CHAPTER FIVE

PROBITY ISSUES

Introduction

5.1 The Committee's interest in the probity of the tendering process for the Initiative became a matter of grave concern when irregularities with the Health Group tender process were brought to its attention and its requests for information were not fully answered.[1] In this chapter, the Committee looks at key issues dealing with the integrity and proper conduct of the IT outsourcing tendering process—impartiality, accountability, fairness in dealing with the public and the role of the probity auditor.

5.2 In March 1998 the Commonwealth Procurement Guidelines (CPGs) were substantially reduced in length. The Committee accepts that the move behind changes to this guide was intended to 'strike a balance between prescription and empowerment by encouraging agencies to obtain the best value from procurement on a whole-of-life cost basis.'[2] Although this allows agency heads the discretion to decide how best to manage their business, there is an increased risk of undermining not only the quality of contracting by agencies, but also the accountability principles espoused by the Commonwealth.

Record keeping and accountability

5.3 At the most basic and practical level, public accountability depends on clear, accurate and comprehensive documentation backed up by sound record keeping practices. The Management Advisory Board stated categorically in 1997 that public sector managers should document all decisions made in selecting tenderers. Clearly, this practice is important for both internal and external accountability.[3]

5.4 Although the Committee has identified a number of deficiencies in the tendering process, this matter of record keeping and documentation is of particular concern.

5.5 The Committee endorses wholeheartedly the advice about record-keeping practices given by the Management Advisory Board. The inclusion of this 1997 document on the current Competitive Tendering and Contracting page of the

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1 The irregularities consisted of an unauthorised disclosure of tender information and the acceptance of a late tender.

2 Media Release, the Hon John Fahey, Minister for Finance and Administration, 'Commonwealth Procurement Guidelines (CPGs)', No. 31/98, 1 April 1998 and Department of Finance and Administration (DOFA), *Commonwealth Procurement Guidelines: Core Policies and Principles* (CPGs), March 1998.

3 MAB/MIAC Report No. 23, *Before You Sign the Dotted Line,* May 1997, p. 17. The CPGs insist that good record keeping is an essential element of accountability. DOFA, *CPGs*, March 1998, p. 13.

Department of Finance and Administration (DOFA) website indicates its continuing relevance. The Committee, however, goes further to stress the importance of documentation when a breach or irregularity has occurred in the process. Indeed, the Committee could simply not comprehend the casual attitude taken toward record keeping, in particular by the Office of Asset Sales and Information Technology Outsourcing (OASITO). When this laxity in documentation combines with an absence of any clear guidelines or set procedures, the risks to the tendering process escalate.

5.6 Such a situation became evident to the Committee when inquiring into an unauthorised disclosure of information and the receipt of a late tender during the Health Group tender process. This was dealt with at length in the Committee's second interim report that highlighted the absence of clear guidelines and poor documentation in dealing with these matters. In raising this matter again, the Committee concentrates on the documentation side of the late tender.

5.7 Mr Yarra, OASITO, explained to the Committee that OASITO writes tender rules each time it issues a tender and that they are written before the process commences. In this particular case of the Health Group tender, he maintained that the rules were in place before the tender got underway and that OASITO observed those rules in dealing with the late tender. He asserted that the late tender rules are in the Request for Tender (RFT) and that there is a full section that sets out the rules in great detail.

5.8 Clause14.1.2 of the RFT reads:

> The Commonwealth reserves the right at its sole discretion to accept or reject late tenders, or parts thereof, submitted after the closing time and date. The Commonwealth expressly reserves the right at its sole discretion to change the time and date for lodging of tenders. The judgement of the Commonwealth as to the actual time that a tender is lodged is final. Each tender will receive a receipt showing the date and time of lodgment.

Similar clauses can be found in the RFTs for other IT outsourcing request documentation.[4]

5.9 The Committee accepts that such a broad clause is both fair and necessary to allow for extenuating circumstances that might cause a tenderer to miss the closing date. Indeed, OASITO's Chief Executive, Mr Smith gave an example in evidence:

> I can remember accepting late tenders in the late seventies…the framework, I recall, was put in place in about the late eighties, when a purchasing reform was conducted…we had instances in which better offers were late because someone's car had broken down 100 metres from the tender box. You had a couple of choices: ignore that bid or retender. The costs of

4 The most recent request for tender (RFT) is for Group 11. This clause is at 14.1.2

> retendering are significant. As a result of that experience, the processes were changed.[5]

5.10 The Committee is not concerned here with the clause in the RFT that allows the Commonwealth discretion to receive a late tender, but rather with the procedures in place to ensure accountability and transparency. In this particular instance, only two of the three tenders were in the tender box after the closing time for receipt of tenders which was 9.00 am. OASITO decided to accept a tender that arrived later that day. It could not, however, produce documentation to show that officers had followed a process that was objective, fair and equal to all tenderers. Officers from OASITO could not say for certain whether they contacted the late tenderer or vice versa; they could not produce documentation from the tenderer offering an explanation for the late bid; and there is no record of the response of the other tenderers to advice about the late tender. Again, OASITO officers made no reference (apart from the RFT) about guidelines they used to establish the grounds for accepting a late tender.

5.11 Mr Smith outlined to the Committee the reasons for accepting the late tender:

> Two things have occurred here: this information has been received by two parties and will remain unopened; our tender rules allow us to accept late tenders; and, thirdly, in our best judgment these prices would have been well and truly signed off in the hierarchies of these companies way before 9 a.m.[6]

5.12 OASITO stated that its assumptions about internal clearance process for bidders were:

> based on more than a decade of experience relating to the preparation of and internal approval procedures relating to large proposals from industry.[7]

5.13 The Committee believes that assumptions, even those based on years of experience, are a poor substitute for thorough checking and well documented procedures. Again the issue is not about the actual decision taken by OASITO to receive the late tender, but the lack of written records and the *ad hoc* procedures adopted regarding the receipt of tenders. Indeed, the Committee is concerned that the lack of transparency and due process put at risk the integrity of the process.

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5 Mr R. Smith, Office of Asset Sales and Information Technology (OASITO), Committee, *Hansard*, 19 June 2001, p. 632. OASITO further explained that 'Mr Smith's comments referred to a range of Commonwealth purchasing reforms that occurred during the late eighties and early nineties. Important among these was the replacement of the more prescriptive Commonwealth Purchasing Manual with the Commonwealth Procurement Guidelines (CPGs) in 1990. The Commonwealth's current tendering and procurement practices are set out in the CPGs. These guidelines have been modified since their inception. The CPGs dated 1997, specifically referred to late tenders and provided broad guidance regarding the acceptance of late tenders. In the current version, specific reference to 'late tender process' has been deleted. Under the current framework agencies are accountable for ensuring their procurement processes are in line with the CPGs and defined in their Chief Executive Instructions'. Answer to supplementary question, 19 June 2001.

6 Mr R. Smith, OASITO, Committee, *Hansard*, 19 June 2001, p. 631.

7 OASACS , answer to supplementary question on notice, 19 June 2001.

5.14 While there appears to be valid grounds for accepting the late tender, the Committee is disturbed that OASITO did not refer in evidence to any guidelines used to validate its decision, nor was there clear documentation to verify that OASITO had acted objectively. A tender process is not one for improvisation, it should adhere to approved and established procedures and should be adequately documented.

5.15 The *ad hoc* approach taken by OASITO contrasts with that advocated by, for example, the Department of Defence, which has a precise and clear policy to be followed on receiving a late tender. It specifies that tenders lodged after the closing time specified in the RFT may be deemed to be Late Tenders. Late tenders will be opened and registered separately and may be excluded from the evaluation process at the discretion of the Commonwealth. Late tenders shall be admitted to evaluation if there is proof that they were mishandled by the relevant departmental purchasing office or by an official postal or telecommunications service.

5.16 The Department of Defence requires that following notification that a submission has failed to meet the tender closing time and is deemed to be a Late Tender, the relevant tenderer may be asked to provide explanatory evidence in an appropriate form for consideration by the purchasing officer. It requires the Liability Approver to determine whether to exclude a late tender from further consideration or not. In doing so it directs that:

> Such judgments should ensure that the objective of value for money and the requirement to exercise probity and fair dealing are satisfied. The reasons for the decision are to be recorded and the tender notified if their offer has been excluded because of lateness.[8]

5.17 With the late tender for the Health Group, the Committee would have expected OASITO to have immediately put in place measures drawn from established and approved guidelines and then to clearly document the procedures they followed and keep a written record of any decisions taken and the reasons for such decisions. Even more so, because the Health Group had already had a breach of tendering procedures with an inadvertent disclosure of information. But, as noted earlier, OASITO has provided no evidence that there is clear documentation on this matter—no written explanation by the tenderer for its late tender; no written advice to the Chief Executive Officer who authorised the receipt of the late tender; and no written authority for the tender to proceed.

5.18 The Committee is also concerned that an environment was created during the Health Group tendering process that further jeopardised the integrity of the transaction. The inadvertent disclosure and the late tender were serious in themselves but clearly there were pressures being applied at the time that could have unduly influenced decisions. Dr Harmer from the Health Insurance Commission (HIC)

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8 Department of Defence, *Defence Procurement Manual*, version 2.1, July 1999, Section 5, Chapter 1 para 707 and 708.

explained the circumstances for agreeing to the tendering process to continue after the inadvertent disclosure of information to one of the tenderers:

> for the Health Insurance Commission the process was quite a debilitating one. I was afraid of losing staff. It had gone on for a long time. It would not quite have been in the interests of the HIC, in my view, that we went out to tender again or that we extended the process any longer than necessary. I was losing key staff, we had a very important social program to run in Medicare and I was anxious to get the situation resolved so that I could continue to run an efficient operation.[9]

Fairness in dealing with the public

5.19 Another fundamental condition underpinning the principle of accountability is transparency. In this report, the Committee has cited a number of clauses in the RFTs that reserve to the Commonwealth certain very broad rights, such as the right to receive a late tender and the right to vary or amend information and procedures set out in the RFT. As stated earlier, the Committee understands the need to allow the Commonwealth wide discretion in such matters. The Committee is concerned, however, that certain obligations of the Commonwealth towards tenderers are not spelt out in the RFTs.

5.20 Mr Rob Durie of the Australian Information Industry Association (AIIA) made the point that 'the Government is in a special position because it is the buyer, the regulator, the rule setter and the legislator'.[10] Because of this unique situation, agencies should be careful not to misuse or abuse their position. They should not only ensure that the rights of the Commonwealth are protected but that people and organisations in the private sector are dealt with fairly and equitably and that their rights are respected.

5.21 The Committee has difficulty in accepting, for example, Clause 10.3 in the Health RFT which reads:

> The Commonwealth reserves the right at its sole discretion to suspend, terminate or abandon in whole or in part this Project at any time prior to the execution of a formal written contract in the form of a Services Agreement. The Commonwealth will notify Tenderers to this effect *but is not obliged to provide any reasons.* (italics added)

Similarly clause 10.3.1.1 reads:

> The Commonwealth reserves the right, at its sole discretion at any stage of the tender process, to do all or any of the following:

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9 Dr J. Harmer, Health Insurance Commission (HIC), Committee, *Hansard*, 19 June 2001, p. 635.

10 Mr R. Durie, Australian Information Industries Association (AIIA), Committee, *Hansard*, 15 March 2001, p. 292.

> …
>
> (b) change the structure and timing of the tender process;
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> (c) terminate further participation in the tender process by any Tender for any reason, regardless of whether the tender submitted conforms with the requirements in this RFT;
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> (d) terminate any negotiations being conducted at any time with any tenderer for any reason;
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> …
>
> (g) change the scope of the Services or other requirements of this RFT.[11]

5.22 These particular terms are of concern, not because they offer safeguards for the Commonwealth against a range of contingencies but because these assertions of rights do not appear to be matched in the RFT with recognition of certain basic obligations of fairness and accountability. The Committee draws particular attention to the Commonwealth's policy as specified in the CPGs that:

> Agencies offer bidders a written or oral debriefing on why their offers were successful or failed.[12]

5.23 The CPGs also suggest that agencies should not exclude, without good cause, those who have expressed interest in supplying goods or services. If they choose to exclude any potential bidder, the CPGs recommend that they should document the reasons for doing so and make these available to the supplier. Similarly, the *Defence Procurement Manual* offers the following advice:

> A decision to discard a tender at any point in the evaluation process must be able to be justified.

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11 RFT, Health Group.
The same clause is included in slightly stronger terms in the Centrelink RFT, clause 6.4.1 and in Treasury's RFT 10.4.1:

> The Commonwealth reserves the right, in its sole and absolute discretion at any stage of the RFT process to do all or any of the following:
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> …
>
> b. change the structure and timing of the RFT process;
>
> c. terminate further participation in the RFT process by any Tenderer for any reason, regardless of whether the tender submitted conforms with the requirements of the RFT;
>
> d. terminate any negotiations being conducted at any time with any Tenderer for any reason;
>
> e. negotiate with one or more Tenderers and to enter into any agreement (and other transaction documents) without prior notice to any other Tenderer;
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> …
>
> i vary, amend or terminate the RFT process; (same as and also 10.18 and 11.1)

12 DOFA, *CPGs*, p. 8.

> During the tender evaluation process, those tenderers who tenders are screened out or are not shortlisted are to be promptly advised.[13]

5.24 The Committee argues that the terms in the RFT should reflect Commonwealth policy. The terms should not include an assertion that the 'Commonwealth is not obliged to provide reasons for its actions' rather they should include a statement that the Commonwealth will indeed offer explanations for actions as important as suspending or terminating a tendering process or excluding a tenderer from the process.

Recommendation No. 7

The Committee recommends that all RFTs for IT outsourcing, which contain clauses allowing the Commonwealth broad discretionary rights to alter the RFT or to exclude a tenderer from the process or any similar decision, also include a clause which places a clear and definite obligation on the Commonwealth to provide in writing the reasons for the variation, amendment, cancellation or termination. RFTs should be consistent with the Commonwealth Procurement Guidelines.

5.25 Overall, the Committee believes that the CPGs need to be reviewed and a careful look taken at the proposed new *Competitive Tendering and Contracting: A Guide for Managers* in light of the findings from this inquiry. At the very heart of the matter is not only the articulation of principles such as accountability, fairness and equity, but also ensuring that they are embraced and practised in the Australian Public Service (APS). Moreover, practical measures such as directions to include certain statements of obligations in RFTs may be needed to ensure that principles such as fair dealing and accountability are recognised, adopted and observed.

Recommendation No. 8

The Committee recommends that:

- **The Government review the CPGs with a view to making them more explicit and detailed for agency heads and less likely to broad and uncertain interpretation. An annual review is also recommended to ensure their continuing relevance.**
- **All officers performing duties in relation to the procurement of property or services be required to 'act in accordance with', rather than simply 'have regard to', the core policies and principles detailed in the Guidelines. Such officers must make written records of any actions that are not in accord with the Guidelines and their reasons for doing so.**

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13 Department of Defence, *Defence Procurement Manual*, version 2.1, July 1999, Section 5, Chapter 1, Handy Hints.

- **The outcome of the review of the accompanying *Competitive Tendering and Contracting: A Guide for Managers* include a document that provides greater detail about procurement practices and procedures.**

5.26 These proposed guidelines should build on the collective experiences of Commonwealth agencies in procurement and offer clear, precise and practical guidance on the range of issues confronting procurement officers such as procedures to be followed for a late tender.

5.27 In this section the Committee has dealt with what it perceived as behaviour that increased the risks to the integrity of the IT outsourcing tendering process and therefore is likely to increase the Commonwealth's exposure to litigation. The Committee has recommended that particular measures be taken to lessen these risks. It now turns to the role of probity auditor, which increasingly is assuming an important place in Commonwealth competitive tendering and contracting.

The probity auditor

5.28 Probity auditing, although a fairly recent development in major governmental infrastructure undertakings, is now becoming accepted as a necessary part of any large contractual process involving government and the private sector. The increased focus on the issue of probity in the public sector is a product of the increasingly commercial nature of its service delivery methods, demands for more open and accountable government and greater scrutiny of tendering processes.[14] The key function of a probity auditor is to independently monitor a tendering process to ensure it 'is conducted in accordance with identified probity principles'.[15]

5.29 A probity plan articulates a set of principles against which the actual conduct of a tendering process is assessed. In the view of the South Australian Auditor-General, a probity plan should encapsulate the following probity principles, fairness and impartiality; open competitive process; consistency and transparency of process; identification and resolution of conflicts of interest; accountability, security and confidentiality; and monitoring and evaluation of performance.[16] These principles are currently embodied in the Victorian and Tasmanian procurement guidelines.[17]

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14 As noted by the South Australian Auditor-General, the appointment of a probity auditor 'is not a stipulated requirement with respect to government contracting', Auditor-General's Department, South Australia, *Electricity Businesses Disposal Process in South Australia: Arrangements for the probity Audit and Other Matters: Some Audit Observations*, 28 October 1999, Part 1.

15 Australian National Audit Office (ANAO), *Implementation of Whole-of-Government Information Technology Infrastructure Consolidation and Outsourcing Initiative*, Audit Report No. 9 2000–2001, p. 88.

16 Auditor-General's Department, South Australia, *Electricity Businesses Disposal Process in South Australia: Arrangements for the Probity Audit and Other Matters: Some Audit Observations*, 28 October 1999, Part 1.

17 The Victorian and Tasmanian guidelines are discussed in the section on 'probity and government contracting: state issues'. See for example, Probity Guidelines for Government Tendering Projects in Victoria, http://www.vgpb.vic.au/../polguid/guid1b.htm (18 July 2001)

5.30 The South Australian Auditor-General adds that a probity plan serves as a guide that enables the probity auditor to decide which issues need to be examined to determine whether a particular transaction has been followed lawfully and according to generally accepted government practices. At the end of a tendering process the probity auditor writes a report offering an independent professional view on the way in which the tender was managed from a probity perspective.[18]

5.31 The CPGs make no reference to the specific role of probity auditing. The section on ethics and fair dealing is restricted to the observation that if parties involved in a contract comply with ethical standards they will 'deal with each other on a basis of mutual trust and respect; and conduct their business in a fair and reasonable manner, and with integrity'.[19] The evidence suggests that apart from a broad statement of principle relating to procedural fairness and impartiality, there are no current Commonwealth guidelines that specifically discuss the probity aspects of Commonwealth contracting practices.[20]

Probity and government contracting: State issues

5.32 Since at least 1999 there has been growing recognition by the Victorian, Tasmanian and South Australian State governments of the important distinction between a probity auditor and a probity adviser. This has come about as a direct result of State governments undertaking inquiries and audits of government contracting practices during the 1990s. These inquiries have identified in some instances a shortfall in standards of probity and in other cases increased recognition of the potential for conflicts of interest involving probity auditors. They are summarised in this section of the chapter.

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18 Auditor-General's Department, South Australia, *Electricity Businesses Disposal Process in South Australia: Arrangements for the probity Audit and Other Matters: Some Audit Observations*, 28 October 1999, Part 1.

19 DOFA, *CPGs*, March 1998.

20 According to the Australian Government Solicitor (AGS) legal briefing entitled 'Probity Aspects of Tendering', the importance of a probity plan for Commonwealth contracting processes is recognised in Commonwealth Procurement Circular 97/5 which indicates that a probity plan is an important strategy to ensure fair dealing in tendering. A carefully worded probity plan 'will make it more difficult for an unsuccessful tenderer to challenge the tendering process on the grounds that the agency had breached the obligation to act fairly in the treatment of the tenderer' A closer inspection of DOFA's competitive tendering and contracting (CTC) website reveals that Circular 97/5 is not included in DOFA's list of current circulars. Nor is there any mention of probity issues in the eleven CTC and procurement toolkits that have been developed to help APS staff understand their policy obligations in the contracting process. Moreover, the AGS legal briefing on probity does not address the probity auditor/adviser distinction that has been accepted by some State governments. It states that a probity plan would normally require the appointment of a probity adviser, 'sometimes called a "probity auditor"', and then proceeds to briefly describe the role of a probity adviser. There is, however, no further mention of a probity auditor.

See AGS, *Probity Aspects of Tendering*, Legal Briefing No. 51, 25 October 1999, p. 1; DOFA, *Competitive Tendering and Contracting*, http://www.dofa.gov.au/ctc/index.html; Two of the toolkits, 'Ethics in Government Procurement' and 'Fair Dealing in Tendering', relate specifically to the conduct of officers engaged in government procurement activities, and the risks and legal liabilities that can arise for government agencies conducting a competitive tendering process.

5.33 The proliferation of contracts entered into on behalf of governments in recent years has resulted in a number of State government reviews of the procedural integrity of government tendering and contracting. This has created a situation where the States, and not the Commonwealth, are now at the forefront of developing detailed probity and accountability guidelines for government procurement strategies, and revising and updating probity guidelines that have been in place for several years. The Committee is concerned with the absence of any probity guidelines at a Commonwealth level because of the significant funds involved and the resistance to accountability that it has experienced. As Victoria's Assistant Auditor-General, Mr Russell Walker, emphasised recently:

> probity must be an integral part of any process and not be a last minute consideration. Agencies need to have in place systems, policies and procedures that can withstand public scrutiny.[21]

5.34 The Victorian Government Purchasing Board launched new probity guidelines and a probity policy in May 2001, and the Tasmanian Department of Treasury and Finance developed comprehensive probity guidelines in May 1999.[22] Both sets of guidelines are designed to help State government employees establish and maintain high standards of probity in all procurement and contracting processes. The NSW government also developed in 1999 a Code of Practice and a Code of Tendering for government procurement that establishes ethical principles to ensure 'honesty, integrity, fairness, consistency and value for money in all aspects of the procurement process'.[23] The remaining states either draw attention to the probity of government tendering processes in their purchasing and procurement guidelines, but fall short of providing guidance on the appropriate use of probity auditors/advisers, or do not refer specifically to probity issues.[24]

5.35 Of particular relevance to this inquiry, especially with regard to improving the accountable management of IT contracts, is the detailed examination of all aspects of the probity of government contracting in the Victorian and Tasmanian guidelines.

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21 Russell Walker, Assistant Auditor-General, Victoria, 'The Audit Perspective on Probity—Probity in Victorian Government Contracts: A Case of Minding Your P's', Seminar Paper, 23 May 2001, p. 2.

22 Victorian Department of Treasury and Finance, *Policies and Guidelines—1b Probity Guidelines for Government Tendering Projects in Victoria*, 2001 and *Policies and Guidelines—1.13 Probity Policy*, (the guidelines were first issued in 1998); Tasmanian Department of Treasury and Finance, *Probity Guidelines for Tendering and Contracting*, May 1999. The Victorian probity policy and guidelines were launched on 23 May 2001 by the Victorian Minister for Finance, the Hon Lynne Kosky MP, at a seminar entitled Probity in Victorian Government Contracts: A Case of Minding Your P's'.

23 Department of Public Works, *Policy Statement NSW Government Procurement: A whole of government framework*, State Contracts Control Board, 1999; Department of Public Works, *Code of Practice: NSW Government Procurement*, State Contracts Control Board, 1999, p. 5. See also Department of Public Works, *Code of Tendering: NSW Government Procurement*, State Contracts Control Board, October 1999.

24 Queensland's State Purchasing Policy, for example, has 'probity and accountability for outcomes' as one of its three core objectives, but the policy does not proceed to state how probity and accountability are to be achieved. Queensland Government, *State Purchasing Policy*, Department of Public Works, 2000.

Both sets of guidelines draw a clear distinction between a probity auditor and a probity adviser and discuss their roles and responsibilities. They also elucidate the minimum mandatory probity requirements for government contracting, and describe probity principles that should be applied consistently to all contracting processes. Included in the Tasmanian guidelines is a template for probity issues that are likely to arise during the evaluation process. The Victorian guidelines include a template for probity reports covering important issues that are to be included in each probity report.[25]

5.36 Five aspects of the Victorian guidelines are of particular relevance to the probity of the Commonwealth Initiative. These cover issues such as when a probity auditor is required, the independence of a probity auditor, the reporting procedures for a probity auditor, the transparency and accountability of probity reporting, and the ability to engage the services of a probity auditor. The guidelines stipulate that:

- Probity processes in major government transactions may need to be checked by a probity auditor who is independent of the transaction team.
- An external probity auditor may be needed when the transaction is of high value (over $10 million); the matter is highly complex, unusual or politically sensitive and vulnerable to controversy; or the nature of the market place makes bidder grievances more likely.
- The probity auditor should always report to the Secretary or his/her nominee as an independent probity auditor to the project. However, before a tendering process commences, the project team should establish 'a clear set of procedures which enables the probity auditor to raise any concerns at an appropriately senior level within government…[A]n avenue should be available for escalating the concern…to the Departmental secretary or Audit Committee'.[26]
- Probity auditor reports should be available in full for scrutiny by Parliament, the Auditor-General and any interested person.

25 The template probity auditor report lists seven issues: description of the scope of audit; statement that the probity auditor has fulfilled his/her Project Brief; purpose for which the probity auditor's report has been prepared; description of the probity framework (plans, policies, guidelines) against which the review/audit has been conducted; statement whether the audit has been conducted in accordance with this framework; any qualifications or limitations on the probity auditor's opinion on the process; and findings in the form of an expression of opinion about whether, in all respects and based on the probity framework, the process has been undertaken in accordance with identified probity principles covered in the probity plan'. Victorian Department of Treasury and Finance, *Policies and Guidelines—1.13 Probity Policy*.

26 Victorian Department of Treasury and Finance, *Policies and Guidelines—1b Probity Guidelines for Government Tendering Projects in Victoria*, 2001, p. 13.

- An independent probity auditor can be engaged by consulting the probity auditors' panel that is being established by the Procurement Branch, Department of Treasury and Finance.[27]

5.37 The probity of government contracting during the 1990s has also been the subject of two recent State audits. The South Australian Auditor-General reported in October 1999 on the probity of the government's sale of electricity assets. The report recommends among other things that there should be a clear separation of roles for a probity auditor and a probity adviser to ensure that the probity auditor's role is independent from a sale or tendering process.[28] It states clearly that a probity adviser provides advice on how to conduct a process or deal with issues, including probity issues that arise during the course of a sale or lease. A probity auditor, on the other hand, independently monitors the sale, bidding and evaluation processes 'to ensure that they are defensible and that they are conducted in a fair and unbiased manner and that any potential liability of the State is identified and understood'.[29]

5.38 The auditor/adviser distinction is well captured by the guidelines of the Tasmanian Department of Treasury and Finance:

> The terms Probity Auditor and Probity Adviser are generally used interchangeably, however, there is a distinct difference between the two that should be clarified. A Probity Auditor's role is more generally an *ex post* role, that audits the process by way of observing and reviewing after the process is completed. A Probity Adviser's role is more generally an *ex ante* role, that is pro-actively being involved prior to embarking on a tender, providing advice on probity issues which may arise, and providing advice on strategies to overcome potential problems. The pro-active approach by the Probity Adviser should help to achieve best practice processes and outcomes.
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> The engagement of a Probity Adviser ensures that participants in a process are treated fairly, and officers and Ministers involved in the process are kept at arms length and protected from potential conflicts.[30]

5.39 Victoria's Audit Review of Government Contracts published in May 2000 is an independent report that addresses the probity of government contracts in Victoria

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27 The Tasmanian Department of Treasury and Finance has also developed a directory of fifteen individual probity advisers who have been pre-qualified by an Inter-Agency Evaluation Group and approved by the Treasurer to form a 'Probity Adviser Panel'.

28 Auditor-General's Department, South Australia, *Electricity Businesses Disposal Process in South Australia: Arrangements for the probity Audit and Other Matters: Some Audit Observations*, 28 October 1999, Part 3.

29 ibid.

30 Tasmanian Department of Treasury and Finance, *Probity Guidelines for Tendering and Contracting*, May 1999, Part 4 'What is Probity Advising?'.

between 1992 and 1999.[31] In many respects the report's findings on the probity issue are consistent with those of the South Australian Auditor-General. It states that the functions of a probity auditor and a probity adviser must be kept distinct. The probity auditor's main role is to carry out an audit of functions performed by the probity adviser as well as by the agency after the tender has been completed or, in complex tenders, at critical stages of the process. However:

> The Auditor cannot be involved in the decision-making process and must remain independent so that he or she can report after the event, or in a complex tender, at various stages. If the Auditor is asked to provide advice during a tender process then his or her function is compromised.[32]

5.40 The Committee is concerned that the CPGs, in their current form, do not address probity issues associated with the procurement process, and that information to assist agencies to deal with probity issues is now out of date.

Recommendation No. 9

The Committee recommends that DOFA undertake a review of available guidance on probity issues associated with the procurement process, taking into account the new and revised probity guidelines of the Victorian, Tasmanian and South Australian State governments. The review should form the basis of a revision of the CPGs.

Probity issues raised by the Australian Auditor-General

5.41 The ANAO's assessment of the probity process for the Initiative resulted in three main findings. First, the probity audit plan provided to ANAO by OASITO (dated November 1997) 'did not identify the independent audit testing that the probity auditor planned to undertake as the basis for providing the required clearances and sign-offs'. Second, the scope of services to be provided by the probity auditor were revised; however the revised probity plan in respect of those revised services was not provided to ANAO. Third, the nature of the sign-offs to be provided by the probity auditor 'was not stipulated and agreed between the Commonwealth and the Probity Auditor prior to the commencement of the engagement or included in the contract for the engagement'.[33]

5.42 In light of these findings ANAO made three specific recommendations for future consultancy agreements. These are grouped together under Recommendation

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31 Audit Review of Government Contracts, *Contracting, Privatisation, Probity & Disclosure in Victoria 1992–1999*, An independent report to Government, May 2000. The review analysed seven case studies covering a representative sample of the major contracts entered into by successive Governments.

32 ibid., p. 89.

33 ANAO, *Implementation of Whole-of-Government Information Technology Infrastructure Consolidation and Outsourcing Initiative*, Audit Report No. 9 2000–2001, pp. 90–91.

No. 6. It states that the provision of probity auditing services in future IT outsourcing tenders stipulate:

> (a) that a comprehensive probity plan is to be finalised before the commencement of the tendering process;
>
> (b) the nature of any sign-offs and reports to be provided by the probity auditor to the decision-maker; and
>
> (c) that the scope of the probity auditor's services include provision of a formal sign-off to the decision-maker prior to the execution of the final contract.

The DOFA whole-of-government response agreed with this recommendation.

Probity and the Initiative

Summary of process

5.43 Mr Stephen Marks of Stephen Marks & Co. Pty Ltd was appointed probity auditor to the Initiative on 2 October 1997 under a sole-sourced arrangement, and commenced duties with the Cluster 3 tender.[34] The contract between the Office of Government Information Technology (OGIT) (subsequently OASITO) and the probity auditor set out the scope of services to be provided by the probity auditor. The services are listed in Schedule 1 of the Consultancy Agreement. They include a requirement to audit the following aspects of the tendering process: accountability and transparency of the process; management of conflicts and potential conflicts of interest; short listing and evaluation of tenderers' proposals; and selection of preferred tenderer.[35]

5.44 While he was contracted to OASITO, Mr Marks believed that his responsibility was 'effectively to the government' to ensure that the IT outsourcing process was:

> fair and equitable, that it was defensible and transparent, that the bidders were all given equal opportunity and that nobody was disadvantaged by the way in which the process was conducted.[36]

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34 According to ANAO, Mr Marks was approached and interviewed by the Office of Government Information technology (OGIT) when a restricted competitive tender it conducted had not resulted in an appointment because 'conflict of interest issues' could not be resolved. ANAO, *Implementation of Whole-of-Government Information Technology Infrastructure Consolidation and Outsourcing Initiative*, Audit Report No. 9 2000–2001,p. 88, fn. 95.

35 Fn. 47 Consultancy Agreement, Commonwealth of Australia acting through and represented by the Office of Government Information Technology (OGIT) and Stephen G. Marks & Co. Pty Ltd, 2 October 1997. (Hereafter, Consultancy Agreement).

36 Committee, *Hansard*, 17 May 2001, p. 447.

Mr Marks told the Committee that his role was not to pass judgement on OASITO's conduct per se, but to make sure 'that the process [it] undertook ensured proper probity'.[37]

5.45 Mr Marks advised the Committee that if he was asked to report on a breach or potential breach of process, his contract required him to report to OASITO, who would then report his findings to the Minister. He also advised that he had a reserve power which was not stipulated in his contract, to report 'directly to the Minister if an occasion presented itself—but it did not present itself'.[38]

Revising the schedule of services

5.46 The probity auditor's schedule of services was completely revised on two occasions—6 May 1998 and 12 December 2000. In addition to the four key audit functions the original schedule states under the heading 'Deliverables' that the probity auditor shall: 'Prepare a report for Office of Government Information Technology (OGIT) at the end of each specified phase of the process or as requested by the Project Action Officer'.[39] Reference to the four audit services and preparing progress reports was first removed from the schedule dated 6 May. The two revised schedules list similar work duties and emphasise (in bold) the 'Milestone Sign Offs' to be provided by the probity auditor.

5.47 OASITO told the Committee on two separate occasions that the probity auditor's schedule was revised to reflect the evolving nature of the tendering process which, in turn, influenced the nature of the probity advice sought by OASITO.[40] The original schedule, for example, did not include provision for attendance at steering committee meetings, but in time this became an important role for the probity auditor.

5.48 The Committee was interested in this need to revise the schedule on two occasions, and who instigated the changes. According to ANAO, the probity auditor had advised that following consultations with OASITO it was agreed that 'the resource requirements associated with the draft probity plan were greater than those considered appropriate for the IT Initiative'.[41] The ANAO report was tabled on 6 September 2000, before the second revision.

5.49 The Committee accepts that changes to the schedule were made to accommodate changes in the tendering process. It is concerned, however, that sufficient planning and forethought were not given to the auditor's plan to anticipate fairly obvious tasks such as attendance at steering committee meetings. This failure in

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37 ibid.

38 ibid., p. 448.

39 Consultancy Agreement, Schedule 1—Services.

40 Committee, *Hansard*, 18 May 2001, p. 567; Committee, *Hansard*, 19 June 2001, p. 643.

41 ANAO, *Implementation of Whole-of-Government Information Technology Infrastructure Consolidation and Outsourcing Initiative*, Audit Report No. 9 2000–2001, p. 89.

preparation is consistent with the lack of planning that characterised the implementation of the Initiative.

5.50 There was also confusion between OASITO and the probity auditor about certain provisions in the contract. According to Mr Marks, provision for reimbursements to cover the cost of appearing before any parliamentary inquiries related to the Initiative was deleted 'for some inexplicable reason'.[42] This is significant to the extent that Mr Marks told the Committee he was not aware that the provision had been removed until just before his appearance before the Committee at a public hearing on 17 May 2001, some two years after it was removed.[43] Mr Marks' unawareness of this particular change to his schedule up to the time of the May hearing contradicts OASITO's matter-of-fact answers to supplementary questions from the 19 June hearing about the two revised schedules:

> **Committee**: (a) Can you please describe the nature and extent of your consultations with Mr Marks about the need to amend his schedule of services? (b) Was Mr Marks subsequently provided with a copy of the two revised schedules?
>
> **Answer:** (a) As is the case for all contracts, OASACS contracts require that both parties agree to any contract variations. Mr Marks agreed to the variations to his contract.
>
> (b) Yes.[44]

5.51 The Committee is concerned about the lack of clarity and certainty about the probity auditor's responsibilities and the casualness surrounding the changes made to his schedule.

5.52 The Committee believes it is undesirable for the probity auditor's scope of services to change after the tender process has commenced, as this might inadvertently compromise the probity auditor's perceived independence in carrying out a final audit. There is an unacceptable level of risk if changes are made to the probity auditor's schedule to accommodate events set in train for which the outcome is uncertain—especially changes that blur or extinguish the probity auditor/adviser distinction.

5.53 For example, the 'independence' of the probity auditor's advice might be questioned if the agency that has contracted the probity auditor's services is embroiled in a situation requiring it to seek probity advice. The potential for such a situation to arise did in fact occur following the unauthorised disclosure of information during the Health Group tender process and the subsequent acceptance of a late tender.

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42 Committee, *Hansard*, 17 May 2001, p. 451.

43 Mr Marks decided to check the schedule of services in his contract in the days leading up to the Committee's public hearing on 17 May because he raised with the Committee Secretariat the issue of reimbursement for the cost of travelling from Melbourne to Canberra to appear before the Committee.

44 OASITO, answer to supplementary question, 19 June 2001.

5.54 Given the serious nature of the breach of confidentiality, the probity auditor, in his capacity as probity 'adviser', was not in a position to carry out an 'audit' of the Health tender process. At the public hearing on 19 June, the Committee pointed out to OASITO that given the probity auditor's proactive role following the unauthorised disclosure, it would have been difficult for him to have conducted an audit of his own advice when the process was completed.[45]

5.55 It was only after a period of sustained questioning by the Committee that Mr Smith, OASITO, more or less conceded this important point, although an element of doubt remains about OASITO's willingness to grasp its significance. The following extract from the public hearing on 19 June relates to the audit of the Health Group tender process following the unauthorised disclosure:

> **Chair**—Did anyone…go back independently and assess the processes that were put in place or actually audit the process to ensure that probity had been achieved as a result of what had been advised? There seems to be a fair degree of uncertainty—not only in our minds but also in the minds of other people who have been asked the question—as to when a person is a probity auditor and when a person is a probity adviser.
>
> …
>
> **Mr Smith**—Did we have an independent party come through and tick all the boxes as to whether that [the tendering process] was fully complied with? The answer would be no—other than that I would have an obligation…to report at the end of the process if something like that had not been complied with in briefing ministers and other delegates. There was nothing that I can see from the process that we did not do in terms of what it was suggested we do.[46]

Probity auditor or probity adviser?

5.56 This distinction between the role of probity auditor and probity adviser is a key issue and is the focus of this section of the chapter.

5.57 Evidence provided to the Committee by the probity auditor and by OASITO reveal that Mr Marks' primary role was that of a probity 'adviser' providing, where necessary, proactive advice to all players involved in the tendering process. This is consistent with ANAO's finding that the probity audit plan for the Cluster 3 tendering process (dated November 1997) did not contain the independent audit testing for sign-offs. OASITO's written submission to the Committee contains a section entitled 'probity' which refers exclusively to the role of the probity 'adviser' in developing a set of probity protocols and conducting probity briefing sessions for IT and other staff

45 Committee, *Hansard*, 19 June 2001, p. 644.

46 ibid.

within agencies. Interestingly, the section does not refer to probity auditors, revealing an inconsistency at least in terminology or job title.[47]

5.58 In contrast to this written documentation, Mr Marks was contracted by OASITO under the official title of 'probity auditor', specifically to 'monitor and report on the integrity and probity of the process for the IT Infrastructure Initiative'.[48] Of greater importance is Mr Marks' description of his own role in the Initiative which indicates that up until at least May 1998 he was, in theory, juggling two probity roles—that of auditor and adviser. In responding to questions from the Committee, Mr Marks stated that being a probity auditor is 'very much a proactive role, not a reactive role, as you would get with a financial audit'. With regard to the Initiative, it involved dealing with issues before they became major problems, and providing 'sign-offs' at various 'milestones' in the tendering process:

> Therefore, you are quite involved in the process, while sitting over the top of it. You do not get involved in the day-to-day side of it, but you involve yourself in a review process. [49]

5.59 Shortly after stating that as probity auditor he was 'quite involved' in the tender process, Mr Marks went on to say that: 'I am not involved in the process per se. I do not get involved…My role is very much looking at the pure process and ensuring that the agency…does not cause a breach of the process by its action'.[50] These vague descriptions add a layer of confusion to the probity process for the Initiative.

5.60 In November 1997, Mr Hutchinson explained how OASITO viewed the role of the probity auditor contracted for the Initiative. He told the Finance and Public Administration Legislation Committee that:

> The independent probity auditor is there to advise us of process, of compliance with process, and to monitor compliance with process. Part of his role is ensuring that the process we adopt is correct, that it is adhered to, and that a proper documentary trail exists to demonstrate that we adhered to it. The probity auditor has another function, which is to work with us in defining the protocols concerning the conduct of our relationship with industry and with other interested parties to ensure that they are beyond criticism.[51]

5.61 One of the main reasons for the change of the scope of the probity auditor's services during the Initiative was concerned with the auditor/adviser distinction, stressing on more than one occasion that the nature of work carried out by Mr Marks

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47 OASITO, submission no. 4.

48 Consultancy Agreement.

49 Committee, *Hansard*, 17 May 2001, p. 449.

50 ibid., pp. 449-450.

51 Finance and Public Administration Legislation Committee, *Hansard*, 24 November 1999, p. 456.

was 'absolutely independent' and that his role always corresponded with the schedule attached to his contract. As Mr Smith explained:

> He [Stephen Marks] was our probity auditor engaged back in 1997…The contract was amended over time to align his duties with the changing shape and nature of the initiative…To me the important thing was that the description of his services that we required aligned with what we needed from a probity adviser/auditor. If the name 'probity auditor' remained on the contract, then so be it, because we just amended the schedule at the back.[52]

5.62 At a later hearing, OASITO offered the same explanation: 'The schedule for us is the important part of the contract, since it sets out the obligations of the probity auditor or probity adviser. There was no great clarity in terms of whether the probity adviser was a probity auditor or probity adviser'.[53] It is clear to the Committee that OASITO considered that its ability to receive timely advice from the probity auditor was the key to ensuring effective probity of the tendering process.

5.63 This chapter previously discussed the findings of the South Australian Auditor-General in his report of October 1999, and Victoria's Audit Review of Government Contracts report of May 2000. Both reports conclude that it is the distinction between a probity auditor and a probity adviser that clearly establishes the credibility of a probity auditor's independence during the procurement or contracting process.

5.64 While the Committee accepts that the need for the distinction between auditor and adviser roles was not widely recognised in the early days of the Initiative, it expects OASITO to have been more attentive to State developments in this important area over the past three years. It also expects that DOFA, in its policy advisory role, to have been monitoring such developments and passing such information on to OASITO.

5.65 In practice, during the course of the Initiative, the probity adviser role gradually extinguished the probity auditor role, which is reflected in the revised schedule of services. The Committee holds the view that this situation could have been avoided had both a probity auditor and a probity adviser been contracted at the commencement of the Initiative, each with separate roles and separate reporting procedures. This would have minimised the risk of any potential conflict of interest arising between the two probity roles, and established the probity auditor's independence from the tendering process.

5.66 The Committee finds that DOFA and OASITO failed to recognise the distinction between the role of a probity auditor and probity adviser. These agencies have demonstrated little interest in policy developments regarding probity issues that have taken place in at least three States since 1999. The Committee finds that this

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52 Committee, *Hansard*, 18 May 2001, p. 567.

53 Mr. D. Yarra, Committee, *Hansard*, 19 June 2001, p. 643.

conflicts with OASITO's claim that the Initiative underwent a process of continuous improvement.

5.67 The respective roles and functions of probity auditor and adviser should be carefully stipulated to ensure that the independence and objectivity of the probity auditor's position is maintained at all times. A probity auditor should be responsible for producing a full report at the end of the tender process certifying that all procedures have been followed in accordance with probity principles covered in a probity plan that is established *before* the commencement of the tender process. The Committee is strongly of the view that the appointment of a probity auditor for complex and expensive outsourcing initiatives brings independent oversight of the tender process and strengthens its accountability and overall integrity. This approach would require the probity adviser to fully document the grounds of his advice and agencies to provide justification if advice is not followed. Such documentation would then be examined in the probity audit.

Recommendation No. 10

The Committee recommends that for future IT outsourcing contracts valued over $10 million agencies contract the services of both a probity auditor and a probity adviser and that their roles involve separate and distinct tasks.

5.68 The Committee suggests that the Australian Government Solicitor (AGS) consider updating its legal briefing to reflect the growing awareness of the distinction between the role of a probity auditor and a probity adviser in large and complex tendering processes.

Independence of probity auditor

5.69 Mr Marks discussed his independence with the Committee, claiming that he was independent in his capacity as probity auditor for the Initiative. He explained that to his knowledge he was probably the only probity auditor without *any* links to the private sector, his company having previously acted only on behalf of governments.[54]

5.70 The probity auditor's independence from private sector interests also raises the broader issue of the likelihood of agencies or departments being able to obtain truly independent probity advice for IT contracts.

5.71 In this respect, the Committee endorses the probity guidelines launched by the Victorian Government Purchasing Board in May 2001. According to the guidelines, the common situation where probity auditors are paid for their services by the agency which employs them 'can create the appearance of divided loyalties, real or otherwise'. This is why it expresses the view that probity auditors should be accessed

54 Mr Marks advised the Committee that he has been involved in 'probably most of the major outsourcings in government contracts, where probity auditors have been required, throughout Australia', commencing with electricity sales in Victoria. He was also involved in a panel of contractors for IT work established by the South Australian government. Committee, *Hansard*, 17 May 2001, p. 447.

from a whole of government panel to help 'keep the engaging agency at arm's length and to avoid capture'.[55]

Recommendation No. 11

The Committee is strongly of the view that Commonwealth agencies should in future have confidence in being able to source truly independent probity advice. It recommends that, consistent with Victoria's probity guidelines, the Government consider the establishment of a whole of government panel of probity auditors to assist agencies and departments avoid real or perceived conflicts of interest when establishing the probity standards that will guide their IT outsourcing tender processes.

The probity report

5.72 Another area lacking clear definition involved the probity auditor and parliamentary accountability. During evidence provided to the Committee on 17 May, Mr Marks stated that he was not 'particularly aware' of the fact that probity reports might be requested by the Parliament and its committees, and he did not have any discussions with OASITO about this issue.

5.73 When a member of the Committee asked Mr Marks if he could provide any reasons why his probity reports should not be made available to the Committee, he responded by making reference to Victoria's new probity guidelines:

> In fact in Victoria currently, the government has brought out a statement on probity where they have decided that probity auditors' reports will, as a matter of course, be made available to the parliament.[56]

5.74 When Mr Marks was asked immediately afterwards to provide the Committee with all probity reports associated with IT outsourcing he became defensive, raising the possibility of commercial-in-confidence for his own reports:

> I do not believe in principle that it is appropriate for those sorts of reports to be submitted. I think you have also had this debate before at the Senate estimates and it is one that I do not wish to get into. I do not believe I have an obligation or a responsibility to provide those reports, for the

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55 Victorian Department of Treasury and Finance, *Policies and Guidelines—1b Probity Guidelines for Government Tendering Projects in Victoria*, 2001, p. 5.

It was the potential for a real or perceived conflict of interest that led to the withdrawal of the first probity auditor engaged by the South Australian Treasurer for the disposal of electricity assets. Apparently, the probity auditor informed the Treasurer that his firm had an established relationship with an entity that expressed an interest in bidding for the assets being offered for lease and that under the circumstances it would be inappropriate for the firm to continue as probity auditor. Auditor-General's Department, South Australia, *Electricity Businesses Disposal Process in South Australia: Arrangements for the Probity Audit and Other Matters— Some Audit Observations*, 28 October 1999, Part 1.

56 Mr S. Marks, Committee, *Hansard*, 17 May 2001, p. 453.

> commercial-in-confidence reason which you have just been through previously.[57]

5.75 In response to a question on notice from the hearing in May, Mr Marks, however, advised the Committee that there is 'not a commercial-in-confidence clause in my contract regarding the disclosure of probity auditor reports'.[58]

5.76 The following exchange from the estimates hearing referred to by Mr Marks highlights OASITO's thinking about the alleged sensitive nature of probity auditors' reports. It also reveals the Government's view that such reports attract professional privilege, and generally illustrates the extent of confusion over the status of probity reports.

> **Senator Lundy**—What I would like to see from you during the course of this hearing is a copy of the probity auditor's report into this incident [the Health leak].
>
> **Mr Smith**—I am afraid I am unable to provide that to you. That is an in-confidence document to the government.
>
> …
>
> **Senator Lundy**—Minister, can I ask you directly to supply this committee with a copy of the auditor's report and the associated documentation in relation to this instance so we, the parliament, can be sure that in fact probity was adhered to…
>
> **Senator Ellison**—This sort of advice is confidential to the government. Legal advice is a similar situation.
>
> **Senator Lundy**—This is not legal advice. It is a probity auditor report into a significant incident.
>
> **Senator Ellison**—That may be your assessment…but I think advice on probity would be getting pretty close to legal advice because it would open you to liability for being sued. So, yes, I think it is very much a cousin of legal advice, if not the very same thing.
>
> **Senator Lundy**—So you are going to refuse to release it?
>
> **Senator Ellison**—Governments of all persuasions have not released this sort of advice, and we are not going to.[59]

5.77 At a separate hearing, the Auditor-General, Mr Barrett, provided an important view about the types of information one could expect to encounter in a probity

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57 ibid.

58 Answer to question on notice, 17 May 2001.

59 Finance and Public Administration Legislation Committee, *Hansard*, 8 February 2000, p. 221.

auditor's report. He informed the Committee that in the normal course of events it is unlikely that a probity auditor would be reporting on an issue that would impact adversely on an individual contractor or tenderer: 'I could not see why that would happen'. He went on to say: 'In terms of the probity audit process, we are not talking about pricing; we are not talking about the assets that are involved or the particular way in which the business is going to be conducted…by a potential tenderer'.[60]

5.78 As it emerged, the substance of the probity auditor's report (dated 29 July 1999) on the unauthorised disclosure of tender information for the Health Group, supports the Auditor-General's contention. The probity auditor's report does not contain any material that could be construed as being sensitive, particularly two years later when it was sought for this inquiry.

5.79 The probity report, which amounts to a one-page letter addressed to Mr Smith, states in part: 'I have examined the probity implications of this occurrence. I concur with the advice provided to you by Blake Dawson Waldron'.[61] It proceeds to suggest a course of action that, in Mr Marks' professional opinion, would uphold the probity of that particular tender process.

5.80 OASITO's and Mr Marks' responses to the Committee's request for the probity advice is yet another example of the ill-considered and expedient use of commercial-in-confidence claims.

5.81 OASITO's early cooperation with the Committee's request for all probity reports would have strengthened the integrity and transparency of that tendering process, instilled public confidence in the Initiative, and reassured the Committee that adequate probity safeguards were in place.

5.82 The Committee notes that OASITO's contract with the probity auditor does not include a provision alerting him to the possibility that probity reports may be made available for scrutiny by the Parliament and its committees, and by others, such as ANAO.[62] The Committee recognises that Mr Marks' initial contract with OGIT provided for him to receive hourly payment for preparation and appearance before parliamentary committees.[63]

5.83 Mr Marks advised the Committee that he requested that this provision be included in his list of services. He said that it is a provision 'which goes into all of my contracts', and was included in his contract with OASITO 'at my instigation, not theirs'.[64] Mr Marks explained to the Committee that it was normal practice for him to

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60 Committee, *Hansard*, 17 May 2001, p. 469.

61 Additional information.

62 Chapter eight provides more detail including that while not necessary, such clauses alert the private sector to different requirements of contracting with government.

63 OASITO, answer to question on notice, 18 May 2001.

64 Committee, *Hansard*, 17 May 2001, p. 451.

request that this provision be included in his contracts because it was not uncommon to be asked to appear before parliamentary committees. The example provided was his involvement in the ACTEW–AGL merger in the ACT which required that he appear every second Friday before the ACT Legislative Assembly's Public Accounts Committee.[65]

Recommendation No. 12

The Committee recommends that agencies include provisions in their contracts that require:

- **probity auditors to keep accurate records and provide sufficient information to allow for proper parliamentary scrutiny of the audit process; and**
- **probity reports to be made public**.

Promoting a culture of probity for devolved IT outsourcing

5.84 OASITO advised the Committee that it terminated Mr Marks' contract sometime in February 2001.[66] This followed the Government's acceptance of the Humphry Review recommendations and the cessation of OASITO's centralised role. This raises an important question about how the probity of government contracts will be managed in a devolved environment where single agencies are assigned responsibility for outsourcing IT services. To the Committee's knowledge this has not been addressed by OASITO or DOFA.

5.85 There is no doubt that IT outsourcing in a devolved environment will place greater demands on agency heads who will carry the responsibility for implementing their outsourcing arrangements. One major challenge will be to ensure that probity policies and rules are established within each agency and are embraced by all personnel engaged in project teams. The Victorian probity guidelines present a strong case for promoting a 'probity culture' within government agencies:

> A concerted effort will usually be required by senior managers to explain and promote probity principles, in such a way that…they become an integral part of day-to-day working and decision-making…If a probity auditor is appointed, staff will need to be briefed clearly as to the auditor's role, when he/she should be present and when issues ought to be referred to the auditor for discussion or decision.[67]

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65 ibid.

66 Committee, *Hansard*, 18 May 2001, p. 567.

67 Victorian Department of Treasury and Finance, *Policies and Guidelines—1b Probity Guidelines for Government Tendering Projects in Victoria*, 2001, p. 9. The Tasmanian Department of Treasury and Finance's probity guidelines make exactly the same point: 'probity, as a way of thinking, should become

5.86 The Committee believes that Commonwealth agencies should develop and have in place a detailed probity plan before the commencement of the tender process. The plan should articulate a set of criteria against which the probity auditor can assess the probity of the process. The main strength of this approach, as stated in the ANAO report, is that: 'The [probity] auditor would…audit against those criteria and provide a report that would make it clear what the criteria were, what work was undertaken to form an assessment, and what the assessment was.'[68]

Summary

5.87 In this chapter the Committee has identified a number of broad areas of concern with the probity process established for the Initiative. These include the need to establish a clear separation of the roles of probity adviser and probity auditor as a priority in outsourcing tenders valued over $10 million. It is also important to ensure that probity auditing is transparent, that the auditor is independent of involvement with private sector parties in a tender process and from the work of the probity adviser. There should be no doubt that documents and processes are open to full scrutiny by the Parliament and its committees. The Committee strongly favours an approach that will engender within each agency a culture of probity to strengthen the accountability and transparency of large and complex IT outsourcing contracts.

part of the workplace approach of managers, not a separate or special consideration', Part 4 'What is Probity Advising?'

68 Committee, *Hansard*, 17 May 2001, p. 468.