The Parliament of the Commonwealth of Australia

Senate
Finance and Public Administration
References Committee

COMMONWEALTH CONTRACTS: A NEW FRAMEWORK FOR ACCOUNTABILITY

FINAL REPORT ON THE INQUIRY INTO THE MECHANISM FOR PROVIDING ACCOUNTABILITY TO THE SENATE IN RELATION TO GOVERNMENT CONTRACTS

SEPTEMBER 2001

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CHAPTER ONE

INTRODUCTION

Reference

1.1 On Wednesday 12 April 2000 the following matter was referred by the Senate to the Finance and Public Administration References Committee:

> The mechanism contained in general business notice of motion no. 489, standing in the name of Senator Murray, providing for accountability to the Senate in relation to government contracts.[1]

1.2 On 26 June 2000 general business notice of motion 489 read:

489 **Senator Murray:** To move—That—

(1) There be laid on the table, by each minister in the Senate, in respect of each department or agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that an indexed list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.

(2) The indexed list of contracts referred to in paragraph (1) indicate:

(a) each contract entered into by the department or agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of $10 000 or more;

(b) the contractor and the matters covered by each such contract; and

(c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by a party as confidential, and a statement of the reasons for confidentiality.

(3) In respect of each contract identified as containing provisions of the kind referred to in paragraph (2)(c), there be laid on the table by the Auditor-General, within 6 months after the relevant letter of advice is tabled, a report indicating whether, in the opinion of the Auditor-General, the claim of confidentiality in respect of that contract is appropriate.

(4) In this order:

"**autumn sittings**" means the period of sittings of the Senate first commencing on a day after 1 January in any year;

"**indexed**" means indexed alphabetically for subject matter of contract and contractor; and

"**spring sittings**" means the period of sittings of the Senate first commencing on a day after 31 July in any year.

1.3 Twenty submissions were received during the inquiry and a public hearing was held on 12 May 2000. The committee tabled a report entitled *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts* on 26 June 2000.

1.4 At the committee's hearing on 12 May 2000 the Australian National Audit Office (ANAO) advised that it would consider conducting a performance audit on the use of confidentiality provisions in Commonwealth contracts. In its report, the

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1 *Journals of the Senate,* No. 112, 12 April 2000, p. 2619.

committee undertook to report again on the motion after the results of the audit were known. Audit Report No.38 2000-2001, *The Use of Confidentiality Provisions in Commonwealth Contracts,* was tabled in the Parliament on 24 May 2001.

1.5 This report is the committee's final report on the mechanism proposed in general notice of motion no. 489, standing in the name of Senator Murray. The motion, which provides for accountability to the Senate in relation to government contracts, is now a Senate order. The changed wording of the order, passed on 20 June 2001 in the first sitting week to follow the tabling of the ANAO report, reflects some of the committee's concerns described in its June 2000 report. The order requires the committee to consider and report on its first year of operation.

Structure of the report

1.6 Chapter Two of this report considers the broad framework of accountability and government contracting against the background of the Government's statements regarding its policy of open government. This policy is undermined by certain features of the current devolved Australian Public Service (APS) environment identified in ANAO Report No.38 2000-2001, in particular a lack of knowledge of and consistency in the application of its underlying principles. The committee sees this as a significant issue which needs to be addressed because departments and agencies are different parts of the same legal entity, the Commonwealth.

1.7 Chapter Three looks at the Murray motion, the Senate order and other key mechanisms for providing accountability in Commonwealth contracting and how they may be more effective. It examines the Government response to the Senate order, tabled on 27 August 2001, and other compliance issues identified immediately following the first date for tabling of ministers' letters.

1.8 The recommendations in Chapter Four advance the committee's objective of a legislative and administrative framework that promotes and safeguards the principle of openness in Commonwealth contracting.[2] In it, the Committee proposes amendments to the order. These are put forward after consideration of a submission from the Department of Defence dated 18 September 2001 and other evidence received throughout this inquiry, including a submission from the Department of Veterans' Affairs provided on the day that the first report was tabled. The committee also recommends changes to the accountability framework that, if implemented, would ensure that stated goals of openness and accountability are achievable. Other recommendations aim to reduce duplication between the revised order and existing gazettal and annual reporting requirements.

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2 See also Committee, *Re-booting the IT agenda in the Australian Public Service, final report on the Government's information technology outsourcing initiative*, August 2001, Chapter 8.

CHAPTER TWO

OPEN GOVERNMENT

> Australia is a representative democracy. The Constitution gives the people ultimate control over the government, exercised through the election of the members of Parliament. The effective operation of representative democracy depends on the people being able to scrutinise, discuss and contribute to government decision making. To do this, they need information.
>
> Australian Law Reform Commission & Administrative Review Council, 1995[1]

2.1 The public must be able to scrutinise the actions and expenditure of the government if it is to make judgements as to a government's effectiveness and participate meaningfully in the political process.

Commonwealth contracts—accountability to the public

2.2 As government services are increasingly contracted out, government contracts account for a growing proportion of public expenditure. Simultaneously, there has been a rise in claims that government contracts, or parts thereof, are confidential, in particular commercially confidential.[2] Acceptance of such claims can considerably limit scrutiny of the expenditure of public money, and those who make them must be prepared to justify them.

2.3 The Senate order of June 2001 will increase the openness and accountability of all Commonwealth contracts with a value of $100 000 or more. Through the tabling by ministers of letters of advice that agencies have placed on their internet sites lists of current contracts, including notification of any confidentiality provisions they contain,

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1 Australian Law Reform Commission/Administrative Review Council, *Open government: a review of the federal Freedom of Information Act 1982*, Report No. 77/Report No. 40, December 1995, p. 12.

2 Numerous reports have made this observation, for example: Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies*, Report No. 48, January 1996; Administrative Review Council, *The Contracting out of Government Services*, Report No. 42, August 1998; Public Accounts and Estimates Committee, *Commercial in Confidence Material and the Public Interest*, 35th Report to the Victorian Parliament, March 2000; *Victorian Audit Review of Government Contracts: Contracting, Privatisation, Probity and Disclosure in Victoria 1992-1999*, Victorian Department of Premier and Cabinet, May 2000, p. 104; Joint Committee of Public Accounts and Audit, *Contract Management in the Public Service*, Report No. 379, October 2000; the Australian National Audit Office (ANAO), *The Use of Confidential Provisions in Commonwealth Contracts*, Audit Report No.38, May 2001. See also previous reports of this committee—*Contracting out of Government Services—First Report*, November 1997; *Contracting out of Government Services—Second Report*, May 1998; *Re-booting the IT agenda in the Australian Public Service, final report of the Government's information infrastructure outsourcing initiative*, August 2001.

the public is now informed of what contracts exist and why access to some of them is restricted.

2.4 The order works as a safeguard against the overuse of confidentiality claims in Commonwealth contracts. Agencies now need to think carefully about whether there is a genuine reason for keeping material confidential and restricting access to details of public expenditure.

The reverse onus principle

2.5 The Senate order places the onus on those who wish to keep the information confidential to argue that the confidentiality is warranted. Information regarding government contracts should be publicly available unless there a sound reason for it not to be. This principle, central to open and accountable government, is described as the reverse onus principle and is applicable to all government information. It enables the public to scrutinise government activities and grants citizens access to information about programs that affect them.

2.6 Dr Nick Seddon explains the reverse onus principle as follows:

> In order for the court to be persuaded to protect a government secret, the government must establish that it is in the public interest that the information not be disclosed. Further, the courts have been sceptical of governments wishing to keep matters secret so that the onus on the government is a heavy one.[3]

2.7 While contracts between private sector parties have traditionally emphasised secrecy and control of information, this is not appropriate for government contracts which are funded by the taxpayer.

2.8 Relevant case law supports the reverse onus principle. The decision in the case of Esso Australia Resources Ltd v Plowman stated:

> This involves a reversal of the onus of proof: the government must prove that the public interest demands non-disclosure.[4]

2.9 Similarly, the decision regarding Commonwealth v John Fairfax & Sons Ltd stated:

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3 Nick Seddon, 'Is Accountability a Cost of Contracting Out?' in *Administrative Law for the New Millennium, Papers presented at the 2000 National Administrative Law Forum*, Australian Institute of Administrative Law, 2000, p. 42. Dr Nick Seddon was associated with the Australian National University Faculty of Law for 25 years, specialising in the areas of contract, government contracts, privacy and public administration. He has recently returned to the private sector.

In addition to Nick Seddon, see also *Victorian Audit Review of Government Contracts: Contracting, Privatisation, Probity and Disclosure in Victoria 1992-1999*, Victorian Department of Premier and Cabinet, May 2000, p. 104; Public Accounts and Estimates Committee, *Commercial in Confidence Material and the Public Interest*, 35th Report to the Victorian Parliament, March 2000, pp. 71, 80-81.

4 Esso Australia Resources Ltd v Plowman (1995) 183 CLR 10 at 31.

> …the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected.[5]

2.10 Unfortunately, in the context of government contracts the reverse onus principle is in a precarious position because, as it stands, the reverse onus principle may be bypassed by contractual provisions. Dr Seddon writes:

> It is a basic principle of contract that the parties may, absent illegality, agree to whatever they like. Once an obligation of confidentiality is embodied in a contract then it is a matter of contract law and its remedies rather than the law of confidentiality, outlined above. Thus a government, like any other contracting party, can choose to make information confidential by means of a commercial-in-confidence clause and enforce the obligation without having to justify on public interest grounds the use of the confidentiality clause.[6]

2.11 The act of signing a contract that is inconsistent with the reverse onus principle is incompatible with open government. In the committee's view, it contradicts the spirit of legislation and administrative guidelines such as the *Freedom of Information Act 1982* (the FOI Act), the *Commonwealth Protective Security Manual* and the *Commonwealth Procurement Guidelines: Core Principles and Policies* (CPGs) made under the *Financial Management and Accountability Act 1997* (the FMA Act).

Freedom of Information Act 1982

2.12 While the FOI Act relies on the public actively seeking information, rather than the government actively and voluntarily disclosing it, the Act clearly articulates the principle that lies behind the disclosure of government information. The Act states that its object is 'to extend as far as possible the right of the Australian community to access to information in the possession of the Government of the Commonwealth'.[7]

2.13 In fostering open government, maximum disclosure of government information is encouraged. The first annual report on the FOI Act stated:

- when government is more open to public scrutiny it becomes more accountable
- if people are adequately informed and have access to information, there is likely to be more public participation in the policy-making process and in government itself.[8]

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5 Commonwealth v John Fairfax & Sons Ltd (1980) 147 CLR 39 at 51-52.

6 Dr Nick Seddon, submission no. 14, p. 3.

7 *Freedom of Information Act 1982* (the FOI Act), section 3.

8 Attorney-General's Department, *FOI Annual Report 1982-1983,* para. 1.2.1. http://www.law.gov.au/foi/history/foiactreworked.html

2.14 More recently, the Attorney-General stated that 'the FOI Act is an important component of the administrative law package contributing to open government.'[9]

2.15 The FOI Act contains a number of grounds for exempting material from disclosure to the public. That material falls within one of these categories does not mean that it should be automatically considered confidential. (For example, sections 33-47a refer to exempt material including material affecting national security, defence or international relations; affecting relations with States; affecting enforcement of law and protection of public safety; to which secrecy provisions of enactments apply; affecting financial or property interests of the Commonwealth; affecting personal privacy; subject to legal professional privilege; affecting national economy; disclosure of which would be contempt of Parliament or contempt of court; Cabinet documents; Executive Council documents; and electoral rolls and related documents.)

Commonwealth Protective Security Manual

2.16 The *Commonwealth Protective Security Manual* applies to both national security information and non-national security information, the latter including government or agency business, commercial interests, law enforcement operations, and personal information. It outlines policies, practices and procedures to protect secure information. In accordance with open government, the manual notes that:

> Government policy is to keep security classified information to the minimum. Information requiring increased protection is identified by considering the consequences of its unauthorised disclosure or misuse.[10]

2.17 With regard to both national and non-national security information, the manual notes that 'Not all information about these matters needs to be security classified. This information must only be security classified if the compromise could cause damage'.[11]

2.18 The manual further states that, while a document or file must be labelled according to the highest classification of material in it, it is possible to classify paragraphs of a document. This allows, for example, sections of a document without classification to be quoted while other paragraphs remain confidential.[12]

Commonwealth Procurement Guidelines: Core Principles and Policies

2.19 Finally, the principle of open government is explicitly supported in the context of government procurement, with the CPGs stating:

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9 Attorney-General's Department, *FOI Annual Report 1996-1997,* p. v. http://www.ag.gov.au/publications/FOI_96_97/chapters/Minintro.pdf

10 Attorney-General's Department, *Commonwealth Protective Security Manual*, October 2000, p. C 28, para. 6.19.

11 ibid., p. C 30, para. 6.25.

12 ibid., p. C 40-41, para. 6.76-6.77.

> Accountability involves ensuring individuals and organisations are answerable for their plans, actions and outcomes. Openness and transparency in administration, by external scrutiny through public reporting, is an essential element of accountability.[13]

2.20 One of the benefits of contracting out, according to *Competitive Tendering and Contracting: Guidance for Managers*, is that 'When implemented well, CTC [competitive contracting and tendering] can increase accountability for government involvement in an activity'.[14]

2.21 The committee believes that public accountability should be seen as a condition of doing business with government. If this is applied consistently, all contractors will face the same demands for openness, that is, there will be a level playing field.

Protection of the reverse onus principle

2.22 In order that open government is not deliberately or unwittingly compromised in the context of Commonwealth contracting, the reverse onus principle requires protection. The committee favours reinforcement by legislation requiring all government contracts to be publicly available unless particular exemptions apply. Such legislation would allow genuinely confidential information to remain confidential. This approach was recommended in the committee's final report on the Government's IT outsourcing initiative.[15]

2.23 Other jurisdictions have enacted legislation and introduced major policy changes to support the reverse onus principle in government contracting. Measures taken by State governments include:

- The Victorian policy places the burden of proof to disclose government contracts on government agencies. If there is a compelling reason, information need not be disclosed but such non-disclosure extends for only a limited time. Details of all departmental contracts worth more than $100 000 are accessible on the internet and contracts over $10 million are published in full on the internet.[16] If a clause has been removed from a contract, a statement is required to explain the reason for and scope of the exclusion.
- In Western Australia (WA) the details of contracts over $10 000 are to be published on the internet after the contract is signed.[17] All government contracts

13 Department of Finance and Administration (Finance), *Commonwealth Procurement Guidelines: Core Principles and Policies* (CPGs), March 1998, p. 13.

14 Finance, *Competitive Tendering and Contracting: Guidance for Managers,* March 1998, p. 16.

15 Committee, *Re-booting the IT agenda in the Australian Public Service, final report on the Government's information technology outsourcing initiative*, August 2001, Recommendation 17, p. 164.

16 http://www.tenders.vic.gov.au/contracts/major/default.asp

17 Initially the threshold was $20 000. It was reduced to $10 000 on 12 April 2001. The site for accessing contracts is http://www.cams.wa.gov.au/web/contracts.nsf/all+contracts+by+category

must include disclosure clauses which advise that contractual documents may be disclosed if required by law, under the WA *Freedom of Information Act 1988*, by tabling the documents in State parliament or under a court order.

- *Principles and Guidelines for the Treatment of Commercial Information Held by ACT Government Agencies* outlines how information in a contract can be determined as confidential at the time a contract is being negotiated. Legislation has also been enacted to ensure that agencies prepare a public text of a contract within 21 days of making the contract.[18] The public text only excludes clauses deemed genuinely confidential according to section 13 of the Act.[19] The ACT Auditor-General maintains a register of contracts containing confidentiality clauses.

2.24 The above legislation and policies still respect the need for genuinely confidential material to remain undisclosed. Each system makes clear that governments are accountable for agreeing to non-disclosure and must be prepared to justify their decisions.

ANAO: *The Use of Confidentiality Provisions in Commonwealth Contracts*

2.25 The extent and appropriateness of government wide and agency use of confidentiality clauses in contracts was examined by the ANAO and reported in Audit Report No.38 2000-01 *The Use of Confidentiality Provisions in Commonwealth Contracts*.[20] The report supports the appropriateness of applying the reverse onus principle in government contracting. It also notes that the terms of a Commonwealth contract will rarely contain information of the type held by the courts to be confidential, a view borne out by its examination of 62 agency contracts.[21]

2.26 The ANAO report confirmed widespread suspicions that agencies are not using confidentiality provisions in contracts in a way that promotes or reflects the public's right to access government information. Of the contracts examined, the ANAO found that only 11 per cent of the contracts examined had no confidentiality provisions. Of contracts with confidentiality provisions, 48 per cent required the

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18 *Public Access to Government Contracts Act 2000 (ACT).*

19 Grounds for confidentiality include that the release of the information would result in the unreasonable disclosure of personal information; the disclosure of a trade secret; the unreasonable disclosure of information with commercial value; or the unreasonable disclosure of information about the business affairs of a person; or that it is required by, or gives effect to, an obligation of confidentiality that arises from another source. The section also explicitly states that an agency must not agree to make information confidential if it would inappropriately restrict an agency in the management or use of Territory assets; it would not be in the public interest to do so; the information is already public knowledge; the information has been obtained by the government agency from another source; or the agreement would require the confidentiality to apply for longer than is necessary to protect the interest concerned.

20 ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts,* Audit Report No.38 2000-2001.

21 ibid., p. 60.

contractor to keep information confidential and 41 per cent required both parties to keep information confidential.[22]

2.27 The report concluded that there are weaknesses in the way that agencies generally deal with the inclusion of confidentiality provisions in contracts, including:

- consideration of what information should be confidential is generally not addressed in a rigorous manner in the development of contracts;
- where there are confidentiality provisions in contacts there is usually no indication of what specific contractual information is confidential; and
- uncertainty among officers working with contracts over what information should be properly classified as confidential.

2.28 According to ANAO, a major contributing factor to these shortcomings in the treatment of confidential material is a lack of guidance in the existing CPGs. They provide no assistance on how to determine whether contracts and contract related material are genuinely confidential, from either the Government's or the contractor's viewpoint. Nor do they provide guidance on dealing with requests for access by the Parliament or the public.

2.29 Agencies must consider the issue of what information is confidential before they agree to accept information on the basis that it is to be kept confidential, insert a confidentiality clause into a contract, or take other measures which result in restrictions on disclosure. The committee supports the Auditor-General's emphasis on the desirability of determining what is confidential in a contract and contract related material before the contract is signed.[23]

ANAO criteria

2.30 The Auditor-General developed a set of criteria for determining whether a sound basis exists for deeming information in contracts confidential. The criteria apply to the release to the public of certain information and are based on sections 43 and 45 the FOI Act. They are most relevant in the designation of commercially sensitive material.[24] Agencies must also assess whether information needs to be

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22 ibid., p. 47.

23 ibid., p. 54.

24 Section 43 of the FOI Act describes commercially sensitive material as that which would reveal:
- trade secrets or any other information having a commercial value that would be destroyed or diminished if the information were disclosed;
- information about a person or organisation's business affairs which, if disclosed, would adversely affect that person or organisation's lawful business or financial affairs; or
- information which could prejudice the future supply of information to the Commonwealth or an agency for the purpose of the administration of a law or the administration of matters administered by an agency.

There is general consensus that commercially sensitive information includes trade secrets; intellectual property; proprietary information of contractors; internal costing structures or profit margins; and pricing structures.
Section 45 of the FOI Act pertains to documents containing material obtained in confidence.

protected under a specific legislative provision. Some information may also need to be protected because disclosure would not be in the public interest. The reasons for these should be recorded.

2.31 The committee endorses the application of all of the following criteria before agencies agree to classify information 'confidential':

- The information to be protected must be able to be identified in specific rather than global terms. For example, specific clauses within a contract rather than the contract as a whole.
- The information must have the necessary quality of confidentiality. It must not be already in the public domain and it must have continuing sensitivity to a business that would suffer if it were released.
- 'Detriment to the confider' as a result of disclosure must be proved. In the case of government contracts detriment must be established by reference to the relevant public interests that would be damaged upon disclosure. This means, most importantly, that the Commonwealth is obliged to act in the broader public interest.
- The circumstances in which the information is provided or accepted are also important. It is significant if material is provided with the understanding that it will not be disclosed.[25]

2.32 The committee strongly supports agencies' immediate use of the above criteria, set out in full in Appendix A, to assess private sector claims and determine what is genuinely confidential in government contracts in advance of signing a contract. Both parties must agree to the inclusion of confidentiality clauses in Commonwealth contracts, but the onus is on the minister to justify any such inclusion.

Commonwealth contracts—accountability to Parliament

2.33 In addition to developing the above criteria, the ANAO report made two recommendations to increase the level of openness of government contracts. The first was that requests for tender should include advice about the public accountability responsibilities of agencies and the possible consequential disclosure of contractual information to Parliament. The second recommendation was that progressive information on performance against relevant measures in contracts be made available to parliamentary committees.

2.34 Two recommendations in the committee's final report on the Government's IT outsourcing initiative, *Re-booting the IT agenda in the Australian Public Service,* parallel ANAO's recommendations. The committee's recommendation 18 further emphasises the need for all parties to be fully aware of such obligations:

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25 ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts,* Audit Report No.38 2000-2001, pp. 56-57.

> The Committee recommends that budget funded agencies take immediate action to ensure that before they enter into any formal or legally binding undertaking, agreement or contract that all parties to that arrangement are made fully aware of the agency and contractor's obligation to be accountable to Parliament.

2.35 Recommendation 19 states:

> The Committee further recommends that any future Requests for Tender (RFTs) and contracts entered into by a Commonwealth agency include provisions that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny, including before parliamentary committees, of the contract and its arrangements.

2.36 The committee wishes to emphasise the distinction between disclosure of Commonwealth contracts to the public and disclosure to a parliamentary committee.

2.37 The Senate order for the production of contracts enables greater scrutiny of government contracting and expenditure by the public. The Senate recognises that genuine grounds may exist for withholding certain clauses in contracts from publication or release to the public, if only for a specified and limited period (when the grounds for secrecy expire), and seeks to notify the public of their existence.

2.38 Genuine grounds for the non-provision of information to the public may be advanced by any agency. The standing of the claims will be determined in all cases by the Senate or a parliamentary committee, that is, the Senate or the committee will decide whether they will be accepted or overridden. While public servants may make recommendations for non-disclosure, the minister is responsible for the decision.

2.39 Parliamentary committees have been increasingly frustrated by the refusal of ministers and public servants to provide contract and contract related material because of assertions that the information is commercially sensitive.[26] Public servants in particular are not sufficiently familiar with this area to recognise that such claims originate in the FOI Act which does not apply to parliamentary processes.

2.40 The Senate Standing Orders and other orders of the Senate, the rules for the conduct of its proceedings made pursuant to the Australian Constitution, confer on committees the power to invite the attendance of a person or the production of a document. If that invitation is declined, committees have the power to require (or order) the attendance of that person, or production of that document.[27]

2.41 When faced with a request for access to documents or information, witnesses may present their concerns regarding its commercial confidentiality with reference to the ANAO criteria referred to earlier in this chapter for guidance. A committee may

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26 See reports referred to in footnote 2, p. 3.

27 The Senate, *Standing Orders and other orders of the Senate,* February 2000, Standing Orders 25 (15) and 34 (1), pp. 27 and 31.

respond positively to such concerns where the information is incidental to its inquiry. However, if the committee does not and requires the information to be provided, the witness must comply regardless of the information's sensitivity in terms of the ANAO criteria. To refuse may constitute contempt of the Senate.[28] The same provisions apply in respect of confidentiality for reasons other than commercial sensitivity.

2.42 A committee may resolve to receive material or to hear evidence *in camera* (on a confidential basis) on application from a witness. It is important to note however that the decision as to whether the committee will receive the evidence *in camera* is a decision made by the committee. This decision is binding on the witness and therefore offers the protection afforded by parliamentary privilege. A witness cannot demand that the evidence be received *in camera* or refuse to provide it. While a committee may resolve to conduct a hearing or receive a submission *in camera*, no guarantee can be given to a witness that the evidence or the document will remain protected. The Senate and Senate committees both have the power to publish subsequently the *in camera* evidence. Under Privilege Resolution 1(8), witnesses are to be made aware of this possibility before giving evidence.

2.43 Unlike the reverse onus principle, the constitutionally-based standing orders are not diminished by contractual provisions. Senate Procedural Order of Continuing Effect no. 32 explicitly provides for the Senate's access to contractual information:

> …there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committees unless the Parliament has expressly provided otherwise.[29]

2.44 Material can be refused to the Senate or its committees if a public interest immunity claim is made by a minister.[30] However public interest immunity claims are not accepted automatically by the Senate. If it is thought that the public interest still lies in the production of the documents then a committee may report this to the Senate and the matter will be resolved by the Senate, unless a compromise can be reached. If the Senate disagrees with the claim then it has a legal right to the material.

2.45 Confidentiality does not provide grounds for a public interest immunity claim. Possible grounds for public interest immunity claims include: that material would

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28 ibid., Privilege Resolution 6 (8), p. 107.

29 The Senate, *Standing Orders and other orders of the Senate,* February 2000, Procedural Resolution 32, p. 130. The powers of parliament to call documents has also been upheld in Common law cases, in particular Egan v Willis and Egan v Chadwick in the New South Wales. In these cases a majority of the court held that the power of the legislative Council to inquire and to require production of documents was a necessary incident of its function in reviewing executive conduct, consistent with the principle of responsible government. While these cases occurred in News South Wales, it is held that the have implications of Commonwealth parliamentary powers. See Christos Mantziaris, 'Egan v Willis and Egan v Chadwick: Responsible Government and Parliamentary Privilege', Parlimentary Research Paper 12, Parliament of the Commonwealth of Australia, December 1999.

30 *Odgers' Australian Senate Practice*, 10th edition, 2001, p. 482.

damage national security, defence, international relations or relations with the states; disclose deliberations or a decision of the Cabinet; disclose deliberations or advice to the Executive Council; material relating to law enforcement or the protection of public safety; or material that would potentially prejudice to the position of litigants.

2.46 Advice and recommendations which are part of the deliberative process of government may be put forward as a basis for a public interest immunity claim.[31] However, because of the potentially exhaustive application of this category, the committee warns that the public interest in withholding the information would need to be demonstrated.

2.47 The committee is most concerned that the Department of Finance and Administration response to the Auditor-General's recommendation that high level advice be included in the CPGs leaves in doubt that parties to Commonwealth contracts are made fully aware of the implications of parliamentary accountability.[32] The Commonwealth has a responsibility to ensure that accountability obligations are clearly articulated in tender and contract documentation.

Conclusion

2.48 The Senate order is a further attempt to halt the trend towards unnecessary secrecy in Commonwealth contracts. It clearly enhances open government by removing obstacles to the public's ability to examine information which informs them about government expenditure, programs and performance. The role of the Auditor-General in assessing claims will restore confidence that the material should not be publicly disclosed.

2.49 The order enhances parliamentary accountability by providing information useful in the scrutiny of government expenditure and performance. Unlike the public, committees have the option of examining these contracts and confidential clauses.

2.50 For the record, the committee affirms that the Protective Security Manual, Commonwealth Procurement Guidelines and FOI legislation do not prevent the disclosure to the Senate of any material required by the Senate or its committees.

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31 Department of the Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters,* November 1989, p. 9.

32 Although the CPGs are currently under review, Finance could not agree to high level advice being included in the next edition as 'the Minister for Finance and Administration had responsibility for the CPGs and must approve any changes'. ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts,* Audit Report No. 38 2000-2001, p. 67.

For further information on implications of parliamentary accountability, see Senate Procedural Order of Continuing Effect no. 32 quoted in clause 2.42.

CHAPTER THREE

ACCOUNTABILITY MECHANISMS FOR COMMONWEALTH CONTRACTS

3.1 This chapter considers existing accountability mechanisms for performance and expenditure arising from Commonwealth contracts. These mechanisms include the Senate order of 20 June 2001, the Gazette Publishing System (GaPS) and annual reporting requirements.

The Murray motion

3.2 The committee's June 2000 report on general business notice of motion 489, the Murray motion, looked at possible alternatives to the proposed motion but did not reach a definitive position on the issues or make recommendations. The committee agreed instead to await the Auditor-General's assessment of the extent of overuse of confidentiality claims.

3.3 The committee did identify a number of potential problems with motion as it stood:

- Definitional issues—terms in the motion such as 'agency', 'contract' and 'fully performed' were raised as presenting difficulties in interpretation and application.[1] This concern was addressed in the order in respect to 'agency' which was defined as an agency within the meaning of the *Financial Management and Accountability Act 1997 (FMA Act)*.
- Number and size of contracts and low threshold level—evidence to the committee suggested that the motion as it stood could potentially involve thousands of contracts if the $10 000 threshold applied as in the original motion.[2] This concern was addressed in the order with the contract value being increased to $100 000.
- Retrospectivity—retrospective reporting requirements would incur substantial administrative costs as systems are not in place to capture the information required in the motion.[3] The subsequent order stated that it applies on and after 1 July 2001. Agencies need to examine contracts current at 1 July and provide the information requested, even though agreements on their confidentiality may predate the order.

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1 Committee, *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, June 2000, p. 13.

2 ibid., pp. 15-16.

3 ibid., p. 16.

- Six-monthly tabling requirement—the relevance of confidentiality of contract provisions may vary over time, and therefore may need to be re-assessed for every six-monthly tabling period.[4] This was seen to be potentially onerous. This can be avoided if the Auditor-General's advice is followed and the duration of the agreement is limited and the reasons for confidentiality are identified at contract signing.[5] The amended motion maintains this tabling requirement.

- Cost of implementing the order—all agencies participating in the committee's inquiry indicated that they would face additional costs if the motion went ahead. In response to this concern the amended motion included an additional requirement for agencies to include an estimate of the cost of complying with the order.[6] Chapter Four canvasses other concerns about compliance costs of reporting arrangements.

- The Auditor-General's role—the original motion sought reports by the Auditor-General every six months on whether the confidentiality claims were appropriate. The committee received evidence that the vast majority of Commonwealth contracts contain confidentiality provisions, and that potentially the Auditor-General would be required to consider thousands of contracts every six months.[7] The amended motion addressed this concern by requesting the Auditor-General to provide a report every six months based on an examination of a selection of contracts with confidentiality provisions. A further change to the Auditor-General's role is recommended in Chapter Four.

- The first report of this inquiry identified issues that arose with Senate Procedural Order of Continuing Effect no. 6[8] on indexed lists of departmental and agency files and that should be considered by the Murray motion. They included the need for absolute clarity in the wording of Senate order and the value of a monitoring exercise. The order addresses these issues to some extent by providing for this committee to consider and report on the first year of operation. Further changes to the wording of the order are recommended in Chapter Four.

3.4 The June 2000 submission from the Department of Veterans' Affairs (DVA) stated that much of its expenditure on services would not be encapsulated by the motion, now the order, because it occurs under less formal arrangements. It also noted other difficulties with the motion, including that disclosure of rates and prices might not be in the Commonwealth's commercial interests; privacy issues and the cost of compliance.

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4 ibid., p. 17.

5 Australian National Audit Office (ANAO), *The Use of Confidentiality Provisions in Commonwealth Contracts,* Audit Report No.38 2000-2001, p. 54

6 Committee, *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, 2000, pp. 17-18.

7 ibid., p. 18.

8 Also known as the Harradine motion.

Senate Order for production of documents – departmental and agency contracts

3.5 On 20 June 2001 the Senate adopted an amended motion. The order—*Departmental and agency contracts — Order for production of documents* (the order) reads:

> (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.
>
> (2) The list of contracts referred to in paragraph (1) indicate:
> (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of $100 000 or more;
> (b) the contractor and the subject matter of each such contract;
> (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, and a statement of the reasons for confidentiality; and
> (d) an estimate of the cost of complying with this order.
>
> (3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
>
> (4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.
>
> (5) This order has effect on and after 1 July 2001.
>
> (6) In this order:
> "agency" means an agency within the meaning of the Financial Management and Accountability Act 1997;
> "autumn sittings" means the period of sittings of the Senate first commencing on a day after 1 January in any year; and
> "spring sittings" means the period of sittings of the Senate first commencing on a day after 31 July in any year.

Government response to the Senate order

3.6 Given that the order is to take effect on and after 1 July 2001, the first date letters were to be tabled was 28 August 2001.

3.7 On 27 August 2001 the Manager of Government Business in the Senate, Senator Ian Campbell, incorporated the Government's response to the order in *Hansard.* This response refers to advice from the Australian Government Solicitor (AGS) 'that the order is probably beyond the Senate's powers because it requires information to be provided to the public and not the Senate or a Senate committee'. The AGS is also reported to have advised 'that it is likely that the Parlimentary

Privileges Act 1987 would not provide absolute privilege in respect of the publication of information on the Internet'.[9]

3.8 In the committee's view, the doubts expressed by the Government about the application of parliamentary privilege to the publication of information on the internet are not supported by the *Parliamentary Privileges Act 1987*. Pursuant to paragraph 16(2)(d), the Act applies to:

> the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

3.9 The Government response goes on to confirm that it would comply with the spirit of the order on the basis that:

- Agencies will use the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity (in Government Guidelines for Official Witnesses before Parliamentary Committees) to determine whether information regarding individual contracts will be provided;

- Agencies will not disclose information if disclosure would be contrary to the Privacy Act 1988, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed; and

- Compliance with the Senate order will be progressive as agencies covered by the Financial Management and Accountability Act 1997 refine arrangements and processes to meet the requirements.[10]

3.10 The committee considered the Government response to the order at a meeting on 30 August 2001 and resolved to write to Senator Ian Campbell to request the release to the committee of the AGS advice concerning the order. At the time this report was finalised no response had been received. In the absence of the reasoning behind the claims, the committee sought the views of the Clerk of the Senate. The committee wrote to the Clerk on 20 September 2001.

3.11 The Clerk's reply confirmed the committee's view. It advised the committee that an order instructing agencies to publish material on the internet falls within the Senate's powers and that there is no doubt that the published lists of contracts would attract parliamentary privilege. A copy of the Clerk's letter is provided at Appendix B.

3.12 The committee makes three further points about the Government's response:

- The order requires agencies to publish lists of contracts on their internet sites. The *Freedom of Information Act 1982* (the FOI Act) relating to exemptions to

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9 *Senate Hansard*, 27 August 2001, p. 26355.

10 *ibid*.

public access to information are more relevant than the 1989 *Guidelines for Official Witnesses before Parliamentary Committees and related matters*. The revised guidelines had not been approved or released at the time this report was finalised, so they do not provide an acceptable point of reference. (Neither set of guidelines has been approved by the Senate or the Parliament.)

- The committee accepts that agencies may refer to FOI Act exemptions and must act within relevant statutory provisions when publishing contractual details. However, given the Auditor-General's findings on the overuse of confidentiality clauses and criticism of the lack of guidance in the CPGs on appropriate grounds for giving an undertaking that information in government contracts will not be disclosed, the committee questions the credibility of undertakings made. The reason for such undertakings must be transparent and the reasons for confidentiality must be notified on agency web sites.
- All ministers are required to comply with the Senate order by tabling letters on the tenth sitting day of the relevant parliamentary session. Where their portfolio departments or an agency may have only partially complied, ministers should include advice of this together with the anticipated date of full compliance. Chapter Four recommends changes to the wording of the order to clarify this.

Compliance report: 28 August 2001

3.13 The two elements to compliance with the Senate order are the placement of lists of relevant contracts with required details on each department's and agency's website and the tabling of letters of advice by ministers.

3.14 One letter of advice was tabled in the Senate on 28 August 2001. The letter from the Minister for Defence, the Hon. Peter Reith MP, advised that a list of contracts entered into over the last five years valued at over $100 000 with details of the name of the contractor, contract number, contract date and subject matter, is available on the department's website. In addition, the website includes a general statement of Defence's approach to commercial-in-confidence information. The Minister advised further, that given the large volume of contracts entered into by the department each year, 'it was impractical in the time frame to examine each contract individually and identify the precise extent and location of commercial-in-confidence information.'[11]

3.15 In Chapter Four the committee proposes changes to the order to make clear that letters should be tabled regardless of the completeness of the lists published by agencies. Only the content of the letter would change.

3.16 In its submission to this inquiry, Defence further emphasised that it had experienced a number of difficulties in complying. The submission expressed concern that the routine provision of some non-confidential information would result in the

11 Tabled letter of advice from the Minister for Defence to the President of the Senate, dated 22 August 2001.

erosion of the Commonwealth's negotiating position. The counter argument to this is that more openness brings more competition, but the committee acknowledges there may be some markets for Defence where this is less likely. In relation to the Senate order, it is difficult to see that notification of the existence of and reasons for restrictions on disclosure would have any impact. The committee's review of the first year of operation will look for evidence of this.

3.17 The department has estimated an initial compliance cost of $1.5 million, reducing over time. In Chapter Four the committee recommends some measures to reduce duplication between the order and GaPS. It also recommends that the basis for agencies' estimates be provided.

3.18 On 31 August 2001 a letter from Senator Minchin was tabled in the Senate stating that the list of departmental contracts for the Department of Industry, Science and Resources had been placed on the internet. It noted that the list does not at this stage include administered items, although these will be added as the department refines arrangements and processes.

3.19 Also on 31 August a letter from Senator Bill Heffernan was tabled stating that agencies within the Prime Minister and Cabinet portfolio had placed a list of contracts on their websites. Listed in the letter were the Department of the Prime Minister and Cabinet (PM&C), the Australian National Audit Office (ANAO), the Office of the Commonwealth Ombudsman, the Office of the Official Secretary to the Governor General and the Office of National Assessment.

3.20 The committee observes that the letter does not refer to the Public Service and Merit Protection Commission or the Office of the Inspector-General of Intelligence and Security, even though both are within the PM&C portfolio and are agencies for the purposes of the order. This highlights another potential problem—that ministers' letters must report on compliance by each and every agency for which they are responsible.

3.21 On 31 August a letter from Mr Robert Kerr, Head of Office of the Productivity Commission was tabled stating that the Commission had placed a list of contracts on its website.

3.22 The committee acknowledges the difficulties certain agencies with a significant number of contracts may have in setting up their compliance systems. In its report to the Senate on the first year of operation of the order, the committee intends to recognise this by taking a more understanding approach in extreme cases where sound reasons are advanced and accepted by the Senate. In saying this the committee notes, however, that confidentiality clauses in new contracts should now be identified at signing and that the committee's flexibility will be limited.

Gazette Publishing System (GaPS)

3.23 Mandatory reporting requirements stipulate that details of all contracts with a value of $2000 or more are to be notified in the Commonwealth Purchasing and Disposals Gazette within six weeks of entering into the contract.

3.24 The ANAO report *The Use of Confidentiality Provisions in Commonwealth Contracts* included an examination of GaPS.[12] The committee also recorded difficulties with the system.[13] The problems identified impact significantly on data integrity. For example:

- no contract expiry date, no indication of whether a contract had been discontinued and no indication whether a contract continues across financial years;
- failure to gazette within the six week period;
- duplication of entries;
- different gazettal practices in agencies—including the failure of some smaller agencies to gazette at all;
- a lack of internal control on agencies— including effective or non-existent contract registers to ensure that the gazettal process captures all relevant material; and
- failure to report contract variations.

3.25 ANAO noted that there was widespread confusion within agencies as to what and how items should be gazetted. Even when automated systems ensure that relevant data is captured, there is a lack of effective internal control mechanisms that ensure the data is of good quality.

3.26 The DVA submission suggested that 'There would be value in giving consideration to reporting mechanisms that build on the current whole-of-government approaches, such as GaPS'.[14] The committee supports the idea that any revision of GaPS should occur in the broader context of measures taken to address the need for increased transparency in government contracting.

3.27 The committee is aware that a review of the GaPS system by the Department of Finance and Administration is currently under way and due to be completed shortly. In addition to problems identified in the committee's first report and the ANAO report, the committee suggests that the review considers the potential for

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12 Australian National Audit Office (ANAO) *The Use of Confidentiality Provisions in Commonwealth Contracts*, Audit Report No.38 2000-2001, pp. 74-83.

13 Committee, *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, 2000, p. 26.

14 Department of Veterans' Affairs (DVA), submission no. 21.

GaPS to be used to deliver the information sought by the Senate order. With this in mind, the committee has made recommendations in Chapter Four regarding GaPS.

3.28 The committee is aware that changes to gazettal requirements will impose costs on agencies that will need to be weighed against expected benefits. These need to be considered in the light of the current system which has been found inadequate as an accountability tool, yet continues to consume significant agency resources.

Annual reporting requirements

3.29 Section 12(6) of the current *Requirements for Annual Reports* require that the annual report must include a summary statement detailing the number of consultancy services contracts let during the year and the total expenditure on consultancy services during the year. More detailed information on consultancy contracts let to the value of $100 000 or more is also required either as an appendix to the report, on request or through the internet. Such information includes:

- a summary of the department's policy on the selection and engagement of consultants, its selection procedures, and the main categories of purposes for which consultants were engaged; and
- a list of all consultancy contracts let to the value of $10 000 or more, with details for each individual consultancy, except where a large number of consultancies renders this impractical. Details are to include the name of the consultant, a summary description of the nature and purpose of the consultancy, the contract price for the consultancy, the selection process used, and the justification for the decision to employ consultancy services.[15]

3.30 The requirements also state that the report must include a summary statement in relation to competitive tendering and contracting undertaken during the year. They suggest this statement refer to the total value and period of each contract let in excess of $100 000 the nature of the activity, and the outcome of competitive contracting and tendering, including any net savings. [16]

3.31 The current requirements relating to information for non-consultancy contracts only suggest annual reports include disaggregated information for each contract let. The committee has criticised previously the fact that annual reporting is voluntary in relation to areas of significant government expenditure and items of continuing public interest.[17] This criticism extends to the inadequate level of annual reporting on Commonwealth contracting, including consultancies.

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15 Department of the Prime Minister and Cabinet, *Requirements for annual reports*, p. 20, Approved by the Joint Committee of Public Accounts and Audit on 7 June 2001.

16 ibid., p. 10.

17 Finance and Public Administration Legislation Committee, *Report on 1999-2000 Annual Reports: Report One*, March 2001, p. 13.

3.32 In its first report the committee identified a major drawback with the annual report as an alternative to the Senate order. The time lag of potentially sixteen months between the letting of a contract and the information being publicly available is unacceptable.

Conclusion

3.33 There are now three mechanisms to provide transparency in relation to Commonwealth contracts—the Senate order, GaPS and annual reports. Each has its shortcomings, including high compliance costs. It is fifteen months since the problems were outlined in the committee's June 2000 report, and four months since the Auditor-General confirmed these and reported on others. It is likely that these problems had all been identified in one way or another prior to both reports.

3.34 In the next chapter the committee recommends a more streamlined way of making contract information available to the Parliament and public. While the committee appreciates that establishing a new system requires time, it calls on the Government to allocate a higher priority to the implementation of effective and coordinated accountability mechanisms for Commonwealth contracting.

CHAPTER FOUR

THE ROAD TO A NEW FRAMEWORK

4.1 In this report and previously, the committee has identified inadequacies and inconsistencies that undermine the effectiveness of accountability mechanisms in the Australian Public Service. These reduce the transparency surrounding Commonwealth contracting, an area that involves substantial public expenditure.

4.2 The committee has drawn on key government documents that indicate the Government's intention to be accountable and its view that 'openness and transparency in administration, by external scrutiny through public reporting, is an essential element of accountability'.[1] Therefore the committee concludes that the lack of information about government contracts is a result of inadequate information systems and needs to be addressed by those that manage them.

4.3 The committee's recent experience of the inquiry into the Government's IT outsourcing initiative has provided a useful background to this report. There is no room to doubt that the Auditor-General's criticism of the lack of guidance available to agencies on the use of confidentiality clauses in Commonwealth contracts is well founded, or that the impact of this has been reduced access to information that should be in the public domain. Five recommendations in the final report of that inquiry, *Re-booting the IT agenda in the Australian Public Service*, are set out below. These steps need to be taken to ensure more accountability in Commonwealth contracting. The committee has recommended that:

- the Government give serious consideration to introducing legislation that will provide a greater degree of transparency in Commonwealth contracts by making them publicly available … In this context the ANAO criteria would provide guidance on what, in such circumstances, would still be considered genuinely confidential and may be withheld from publication (Recommendation No. 17);
- the Government re-introduce mandatory competency standards for all officers undertaking procurement functions (Recommendation No. 5);
- consistent with the Department of Finance and Administration's policy responsibility for Commonwealth contracting and procurement, the competency standards and training should be developed by that department. This is to be done in consultation with the Public Service and Merit Protection Commission to ensure consistency with the Australian Public Service Values (Recommendation No. 6);

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1 Department of Finance and Administration (Finance), *Commonwealth Procurement Guidelines: Core Policies and Principles,* 1998, p. 13.

- budget funded agencies take immediate action to ensure that before they enter into any formal or legally binding undertaking, agreement or contract that all parties to that arrangement are made fully aware of the agency and contractor's obligation to be accountable to Parliament (Recommendation No. 18); and
- any future Requests for Tender (RFTs) and contracts entered into by a Commonwealth agency include provisions that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny, including before parliamentary committees, of the contract and its arrangements (Recommendation No. 19).

4.4 If these recommendations are adopted, legislation would be enacted to secure the application of the principle that information relating to Commonwealth contracts should be in the public domain unless there are sound reasons for withholding it. This would not be able to be signed away, either deliberately or unwittingly. Competency standards and competency based training for public servants involved in contracting and contract management would improve performance and guard against any 'unwitting' behaviour —particularly unnecessary restrictions being placed on public access to information.

4.5 The committee is puzzled at the apparent reluctance shown by Finance to inform all potential and actual contracting partners of the Commonwealth in advance of the full implications of contracting with government. It considers the absence of clear written advice about contractors' public accountability responsibilities and the requirement for them to be open to parliamentary scrutiny as bordering on irresponsible, particularly in the light of Senate Procedural Order of Continuing Effect no. 32, quoted in the previous chapter (clause 2.43 refers).

4.6 The central feature of the framework recommended in the committee's final report on IT outsourcing outlined above is legislation. Should the Government agree, the enactment can be expected to take time. In the meantime, the combination of the Senate order of June 2001, the GaPS system and annual reports provides a less satisfactory alternative. The following recommendations aim to streamline the three systems and promote a culture of disclosure of government contracting information unless there are sound reasons for withholding it. The committee sees the costs associated with duplication and the identified shortcomings of GaPS as a major concern.

Recommendation 1: Amendments to the Senate order

4.7 The Senate order is particularly important as an interim and preparatory measure for the proposed legislation. The committee proposes a number of amendments to strengthen it and provide a degree of clarification where problems have been identified at this early stage of its implementation. Appendix C explains the difference between the Senate order and the wording proposed by the committee.

4.8 The amendments include changes to:

- advise the value of the contract, a nil return and whether all departments and agencies for which the minister is responsible are covered by the letter;
- provide for ministers to report on non-compliance in any or all of the agencies for which s/he is responsible;
- clarify the reporting period for letters tabled on the tenth sitting day of the spring and autumn sittings;
- provide the basis for estimates of compliance costs; and
- recognise that contracts not listed on agency websites should also be open to the Auditor-General.

The committee recommends that the order passed by the Senate on 20 June 2001 be amended to read:

LISTS OF DEPARTMENTAL AND AGENCY CONTRACTS - ORDER FOR PRODUCTION OF DOCUMENTS

(1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.

(2) The list of contracts referred to in paragraph (1) indicate:

(a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of $100 000 or more;

(b) the contractor, the amount of the consideration and the subject matter of each such contract;

(c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and

(d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.

(2A) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:

(i) the list is not up to date
(ii) not all relevant agencies are included
(iii) contracts all of which are confidential are not included.

(2B) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

(3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

(3A) In respect of letters including matter under paragraph (2A), the Auditor-General be requested to indicate in a report under paragraph (3) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.

(4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.

(5) This order has effect on and after 1 July 2001.

(6) In this order:

"agency" means an agency within the meaning of the *Financial Management and Accountability Act 1997*;
"autumn sittings" means the period of sittings of the Senate first commencing on a day after 1 January in any year;
"previous 12 months" means the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be;
"spring sittings" means the period of sittings of the Senate first commencing on a day after 31 July in any year.

Recommendation 2: Changes to the Gazette Publishing System (GaPS)

4.9 GaPS is a mechanism for reporting Commonwealth contracts that can be relatively readily adjusted to accommodate the Senate order. The Committee notes the current review by Finance of GaPS is yet to be finalised. It observes that correcting the problems identified by the Auditor-General and making technical adjustments to enable GaPS to deliver additional information and functionality would reduce considerably the compliance costs of a more transparent approach to contracting.

(a) The committee recommends that GaPS be amended to provide:

- **an extra field , or another additional facility to record data, that can be used to notify the public of the existence of each confidentiality clause;**
- **a set of codes that specifically indicate the reason for each restriction, for example, national security, personal privacy or commercial sensitivity (including the relevant ANAO criterion);**
- **information about the end date, renewal, extension of and amendment to, contracts listed; and**
- **the capacity to sort information in GaPS by agency, contract value and whether the field notifying confidentiality is filled.**

(b) The committee also recommends that where the secretary of a department or agency head has decided to exclude a contract from notification in GaPS the reasons should be documented and made available to the Auditor-General on request.

Recommendation 3: Changes to annual reporting requirements

4.10 If the above recommendations are implemented, more timely and meaningful information about consultancies and contracts entered into by an agency would be available than the current annual reporting provisions provide.

The committee recommends that annual reports of Financial Management and Accountability Act agencies provide the following information:

- **the web address of lists of contracts of $100 000 or more;**
- **a report on compliance with the Senate order;**
- **a report on training completed by officers undertaking procurement functions;**
- **a report on the inclusion in RFTs and contracts of advice about public and parliamentary accountability responsibilities; and**
- **a report on the agency's compliance with mandatory reporting requirements and steps taken to improve the integrity of its data in GaPS.**

Recommendation 4: Accountability to the Senate

The committee recommends that potential and actual partners to a government contract be informed that contracts and contract related material may be requested by Parliament and 'that there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the Parliament or its committee unless the Parliament has expressly provided otherwise'.[2]

4.11 The committee is concerned at the repeated displays of ignorance of parliamentary and committee powers that it has witnessed and reported over the past six months. In the absence of the legal opinions used to justify withholding documents from the committee, and now used to resist an order of the Senate, the committee must believe government claims as to the content of legal advice. As a result, it questions the value for money of recent legal advice to government, for example, on the Senate order.

4.12 In doing so, the committee recalls the IT outsourcing inquiry during which it became apparent that the provision of incomplete background information to advisers resulted in poor quality and costly legal advice to government.[3]

4.13 The Senate's power to require information about government contracting to be provided or published and the protection of that information by the *Parliamentary Privileges Act 1987* are beyond doubt.

Senator George Campbell

Chairman

2 The Senate, *Standing Orders and other orders of the Senate,* February 2000, Procedural Order of Continuing Effect no.32, p. 130.

3 Committee, *Inquiry into the Government's information technology outsourcing initiative, Accountability issues: Two Case studies, June 2001.*

APPENDIX A

CRITERIA FOR DETERMINING GENUINE COMMERCIAL SENSITIVITY

In the absence of any comprehensive material to assist agencies in determining whether contractual provisions should be treated as confidential, the Australian National Audit Office (ANAO) has developed a set of criteria. A decision on the inherent quality of the information—rather than the circumstances surrounding the provision of the information—should be made before the information is accepted or handed over.

The committee supports the use of the following criteria to identify whether it is appropriate to agree to protect, as confidential, information in Commonwealth contracts. The committee notes that much commercial information has quite a short sensitivity period, say two or three months, but some can remain sensitive for many years.

The information to be protected must be able to be identified in specific rather than global terms.

- Particular clauses or parts of clauses within a contract or particular information, should be identified, rather than protecting the contract as a whole, or all of the information.
- A confidentiality claim should not be made or accepted in relation to innocuous material.

Information has the necessary quality of confidentiality

- The information in question must not be something that is trivial or within the public domain (for example, details may already appear in the client charter, published business plan or annual report).
- The information must have continuing sensitivity for the entity whose information has been confided. It is not sufficient that the 'confider' merely wishes to protect the communication.
- The information must have a commercial value to the business or its competitors (for example, trade secrets), and it is likely that detriment will be caused to the 'confider' should it be disclosed.
- At the time when confidentiality is claimed, the information must be known only by a limited number of parties. The nature of some of the items of information may be such that they enter the public domain over time as circumstances change (for example, where otherwise confidential information has been

tendered in court proceedings, or where a contract has been awarded following a tendering process).

Detriment to the 'confider' of the information

Detriment to a 'confider' resulting from the disclosure of information is generally a necessary element to a court making a finding that disclosure would amount to a breach of confidence. However, where the information is about spending taxpayers' money and the government seeks to enforce a confidence, the courts have held that detriment must be established by reference to the relevant public interests that would be damaged upon disclosure. Unlike a private party seeking to enforce a confidence against the Commonwealth, the Commonwealth is obliged to act in the broader public interest. Public discussion and criticism of government actions or embarrassment do not amount to sufficient detriment to warrant a confidentiality claim.

Circumstances in which information is provided

The information above has been provided to assist with the making of an assessment about the nature of the information that is being provided or accepted.

The circumstances in which the information is provided or accepted are also important. If the information is provided or accepted where it is clear that the provider's position is that the information should not be disclosed, this is an important factor to consider when making an assessment about whether to classify the information as confidential. The Senate order passed in June 2001 for the production of departmental and agency contracts requires the reasons to be made public for agencies agreeing to any confidentiality clauses and for these to be audited by the Auditor-General.

It is absolutely necessary for the private contracting party to be informed of the different accountability obligations that arise from contracting with the Commonwealth as these may impact on them in the future. In addition to disclosure to the public under the FOI Act, their information may be required to be disclosed by law, for example under court subpoena, parliamentary order or as part of discovery during legal proceedings. For example, while a contract may identify as confidential information about contract performance, a Senate committee examining budget estimates may require such information to be provided as evidence that the contract is an effective and efficient use of public funds. The contract clauses would not protect against this disclosure – and, while other committees may agree to receive information *in camera*, information provided as part of estimates hearings is automatically made public.[1]

1 See clause 2.42 of this report.

APPENDIX B

ADVICE TO COMMITTEE FROM THE CLERK OF THE SENATE

21 September 2001

Ms Helen Donaldson
Secretary
Finance and Public Administration Committee
The Senate
Parliament House
CANBERRA ACT 2600

Dear Ms Donaldson

PUBLICATION OF DOCUMENTS BY THE SENATE

Thank you for your letter of 20 September 2001, in which the committee requests advice on remarks made in the Senate by the Manager of Government Business in the Senate on 27 August 2001 in response to the Senate's order of 20 June 2001 for the production of lists of government contracts.

In the course of a statement on behalf of the government, the minister stated:

> The Government has been advised by the Australian Government Solicitor that the order is probably beyond the Senate's power because it requires information to be provided to the public and not the Senate or a Senate Committee.

and

> ……it is likely that the Parliamentary Privileges Act 1987 would not provide absolute privilege in respect of the publication of information on the Internet……

The committee has asked for a copy of the advice provided to the government but this request has not yet been met.

If these statements are an accurate paraphrase of the advice provided to the government, it is difficult to imagine the reasoning which could have led to the advice. The conclusions as stated are flatly contradictory of the Parliamentary Privileges Act. The Act provides in paragraph 16(2)(d) that the formulation, making or publication of

a document by or pursuant to an order of a House or a committee is a proceeding in Parliament within the meaning of the Act, and therefore protected by parliamentary privilege. The publication of a document by order of the Senate could not be protected by parliamentary privilege unless it were within the power of the Senate to order the publication of the document.

It may be that the advice provided to the government argues that the Senate cannot order a document to be published until the document is laid before it. Such a contention is contradicted by the terms of the Parliamentary Privileges Act. This question was settled in 1984 when the Senate first ordered the publication of a Senate committee report and a government document in advance of their presentation to the Senate, by providing that their publication was to take place when they were provided to the President. It was pointed out at that time, the Parliamentary Privileges Act not then having been passed, that the power to order the publication of a document without the document having been prepared or laid before the Senate is one of the statutory powers of the United Kingdom House of Commons which attaches to the Houses of the Australian Parliament by virtue of section 49 of the Constitution. After that time, the Senate regularly ordered the publication of documents before the documents were prepared or laid before it, and when the Parliamentary Privileges Act was drafted it was framed so as to remove any possible doubt that the power to order the publication of documents did not depend on the documents first having been prepared or presented to the Senate.

It would be most surprising, to say the least, if, after all this time, and in the face of the unambiguous terms of the Parliamentary Privileges Act, the government's advisers have suddenly come to the conclusion that the Senate cannot order the publication of a document with parliamentary privilege attaching to the publication.

If it is the mode of publication, electronically on the Internet, which troubles the government's advisers, it need only be pointed out that the Acts Interpretation Act, section 25, defines the term "document" to include documents in electronic form, and the Senate has been ordering the publication of documents in that mode for several years.

In the absence of the actual terms of the advice provided to the government, I cannot take the matter any further, but if that advice is obtained I would be pleased then to comment further on it.

Please let me know if I can be of any other assistance to the committee.

Yours sincerely

SIGNED
(Harry Evans)

APPENDIX C

PROPOSED CHANGES

DEPARTMENTAL AND AGENCY CONTRACTS — ORDER FOR PRODUCTION OF DOCUMENTS, 20 JUNE 2001

Introduction

In this report, the committee has recommended changes to the Senate order for the production of lists of departmental and agency contracts. The revised wording of the order is provided in Chapter Four and in this appendix the committee details the difference between the existing order and the proposed changes.

The committee continues to support the existing order and the changes should not be seen as alleviating the Government of the requirement for it to comply. Should the Senate not agree to the revised wording, it is the committee's intention that the existing order continue to apply.

Additions to the wording of the Senate order are underlined below, deletions are also marked:

LISTS OF DEPARTMENTAL AND AGENCY CONTRACTS - ORDER FOR PRODUCTION OF DOCUMENTS

(1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.

(2) The list of contracts referred to in paragraph (1) indicate:

(a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of $100 000 or more;
(b) the contractor, the amount of the consideration and the subject matter of each such contract;
(c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether ~~any provisions of the contract are regarded by the parties as confidential,~~ there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
(d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.

(2A) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:

(i) the list is not up to date
(ii) not all relevant agencies are included
(iii) contracts all of which are confidential are not included.

(2B) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

(3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

(3A) In respect of letters including matter under paragraph (2A), the Auditor-General be requested to indicate in a report under paragraph (3) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.

(4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.

(5) This order has effect on and after 1 July 2001.

(6) In this order:

"agency" means an agency within the meaning of the *Financial Management and Accountability Act 1997*;
"autumn sittings" means the period of sittings of the Senate first commencing on a day after 1 January in any year;
"previous 12 months" means the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be;
"spring sittings" means the period of sittings of the Senate first commencing on a day after 31 July in any year.

Intention of Recommendation 1

The amendments are intended to strengthen and clarify the order. The reporting period for tabled letters and the scope of confidentiality are more clearly defined by the revised wording. The availability to the Auditor-General of contracts not listed on agency websites is confirmed. In the interests of presenting more complete information, the proposed wording requires that:

a) agencies–

- advise the value of the contracts listed, and
- provide the basis for estimates of compliance costs;

b) ministers' letters–

- state which departments and agencies are covered by that letter,
- report on non-compliance in any or all of the agencies for which s/he is responsible, and
- advise if no contracts fall within the terms of the order.

Publication

Nothing in the order invalidates any applicable statutory duty to maintain the confidentiality of certain information, such as that relating to national security or personal privacy. The committee recognises that statutory provisions may prevent the publication of details, even the title of a contract. In such instances, paragraph 3A of the order allows for the Auditor-General to examine the relevant contract and report as to whether any inappropriate use of such provisions was detected.

Parliamentary Privilege

The Senate has ordered that the following information be published on the internet:

- name of contract/s and contractor/s;
- value of contract/s;
- subject matter of each contract;
- whether the contract contains confidentiality clauses or whether there are other confidentiality requirements;
- if there are confidentiality requirements, a statement of reasons for the confidentiality; and
- an estimate of compliance costs and formula details.

The doubts expressed by the Government about the application of parliamentary privilege to the publication of information on the internet are in conflict with the *Parliamentary Privileges Act 1987*. Pursuant to paragraph 16(2)(d), the Act applies to:

> the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

In the committee's view, the publication of this information is clearly protected by parliamentary privilege.