

Senate report into the Order for production of documents on university finances

Introduction

1.1 For some time, the Senate has harboured concerns about the approach of the Government to the timely provision of information as requested by the Parliament. These concerns go to the propensity of government ministers to respond to requests, in particular to requests for specific financial and other data related to Commonwealth expenditure, by citing the principle of ‘commercial in confidence’. On this basis, requests are denied.

1.2 Senate standing order 164 can be invoked in an attempt to have documents tabled. The standing order provides for the Senate to make an order for documents to be produced by the Leader of the Government and laid on the table. The documents so produced are known as returns to order. This report arises from the Government’s refusal so far to comply with this order.

1.3 *Odgers Australian Senate Practice* says that:

Refusals by the government to comply with an order have been rare. Refusal is usually based on the argument that to produce the document would not be in the public interest.¹

1.4 However, in the past, ministers have offered several other grounds. These have included an appeal to confidentiality and, more recently, under the current government, the resort to the concept ‘commercial-in-confidence’ has become increasingly common.

1.5 In 1999, the government refused to produce information on higher education funding, citing three grounds including ‘commercial confidentiality’. The Clerk’s advice questioned the grounds put forward, saying that they were ‘over-extended and confused the claim’.²

1.6 It is open to the Senate to take various forms of action in circumstances where a minister refuses to provide documents in response to an order. The Senate may, if it so determines, accept the justification given. Or the Senate may censure the minister. At the most extreme, the Senate could treat a refusal to provide documents as contempt of the Senate³.

1.7 While this inquiry deals specifically with a particular instance where the appeal to confidentiality has been invoked to avoid the provision of documents to the Parliament, there is a more general issue at stake: the grounds on which the Senate

¹ *Odgers Australian Senate Practice*, 10th edition, p.456

² *ibid.*, p.458

³ *ibid.*, p.460

finds it acceptable for a Minister to refuse to comply with an order of the Senate. This is a question relating to the concept of executive privilege.

1.8 In the Senate Standing Orders, the principle of confidentiality is mentioned as a possible justification for refusing to table a document only when a minister is quoting orally from a particular document, and an order is made for the document to be tabled (Senate Standing Order 168(1)). Standing Order 164, which deals specifically with conditions applying to Returns to Order, does not specify the grounds on which a minister may refuse to comply. Precedent in this area suggests, however, that the Senate is not usually satisfied with an appeal to confidentiality *per se*. On the question of commercial grounds (as opposed to confidentiality grounds) for the withholding of documents, Odgers cites an occasion in 2000 when the Senate allowed the withholding of certain material associated with contracts entered into by Telstra, on the basis that the material was ‘genuinely commercially sensitive’.⁴ Odgers does not note any further cases where this reason has been successfully invoked.

1.9 The Government, in refusing to table the information requested in the instance occasioning the current inquiry, also justified its action by referring to the fact that, in collecting the same information from universities, it had made an undertaking to them to maintain confidentiality of the data supplied. There do not appear to be precedents for the Senate accepting as adequate grounds for refusal such undertakings regarding confidentiality.

1.10 Thus it is argued by the Opposition senators that the use of the principle of ‘commercial-in-confidence’, and, secondly, the reference to undertakings to maintain confidentiality of data, are not of themselves acceptable grounds for the Minister’s refusal to table documents as ordered.

1.11 In its refusal to table the information as ordered by the Senate, the Government also cited other grounds. These, too, are worthy of examination.

1.12 One action available to the Senate in these circumstances is to refer the matter of the government’s refusal to comply with the order to a Senate committee. There are precedents in this regard. Because the Senate has become increasingly disturbed by the government’s propensity to cite commercial confidentiality in connection with its own dealings with Commonwealth agencies and Commonwealth-funded agencies and institutions – such as universities – it decided in the case of the current inquiry to refer the matter of such a refusal to the Employment, Workplace Relations and Education References Committee.

Background and key issues

1.13 This inquiry arises from a request of the Senate lodged on 21 August 2002 for a Return to Order of six categories of information.⁵ This information relates to the financial position of Australian universities as assessed by the Department of

⁴ *ibid.*, p.459

⁵ See Appendix 1 – extract from *Journals of the Senate*, 21 August 2002

Education, Science and Training. The Government has refused to provide this information.

1.14 While Senator Ian Campbell, representing the Minister, the Hon Brendan Nelson MP, tabled limited material related to two of the categories of information requested, the Government has refused to release further data on the basis that it would be inappropriate to do so. In a letter to Senator Carr, Dr Peter Shergold, then Secretary of DEST, argued that the information contained in these requests was intended as a basis for policy advice to the Minister, and was not provided by universities in order to comply with legal requirements under the Higher Education Funding Act. He argued, therefore, that there was ‘no obligation in the Act to treat any information provided as public or to disclose it to the Parliament.’ He further stated that information in the documents requested by the Senate was provided by universities to DEST on the basis that confidentiality would be observed, and in return the Department ‘also makes it clear to the universities that the Department’s own financial analysis of this data will be regarded as commercial in confidence.’⁶

1.15 In response to the Government’s refusal to table further information, the matter was referred to the Senate Employment, Workplace Relations and Education References Committee on 18 September 2002.

1.16 While there are no specific terms of reference for this inquiry, the key issues to be addressed relate to:

- the financial standing of Australian universities, insofar as this can be gathered from information before the Inquiry; and
- whether it is appropriate and justifiable for Government to withhold the information contained within this request, and whether financial information collected by DEST from universities, and DEST analysis of individual universities’ financial standing and projections on the same, should appropriately be viewed as commercial-in-confidence and withheld from public scrutiny.

1.17 The following sections summarise the information provided to the inquiry in terms of these two key issues.

The financial standing of Australian universities

1.18 The Government has vigorously rejected claims made in the Senate that the university system is in crisis⁷. The submission provided by DEST to this inquiry asserts that the ‘financial performance and financial position of the higher education sector remains sound’. Evidence provided to support this claim points to increased

⁶ Dr Peter Shergold to Senator Kim Carr, 13 September 2002, Attachment A to DEST submission to Senate inquiry. See Appendix 2 to this report.

⁷ See, for instance, Senate Hansard debate Tuesday 21 August 2002, Matters of Urgency: Higher Education Funding.

revenue, positive liquidity, low levels of borrowing (by private sector standards) and a significant level of assets.⁸

1.19 Data for individual universities is not cited to support this claim. Rather, the DEST analysis is based on the aggregation of data for all universities that receive funding under the *Higher Education Funding Act 1988*. The Department does not acknowledge or address any differences between the individual institutions which comprise the higher education sector, beyond stating that the number of universities posting a deficit averaged approximately five per year between 1993 and 2002, and that a deficit alone is not an indicator of a financial crisis.⁹

1.20 The figures published by DEST for each institution (published in statistical publications, such as *Finance 2001: Selected Higher Education Statistics*), and other data collected through the Senate Estimates process, show that the financial strength of individual universities varies substantially.

1.21 As Table 3 (overleaf) shows, three of the 42 institutions for which data is recorded captured nearly half the operating profit of the sector in 2001. Seven universities – Sydney, Melbourne, Queensland, Western Australia, ANU, Monash and UNSW – which were in the top eight in terms of operating result and operating revenue in 2001 had been in that position consistently for the past several years. Not only does a group of the largest and wealthiest universities dominate the sector in terms of financial success, but its position of strength appears to be consolidating. The obverse side of this is that a large number of universities account for only a small percentage of the surplus. A number of institutions operate uncomfortably close to a deficit and some have for a time been in deficit.

Changing cost drivers in higher education

1.22 The funding gap between institutions is linked to emergent cost drivers. The changing environment in which universities operate has demanded substantial investments in capital infrastructure, staffing and commercial activity. For example:

Universities have had to increase their investment in information technology and e-learning environments to meet the learning expectations and needs of students and communities. Rapidly obsolescent technologies increase depreciation costs. According to former DEST Secretary, Dr Peter Shergold, net investment in capital assets – including buildings and IT infrastructure – has increased by \$4.7billion since 1996.¹⁰

1.23 The introduction of the Research Training Scheme, and a concomitant capping of the total funded postgraduate student load, has adversely affected newer universities seeking to grow postgraduate research student capability. Between 1998 and 2002, a total of 455 research student places disappeared from ten universities. The main losers have been newer, regional and outer-metropolitan universities such as

⁸ DEST Submission no. 2, p. 2

⁹ *ibid.*

¹⁰ Peter Shergold, *Financing University Education: an overview*, Address to plenary forum higher education review, 3 October 2002, p.10

University of Western Sydney, University of New England, James Cook University and the University of Canberra. Therefore, in order to maintain critical mass in areas of research excellence, universities are investing in building research capacity from discretionary funds and seeking international research student markets.

1.24 Competition for education and research markets has also increased the need to develop staff capability and attract ‘stars’. This is a substantial cost driver in new universities trying to build critical mass in areas of teaching and research excellence.¹¹

1.25 Since 1996, the indexation of university operating grants has been inadequate and inappropriate. All salary increases have been funded from within universities’ discretionary funding. Indexation of the proportion of operating grants notionally tagged to salaries is pegged to movements in the Safety Net Adjustment: in other words, to the salary movements of the lowest paid workers. David Phillips and Gerald Burke argue that if Average Weekly Earnings increases were applied to the salary component of operating grant indexation, it would have delivered an additional \$500m in 2001.¹² At the same time, the proportion of indexation tagged to infrastructure – measured by the CPI – has not kept pace with cost increases in equipment and library infrastructure caused by the declining value of the Australian dollar. Since October 1996, the Australian dollar has declined relative to the US by 17.6 per cent. It must be remembered, however, that during much of the intervening period the decline was actually much higher, being above 30 per cent.

1.26 The effect of emergent cost drivers is reflected in increased borrowings. Between 1996 and 2001 (latest figure available), sectoral borrowings increased by 121 per cent. According to DEST, this level of borrowings is low by private sector standards, and poses no cause for concern. Unlike the situation in the private sector, the majority of universities’ assets are fixed and directly linked to operating use; and are therefore unable to be realised. Therefore, the actual level of assets against which universities could borrow would be substantially lower than that shown by a straight debt-to-revenue calculation. DEST has not calculated borrowings against realisable assets.¹³ In fact, DEST does not have detailed data on the realisable or liquid assets of either individual universities, or of the system as a whole.

1.27 As is the case for liquidity and operating result, the actual level of borrowings varies substantially across the sector. Table 1 provides detail for 2002, showing that, while eleven public higher education institutions had no external borrowings in that year, a further eleven had external debt exceeding \$20 million. One of them, the University of Melbourne, had accumulated debt of over \$148 million. The committee notes, also, that the sector-wide quantum of external debt more than doubled between

¹¹ A recent review of census data conducted by the *Australian Financial Review* found that, despite increasing casualisation within the sector, there had been a substantial increase in the number of academics on salaries in excess of \$78,000pa, largely due to competition to attract ‘star’ performers.

¹² Gerald Burke and David Phillips, ‘Implications of Changed Indexation Arrangements for the Australian Higher Education System’, unpublished paper, October 2001

¹³ Senate Estimates - Derived from DEST Question E379_03, question asked by Senator Carr, 21 November 2002

1996 and 2002. Some universities, in financially sound circumstances, might be taking advantage of low interest rates to borrow to finance capital works: in the case of others, however, the escalation in borrowing implies that they may be struggling in an increasingly deregulated, market-oriented policy environment.¹⁴

Table 1 – Universities’ external debt, as at 31 December 2002 (\$ 000)

University of Melbourne	148,304
Monash University	83,130
RMIT	50,000
University of Technology, Sydney	40,000
Deakin University	31,812
Edith Cowan University	29,819
Curtin University of Technology	28,198
Griffith University	25,769
La Trobe University	25,513
James Cook University	20,564
University of Notre Dame	20,445
Macquarie University	16,884
University of South Australia	15,000
University of New England	11,171
Australian Catholic University	10,667
Murdoch University	10,256
Victoria University of Technology	7,644
Swinburne University	6,500
University of Wollongong	5,049
University of the Sunshine Coast	4,427
University of Western Sydney	4,077
University of Canberra	4,000
University of Ballarat	3,495
Flinders University	3,090
Northern Territory University	2,358

¹⁴ Senate Estimates - Derived from DEST Question E661_03, question asked by Senator Carr, 13 February 2003

Queensland University of Technology	858
University of Adelaide	100
University of Western Australia	40
Central Queensland University	2
Charles Sturt University	0
Southern Cross University	0
University of New South Wales	0
University of Newcastle	0
University of Sydney	0
University of Queensland	0
University of Southern Qld	0
Australian Maritime College	0
University of Tasmania	0
Australian National University	0
Total	609,172

1.28 A recent report by the firm Standard and Poor's *Australian universities – a credit rating perspective July 2003* notes that, in the authors' view, the credit differentiation between Australian universities is likely to widen as a result of the introduction of the Government's higher education reform package, *Backing Australia's Future*. The report notes:

With fee income becoming a greater proportion of universities' income in recent years. The credit profile within the sector is becoming more diverse, reflecting differences in academic reputation, research base, student demand, and income diversity. The outcome of the federal government's review of higher education announced in May 2003 will give further impetus to these trends. With greater scope to earn more fees from domestic undergraduate students, universities with high reputations and strong student demand will be in a position to boost their financial profile.¹⁵

1.29 The report goes on to point out that much of the financial assets of universities are encumbered or restricted in some way.¹⁶ Standard and Poor's says that it is essentially liquid or realisable assets that should be used in assessing the capacity of an institutions to carry debt. In an answer provided to the EWRE Committee

¹⁵ Standard and Poor's *Australian Universities – a credit rating perspective July 2003*, p.8

¹⁶ *ibid*, pp.15-16

examining the Estimates, the Department essentially admitted that it had little idea of the level of unencumbered financial assets enjoyed by each university.¹⁷

1.30 Between 1997 and 2000, the Commonwealth Government imposed a 6 per cent cut on forward estimates relating to university operating grants. The impact of this decision varied throughout Australia. Because NSW, WA and Queensland at the time had some growth factored into forward estimates, in those states the actual impact of the cuts, in constant dollars, was not as severe as that in states such as Victoria and South Australia, where no allowance for growth had been included. Indeed, in Queensland the impact of a 6 per cent cut on forward estimates left the state with a real increase of 8.85 per cent in operating grants between 1996 and 2001 (albeit much reduced over the growth level previously projected), compared with a real decline in Victoria of 5.48 per cent.¹⁸

Table 2 – Real cut in operating grant value, 1996-2001

	Operating Grant decline 1996 - 2001: %
Victoria	-5.48%
NSW	-1.38%
ACT	-2.56%
NT	-2.16% ¹⁹
Qld	+8.85%
SA	-5.01%
Tas	-5.26%
WA	+2.01%
Multistate	+6.4%
Australia	-2.08%

1.31 To varying degrees, therefore, universities have had to restructure their operations in response to the changing operating and funding environment, although they have done this with little additional support from Government and, in some cases, a real reduction in public funding.

¹⁷ EWRE Hansard, Senate Estimates, 13 February 2003, p 300

¹⁸ DEST Triennium Reports 1996-2002. Percentages are calculated after the conversion of tables to constant 2002 dollars. Derived from NTEU submission to Higher Education at the Crossroads.

¹⁹ This is grossly inflated by increased funding to Batchelor. The cut to NTU is equivalent to – 5.73%

1.32 Even when data is aggregated across the sector, there is evidence that expenditure has risen faster than income. According to data provided through the Senate Estimates process, if operating result and operating expenditure are converted to constant dollars, expenditure can be seen to have increased by 82 per cent, while operating surpluses have fallen by 48 per cent.²⁰

Capturing non-government income

1.33 The funding gap between institutions reflects to some extent their relative capacity to prosper within an increasingly market-driven environment. Publicly available data shows that a relatively small number of universities – mostly clustered within the Group of Eight - capture the lion's share of commercial income. As Table 3 below shows, three of the 42 institutions for which data on revenue was recorded in 2001 captured 25 percent of all fee income. The top three also accounted for 52 per cent of investment income, and 45 per cent of the total profit.

Table 3 – Percentage of non-government revenue won by top three earners²¹

2001	Total sectoral revenue \$	Largest shares (top three)
Fees and charges	2,020,661,000	191,560,000 – UNSW = 9% 161,604,000 – Melbourne = 8% 144,089,000 – Monash = 7% % held by top three = 25%
Investment revenue	302,641,000	60,012,000 – Sydney = 20% 49,233,000 – ANU = 16% 48,710,000 – Melbourne = 16% % held by top three = 52%
Total operating revenue	10,202,101,000	739,923,000 – Sydney = 7% 714,827,000 – Melbourne = 7% 663,421,000 – Monash = 7% % held by top three = 21%
Total operating surpluses	500,356,000	88,791,000 – Sydney = 18% 74,060,000 – Melbourne = 15% 57,907,000 – ANU = 12% % held by top three = 45%

²⁰ Senate Estimates - DEST Question E596_03, question asked by Senator Carr, 13 February 2003.

²¹ Derived from Finance 2001: Selected Higher Education Statistics, DEST, 2003.

1.34 Data received through Senate Estimates shows that while the total amount of cash and investments held within the sector increased from \$4.38 billion in 1999 to \$4.76 billion in 2001, an increase of \$374 million. Melbourne University alone recorded an increase in excess of \$105 million. Meanwhile, cash and investments held by eleven institutions fell.²²

1.35 The number of universities' 'controlled entities' (companies in which a university holds a controlling interest) has increased in recent years, as universities seek to develop stronger lines of commercial activity. However, this is not resulting in consistent increases in income flow. For instance, out of fifty subsidiaries recorded in the Victorian Auditor-General's June 2002 Report on Public Sector Agencies, 27 recorded a loss. Combined surpluses totalled \$24.96 million (including a \$6 million surplus for Victorian College of the Arts), with combined losses totalling \$26.73 million (including a \$7.8 million loss for Monash University Foundation trust, and a \$3.8 million deficit for Melbourne University Private). Some of these losses may be due to recent currency and stock market fluctuations; some to business plans that do not anticipate a break-even result for some years. In institutions with small operating margins, losses can have a significant impact on operating results.

1.36 Even in a large and relatively wealthy institution, substantial losses within controlled entities can have a significant effect on the parent entity and the overall operating result.

Forecasts of institutions' financial health

1.35 The Senate's intention in making its Order was to obtain data crucial to an assessment of the current and future financial health of Australian universities. This information is relevant to the Parliament's understanding and assessment of the Government's proposed reform package for higher education. Nevertheless, no data showing financial projections were provided by the Government to this inquiry. On the other hand, the Minister has acceded to the Senate's request and provided the inquiry with forecast student load figures.

1.36 Fifteen universities provided letters to the inquiry relating to the release of DEST financial projection data. Five universities provided the data requested, with the exception of the minutes of meetings, between the institutions and DEST, where financial projections were discussed.²³ No universities provided, as requested, copies of the minutes of educational profiles meetings.

1.37 The DEST submission states that the projections in question are developed as part of 'a forecasting exercise', but states that 'they are not intended to be, nor does the Department purport them to be, an accurate assessment of the likely future financial position of a university'. The universities' most commonly-expressed

²² Senate Estimates – DEST Question E592_03, Question asked by Senator Carr, 13 February 2003.

²³ University of South Australia, RMIT, Griffith University, Australian National University and University of New South Wales

concern regarding the release of projections of universities' financial standing related to its accuracy.

1.38 The committee believes that the refusal of some universities to provide information on financial projections was probably based more on their reluctance to put inaccurate data into the public domain than actually to withhold the information. Professor Gavin Brown, the Vice-Chancellor of the University of Sydney, for instance, advised that he had no objection to the release of any financial information about the university, including the DEST projections.

1.39 The committee believes, however, that institutions of any kind would be reluctant to publish information about them which they believed to be inaccurate and misleading, perhaps damagingly so. Possibly for this reason other vice-chancellors were rather less sanguine than Professor Brown about the release of their own universities' data. As the Vice-Chancellor of Flinders University stated, material for the financial projections was prepared for the Minister and DEST, but the University disagrees with the projections made by the department on the basis of the information it provided. According to the University, the resultant DEST projections misrepresent the financial position of Flinders.

1.40 A number of other universities implied that the same was true of their respective DEST projections. Professor Roger Dean of the University of Canberra stated: '...we and most other universities do not wish to release the material, largely because the projections involved are grossly inaccurate.' There are implications here for the monitoring and compliance role of DEST and the relationship of trust which should be maintained between DEST, the Minister and the universities.

1.41 While the comments of some vice-chancellors might suggest that DEST financial projections are in some way methodologically flawed, this accusation would presumably be denied by the department. There is, however, consensus between universities and DEST as to the unreliability of DEST financial projections. The absence of agreed and reliable short-term forecasting data raises questions as to the basis of the Government's confidence in the ongoing financial health of the higher education sector. Given that neither DEST nor the government have moved beyond aggregate figures in attesting to the financial health of Australian universities, the basis for such confidence is not known.

Commercial-in-confidence and public disclosure

1.42 It is reasonable to ask that, when the Government claims – as does DEST in its submission to the inquiry – that the sector is 'financially healthy', that it provide access to the information that forms the basis for this judgment.²⁴ This is especially the case at a time when the Government is asking the Parliament and the people to accept major structural reform of the higher education funding system arising from the Commonwealth's Review of Higher Education as set out in Backing Australia's

²⁴ DEST, submission no. 2, p.3

Future – reforms that, if implemented, will affect the financial operations of universities, the governance of universities, and the costs borne by students.²⁵

1.43 However, as previously stated, the Government – through DEST submissions – claims that the information provided by universities which forms the basis of its analysis is provided on a ‘commercial in confidence’ basis: a claim usually restricted to disclosure of private commercial arrangements. This would imply that the Government expects the Senate, and the public, to agree to radical reforms to the funding of universities, and other aspects of the financial environment in which they operate, without any means of testing its claims that the system as a whole is currently financially sound – in terms of its capacity to withstand the effects of the proposed reforms.

1.44 More crucially, while the Government admits that the reforms would lead to differential financial impacts upon individual institutions, it has refused to allow open scrutiny of the current circumstances of individual universities, so that the potential impact of the changes can be assessed.

1.45 Australian universities are in an anomalous position. The National Tertiary Education Union (NTEU) and the Minister, Dr Nelson, both agree, as stated in the Minister’s Discussion Paper, *Higher Education at the Crossroads*, that ‘few countries have higher education systems that are as strongly public as they are in Australia’.²⁶ This is certainly the case if the system is defined in terms of the ratio of private to public universities in Australia. Only two of the 37 institutions operating as universities are recognised as private institutions. The others are, as the Minister’s comment suggests, classed as public universities, established under Acts of Parliament to meet public objectives, and as such they receive the majority of funds allocated under HEFA. As public institutions, universities should be required to make full disclosure in relation to funding issues and their financial circumstances.

1.46 At the same time, the recent report published by the Productivity Commission shows that as a system, Australian higher education is one of the most dependent on private funding in the OECD.²⁷ Only Korea, Japan and the US have a higher proportion of private investment in tertiary education than Australia. While in those countries the proportion of funding derived from public investment grew between 1998 and 1999, in Australia it continued to fall, standing at 52.4 per cent.²⁸

1.47 This neatly illustrates the bind that Australian universities find themselves in: as public institutions receiving public funds they have clear accountabilities to the taxpayer reflected in their governance structures and in state and federal requirements for performance and financial reporting. At the same time, they are dependent on private income and commercial activity to remain viable.

²⁵ See, for instance, *Sydney Morning Herald*, 25 February 2003

²⁶ Brendan Nelson, *Higher Education at the Crossroads*, p. 5, quoted in Submission No 3, NTEU, p.2

²⁷ Reference University Resourcing: Australia in an International Context

²⁸ Senate Estimates - Response to Question E423_03, 22 November 2002

1.48 The importance of private income and commercial activity is one basis for arguing that information relating to universities' financial standing provided by institutions to DEST, and DEST's analysis based on this information, is commercial-in-confidence. Yet there are equally compelling reasons why matters relating to the present and future funding of universities should be revealed. First, because private funding and commercial activity underpin the health of public institutions, it could be argued that the Australian public has a stake in knowing whether such funding is sufficient to maintain the quality and accessibility of education demanded by a progressive nation. It could also be argued that the public has a right to know whether the public funds invested in universities are not being compromised by potentially loss-making commercial activity.

1.49 The Western Australian Auditor-General, in a letter to the inquiry, reiterated the importance of linking substantial public funding to requirements for openness and transparency, stating that:

Where public funds are involved I would suggest that there is a presumption that there should be the fullest possible disclosure and that those making a claim of 'commercial in confidence' carry a heavy burden of proof to overcome that assumption.²⁹

1.50 A further reason for full disclosure of universities' financial information – including forward projections – in the public interest is based on the need for transparency and trust between stakeholders in the sector. If universities and the Commonwealth are perceived to conspire to keep staff, students, the Parliament and the public generally in the dark about these matters, then the grounds for cooperation and support are lacking. Universities can only operate where they enjoy the confidence and respect of the community at large. This argument rests on a general view about the fundamental preconditions for a strong civil society.

1.51 So on what basis might information about universities' funding be legitimately withheld?

1.52 As noted at the outset of this report, *Odgers' Australian Senate Practice* states that the only formally legitimate grounds for not complying with an Order for Return is when the production of such documents would be detrimental to the public interest. Of the eighteen universities which responded to the inquiry regarding the disclosure of financial forecasts, none suggested that complying with this Order would be detrimental to the public interest. Neither has DEST demonstrated that such production would be counter to the public interest: rather, it argues that, for various reasons, it would be inappropriate. One of the reasons for this, according to the DEST submission, is that universities provide this information on a confidential basis.³⁰

1.53 It is not clear how this confidential basis is established. DEST provides no copies of correspondence with universities that makes clear any intention to treat as

²⁹ Letter, WA Auditor-General to Senator Carr: re Senate Inquiry into University Finances, 10 January, 2003

³⁰ Letter Shergold to Carr, see Appendix 2

confidential the financial and other data provided to it as part of the profiles process. Indeed, the documentation sent by DEST to universities requesting profiles-related information makes no comment on the confidentiality or otherwise of the data.³¹

1.54 The DEST claim that universities provide the information on a confidential basis is explicitly contradicted by the letters from a number of vice-chancellors, which state that the release of the data is a matter for the Minister's discretion.³² This implies that these vice-chancellors, at least, do not regard the data as confidential, and nor do they apparently believe that they have provided the information on the basis of a guarantee that it will not be disclosed. The Government's and the Department's argument that information is confidential to the Department and to the institution is not supported by any of the evidence put before the inquiry. On the basis of evidence before the inquiry, the question of who controls release of the data and in whose interests it should remain confidential is not resolved.

1.55 Even if it were to be accepted that the information was indeed provided on a confidential basis, and that the minutes of profiles meetings were similarly subject to confidentiality requirements, questions remain as to the legitimacy of this position; especially given the absence of arguments related to the public interest.

1.56 In its statement of principles on commercial confidentiality and the public interest, the Australasian Council of Auditors-General says that it is possible to distinguish in law and practice between commercial information that should be released and that which should remain confidential for commercial reasons.³³ This distinction reflects several factors:

- the economic cost to the owner of commercial information if it is released, versus community costs if it is not;
- the requirements of management to provide sufficient information to account for the exercise of their stewardship responsibilities;
- the requirements of management to obtain the consent of shareholders where proposed action is outside of the powers delegated to management;
- the voluntary or involuntary nature of the economic relationships to which the commercial information relates; and
- the capacity to keep information secret.

1.57 In the letters provided to the inquiry by 15 vice-chancellors none argue that release of the information would compromise their university's interests, or that the private interest in these matters overrides the public interest. None make reference to an economic cost to the university if such data were to be published. Rather, their

³¹ DEST, documentation provided to universities to assist with collection of data for profiles, 2002.

³² See, for instance, the letter of 1 November 2002 from Professor Gavin Brown to Senator Carr.

³³ Statement of Principles on Commercial Confidentiality and the Public Interest, the Australasian Council of Auditors-General (www.acag.org.au)

arguments relate to possible inaccuracies or to disagreements with the DEST data itself.

1.58 Of these submissions from vice-chancellors, only two explicitly sanction release of the data, although most universities agree in principle to the release of the data as requested, with the exception of minutes of profiles discussions.

1.59 Taken together, these responses contain no evidence that it would be contrary to universities' interests for this material to be tabled in the Parliament, or that there is a conflict between the private and public interests in this data. Where no such case is made, there is no reason to not release data which relates to the viability and financial management of public institutions.

1.60 In the conclusion to its statement on principles on commercial confidentiality and the public interest, the Australasian Council of Auditors-General Statement suggests that concern about the impact of disclosure is frequently misplaced:

Some private and public sector bodies are instinctively apprehensive and protective about the disclosure of any commercial information. But such views often overstate the implied risks to an entity that might be occasioned by the release of commercial data. After-the-event commercial information has significantly less value than commercial information concerning events that have yet to occur. But even where commercial information might have commercial value to others, there are often overriding obligations that require it to be released. This is so for commercial information held in the private sector and, *a fortiori* it applies to the public sector.³⁴

1.61 Auditors-General from New South Wales, Victoria and Western Australia provided letters to the Senate inquiry. All three refer to the use of forward estimates or budget projections for the purpose of checking performance against targets and thereby assuring the continuing financial viability of individual institutions.

Conclusion and recommendations

1.62 In conclusion, the inquiry has not heard any compelling arguments against the public disclosure of universities' forward projections or other financial data. No supportable reasons have been offered for the Government's refusal to provide this information to the Senate. Furthermore, the question of who controls the disclosure or use of such data – the Commonwealth Government that sanctions the development of forward projections, or the universities who provide the data on which it is based – is not clear.

1.63 The committee emphasises that the government's negative response to the Senate's Order in this instance is made in circumstances where major reform of funding arrangements and mechanisms for universities is proposed. The current, and projected, financial viability of each publicly funded university is a matter of direct relevance to debate on this issue. The Senate will be called upon to consider legislation giving effect to the proposed reforms, and it cannot do so responsibly, and

³⁴ *ibid.*

in an informed manner, if it is not in possession of the facts showing where universities currently stand financially, and how the government expects them to fare, taking account of relevant trends and policy decisions, over the next several years.

1.64 The government already possesses the information in a form that could readily be provided: yet it refuses to do so. This represents an abrogation of its responsibility, in a democracy, to facilitate fully informed debate. Without the financial information that has been requested, the Senate would be obliged to vote on the government's legislative proposals in a position of comparative ignorance – where the comparison is one with the situation of the government itself.

Recommendation

1.65 The committee therefore **recommends** that the Senate request the government release the information as specified in the Senate Return to Order. Further, it is recommended that this request be augmented by any more recent data, in the relevant categories of information, that have since become available, in particular actual data, expressed in the same format, for 2002 and 2003.

Senator Kim Carr
Chair

University Finances Sub-committee

Senator Natasha Stott Despoja