Senate
Finance and Public Administration
References Committee

INQUIRY INTO THE GOVERNMENT'S INFORMATION TECHNOLOGY OUTSOURCING INITIATIVE

INTERIM REPORT

ACCOUNTABILITY IN A COMMERCIAL ENVIRONMENT – EMERGING ISSUES

APRIL 2001

The Parliament of the Commonwealth of Australia

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ISBN: 0 642 71131 3

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CHAPTER ONE

INTRODUCTION

> What must not be lost sight of in this matter is that what is at stake is the expenditure of public money. Of course Parliament wants to reassure itself that its public servants achieved an optimum IT facility at a good price. But it also wants to know that the tendering process was conducted with complete integrity; that the process of contract monitoring by the agency and the audit office is not impeded by lack of access to relevant information; and that the agency/contractor relationship is a well documented, professional partnership open when required to parliamentary scrutiny.
>
> *Senate Finance and Public Administration References Committee, Contracting out of government services - First Report: Information technology, November 1997, pp51-52.*

Terms of reference

1.1 On 29 November 2000 the following matters were referred to the Finance and Public Administration References Committee for inquiry and report:

> The Government's information technology (IT) outsourcing initiative in the light of recommendations made in the committee's report, *Contracting out of government services – First Report: Information technology*, tabled in November 1997, and the *Auditor-General's report no. 9 of 2000-2001*, and the means of ensuring that any future IT outsourcing is an efficient, effective and ethical use of Commonwealth resources, with particular reference to:
>
> a) the need for:
>
> i) strategic oversight and evaluation across Commonwealth agencies;
>
> ii) accountable management of IT contracts, including improved transparency and accountability of tender processes, and
>
> iii) adequate safeguards for privacy protection and security;
>
> b) the potential impact on the capacity of agencies to conduct their business;
>
> c) savings expected and achieved from IT initiatives; and
>
> d) the means by which opportunities for the domestic IT industry, including in regional areas, can be maximised.

Interim report

1.2 The focus of this report is the over-sensitivity of players in the IT Outsourcing Initiative to any scrutiny of their activities and processes. This report explains that the Committee has not required the production of any information identified as sensitive. It has provided the opportunity for sensitive material to be 'blacked out' of documents of interest and required the reasons for this to be provided for its consideration. In spite of this the Committee has had to wait almost four months and moved two orders for the production of documents in the Senate to receive the requested documents.

1.3 A number of grounds were advanced to support decisions to not disclose certain material to this Committee and to the Senate, and these are discussed in the next chapter. The Committee notes that some $1.2 billion of public money has already been committed under the Initiative.

1.4 The purpose of this interim report is to highlight the apparent lack of understanding in the Australian Public Service about parliamentary accountability, as illustrated by the arguments put forward during this inquiry, and to draw attention to what is clearly a much wider problem. The Committee also seeks to facilitate an improved awareness of parliamentary accountability in the private sector, which, as a key player in the outsourcing of information technology and other government services, also needs to understand the rules of accountability.

1.5 In the coming months, the Committee will be examining responses to its requests with a view to establishing the underlying reasons for its difficulties in obtaining relevant documentation. It is keen to establish whether it is merely a lack of understanding on the part of agencies and private individuals about parliamentary accountability, or is due to some other reason.

1.6 In relation to claims of commercial confidentiality, the differing views of the parties about the treatment of similar information were not surprising, however inconsistencies across departments and agencies which are contracted with the same external service provider require further investigation. This indicates that the variations arise not from the private sector's sensitivities, but from their government partners. The Committee is of the view that more guidance on openness and transparency is needed for departments and agencies and that this should translate into better informed contractual partners.

1.7 The Committee notes that the Senate has not set a specific reporting date for the inquiry into the Government's IT Outsourcing Initiative. Any delays in producing any other requested documents will merely extend the duration of the Committee’s inquiry until such time as it is satisfied that it has sufficient information to finalise its inquiry.

CHAPTER TWO

POWER AND RESPONSIBILITY: COMMITTEES, MINISTERS, OFFICIALS, PERSONS

> There has also been considerable discussion of the use of secrecy provisions and claims of commercial-in-confidence with regard to the contractual relationship. The committee recognises that confidentiality is an essential part of a fair tendering process and is also necessary to protect the genuine commercial interests of contractors. However the committee believes that the need for confidentiality should be interpreted as narrowly as possible to ensure that the maximum amount of information is in the public domain.
>
> *Senate Finance and Public Administration References Committee, Contracting out of government services - First Report: Information technology, November 1997, (p xii)*

Parliamentary accountability

2.1 Parliamentary accountability refers to the obligation on governments to give an account of their actions to Parliament, and through Parliament, to the public.

2.2 The principle of parliamentary accountability encompasses a range of issues that, due to timing and resource constraints, have not been examined here. The Committee instead draws attention to one aspect of accountability that has been undermined during its inquiry into the Government's IT Outsourcing Initiative: the right of the Committee to access documents and information necessary for it to effectively conduct an inquiry into a matter of public concern.

Power of inquiry and to send for persons and documents

2.3 Senate committees empowered by the Senate have a clear authority to require the attendance of any person and to require the production of any document relevant to their inquiries. Section 49 of the Constitution grants the Commonwealth Parliament the power to declare the power, privileges and immunities of its Houses, members and committees. Until such a declaration is made, it gives the Houses of Parliament those powers, privileges and immunities as were held by the UK House of Commons in 1901. The most important declaration occurs in the *Parliamentary Privileges Act* 1987 (Cth) which makes provisions in relation to certain aspects of the powers, privileges and immunities of the Houses of Parliament.

2.4 Section 50 of the Constitution enables each House of Parliament to make rules and orders with respect to 'the mode in which its powers, privileges, and immunities may be exercised and upheld'. Relevant orders and resolutions made under this section are found in the operating rules of the Senate known as *Standing Orders and other Orders of the Senate*, the resolutions on matters of privilege agreed to by the Senate

on 25 February 1988 (the Privilege Resolutions) and in orders for the production of documents.

2.5 The relevant powers of the Houses are the power to conduct inquiries and the power to punish contempts. The main immunity of the Houses of Parliament is immunity of parliamentary proceedings from impeachment and question in courts.[1] The immunity protects members and witnesses who are taking part in parliamentary proceedings from statements made or evidence produced being used in legal proceedings. The protection extends to the giving of evidence to a committee and the submission of documents to a committee.

2.6 The power to call for persons and documents is a necessary adjunct of the Senate's authority to conduct inquiries. This power is delegated to the Senate's committees in Standing Orders (SO) 25(15) and 34. (The full text of the relevant standing orders and sections of the Constitution are included in Appendix 1). A committee usually seeks the attendance of witnesses or the production of documents through invitation.[2] Where a *request* for the attendance of a person or the production of a document is not acceded to, a committee has the power to issue a summons requiring the attendance of that person or production of that document.[3] While a witness may offer a reason for the non-attendance of a person or the non-production of a document, it is the committee that determines whether or not to accept that reason.

2.7 Each House of Parliament has the power to investigate and punish for contempt. An act is a contempt if it is likely to either directly or indirectly impede the performance of the functions of the House.[4] A failure by a person to respond to a summons may be reported to the Senate under SO 176. Privilege Resolution 6(13) sets out that a failure to comply with an order to attend before a committee or to comply with an order to produce documents to a committee may constitute contempt of the Senate. Committees do not have the power to deal with the consequences of a failure to comply with an order. A committee may only report to the Senate, and the Senate may then deal with the contempt.

2.8 The Senate Standing Orders, the *Parliamentary Privileges Act 1987* (Cth) and the Privilege Resolutions give extensive protection to witnesses who produce documents or give evidence to a Senate committee. Resolution 1 of the Privilege Resolutions sets out procedures to be observed by Senate committees for the protection of witnesses. Both the Parliamentary Privileges Act and the Privilege Resolutions provide for the protection of witnesses against intimidation or

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1 Section 16(1) of the *Parliamentary Privileges Act 1987* confirms that Article 9 in England's Bill of Rights 1689 applies to the federal Houses of Parliament.

2 Privilege Resolution 1(1).

3 Senate Standing Orders 34 and 25(15).

4 Section 4, *Parliamentary Privileges Act 1987*; see Privilege Resolutions No 3.

inducement. Interference with a witness may constitute a criminal offence,[5] and it is contempt of the Senate to interfere with a witness.[6]

2.9 While the Senate's powers apply to private entities as well as public officials, Privilege Resolution 1(16) sets out special rules for public officials as witnesses. The executive government has prepared special guidelines for public officials who are required to give evidence or provide documents to parliamentary committees. The Guidelines, the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989* are the responsibility of the Department of the Prime Minister and Cabinet and have not been updated since 1989. The Committee is concerned that any developments in the Senate's requirements for public officials in relation to their dealings with parliamentary committees are monitored regularly. On inquiring into the currency of the Government Guidelines, the Committee was advised that a consultation draft of revised guidelines is currently in circulation.

2.10 Documents or evidence given to a committee are not necessarily disclosed more widely. They must not be disclosed unless authorised by the Senate or a committee.[7] A witness can ask, but cannot demand that the evidence be given *in camera* or be kept confidential.[8] The publication of evidence taken *in camera* except with the authorisation of the Senate or a committee is a contempt of the Senate.[9] However, the Senate or the committee can order the production and publication of the *in camera* evidence at a later date.[10] This would generally only occur after consultation between committee members and, where possible, the relevant witness would be advised on the intention to disclose the *in camera* evidence and given the opportunity to object to its disclosure. The Committee would consider any objections before making its final decision. Evidence given *in camera* cannot be examined as evidence in any court.[11]

2.11 This section has briefly outlined the authority conferred upon Senate committees to call for documents relevant to their inquiries, and the powers of the Senate and its committees to deal with the failure of witnesses to provide requested documents. It is a matter for each committee to decide to what extent they will use these powers. This Committee is yet to use its authority and powers to their full extent.

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5 Section 12, *Parliamentary Privileges Act 1987*.

6 Privilege Resolutions 6(10) and (11).

7 Standing Order 37(1).

8 Privilege Resolution 1(7).

9 Privilege Resolution 6(16).

10 Privilege Resolution 1(8) attempts to ensure witnesses are aware of this. Standing Order 37(2) refers to the use of disclosure of *in camera* evidence in dissenting reports.

11 Section 16(4) *Parliamentary Privileges Act 1987*.

2.12 From the outset the Committee has sought cooperation with its inquiries and provided the opportunity for sensitive information to be kept confidential unless it was absolutely necessary for its work. The delays in providing information on this basis suggest over-sensitivity on the part of the players listed to parliamentary scrutiny. All parties mentioned in this chapter should be very familiar with this process and have provided the documents requested - in their sanitised form - without the repeated requests and two orders of the Senate that led to their release.

Inquiry into the Government's IT Outsourcing Initiative

Background

2.13 In 1997, the Government decided to outsource its information technology (IT) infrastructure subject to groups of agencies undergoing a competitive tendering process required to produce savings. The contract value for the entire Whole-of-Government Information Technology Infrastructure Consolidation and Outsourcing Initiative (the Initiative) was estimated at $4 billion.

2.14 The whole-of-government framework was expected to produce financial savings, reduce the costs arising from individual tender processes, deliver more efficient contract management and enhance the IT industry in Australia, especially in regional areas.

2.15 The Office of Asset Sales and IT Outsourcing (OASITO) is the agency responsible for managing the implementation of the Initiative. In November 1997, part of the former Office of Government Information Technology (OGIT) joined with the then Office of Asset Sales (OAS) to form OASITO. Subsequently, on 22 December 1999, OASITO was established as an Executive Agency under section 65 of the *Public Service Act 1999*. Its Chief Executive, currently Mr Ross Smith, exercises the authority of a Secretary in the Australian Public Service (APS). OASITO is responsible for the implementation of 'the sale of major Commonwealth business Assets; the outsourcing of Information Technology Infrastructure Services for Commonwealth budget sector Agencies; and, assisting the market testing and contracting out of relevant activities starting with corporate services (other than IT) currently undertaken by Commonwealth Agencies'.[12]

2.16 In March 1999, the Australian National Audit Office (ANAO) commenced a performance audit of the implementation of the Initiative, with the objectives of the audit being to examine the administrative and financial effectiveness of the implementation of the IT initiative, with a focus on:

- the effectiveness of the overall planning and implementation of the IT Initiative, taking into account the tendering, contracting and monitoring processes undertaken in respect of Cluster 3, DEETYA/EN, ATO and Group 5;

12 OASITO Annual Report 1999-2000, p 6.

- the extent to which those latter processes have contributed to the achievement of the objectives of the IT Initiative; and,
- the extent to which the Commonwealth's interests have been adequately protected within this context.[13]

2.17 This audit report, *Implementation of Whole-of-Government Information Technology Infrastructure Consolidation and Outsourcing Initiative* (Audit Report No.9 of 2000-2001), was tabled in the Senate in September 2000. The recommendations and whole-of-government response are reproduced in Appendix 2.

2.18 In late 2000, the Minister for Finance and Administration established an independent review of the Initiative and appointed Mr Richard Humphry, AO to conduct the review. By the time Mr Humphry's report was finalised in December 2000, IT infrastructure from 23 government departments and agencies had been outsourced at a contract value of some $1.2 billion out of an estimated total of $4 billion for the entire Initiative. Contracts were tendered on the basis of cluster groupings of departments and agencies. The Humphry Report was released by the Minister for Finance and Administration on 12 January 2001 (a list of recommendations of the Humphry Review and the Government's response is included in Appendix 3).

2.19 At the first public hearing of the Senate inquiry, the Chairman of the Finance and Public Administration References Committee noted that the findings of the Humphry Review would be considered by the Committee.

2.20 Given the nature of its inquiry, the Committee expected to be confronted by a range of arguments about why certain information should not be made available to it. From the outset, Committee members recognised that in some cases such claims would be based on genuine grounds of commercial sensitivity and a decision would have to be made about whether the information was required in order to move the inquiry forward. The Committee therefore adopted a cautious approach as evidenced by the initial and subsequent written and oral requests to OASITO (see para 2.28). This approach proved ineffectual. Instead of providing the Committee with an outline of the complex and convoluted processes from the development of RFTs through to the Auditor-General's Report and the Humphry Review, the inquiry process almost stalled while agencies and officials considered, and in some cases debated, the Committee's mild requests.

2.21 Consequently, at a private meeting on 6 March 2001, the Committee agreed unanimously to two courses of action:

> a) a separate report should be prepared to briefly outline and call attention to issues arising from the inquiry that are related to parliamentary

13 Audit Report No. 9, 2000-2001, p 13.

accountability including the performance of public servants appearing before the committee; and

b) the Chairman should give notice in the Senate chamber of a motion ordering the minister to provide documents to the Committee.

2.22 A further decision was taken by the Committee on 2 April 2001 to draw to the attention of the Senate the failure of the acting Minister for Finance and Administration to comply with the Order passed by the Senate on 26 March and requiring him to produce the documents by the Senate adjournment on 4 April.

2.23 The documents were delivered at 6pm on 4 April 2001. Given the timing of this report, the completeness of the answers is yet to be assessed. However the Committee is pleased that the impasse has been broken and looks forward to improved timeliness and cooperation for the rest of this process.

2.24 The following section outlines a sequence of events which illustrates the reasons for the Committee's frustration.

2.25 In addition to the events leading to the two Senate orders, the Chair of the Committee, in his opening statement for the fifth day of public hearings, 16 March 2001, issued a warning to all current and future participants in the inquiry. His statement was prompted by the Committee's waning patience with the lack of response to its requests, and the lack of understanding of the Committee's authority and the role of the Senate, displayed by the witnesses from the public and private sectors (see Appendix 4 for the full text of the statement).

Sequence of events

19 December 2000 – Committee request - RFTs, contracts and evaluation reports

2.26 On 19 December 2000, the Committee wrote to the Chief Executive of OASITO seeking access to:

- the Requests for Tender (RFTs) and any amended RFTs for IT contracts let, or in the process of being let;
- the evaluation reports for those contracts which have been let; and
- copies of all contracts signed with external service providers (ESPs).

2.27 The Committee requested that the documents be provided by 12 February 2001 (see Appendix 5).

2.28 The Committee gave OASITO an opportunity to exclude commercially sensitive information from the documents requested, but required it to provide the basis of any such claims. The letter advised that the Committee may be prepared to receive such material *in camera*, that is, on a confidential basis. The Committee noted that it would view contracts that had already been let as having less justification for claims of commercial confidentiality than those still being negotiated.

24 January 2001 – OASITO response to the Committee's request of 19 December

Requests for Tender (RFTs)

2.29 OASITO wrote to the Committee on 24 January (see Appendix 6). The letter advised OASITO's intention to provide the Committee with the RFTs; these had already been released publicly. These were the RFTs for Cluster 3, Group 5, the Australian Taxation Office, Health Group, Group 8, Group 1 and Group 11. Copies of RFT amendments and a description of the nature and extent of those amendments were also provided.

Evaluation reports

2.30 OASITO refused to provide the requested evaluation reports. It noted that such requests generally only arose as part of applications under the Freedom of Information (FOI) Act, and that the information may fall within the exemption provisions of the Act. OASITO further noted that the FOI Act was almost the only Commonwealth law that addressed the matter of commercial confidentiality, and that it provided some guidance on the issue. This point was made by the Committee in an earlier report[14], but the Committee notes that although the FOI Act provides guidance and grounds for what may be considered commercial-in-confidence, it has no application to the disclosure of information to a parliamentary committee.

2.31 Having made this point, OASITO provided further reasons not to provide the evaluation reports:

> The standard OASITO RFT terms state that the tenderer licenses the Commonwealth to make available to various people including Government representatives tender information to be used for specific purposes. The use of the tender information by the Senate Committee is not related to these purposes of evaluation, clarification, negotiation and/or contract execution.

2.32 OASITO's letter implies that the terms of OASITO's standard RFT (and by implication any other similar agreement) can limit rights of access of the Parliament and its committees. The Committee strongly disputes this on grounds outlined earlier in this chapter. The Committee has the constitutional authority to request the documents and no RFT or contract can sign this away.

2.33 Subsequent examination of the RFTs and contracts revealed OASITO's advice to be incomplete. Five of the contracts did in fact allow for the provision of documents to parliamentary committees (Appendix 7 reproduces some of the disclosure clauses). The Committee wrote to Mr Smith on 16 February requiring an explanation for this discrepancy.

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14 Finance and Public Administration References Committee, *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, June 2000, pp 1-2.

2.34 A third reason for the non-disclosure of the evaluation reports, based on legal advice, was that such disclosure may create a significant risk of litigation to the Commonwealth. OASITO indicated a preference to withhold the reports 'as it may not be in the public interest given such action may leave the Commonwealth exposed to legal action'.

Contracts

2.35 OASITO advised that, again based on legal advice, it had sought the views of agencies and contractors regarding the provision of the Service Agreements (contracts) to the Committee, the information that should be considered commercial-in-confidence, and the reasons for their views. By 24 January it had received the majority of agency responses but was awaiting the finalisation of vendor advice. OASITO stated that it would provide contracts and details concerning the commercial confidentiality of any information in the following week.

1 February 2001 – Committee reply to letter of 24 January

2.36 On 1 February the Committee replied to OASITO and again requested the outstanding documents. It advised the agency that it did not accept the FOI Act as the basis for refusal, nor was the risk of exposure valid in the light of the Parliamentary Privileges Act. The letter referred to advice from the Clerk of the Senate (Appendix 8).

2.37 In response to the implication that the wording of the RFT prevented the provision of the evaluation reports to the Committee, the letter emphasised OASITO's responsibility to ensure that RFTs and related discussions inform potential partners of government about Parliament's right of access. In addition OASITO was requested to provide details of the views of the parties to the contracts with OASITO's response about their release. Copies of letters from the External Service Providers (ESPs) were provided to the Committee on 22 February 2001.

2.38 The Committee also requested a copy of the legal advice upon which OASITO had based its decision to not disclose the evaluation reports.

2.39 Even though the letter advised that the documents should be provided prior to the public hearing scheduled for 7 February 2001, they were not received until 4 April.

7 February 2001 – Public hearing: OASITO, DOFA and Mr R Humphry, AO

2.40 OASITO, DOFA and Mr Humphry appeared as witnesses at the Committee's second public hearing into IT outsourcing on the evening of 7 February 2001.

2.41 At the hearing, OASITO provided the Committee with a letter notifying that the contracts had been prepared as agreed and setting out the reasons for exclusions. Clauses considered to be sensitive were deleted from an electronic copy so the extent of the exclusions was not immediately obvious. Hard copy extracts of the contracts

were delivered over the following six days (see above para 2.35). The covering letter attached to the contract extracts is included in Appendix 9.

2.42 For one contract, that signed by the Health Insurance Commission (HIC), the commercially sensitive information was highlighted rather than deleted, so the Committee was clearly advised of what was considered sensitive. This open approach not only assisted the Committee when examining the HIC contract, but afforded it a greater insight into the exclusions from other contracts. The Committee emphasises that this should be the standard approach, a compromise being that text is blacked out with a pen so that the full extent of exclusions is immediately evident.

2.43 As mentioned in the introduction to this report, the Committee is particularly concerned at the inconsistent approach that has been adopted in the interpretation of what constitutes commercially sensitive information. While this was expected to some extent because of the subjective nature of such assessments by business, the Committee did not expect to find variation across government agencies contracted to the same ESP.

2.44 The Committee took the opportunity to follow up its written requests for the evaluation reports at the public hearing. The Committee requested that they be provided in the same manner as the contracts, that is, with sensitive information blacked out. Mr Smith agreed to this, advising that he expected that 'the vast majority of that document would be blacked out'[15]. Mr Smith agreed to provide this material by 26 February.

2.45 Also at the hearing, evidence provided by Mr Humphry and DOFA witnesses led to questions about the independence of the Humphry Review and revealed that no documents were available to support its recommendations. The Committee sought information about Mr Humphry's appointment and the basis of legal advice he received that documents provided to and generated by the review were not Commonwealth records.

2.46 The Committee notes that DOFA had also sought legal advice on the status of documents generated by the Humphry Review. The advice was provided by Phillips Fox, one of a panel of legal advisers engaged by DOFA. The Committee's request for a copy of this legal opinion was taken on notice at the hearing (see below para 2.56).

2.47 The Committee was particularly interested in gaining access to submissions to the Review. Mr Humphry advised that he had returned the submissions to the authors and not kept copies, that he had identified those who had provided submissions and that the Committee was free to approach them. On further questioning:

15 Finance and Public Administration References Committee, *Hansard,* 7 February 2001, p. 101.

> Are there any submissions that were not listed in that report, from individuals perhaps?[16]

2.48 Even though Mr Humphry answered 'No' to this question, the Committee understands that the names of some submitters may have been left off the list attached to his report.

2.49 The Committee has been unable to elicit reliable data to substantiate claims about savings from outsourcing. The correct basis of these calculations is one of the areas of disagreement between the Australian National Audit Office (ANAO) and the whole-of-government response. On the basis of anticipated savings, agencies' budgets were reduced over a three year period, yet no formal reporting on savings has been undertaken by agencies individually, on a group or cluster basis or on a whole-of-government basis. Legislation committees considering estimates have struggled with OASITO, its predecessors and others to obtain even basic details.

2.50 The Committee was informed that the ANAO, OASITO and DOFA had sought external expert financial advice to assist them in forming views on how savings associated with the IT outsourcing initiative should be calculated. The ANAO provided three pieces of advice in response to a request from the Committee at its first hearing on 5 December 2000.

2.51 At the hearing on 7 February the Committee sought copies of advice supporting the positions adopted by OASITO and DOFA.The response was delivered on 4 April. The question was asked previously of OASITO by the Finance and Public Administration Legislation Committee at Budget estimates hearings on 28 November 2000 when Senator Lundy asked about the source of their independent advice and the dates and nature of advice. The answer provided on 19 January 2001 simply named the source. This list of four names had to be corrected at the subsequent estimates hearings on 23 February 2001 when officials advised that there were in fact five.

8 February 2001 – OASITO response to Committee's letter dated 1 February

2.52 In this reply, OASITO agreed that the documents provided to the Committee would be covered by parliamentary privilege, but claimed that this does not 'fully insulate the Commonwealth from legal action'. OASITO argued that the nature and substance of material released to the Committee may be revealed in the process, leading aggrieved tenderers to seek other avenues to obtain the material. The letter went on to confirm advice at the public hearing on the previous evening that to release the material requested may not be in the public interest (see Appendix 10). Mr Smith confirmed his agreement to provide the evaluation reports as requested by the Committee (paragraph 2.44 refers).

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16 Finance and Public Administration References Committee, *Hansard,* 7 February 2001, p. 60.

2.53 The Committee notes OASITO's failure to distinguish between release of material to the Committee and the publication of the material.

8 February 2001 - Letter from Mr Humphry to the Committee

2.54 Mr Humphry provided an extract of legal advice received from the Australian Government Solicitor in December 2000 regarding the application of the Archives Act to submissions to his review.

9 February 2001 –Committee letter to Mr Humphry regarding conflicting advice

2.55 The Committee sought Mr Humphry's advice as to what the AGS referred to the phrase'[I]n the light of present information', advising that the Committee was unable to reconcile it with advice received from the National Archives of Australia which had been attached for his information. It also sought confirmation that the opinion related to submissions and not other records generated by the inquiry.

12 February 2001 - Committee letter to DOFA requesting legal opinion

2.56 The Committee's request for a copy of legal advice to DOFA on the status of documents generated during the Humphry Review and sought at the public hearing of 7 February, was confirmed in writing on 12 February. A copy of the question that led to the advice was also sought; the deadline of 21 February was advised.

16 February 2001 – Mr Humphry's response to Committee's letter of 9 February

2.57 Mr Humphry indicated that as the Committee appeared to have received differing opinions on the legal status of the documents generated during his review, he had sought additional legal advice from the AGS which he attached to his letter. The advice again referred to 'in light the light of present information'.

2.58 Mr Humphry reiterated his position of 7 February, stating that he 'believed that the individuals who had prepared the submissions [to his review] should have their opinions respected and, accordingly I sent the documents back to those that submitted them'. Mr Humphry advised that he had only returned the documents on the basis of legal advice from AGS that he would not breach any legal requirements 'and the AGS advised that I would not be prohibited from returning the submissions.'

16 February 2001 - Committee letter to Mr Smith, OASITO - request for explanation

2.59 While the disclosure clauses in the seven RFTs provided to the Committee include the statement quoted in paragraph 2.31, five of them - the most recent five - further provide for 'anything else related to these purposes, **including…parliamentary reporting requirements**' (examples of the disclosure clauses from RFTs and contracts are included in Appendix 7).

2.60 It is clear that tenderers were advised through the RFTs about the possibility that their information would be provided to Parliament, and that successful tenderers, the external service providers, have signed contracts agreeing to this with certain courtesies, not conditions, applying.

20 February 2001 – Estimates public hearing - request for DOFA legal opinion

2.61 The legal opinion on the status of documents generated during the Humphry Review, sought at the public hearing of 7 February and in writing on 12 February, was also requested by the Finance and Public Administration Legislation Committee at its additional estimates hearing on 20 February 2001, the day before the deadline set by the References Committee (see paragraph 2.56). The Secretary, Dr Boxall, again took the question on notice. Estimates answers were due on 23 March 2001 but, at the time of the preparation of this report, the answer had not been provided to that Committee.

21 February - Mr Smith's response to the Committee's letter dated 16 February

2.62 In this letter to the Committee, Mr Smith expressed concern that the Committee may have been left with the 'impression' that either he or his officers had 'knowlingly misled the Committee …'. He indicated that he understood the role of the Senate and its committee structure and had 'gone to great lengths' throughout his public service career to 'cooperate positively and fully with various Parliamentary Committees'.

2.63 He further stated that 'OASITO has never suggested that the Committee has no right of access to the relevant documents'. The Committee notes, however, the terms in which Mr Smith offers his cooperation. Mr Smith went on to state that OASITO 'remains at all times ready, willing and able to comply with any **order** that the Committee might make **requiring** me to produce documents' for the Committee's deliberations [emphasis added]. The Committee would like to have seen a more actively cooperative approach.

2.64 Mr Smith's letter continues:

> We have expended considerable effort to manage the sensitivities associated with the provision of the documents requested and believe we have alerted the Committee to possible commercial and legal issues as they have arisen. It is my [Mr Smith] duty to manage the sensitivities carefully while facilitating the provision of information to the Committee. …
>
> My legal advice is that, while material provided to the Committee would itself be privileged against use in any legal proceedings, it could provide information that would lead to legal action complaining, for example, of the conduct of a tender process. Even an unmeritorious action defended vigorously and successfully is costly and undermines public confidence in the outsourcing process.

2.65 The implications of this expose a conflict of interest for OASITO in its central role in advising on what information is sensitive. Decisions are being made by OASITO staff on what information is considered sensitive and whether information may expose the Commonwealth to litigation. Included in their thinking is whether a disgruntled participant in a tender process may use information subsequently published to take action against the Commonwealth for damages arising from deficiencies in the process - the same process which was managed by OASITO.

2.66 The letter further claimed:

> More importantly, however, we [OASITO] believe that if the material in question becomes public it may have an adverse market impact, affecting the Commonwealth's ability to solicit frank and competitive tenders going forward.

2.67 Again, the provision of information to the Committee is seen to be synonymous with its publication. In any event, it is the Committee's view that accountability and transparency are not necessary casualties of outsourcing policy and that by abandoning the cluster approach, the Commonwealth's ability to solicit frank, competitive tenders has been enhanced.

2.68 Based on his legal advice, and what he claimed were the 'areas of legal and commercial risk', Mr Smith repeated his preference not to provide the evaluation reports unless the confidential material is 'blacked out'. Mr Smith advised that OASITO would endeavour to provide the 'marked out' evaluation reports by 26 February, but explained the analysis and consultation processes involved. He assured the Committee that OASITO is ready to cooperate fully.

2.69 Advice was provided on 26 February that final outcomes were still being worked on and that 'a response will be forwarded at the earliest possible time'. This material was provided on 4 April 2001 following two orders of the Senate.

21 February 2001 - Committee's reply to Mr Humphry's letter of 16 February

2.70 The Committee reiterated its request for the information that was provided to the AGS in the first instance upon which the original legal advice and the advice sought subsequently was framed.

27 February 2001 – Reply from Mr Humphry to the Committee's letter of 21 February

2.71 Mr Humphry replied to the Committee's 21 February letter advising that the 'AGS was not restricted in any way to any relevant information…was given complete access to the Secretariat premises and staff in advance of forming its opinion' and that 'the AGS was engaged …to advise on and prepare my letter of appointment… I am unable to be of any further assistance to the Committee'.

2.72 Mr Humphry attempted to reassure the Committee about the basis for AGS legal advice by referring to the AGS's access to all information. The Committee notes that the appointment of Mr Humphry was a public appointment, that his report is printed with a Commonwealth crest on its cover and is protected by Commonwealth copyright, he was paid with public money and supported by a secretariat staffed by some very senior public servants. It is therefore appropriate for this information to be made available to the Committee and the Senate.

2.73 The Committee also notes that the head of the DOFA secretariat has advised that he knew nothing of Mr Humphry's appointment, had seen neither the instrument

nor the contract engaging him. He was unable to inform the Finance and Public Administration Legislation Committee about the legal status of the review.[17]

Senate order for the production of documents

2.74 The sequence of events described above persuaded the Committee that its initially cautious and commercially sensitive approach to obtaining relevant documents has proved ineffectual. The Committee has now decided to adopt a firmer approach, starting with its decision to move a motion for the production of documents in the Senate, followed by a subsequent order.

2.75 Notice of the Committee's motion to order the production of documents was given on Wednesday, 7 March 2001. The motion was postponed on 8 March and departments advised that if the documents were delivered by 26 March, the motion would be withdrawn. None of the documents was delivered.

2.76 Consequently, on 26 March, the Chairman of the Finance and Public Administration References Committee (Senator George Campbell), pursuant to notice of motion not objected to as a formal motion, moved:

> That the Minister representing the Minister for Finance and Administration (Senator Abetz) provide to the Finance and Public Administration References Committee by 26 March 2001 the following documents relating to that committee's inquiry into the Government's information technology (IT) outsourcing initiative:
>
> a) a copy of the legal advice obtained by the Department of Finance and Administration from Phillips Fox, referred to in evidence at the public hearing on 7 February 2001;
>
> b) a record of documents generated by the Humphry Review and their current location;
>
> c) a copy of advice from KPMG on whether the IT outsourcing service contracts contained embedded finance leases;
>
> d) copies of the evaluation reports for IT contracts that have been let, with information identified as commercially sensitive 'blacked out' and providing the reasons for such claims;
>
> e) a copy of legal advice that the disclosure of evaluation reports to the committee may create a significant risk of litigation to the Commonwealth;
>
> f) a copy of a letter and attachments from the Minister for Finance and Administration (Mr Fahey) dated 20 January 1999 to ministers that gives further detail about the Office of Asset Sales and Information Technology Outsourcing's

17 Finance and Public Administration Legislation Committee, *Hansard,* 20 February 2001, pp. 216-217.

role in going forward with the implementation of the IT initiative and advice as to whether the letter was provided to the Humphry Review;

g) details of the transition arrangements and the operation of the Office of Asset Sales and Information Technology Outsourcing (OASITO) for the next 6 months, including:

i) arrangements with the consultants that OASITO previously had on the books,

ii) who is to be retained,

iii) precisely which contracts have been terminated and when, and

iv) ongoing liabilities in terms of contract commitments after 31 December 2001; and

h) copies of financial advice from PricewaterhouseCoopers, dated 26 May 2000, and Deloitte Touche Tohmatsu, dated 10 May 2000, on the methodology used to calculate savings.

2.77 The Minister advised the Senate on 26 March 2001 that the motion provided insufficient time to meet the deadline. However, the Committee notes that some information listed in the order had been requested on 19 December 2000, with the remaining documents requested on 7 February 2001, and the motion had been on the Notice Paper since 8 March. The Committee understands that OASITO's response has been with the acting Minister since 21 February.

2.78 On 2 April the Minister had not complied with the Order and the Chair gave notice of a second motion in a further effort to obtain the documents. While the documents were eventually provided on 4 April, the Committee is concerned that it has taken four months and two Senate orders to obtain documents to which it is entitled.

CHAPTER THREE

BEYOND THE IT OUTSOURCING INITIATIVE

3.1 The Committee considers that several issues arising out of the sequence of events described in this report need to be highlighted:

- the lack of timeliness and quality of answers in response to the Committee's requests;
- the role of OASITO in the Initiative;
- the apparent lack of understanding in the public and private sectors about the parliamentary accountability framework; and
- responsibility of all parties to IT outsourcing to publicly account for their performance, the delivery of outcomes and the use of public funds.

Timeliness and quality of answers

3.2 The Committee's first two days of public hearings, 5 December with the Auditor-General and 7 February with Mr Humphry, OASITO and DOFA presented a stark contrast in attitudes to Committee requests for information.

3.3 All answers to questions taken on notice by the Auditor-General on 5 December 2000 were forwarded to the Committee on 21 December; some of these were equally sensitive to material sought from OASITO and DOFA (see Chapter 2, paragraph 2.48).

3.4 The Committee has been sensitive to the concerns raised by OASITO on behalf of business (and, apparently, other government players), however given the extensive delays experienced, the Committee advises all parties that it is now revising its approach.

OASITO's role in the Initiative

3.5 There is very little understanding of the details of OASITO's role between now and June, by both OASITO and agencies which have appeared at recent public hearings. Documents, which would reveal this role, were requested at the public hearing on 7 February and were due on 21 February. The requested information was provided to the Committee on 4 April.

<u>Allegation of intimidation in dealings with government</u>

3.6 One issue that has arisen in relation to the management of the implementation of the Initiative is the relationship between OASITO and other players. For example, the submission from the Australian Information Industry Association (AIIA) advised:

> Some companies have also indicated that they are reticent to make a submission directly in response to the review. They are concerned that any direct criticism of the process may affect future dealings with the federal government.[1]

3.7 When questioned about this at the Committee's public hearing on 15 March, Mr Rob Durie, Executive Director, AIIA, advised:

> … There is great reluctance on the part of companies to make direct submissions or even to provide any information to our association that might be able to be linked back to an individual company, so we went to great lengths to assure members of our determination to protect their confidentiality and to make sure that there was nothing in our submission that might identify an individual company. I have been with the association for about 11½ years, and this is the first time that companies have made such explicit and strong requests either to be excluded from the submission or to have their identity protected.
>
> Senator BUCKLAND—Out of that, do I deduce that there is a degree of intimidation against possible tenderers?
>
> Mr Durie—I think, as became apparent in the Humphry report and even in the Auditor-General's report, the atmosphere between OASITO, the agencies and the industry was confrontational … There was quite a deal of tension between OASITO and individual suppliers and between OASITO and the association throughout the life of the IT outsourcing program.[2]

3.8 The Committee notes that the general nature of these claims and the expressed desire of AIIA's membership not to be identified, limit what the Committee is able to do about this complaint. If the claims can be substantiated, the Committee will draw them to the attention of the Senate Privileges Committee.

Parliamentary accountability

3.9 The apparent disregard or ignorance of parliamentary accountability, illustrated by the chain of events described in this report, is not limited to this Committee's inquiry, and indeed, may not be confined to the federal sphere.[3] The Committee notes that other Senate committees have had similar experiences of ministers, departments and agencies failing to provide requested documents. This was exemplified recently by a claim of 'common law doctrine of confidentiality', which was used during a Senate Economics Legislation Committee estimates hearing to deny

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1 AIIA, Submission No 24, p 3.

2 Finance and Public Administration References Committee, *Hansard*, 15 March 2001, pp 278-279.

3 The Committee understands that concerns about claims of commercial confidentiality in relation to government outsourcing have also been raised by Australian state auditors-general. The Committee also understands that the disclosure of outsourcing and privatisation contracts once signed is common practice in the UK, New Zealand and the US.

that committee access to a list of names of private companies who had tendered for a government grant under the TCF Strategic Investment Program.[4]

3.10 As part of its IT outsourcing inquiry, the Committee will continue to monitor similar difficulties faced by other committees, as well as state and international experiences, with a view to assisting committees deal with future recalcitrance, and to ensure that governments, agencies and private companies contracted to deliver government services are held accountable through the Parliament for the expenditure of public funds.

3.11 The Committee notes that the Australian National Audit Office is currently examining issues associated with confidentiality clauses in government contracts and is expected to report within the next few months. The Committee is hopeful that this too will assist those who must deal with the complexities that arise when the private sector works for government while government continues to be responsible and accountable for the outcome.

3.12 Partnerships with government need to be open, well documented and conducted with integrity – not only because the public has a right to know how public funds are spent, but because anything less may expose the Commonwealth to litigation, is costly and undermines public confidence. The Committee would be greatly concerned if any process or practice associated with the IT oustourcing process were perceived to be intimidatory or to discourage open debate of the issues, especially if this were to impact on any party wishing to contribute to this inquiry.

3.13 The Committee takes the opportunity to encourage further contributions to the IT outsourcing inquiry and to flag its intention to conduct a public hearing to take evidence from the Clerk of the Senate, private and academic lawyers, and other appropriate witnesses, on issues associated with parliamentary accountability. Comments on matters raised in this report and in relation to IT outsourcing, the Government's Initiative and the Humphry Review are encouraged.

3.14 The Committee would like to report on the outcome of proceedings in June, along with a final report on the IT outsourcing inquiry. However, as indicated at the beginning of this report, whether a final report is handed down in June will depend on the provision of material required to finalise the inquiry.

Senator George Campbell

Chairman

4 Economics Legislation Committee, *Hansard*, 21 February 2001, p 23.

MINORITY REPORT

The Behaviour of the Office of Asset Sales and IT Outsourcing

From the record of correspondence between the Senate Finance and Public Administration Committee and the Office of Asset Sales and IT Outsourcing (OASITO) it is evident that OASITO has attempted to co-operate with the Senate Finance and Public Administration Committee in relation to the provision of documents to the Committee. OASITO has been forthcoming with the Committee, and as the record of correspondence demonstrates, has made every effort to keep the Committee updated with developments.

Mr Smith, the Chief Executive Officer of OASITO, stated in a letter of 21 February that OASITO "remains at all times ready, willing and able to comply with any order that the Committee might make requiring me to produce documents".

To this end, it has provided requested material and answers to questions on notice to the Committee on a number of occasions.

Some of the documents that have been requested by the Committee, particularly the evaluation reports, are of a commercially sensitive nature. The minority Senators note that the Committee has recognised this and extended an opportunity to OASITO to exclude commercially sensitive information, provided that the basis for such claims was made clear. On this basis, contracts have been provided to the Committee, with clauses considered to be commercial-in-confidence deleted.

This measure is required because whilst a witness can provide evidence to a committee on a confidential basis, it is open for that committee or the Senate to subsequently order publication of that evidence. For that reason, **the onus of deciding what is commercial-in-confidence should rest with the party that has been asked to provide the material, and not the Committee**.

OASITO has completed its review of the evaluation reports and has identified commercially sensitive material in these reports, as Mr Smith reveals in his letter to the Committee of 26 February 2001. However, as he points out, the review is being conducted in conjunction with "consultations with relevant agencies and tenderers". He then goes on to say in this letter that, "unfortunately, while significant progress has been made consulting with the relevant agencies and tenderers final outcomes are still being finalised". This is a process that takes some time, and it is important that it be done thoroughly, so that any commercially sensitive information is identified and blacked out.

OASITO has previously made its concerns known about the legal implications of making such material public. In his letter of 24 January, Mr Smith said that, "OASITO has received legal advice that the disclosure of evaluation reports may create a significant risk of litigation to the Commonwealth". In a further

letter of 8 February, Mr Smith, whilst acknowledging that documents presented to the Committee would be protected by parliamentary privilege, said that OASITO is "of the view that the application of this privilege does not fully insulate the Commonwealth from legal action". In a letter of 21 February, Mr Smith further explained that he had received legal advice that, "while material provided to the Committee would itself be privileged against any use in legal proceedings, it could provide information that would lead to legal action complaining, for example, of the conduct of a tender process".

It seems to the minority Senators that OASITO has certainly not gone out of its way to be deliberately obstructionist and has delayed presenting the Committee with evidence out of a concern for the potential legal consequences of such action. In this respect, it has been acting in the best interests of the Commonwealth of Australia.

Senate Order for the Production of Documents

On 7 March, the Chair, Senator George Campbell, moved a notice of motion to order the production of various documents, but on 8 March this motion was postponed. It wasn't until 26 March that the Chair once again moved a notice of motion to order the production of various documents by 26 March, which was directed to Senator Eric Abetz. On that same day, Senator Abetz made a brief statement explaining that it was impossible for him to ensure that the requested material be provided on that day because he only received notice of the order "at about 5.00pm". (*Senate Hansard*, 26 March 2001) Of course, what this highlights is the unreasonable nature of the notice of motion. How was it that the Chair expected all of the documents to be presented by the Senate adjournment on the exact same day of the notice of motion? The practicalities of this make it virtually impossible.

During the course of his statement, Senator Abetz further stated that: "I have forwarded a copy of the order to the Acting Minister for Finance and Administration, Senator Kemp. Senators should understand that the acting minister, Senator Kemp, is the responsible authority for these orders, not me". (*Senate Hansard*, 26 March 2001) Despite the fact that Senator Abetz made clear that he did not have the authority to ensure the production of these documents, and that the responsibility instead fell to Senator Kemp as the Acting Minister for Finance and Administration, it was not until 2 April 2001 that the Chair moved a notice of motion calling on Senator Kemp to produce the relevant documents by the adjournment of the Senate on 4 April. This means that there was an effluxion of some seven days between the period when the Chair was notified of his error, and his move to rectify it.

At least this time, the notice of motion gave the Acting Minister a longer period of time in which to respond, if only two days.

It is also crucial to note that the notice of motion effectively took the decision to release the various documents to the Committee out of the hands of OASITO, and placed it directly in the hands of the Acting Minister.

To this end, the documents the subject which were the subject of the notice of motion were produced to the Senate prior to its adjournment on 4 April. This included the evaluation reports with commercially sensitive information blanked out. However, as Senator Rod Kemp, in his letter to Senator Campbell, of 4 April stated, "despite the blanking out process I am advised there remains a risk that public release could still damage the Commonwealth's interests and expose the Commonwealth to legal action." Due to this, Senator Kemp went on to "request that the Committee hold these documents on an in-camera basis". The minority Senators particularly note this request, and expect that the Committee will heed it.

Allegations of Intimidation in dealings with Government

In both its submission to the Committee and when providing evidence to the Committee at the hearing on 15 March, the Australian Information Industry Association raised allegations that some of its members were reluctant to make a submission to the Committee out of concern that the Government might respond negatively, which could have adverse commercial consequences for its members.

It is difficult to judge just what the specific concerns of the Association are, because Mr Durie, its Executive Director, was not in a position to comment on the specific examples of intimidation that his members had experienced. During the course of the hearing he said: "I would not be able to comment on that [i.e. allegations of intimidation] without the permission of the individual companies concerned". (*Committee Hansard*, 15 March 2001)

These are very serious allegations, and it is appropriate that evidence be put before the Committee to substantiate them.

The effectiveness of committee inquiries ultimately depends upon submissions from interested parties, and a willingness to appear as witnesses before committees. Witnesses must be able to appear before committees without any fear of intimidation, and allegations of intimidation, without any corroborating evidence, only serve to make potential witnesses reluctant to make submissions to committee inquiries.

There are a range of measures available to committees to protect witnesses. As the majority report acknowledges, under s. 12 of the *Parliamentary Privileges Act*, interference with a witness, such as by way of intimidation, may be construed as a criminal offence, and is punishable by fine or imprisonment. (*Majority Report*, p. 5) In addition, the majority report acknowledges that it is a "contempt of the Senate to interfere with a witness", citing Privilege Resolution 6(10) and (11). (*Majority Report*, p. 5)

If the Committee genuinely believes that witnesses or potential witnesses have been interfered with then it should provide evidence of this to the Senate, and where appropriate the Privileges Committee will be able to investigate.

Parliamentary Accountability

The majority's view of the points made in paragraph 3.1 (*Majority Report,* p. 19) has already been dealt with in a general way in the first section of this minority report.

The minority Senators reject absolutely the points that are made in the majority report under the heading of "Parliamentary accountability" (that is, paragraphs 3.9 to 3.14). In particular, the minority Senators reject the inference of paragraph 3.12 that the Government's IT Outsourcing Initiative has not been conducted with "integrity".

Companies considering entering into a partnership with the Government, or who have entered into a partnership with the Government should be able to provide commercially sensitive information to the Government with the confidence that it will not be made publicly available. The provision of material on an in-confidence basis is a normal practice within the commercial sector. Public disclosure of sensitive information may have adverse commercial consequences for the company. It may, for instance, provide a competitor with some sort of commercial advantage. The danger of commercially sensitive material being made publicly available will in fact limit the scope for free and open negotiation between companies and the Government, and may have an adverse impact on government tendering processes. As much was acknowledged by Mr Smith in his letter of 21 February, when he said that if the evaluation reports were to become public, "it may have an adverse market impact, affecting the Commonwealth's ability to solicit frank and competitive tenders going forward".

The majority report states that the Senate Finance and Public Administration Committee, as part of its inquiry into IT Outsourcing, "will continue to monitor" instances where other committees "have had similar experiences of ministers, departments and agencies failing to provide requested documents", which it labels as "recalcitrance". (*Majority Report*, pp. 20 - 21) The minority Senators do not believe that this is an appropriate role for the Committee during this inquiry. Further, they consider that the Committee should limit itself to the terms of reference for the inquiry, as set out on 29 November.

Senator Alan Eggleston
Deputy Chair

Senator Ross Lightfoot

5 April 2001

APPENDICES

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