

SECTIONS 49 AND 50 OF THE CONSTITUTION

AND STANDING ORDERS 25(15) AND 34

Section 49 of the Constitution

Privileges, &c. of Houses.

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

Section 50 of the Constitution

Rules and orders.

Each House of the Parliament may make rules and orders with respect to—

- (i) The mode in which its powers, privileges, and immunities may be exercised and upheld:
- (ii) The order and conduct of its business and proceedings either separately or jointly with the House.

Standing Order 25(15)

Legislative and general purpose standing committees

Standing Order 25(15)

A committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives.

Standing Order 34

Committees generally

Standing Order 34 – Powers

- (1) The Senate may give a committee power to send for persons and documents, and a committee with that power may summon witnesses and require the production of documents.
- (2) The chairman of a committee shall direct the secretary attending the committee to invite or summon witnesses and request or require the production of documents in accordance with the orders of the committee.

**RECOMMENDATIONS FROM AUDITOR-GENERAL AUDIT
REPORT NO. 9 OF 2000-2001**

**Implementation of Whole-of-Government Information Technology Infrastructure
Consolidation and Outsourcing Initiative**

RECOMMENDATIONS

Set out below are the ANAO's recommendations. ANAO considers that agencies should give priority to Recommendations, 1, 3, 5, 8, 12, 13, 14, 17 and 18.

**Recommendation
No.1
Para. 2.25**

ANAO *recommends* consideration of the advantages to the Commonwealth of having a specific agency assigned responsibility for the conduct and coordination of market surveillance and analysis to support and inform strategic planning by agencies for the re-tendering of outsourcing Agreements following completion of the initial implementation of the IT Initiative.

Agree: DOFA whole-of-government response

**Recommendation
No.2
Para. 2.48**

ANAO *recommends* that, as part of the management of Commonwealth IT outsourcing contracts, relevant agencies institute a framework to support the identification of opportunities to enhance the synergistic benefits available from the composition of agency groupings, either during the initial contract term, where cost-effective, or in the future re-tendering of the outsourcing agreements.

Agree: DOFA whole-of-government response

**Recommendation
No.3
Para. 2.66**

ANAO *recommends* that:

- a) OASITO and DOFA agree a timetable for the finalisation and implementation of an evaluation strategy for assessing whole-of-Government outcomes achieved under the IT Initiative;
- b) relevant agencies develop an evaluation strategy for consistently assessing and reporting outcomes achieved under IT outsourcing arrangements from the perspective of agency groups and individual agencies; and
- c) OASITO considers further enhancing its lessons learned processes through the development of mechanisms for the collection, distribution and maintenance of documented lessons learned material, together with appropriate request for tender and contractual material, arising from previous IT outsourcing tender processes to assist agencies undertaking subsequent processes.

Agree: DOFA whole-of-government response

**Recommendation
No.4
Para. 3.29**

ANAO *recommends* that, where appropriate, OASITO improve its management of the Strategic Adviser consultancy for the remaining duration of the IT Initiative by defining key deliverables and milestones required to be delivered by the Strategic Adviser.

Agree with qualification: DOFA whole-of-government response

**Recommendation
No.5
Para. 4.9**

ANAO *recommends* that, in future IT outsourcing tenders, relevant agencies ensure that a comprehensive brief confirming the contractual arrangements negotiated with the preferred tenderer, including updated analysis of cost savings, industry development commitments and satisfaction of evaluation criteria, is provided to the relevant Ministers in support of any recommendation to enter into the final contract.

Agree: DOFA whole-of-government response

**Recommendation
No.6
Para. 4.26**

ANAO *recommends* that agencies ensure that consultancy agreements developed for 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 tender 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.

Agree: DOFA whole-of-government response

**Recommendation
No.7
Para. 4.52**

ANAO *recommends* that, when conducting financial evaluations involving uneven cash flows over time, relevant agencies account for the time value of money in net present value terms, consistently applied in the evaluation outcomes presented to the decision-maker.

Agree with qualification: DOFA whole-of-government response

**Recommendation
No.8
Para. 4.61**

ANAO *recommends* that, for future IT outsourcing tenders, relevant agencies enhance transparency and accountability of decision making in the tender process by incorporating into the evaluation planning process consideration of the means by which tenderers will be ranked in terms of the best combination of value for money/cost savings and industry development criteria.

Disagree: DOFA whole-of-government response

**Recommendation
No.9
Para. 5.22**

ANAO *recommends* that, in future IT outsourcing tenders, relevant agencies consider the release of a draft Request for Tender for industry comment to assist in the development of IT offerings that will maximise competitiveness and support the achievement of cost-effective outcomes.

Agree: DOFA whole-of-government response

**Recommendation
No.10
Para. 5.62**

ANAO *recommends* that, in future IT outsourcing tenders, relevant agencies enhance the transparency and accountability of decision making by documenting explicit consideration of the extent to which tenderers comply with all evaluation criteria and preconditions identified in the Request for Tender.

Agree: DOFA whole-of-government response

**Recommendation
No.11
Para. 6.65**

ANAO *recommends* that relevant agencies ensure that future IT outsourcing agreements complement the Government's whole-of-Government telecommunication policy by stipulating a requirement that:

- a) relevant services be provided to agencies in accordance with whole-of-Government telecommunications arrangements, including that services must be procured under a whole-of-Government Head Agreement supported by appropriate reporting arrangements; and
- b) all telecommunications services be procured in the name of the Commonwealth unless otherwise agreed in writing by the Office for Government Online.

Agree: DOFA whole-of-government response - Part (a)

Agree with qualification: DOFA whole-of-government response - Part (b)

**Recommendation
No.12
Para.7.17**

ANAO *recommends* that, in order for the evaluation to identify the true financial value to the Commonwealth of future IT outsourcing tenders, relevant agencies include, at a minimum, the estimated fair market value of agency residual assets that provide service potential beyond the evaluation period.

Disagree: DOFA whole-of-government response

**Recommendation
No.13
Para. 7.31**

ANAO *recommends* that, in conducting future IT outsourcing tender evaluations, relevant agencies:

- a) identify the risks and benefits relating to ownership of assets that will be borne by each party under the proposed leasing arrangements in order to properly identify the economic substance of the transaction; and
- b) inform the decision-maker of the financial implications of the proposed operating or finance equipment lease arrangements prior to execution of the final contract.

Agree with qualification: DOFA whole-of-government response

**Recommendation
No.14
Para. 7.44**

ANAO *recommends* that, for future IT outsourcing tenders, relevant agencies properly account in the financial evaluation for any residual end-of-term Commonwealth obligations arising from underwriting tenderers' asset risk associated with the outsourced services.

Disagree: DOFA whole-of-government response

**Recommendation
No.15
Para.7.78**

ANAO *recommends* that, to ensure competitive neutrality adjustments are consistent with the conditions on which tenderers' pricing is based, OASITO, in consultation with DOFA, review the methodology to be applied in future IT outsourcing tenders for the calculation of adjustments for the required rate of return on agency assets in situations where the Commonwealth underwrites the asset risk of tenderers.

Disagree: DOFA whole-of-government response

**Recommendation
No.16
Para. 8.78**

ANAO *recommends* that, to assist in the verification of external service providers' reported performance, its compliance with contractual obligations, and as an aid to effective contract and resource management, relevant agencies consider the formulation and implementation of an independent review and evaluation program as soon as practicable in the term of an IT outsourcing arrangement.

Agree: DOFA whole-of-government response

**Recommendation
No.17
Para. 9.38**

ANAO *recommends* that, in managing IT outsourcing agreements, relevant agencies develop procedures for the conduct and documentation of the processes followed in evaluating options for the use of contractually-available service credits to facilitate effective delivery by the external service provider of contracted services.

Agree with qualification: DOFA whole-of-government response

**Recommendation
No.18
Para. 9.70**

ANAO *recommends* that, where appropriate in outsourcing IT infrastructure services, agencies develop, in consultation with Defence Signals Directorate, an integrated security architecture strategy that addresses operational security issues, identifies the necessary security safeguards and the required timetable for their implementation by the external service provider.

Agree: Defence and DOFA whole-of-government response

**Recommendation
No.19
Para. 9.80**

ANAO *recommends* that, in implementing IT outsourcing arrangements, relevant agencies develop a specific strategy for monitoring external services providers' compliance with contractual privacy obligations.

Agree: Privacy Commission and DOFA whole-of-government response

ANAO *recommends* that, in future IT outsourcing processes, relevant agencies:

- a) ensure that the capacity of tenderers to provide the invoicing information and associated documentation required to support the approval of Commonwealth payments and agency budgetary purposes is appropriately assessed during the tender evaluation and transition phases;
- b) specify in the outsourcing Agreement threshold invoice requirements that must be met before payment can be made; and
- c) consider including in the transition milestones and deliverables required to be met in order for the external service provider (ESP) to receive full payment of transition fees, a requirement that the ESP demonstrate adequate capacity to provide invoicing that will satisfy the specified threshold requirements.

**Recommendation
No.20 *
Para. 9.99**

Agree: DOFA whole-of-government response—Parts (a) and (c)

Agree with qualification: DOFA whole-of-government response—Part (b)

HUMPHRY REVIEW RECOMMENDATIONS AND GOVERNMENT RESPONSE

Recommendation 1

While it is the prerogative of the Government to set overall direction, the introduction of the FMA and CAC Acts places responsibility for implementation of policies with Chief Executives and Boards. Accordingly future responsibility for implementing the Initiative should be fully devolved to agency Chief Executives or Boards.

Government Response

Agree: The Government will retain the policy objectives of the IT Initiative including value for money information technology (including savings) and the development of the Australian IT & T Industry. The Government accepts the recommendation to devolve the responsibility for implementing the initiative to agency Chief Executives or Boards. The Department of Communications, Information Technology and the Arts will retain responsibility for the industry development component of this initiative.

Recommendation 2

The appropriateness of a particular outsourcing model will depend on individual agency requirements. The decision as to which model to adopt should be taken by the agency Chief Executive or Board in accordance with their responsibilities under the FMA and CAC Acts.

Government Response

Agree: Agencies can now determine the appropriate model/s for outsourcing within the bounds of the Government's IT initiative.

Recommendation 3

To ensure that the Government's IT outsourcing policy is pursued diligently, the outcomes of the policy need to be included in the performance agreement of agency heads. A committee of Secretaries should be formed to monitor the ongoing progress of the policy. This committee would report progress on a Whole of Government basis.

Government Response

Agree with qualification: The outcomes of implementing the policy will be included in the performance assessments of agency heads. For Secretaries, consistent with the current procedure, the Secretary of the Department of the Prime Minister and Cabinet and the Public Service Commissioner will assess and report on this aspect of their performance to Ministers, drawing on advice of outside experts as appropriate. For other agency heads, similar arrangements should be put in place by the relevant Boards and / or Ministers. The Public Service Commissioner will report on progress of the implementation of the initiative annually in the "State of the Service" report.

Similarly, agencies not in the scope of the Commissioner's report will need to advise on progress in their Annual Reports.

Recommendation 4

When current IT outsourcing contracts expire, there is little benefit in mandating that agencies adhere to their existing groups. Within the overall government policy to outsource, agencies should exercise their own discretion on how to approach re-tendering or contract renewal.

Government Response

Agree: Agencies will more than likely continue to seek economies of scale through groups at their own discretion.

Recommendation 5

It follows from recommendations 1-4, that although OASITO has been an important and necessary catalyst for change and moving the Initiative from a point of inertia to realisation, it is no longer appropriate for them to continue with their centrally managed role. However, OASITO has significant experience in the formal process of government contracting for outsourcing and should continue to be available to agency heads as a reference point for procedural aspects.

Government Response

Agree with qualification: See response to recommendation 1 with respect to devolved management of the Initiative. In practice, under the devolved management model, expertise in IT outsourcing will no longer reside in OASITO. Such expertise will increasingly be located in agencies active in the outsourcing process. In any case, a mature market has emerged from which agencies can source this type of advice. However, a six month transitional arrangement will be put in place whereby OASITO will provide assistance on IT outsourcing at the request of agency Chief Executives or Boards. After the transitional period, agency Chief Executives or Boards will obtain assistance at their discretion if required from a source of their own choosing.

Recommendation 6

There is a need for agencies to receive support from a separate organisation in managing transition and implementation of IT outsourcing. It is essential that such a supporting body adopts the nature of a service organisation, acting as a central repository of skill and knowledge – accessible to agency heads or governing bodies in implementing IT outsourcing. Consideration should be given to the portfolio location of such a body.

This group could draw on OASITO's experience.

Government Response

Agree with qualification: It has always been the responsibility of agency heads to manage the transition to IT outsourcing. The Government will establish a body to advise agencies, at their request and on a fee for service basis, in managing the transition of IT functions to the private sector. This body will reside in the Department of Finance and Administration.

Recommendation 7

Subject to an assessment of the Commonwealth and bidder positions on Group 1:

- The outsourcing process for Centrelink should not proceed until the Centrelink Board is satisfied that the transition and implementation risks can be effectively managed. Subject to that assessment, Centrelink should proceed to outsource its IT infrastructure within the overall government policy to outsource, and should exercise its own discretion on what should be outsourced and the manner in which that outsourcing should take place; and
- The Department of Family and Community Services (FaCS) should continue with outsourcing its IT infrastructure within the overall government policy to outsource, exercising its own discretion on what should be outsourced and the manner in which that outsourcing should take place.

Government Response

Agree: This recommendation can be implemented within the legal and probity framework for the tender process for Group 1. Centrelink and FaCS will assume responsibility for the current tender process for Group 1. The Secretary of FaCS and the Chief Executive Officer of Centrelink will be held accountable for implementing the Government's policy through assessment of their performance (see recommendation 3).

Recommendation 8

Subject to an assessment of the Commonwealth and bidder positions:

Group 11 should not proceed until the Chief Executives of each agency are satisfied that the implementation risks have been adequately addressed. Subject to that assessment, agencies should proceed to outsource their IT infrastructure within the overall government policy to outsource, but should exercise their own discretion on what should be outsourced and the manner in which that outsourcing should take place.

Government Response

Agree: This recommendation can be implemented within the legal and probity framework for the tender process for Group 11. Secretaries and agency heads will assume responsibility for the current tender process for Group 11, and will be held accountable for implementing the Government's policy through assessment of their performance (see recommendation 3).

Recommendation 9

Group 9 should not proceed until the Chief Executives of each agency are satisfied that the implementation risks have been adequately addressed. Subject to that assessment, agencies should only proceed to outsource their IT infrastructure within the overall government policy to outsource, subject to careful decision on what, if any, elements should be outsourced.

Government Response

Agree: Secretaries and agency heads will be held accountable for implementing the Government's policy through assessment of their performance (see recommendation 3).

Recommendation 10

Group 10 should not proceed until the Chief Executives of each agency are satisfied that the implementation risks and security concerns have been adequately addressed. Subject to that assessment, agencies should proceed to outsource their IT infrastructure within the overall government policy to outsource, subject to careful decision on what, if any, elements should be outsourced.

Government Response

Agree: Secretaries and agency heads will be held accountable for implementing the Government's policy through assessment of their performance (see recommendation 3).

Inquiry into the Government's IT Outsourcing Initiative

Extract from the opening statement by Senator George Campbell, Chairman made at a public hearing on 16 March 2001

In light of certain exchanges that have occurred during these hearings, I take the opportunity at this time in the committee's proceedings to put certain of the committee's powers clearly on the record.

Senate committees have a clear constitutional authority to require the attendance of any person and to require the production of any document relevant to their inquiries. This committee may invite the attendance of a person or invite the production of a document and, if that invitation is declined, under standing orders 25 (15) and 34, the committee may require the attendance of that person or production of that document by a subpoena.

I draw to your attention that this power applies to 'a person' and is not limited to public servants. There have been cases before this committee where witnesses have indicated that they have made a decision about what they will or will not provide to the committee or have made a decision about who they think should or should not attend before the committee. I make it clear that neither of these are courses of action open to a witness before a Senate committee. A committee may permit a witness to provide a reason for the non-attendance of a person or the non-production of a document and the committee will then determine whether or not it accepts that reason.

Witnesses before Senate committees are also protected by parliamentary privilege... it has become clear that there is misunderstanding and confusion about the protection which this affords. Concerns that secrecy provisions and statutes, terms and contracts, commercial arrangements, legal professional privilege and legal proceedings in general, prevent disclosure of information to a Senate committee are misplaced. None of these are grounds for the non-provision of information to committees. The provision of information to a committee cannot subsequently be questioned in courts or tribunals. In that context I draw to your attention privilege resolution 610, which states:

Any attempt by any party to influence a person in respect of any evidence given, or to be given, before a Senate committee or to induce them to refrain from giving evidence may be treated by the Senate as contempt.



AUSTRALIAN SENATE

FINANCE AND PUBLIC ADMINISTRATION

REFERENCES COMMITTEE

PARLIAMENT HOUSE
 CANBERRA ACT 2600
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19 December, 2000

Mr Ross Smith
 Chief Executive Officer
 OASITO
 Level 2
 28 National Circuit
 FORREST ACT 2603

Dear Mr Smith

Inquiry into Whole of Government IT Outsourcing Initiative

As you would be aware, the Senate has referred the Government's IT Outsourcing Initiative to the Finance and Public Administration References Committee for inquiry and report. I attach the terms of reference for your information.

The Committee is planning to seek submissions in January, 2001 and will write to you formally then to seek your written submission. The Committee also understands that the inquiry being undertaken by Richard Humphry will have reported by that time and be publicly available.

However, as part of its initial consideration of the issues involved in this inquiry, the Committee is seeking access to a number of documents, specifically:

- ❖ the requests for tender for contracts relevant to the inquiry which have already been let and those which are currently in the process of being let;
- ❖ any amended requests for tender;
- ❖ the evaluation reports for those contracts which have been let; and
- ❖ copies of all contracts signed with external service providers.

The documents should be provided by Friday, 12 January 2001. Where requests for tender were amended it would be appreciated if you could advise the Committee on the nature and extent of the amendments.

We recognise that there may be some information which could be considered to be commercial-in-confidence. Where this might be an issue, you will need to explain the basis for the commercial confidentiality and, if necessary, black out or delete any areas of sensitivity. If OASITO considers that all or part of a document may be

confidential, then the Committee may be prepared to accept such documentation in camera or on a confidential basis. You should note that the Committee will view contracts already let as having less justification for claims of commercial confidentiality than those currently being negotiated.

The Committee will have ongoing information needs and, in order for these to be met expeditiously and efficiently, I would appreciate your nominating a departmental contact officer as the first point of contact for the duration of the inquiry. The secretariat contact officer is Robina Jaffray on 6277 3079.

Please call me if you have any concerns in relation to the Committee's inquiry. I look forward to hearing from you.

Yours sincerely



Helen Donaldson
Secretary



Office of Asset Sales and IT Outsourcing

Chief Executive

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

Dear Ms Donaldson

Inquiry into Whole of Government IT Outsourcing Initiative

Thank you for your letter of 19 December 2000 regarding the Senate Inquiry into Whole of Government IT Outsourcing Initiative.

You advised that the Committee is seeking access to the following documents:

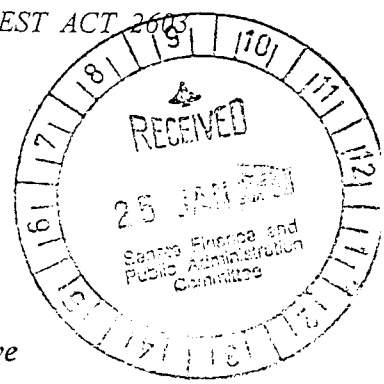
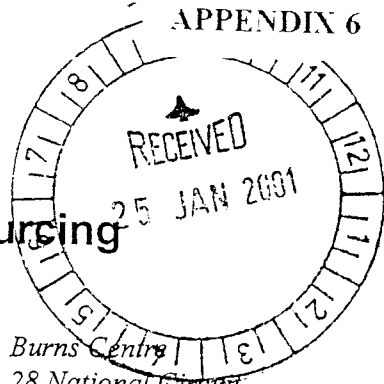
- the requests for tender for contracts relevant to the inquiry which have already been let and those which are currently in the process of being let;
- any amended requests for tender;
- the evaluation reports for those contracts which have been let; and
- copies of all contracts signed with external service providers.

OASITO is able to provide copies of the following requests for Tender (RFTs) to the Senate Committee. This is a complete list of RFTs issued to date:

GROUP	DOCUMENTATION
Cluster 3	Request for Tender
Group 5	Request for Tender
Australian Taxation Office	Request for Tender
Health Group	Request for Tender
Group 8	Request for Tender
Group 1	Request for Tender
Group 11	Request for Tender

You asked that where RFTs were amended for OASITO to advise the Senate Committee on the nature and extent of the amendments. OASITO is able to provide copies of RFT amendments to the Senate Committee and has attached a description of those amendments at Attachment A.

Concerning the request for access to evaluation reports for those contracts which have been let, access to information about the selection process generally only arises in the context of



applications under the Freedom of Information (FOI) Act and such information may fall within one or more of the exemption provisions in that Act. As the Committee has recognised in its report, *Inquiry into the Mechanism for providing Accountability to the Senate in relation to Government Contracts* (June 2000), the FOI Act is virtually the only Commonwealth legislative enactment that addresses the matter of commercial confidentiality and hence provides some guidance on the issues.

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.

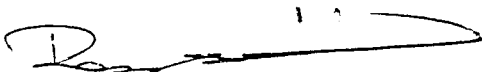
OASITO has received legal advice that the disclosure of evaluation reports may create a significant risk of litigation to the Commonwealth. Accordingly, it is OASITO's preference not to provide evaluation reports to the Senate Committee as it may not be in the public interest given such action may leave the Commonwealth exposed to legal action. This view has been taken following consideration of the draft Australian National Audit Office's Confidential Information Guidelines and the Senate References Committee considerations noted above.

Concerning the request for access to copies of all contracts signed with external providers, acting on legal advice, OASITO has sought the views of Agencies and Contractors regarding provision of the Services Agreements to the Senate Committee. The Committee has recognised there may be some information which should be considered commercial-in-confidence and OASITO has written to agencies and vendors requesting they detail any views they may have on the provision of the Services Agreement to the Senate Committee and the reasons for those views.

OASITO has received the majority of Agency responses but is awaiting the finalisation of vendor advice. It is envisaged that OASITO will be able to advise you of the basis for commercial confidentiality of any information in the Services Agreements in the coming week.

The contact officer for these requests by the Senate Committee is Mr Neil Williams (telephone: 6208 9237). He will be in touch with you regarding outstanding items as soon as possible.

Yours sincerely



Ross Smith
24 January 2001

Examples of disclosure (confidentiality) clauses in RFTs and contracts

Requests for Tender (RFT)

Cluster 3 – November 1997

**DIMA, DOFA Electorate offices, AEC, IP Australia, AGAL, AUSGLIG, IPS,
NCA and DOFA bureau customers**

5.5 Disclosure

The Commonwealth reserves the right to make available to any advisers and others engaged to assist the Commonwealth in this Project a copy of any tender or part of a tender for the purposes of evaluation, clarification, negotiation and/or contract execution.

ATO – 7 August 1998

8.5 Disclosure

The Commonwealth reserves the right, and the Tenderer hereby licences the Commonwealth to make available to Ministers and other Government other representatives, to any advisers and to any others engaged to assist the Commonwealth in this Project, a copy of any tender or part of a tender for the purposes of evaluation, clarification, negotiation and/or contract execution, **and anything else related to these purposes, including governmental and parliamentary reporting requirements** [emphasis added].

Contracts

Cluster 3

Contractor: CSC Australia

Contract date: 31 March 1998

21. CONFIDENTIALITY

21.1. Protection of Confidential Information

CSC must:

21.1.1. keep all Cluster Confidential Information confidential and must not (except as expressly permitted under this Agreement):

21.1.1.1. disclose the Cluster Confidential Information;

21.1.1.2.1. make copies of Material containing the Cluster Confidential Information; or

21.1.1.3. use the Cluster Confidential Information;

- 21.1.2. use due care to safeguard the Cluster Confidential Information and comply with any requirements specified by the Cluster from time to time;
- 21.1.3. implement security practices against any unauthorised copying, use, disclosure (whether that disclosure is oral, in writing or in any other form), access and damage or destruction of Cluster Confidential Information;
- 21.1.4. immediately notify the Cluster if CSC:
 - 21.1.4.1. suspects or becomes aware of any unauthorised access, copying, use or disclosure in any form; or
 - 21.1.4.2. is required by law to disclose any Cluster Confidential Information;
- 21.1.5. take all reasonable steps to enforce any obligation of confidence imposed or required to be imposed by this Agreement; and
- 21.1.6. do all things, execute all documents and give all assistance reasonably required by the Cluster to enforce any obligation of confidence imposed or required to be imposed by this Agreement.

21.4.* **Cluster obligations**

The Cluster has the same obligations in respect of CSC Confidential Information as those imposed on CSC under **clause 21.1**. The Cluster may:

- 21.4.1. use CSC Confidential Information for the purposes of this Agreement and to obtain benefit from the Services; and
- 21.4.2. disclose CSC Confidential Information to:
 - 21.4.2.1. any of its employees, agents or advisers;
 - 21.4.2.2. any Commonwealth Minister; and
 - 21.4.2.3. any Agency,

who has a need to know CSC Confidential Information, as long as it makes the recipient aware of the Clusters obligations under this clause.

21.5. **Exceptions to obligations of confidentiality**

Nothing in this Agreement prohibits the use or disclosure of any Confidential Information by either party to the extent that:

- 21.5.1. the information has been placed in the public domain otherwise than due to a default of the party;

- 21.5.2. the disclosure is expressly required by Law, but the party must use its best efforts to minimise any such disclosure;
- 21.5.3. the information has been independently developed by the party and without reference to the Confidential Information of the other party; or

the other party has approved in writing the particular use or disclosure of the Confidential Information.

Australian Taxation Office

Contractor: EDS

Contract date: 31 March 1999

22.4 ATO obligations

Subject to this **clause 22.4** and **clause 22.5 (Exceptions to Obligations of Confidentiality)**, the ATO must protect the Contractor's Confidential Information. The ATO may:

- (a) use the Contractor's Confidential Information for the purposes of this Services Agreement and to obtain benefit from the Services; and
- (b) disclose the Contractor's Confidential Information:
 - (i) to the ATO Personnel and the ATO's advisers;
 - (ii) to any Commonwealth Minister;
 - (iii) to an Agency; or
 - (iv) for Parliamentary purposes.

as long as it makes the recipient aware of the ATO's confidentiality obligations under this **clause 22.4** and the recipients of the information agree to be bound by a confidentiality undertaking in the form of **Schedule 23** in favour of the Contractor except that in the case of Ministers, an acknowledgment of the confidentiality obligations will suffice.

22.5 Exceptions to obligations of confidentiality

Nothing in this Services Agreement prohibits the use or disclosure of any Confidential Information by either Party to the extent that:

- (a) the information has been placed in the public domain otherwise than due to a breach of an obligation of confidentiality by any person;
- (b) the disclosure is expressly required by Law, but the Party must use its best efforts to minimise any such disclosure;

- (c) the information has been independently developed by the Party and without reference to the Confidential Information of the other Party;
or
- (d) the other Party has approved in writing the particular use or disclosure of the Confidential Information.



AUSTRALIAN SENATE

FINANCE AND PUBLIC ADMINISTRATION

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1 February, 2001

Mr Ross Smith
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 FORREST ACT 2603

Dear Mr Smith

Inquiry into Whole of Government IT Outsourcing Initiative

I refer to your letter of 24 January 2001, responding to the Committee's request for documentation. The Committee has now had an opportunity to formally consider your response.

The Committee is concerned that much of the documentation requested has not been provided. In particular, the Committee is concerned about your comments, firstly that requests for access to evaluation reports generally arise in the context of Freedom of Information requests and secondly, that disclosure of evaluation reports creates a significant risk of litigation to the Commonwealth. I will address each of these points in turn.

The application of the Freedom of Information Act to the Parliament

The *Freedom of Information Act* has no application to the disclosure of information to a House of the Parliament or to a parliamentary committee – the Act does not bind Parliament or its committees. Agencies who have a genuine concern about the disclosure of information to a parliament might want to refer to the grounds on which exemption from disclosure may be claimed, as a basis for persuading a committee not to persist with a requirement for a particular document because disclosure would be harmful in some specific way. However, as you note in your letter, the FOI Act provides guidance only, and a committee is not bound to accept such an argument, simply because the ground for non-disclosure is listed in the Act.

Risk of litigation to the Commonwealth

Advice from the Clerk of the Senate indicates that your concerns about the provision of the documentation to the Committee and the potential for risk of litigation to the Commonwealth are misconceived. The Clerk has advised:

As is made clear by paragraph 16(2)(b) of the *Parliamentary Privileges Act 1987*, the presentation or submission of a document to a House of the Parliament or to a parliamentary committee is a proceeding in Parliament, and as a proceeding in Parliament it cannot be impeached or questioned before any court or tribunal, and nor can it be used against a party in any proceedings relevant or irrelevant. The disclosure of a document to a parliamentary committee therefore cannot expose the Commonwealth to legal action.

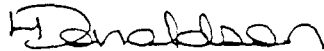
...The disclosure of the reports by other means and in other contexts may well put the Commonwealth in breach of its contractual obligations and expose it to risk of litigation, but there is no such risk with the provision of the reports to a parliamentary committee.

In view of the above advice, I reiterate the request contained in the letter of 19 December 2000, for the evaluation reports. The Committee further requests that you provide copies of the legal advice sought by you on this matter.

Where the contracts are concerned, I note your advice that you are seeking the views of the parties to those contracts. You should ensure that the specifics of those views are communicated to the Committee along with your response. I should point out to you that the Committee would be concerned if OASITO is not making clear in its RFT documentation and in any discussions with potential contractual partners, that the Parliament and its committees have rights of access to all documentation, that those rights of access extend beyond 'Government representatives' to the Parliament and its committees.

I would expect to receive further documentation, especially the evaluation reports, prior to the hearing scheduled for Wednesday next week. I have forwarded a copy of this letter to Minister Fahey for information.

Yours sincerely



Helen Donaldson
Secretary



AUSTRALIAN SENATE

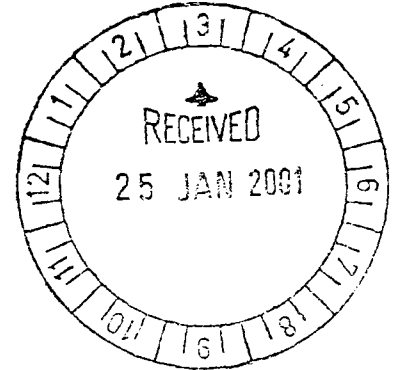
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CLERK OF THE SENATE

hc/let/13111

25 January 2001

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



Dear Ms Donaldson

OASITO — CONTRACT EVALUATION REPORTS

You asked for advice on the letter dated 24 January 2001 from the Office of Asset Sales and IT Outsourcing (OASITO), in which OASITO declines to provide evaluation reports relating to certain contracts which have been let.

The substantive point of the letter is contained in the following sentences:

OASITO has received legal advice that the disclosure of evaluation reports may create a significant risk of litigation to the Commonwealth. Accordingly, it is OASITO's preference not to provide evaluation reports to the Senate Committee as it may not be in the public interest given such action may leave the Commonwealth exposed to legal action.

Before proceeding to that substantive point, I observe that the letter makes reference to the Freedom of Information Act. The relevance of this reference to that Act is not clear. The letter says that the Act "provides some guidance on the issues". OASITO must be aware that the Freedom of Information Act has no application to the disclosure of information to a House of the Parliament or to a parliamentary committee. The only relevance of the Act is that it provides a checklist of grounds on which exemption from disclosure may be claimed for documents. Those grounds may be advanced to a parliamentary committee in the hope of persuading a committee that it should not persist with a requirement for a particular document because the disclosure of the document would be harmful in some specific way, but a committee is not bound to accept such an argument simply because the ground for non-disclosure is listed in the Freedom of Information Act, and is certainly not bound by the Act.

Turning to the substantive point made in the letter, it is misconceived. As is made clear by paragraph 16(2)(b) of the *Parliamentary Privileges Act 1987*, the presentation or submission of a document to a House of the Parliament or to a parliamentary committee is a proceeding in Parliament, and as a proceeding in Parliament it cannot be impeached or questioned before any court or tribunal, and nor can it be used against a party in any proceedings relevant or irrelevant. The disclosure of a document to a parliamentary committee therefore cannot expose the Commonwealth to legal action.

It would be very surprising if any source of legal advice resorted to by OASITO is ignorant of this point. Government legal advisers are well aware of it. It is to be noted that OASITO's letter states that the legal advice is to the effect that "the disclosure of evaluation reports may create a significant risk of litigation to the Commonwealth". This summary of the advice does not indicate that the advice states that the provision of the reports to a parliamentary committee would create such a risk. The disclosure of the reports by other means and in other contexts may well put the Commonwealth in breach of its contractual obligations and expose it to risk of litigation, but there is no such risk with the provision of the reports to a parliamentary committee. It would be surprising if any legal advice suggested otherwise. The way in which the legal advice is paraphrased in the letter suggests some obscuring of what the advice actually says. As summarised in the sentence quoted, the advice does not support the following sentence to the effect that there is risk of legal action in the provision of the reports to the committee.

I suggest that the committee write to OASITO pointing out the law of parliamentary privilege as explicated in section 16 of the Parliamentary Privileges Act, asking whether the legal advice actually says that there would be risk of legal action resulting from the presentation of the reports to the committee, and suggesting that OASITO reconsider its position in light of the Parliamentary Privileges Act.

Please let me know if I can be of any further assistance to the committee in relation to this matter.

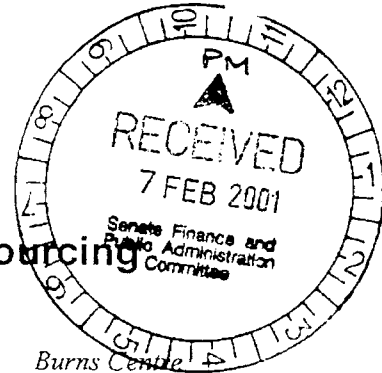
Yours sincerely



(Harry Evans)



Office of Asset Sales and IT Outsourcing



Burns Centre
28 National Circuit
FORREST ACT 2603

Chief Executive

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

Dear Ms Donaldson

Inquiry into Whole of Government IT Outsourcing Initiative

In your letter of 19 December 2000 you advised that the Committee is seeking access to copies of all contracts signed with external service providers. I advised you in my letter of 24 January 2001 that, acting on legal advice, OASITO was seeking the views of Agencies and Contractors regarding the provision of executed Services Agreements to the Senate Committee.

The Committee has recognised that there may be some information that should be considered commercial-in-confidence and that OASITO should explain the basis for the commercial confidentiality and, if necessary, black out or delete any areas of sensitivity. Vendors generally expressed the view that, having participated in good faith on a normal commercial basis in the Initiative, any disclosure of information to the Committee should not place them at any commercial disadvantage.

OASITO, in conjunction with relevant agencies, has spent considerable effort consulting with vendors to reach an understanding of what specific information in the Services Agreements might reasonably be considered confidential information. OASITO has referred to the draft ANAO confidential information criteria to assist with the review and categorisation of sensitive information. Please note that some of the contracts have undergone some variation (as agreed between the parties) since signatory date. The Committee will need to request amendments from the individual agencies concerned.

OASITO is able to provide copies of Services Agreements executed under the Initiative at signatory date with the exception of the Department of Health and Aged Care (DHAC) and Health Insurance Commission (HIC) agreements with IBM-GSA. Copies of the available executed Services Agreements are attached with material considered commercially sensitive or confidential blanked out. Tables for each available agreement explaining the Commonwealth's justification for the exclusions are at Attachment B.

Both the DHAC and HIC agreements with IBM-GSA will be provided to the Committee tomorrow. The DHAC agreement will have the commercially sensitive material blanked out. The nature of these exclusions will also be provided to the Committee. Like OASITO, the

DHAC is keen to work with the Committee to determine the most appropriate way to protect any sensitive material and envisages that all documentation will be made available when this is agreed.

The Committee should be advised that most of the interested parties, including all Contractors, consider the perceived risk of public disclosure of financial information as high and have requested absolute protection of this information because of its inherent commercial and competitive sensitivity.

In your letter of 19 December 2000 you noted that the Committee may be prepared to accept sensitive documentation in camera or on a confidential basis. OASITO would appreciate suggestions from the Committee on how to deal with this material.

A separate letter is being prepared in response to your letter of 1 February 2001 concerning the provision of ITO Evaluation Reports.

Yours sincerely,



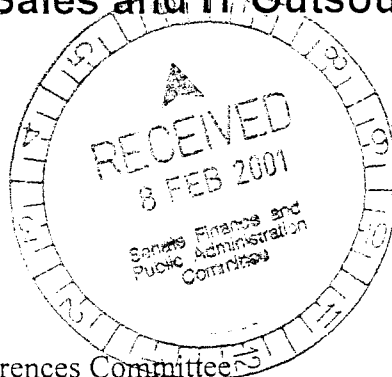
Ross Smith

7 February 2001



Office of Asset Sales and IT Outsourcing

Chief Executive



Burns Centre
28 National Circuit
FORREST ACT 2603

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

Dear Ms Donaldson

Inquiry into Whole of Government IT Outsourcing Initiative

In your letter of 1 February 2001, you advised that the Committee had considered OASITO's response to the request to provide evaluation reports. You mentioned in your letter that the Clerk of the Senate had indicated that documents disclosed to the Committee would be subject to parliamentary privilege and therefore would not raise concerns about the risk of litigation to the Commonwealth.

OASITO agrees that documentation submitted to the Committee in response to its request would be subject to parliamentary privilege and, as the Clerk noted, "cannot be impeached or questioned before any court or tribunal, and nor can it be used against a party in any proceedings relevant or irrelevant."

However, we are of the view that the application of this privilege does not fully insulate the Commonwealth from legal action.


Notwithstanding the fact that the content of documents submitted to the Committee may be subject to privilege, the nature and substance of the content may be revealed in the process. This raises a significant risk that armed with the knowledge of such information, aggrieved tenderers may seek other avenues, including discovery, to obtain copies of the evaluation reports or parts of them and, potentially, other sensitive documentation or information relating to the reports. This concern is coupled with the knowledge that disclosure of the evaluation reports may be commercially damaging to the tenderers involved. This concern relates to the contents of the reports generally and most specifically to the information relating to the technical solution and pricing contained therein.

This is foreshadowed in your letter where you indicated that the Clerk concluded that "disclosure of the reports by other means and in other contexts may well put the Commonwealth in breach of its contractual obligations and expose it to risk of litigation". The Clerk has recognised the very real risk that OASITO is seeking to avoid.

As a result, it is OASITO's preference not to provide the evaluation reports to the Senate Committee, as advised to the Committee at the public hearing on 7 February 2001, as it may not be in the public interest.

In response to the Committee's requests at the public hearing, OASITO is reviewing the evaluation reports to specify the extent of confidential information contained in them. I will advise you of the outcome as soon as possible.

Yours sincerely,



Ross Smith
8 February 2001