preferred method. Basically, it gets you a legally cleared contract that is templated and keeps you out of difficulties. I think we all have legal areas. If an area wants to deviate at all from the standard form contract, they need to clear it through the legal areas.

CHAIRMAN—Are the people who contract to you happy enough with the terms and conditions generally? Do you ever discuss it with them?

Mr McKinlay—Generally, they are happy with them. There are exceptions to that. Some of the larger legal firms have wanted to look at some of the clauses of the contract and vary them around the edges. There have been some consultancies where they have asked us to vary some of the terms.

CHAIRMAN—Some who have responded to this inquiry have stated that Commonwealth departments and agencies are doing a very good job of trying to transfer all risk to the private sector. As we become more and more devolved, where work used to be done in-house 20 years ago under a very risk averse environment—so I am advised; I was not here—and probably heaps was spent in order to make sure that outcomes were exactly what was wanted, today it is a more devolved environment. I guess when we talk about risk management and ANAO, we expect you to take risks because we understand that that is the nature of the business. Do you attempt to transfer all the risk to the contractor, or do you apportion it?

Mr McKinlay—No, I think it is fair to say that in our contracts we apportion it. We realise that if we transfer it we pay through the nose for that. We follow a risk management philosophy in the department. We require our managers to follow a risk management approach in developing their contracts, and we have put risk management guidelines on our intranet to help them do that. The basic philosophy is that the party in the best position to control the risk should wear the risk.

CHAIRMAN—Then to what extent do committees like our committee and Senate estimates committees make you more risk averse by intently questioning you when there is a hiccup?

Mr McKinlay—I don't think we have had a major hiccup in our recent history. So we have not had that unfortunate experience. At the moment, we are in a risk management frame of mind.

CHAIRMAN—Do you build any buildings?

Mr McKinlay—No, we do not. Antarctic Division has built some buildings.

Mr Allen—We have built buildings, but not in recent times—during the rebuilding program of our Antarctic stations, but that was when there was actually a government agency doing that.

Mr McKinlay—And the Bureau of Meteorology builds huts on little plots of land in the middle of nowhere, which contain bits of equipment, I understand.

Ms Gordon—We do. Also, we have some buildings at airports for which—when I say 'we build'—we have a contract management arrangement in place, outsourced, where the buildings are built for us. In that case, we look at what is a reasonable risk management strategy which would include the company which manages the contract on our behalf, the project manager, and also the program manager within the bureau. So I guess it is a value for money judgment as to where the risk should best be managed and in practical terms who has the best capability to minimise any risks that are involved in a particular project.

CHAIRMAN—Those are relatively small projects in a dollar order of magnitude?

Ms Gordon—I would have to take that on notice, but a met office at an airport—I guess it is a matter of what you think is relatively small—is not a hut.

Mr McKinlay—You are not talking about a major office structure.

Ms Gordon—No, certainly not.

CHAIRMAN—One million dollars, $10 million dollars?

Ms Gordon—Nothing of that order, no.

CHAIRMAN—Then I will continue this line of questioning. In your standard contract, do you advise your contractors that the contractor records and/or premises can be audited by the Auditor-General?

Mr McKinlay—It varies from contract to contract. Generally in our contracts, we specify that officers authorised by the secretary can enter the premises, leaving it that broad. There are some specific contracts, for instance, the larger outsourcing contracts where we are quite specific on the Auditor-General. It is all a matter of making it clear.

CHAIRMAN—There is clearly a recommendation from—

Mr McKinlay—It is from the Auditor-General. The Auditor-General wrote to secretaries, I understand, asking them with outsourcing contracts to include such a clause. We do so with our outsourcing contracts.

CHAIRMAN—So which contracts do not yet?

Mr McKinlay—There is one that springs to mind in terms of the outsourcing contracts and that is an IT training contract which we have whereby that requires that all records are held by the department. We did not see the need for such a clause.

CHAIRMAN—I understand that. Have you had any resistance from any of your contractors because of the clauses?

Mr McKinlay—No.

CHAIRMAN—So you do not think your prices have escalated because the Auditor-General might in rare circumstances want to have a look at the books?

Mr McKinlay—I truly believe that the price would not be materially affected at all.

Mr COX—With respect to the contract you referred to where it is an officer authorised by the secretary, was there any particular reason for choosing that configuration?

Mr McKinlay—I suspect it might have been either before or just after the Auditor-General's letter. In more recent contracts, we have been a bit more explicit.

Mr COX—I am not suggesting any malfeasance on your department's part but one of our concerns about that would be that it appears that some departments—or at least one—find it convenient to have the audit trail stop at the contractor and, hypothetically, it would be

convenient in some circumstances for somebody to thwart the Auditor-General by not giving them that authority.

Mr McKinlay—I would not see that we would be so motivated. I think that would make our life a lot harder in this environment so I really do not see the incentive to do that. There is no skin off our nose to allow the heat of the Auditor-General to focus on the contractor.

CHAIRMAN—On page 3 of your submission you commented in respect of your Canberra office:

Much of the expertise has been gained through experience rather than formal training.

Do you then consider that on the job training, rather than formal qualifications, in terms of purchasing and contract management is adequate?

Mr McKinlay—No, far from it. What I was trying to get at there was that we have had the officers for a long time; they have a wealth of experience behind them. I believe that you have two types of qualifications in this world: you have experience and you have academically acquired qualifications. Two of the officers had virtually gone through the formal accreditation process. We expose the officers regularly to formal training. For instance, contract management is the current one that we are focusing on. So, no, we do not diminish the learning side of our staff skills at all.

CHAIRMAN—One of the things that the Auditor talks to us about—and this is included in our terms of reference for the inquiry—is retention or loss of corporate memory within Commonwealth departments as is happening increasingly where operations are sold or departments outsource portions of their work. Do you believe that, with the Antarctic Division and the Bureau of Meteorology in particular, you have retained within the department the appropriate technical skills and the appropriate background in corporate memory and operation of the department to make sure, for instance, that in an IT contract you are getting the kinds of outcomes that you really need to be able to manage those two operations?

Mr McKinlay—I think that what both the Antarctic Division and the bureau have outsourced to date has not been from their fundamental skills base, so I think the experience is ahead of us rather than behind us. We in department central have just moved on to the group 8 IT contract and we are in the transition stage there. I understand the Antarctic Division and the Bureau of Meteorology are in group 9, which is prospective, so it is certainly something that we are aware of and will need to manage.

CHAIRMAN—I thank you very much for your submission and for coming here to discuss the issues with us today.

Resolved (on motion by **Mr Cox**):

That this committee authorises publication, including publication on the parliamentary database, of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 4.28 p.m.