

Is there Adequate Parliamentary Scrutiny of Government Contracts?

The [Senate Order on Agency Contracts](#) aims to ensure parliamentary scrutiny of government activities in the face of increased use of confidentiality as a ground to withhold information from the public and from Parliament.

The Senate Order

The Order originated with the concerns of Senators, as raised by the Senate Finance and Public Administration Committee (SFPAC) in 2000, that:

The level of information available to the Parliament and to the public about government contracting has not kept pace with the increased rate of contracting out.¹

The Australian National Audit Office (ANAO), explored the issue further in its report, *The Use of Confidentiality Provisions in Commonwealth Contracts*.² It concluded that 'there are weaknesses in how agencies generally deal with the inclusion of confidentiality provisions in contracts'.³

On 20 June 2001, the Senate agreed to a motion, originally notified by Senator Andrew Murray on 3 April 2000 and often referred to as the Murray Motion, which aimed to ensure accountability to the Senate for government contracts.⁴ This motion is the Senate Order.

Initiatives in other jurisdictions exist that achieve similar objectives. In New Zealand, information on contracts is published by agencies under the government's procurement policy.⁵ In the United States, some contract information must be made available under the [Federal Acquisition Regulations](#). In the

Australian Capital Territory, the use of confidentiality provisions is restricted by law.⁶

Which Contracts?

The Order applies to [all government and parliamentary departments](#), and agencies prescribed under the [Financial Management and Accountability Act 1997](#). It requires that they report twice a year on:

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

Small contracts are thus excluded. It also appears that several contracts with the one contractor totalling more than \$100 000, provided each was for less than that amount, would also be excluded.

What Information is Provided?

The primary purpose of the reporting is not to provide information about the contracts themselves, but to ensure that the use of confidentiality clauses in contracts can be monitored. The Order requires that each agency report:

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

Despite the focus on confidentiality clauses, the information the Order generates gives a picture of what contractors government agencies are using, and how much they are receiving.

The Order requires that the information be made available on agency web sites. It also requires each agency to report the costs of complying with the Order.

The Government Response

In August 2001, the Government indicated it would comply with 'the spirit of the order on the basis that':

agencies will use the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity (in [Government Guidelines for Official Witnesses before Parliamentary Committees](#)) to determine whether information regarding individual contracts will be disclosed.⁷

In October 2001, the Government also revised the [Commonwealth Procurement Guidelines](#) to state that agencies should:

include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees.

Monitoring Implementation of the Senate Order

Audit Reports

The Senate Order requested that the Auditor-General report regularly on compliance with the Order. Three ANAO reports have so far been produced, and were tabled on 25 February 2002, 18 September 2002, and 5 March 2003.⁸ The reports generally found that agencies were working to implement the Order, and that there was a high level of compliance with the requirements for information provision.

The Senate Committee Report

In December 2002, the SFPAC reported on the first year of operation of the Order.⁹ The Committee concluded that the Order had had positive effects on accountability in contracting, and that agencies were taking a positive approach to complying with the Order. The report also identified some issues, discussed below.

What is a Contract?

The SFPAC report identified some confusion in agencies as to what constituted a 'contract'. Some agencies thought the Order applied—or should apply—only to procurement contracts. The SFPAC disagreed, saying that the intention of the Order was not to monitor procurement but to achieve transparency in *all* government contracting practices.

Confidentiality

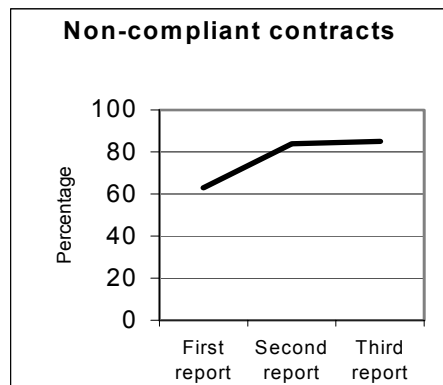
A key issue with contracts concerns whether they are appropriately transparent, to both the Parliament and the public.

Agencies may seek to restrict access to parts (or all) of a contract by, for example, designating them as commercial-in-confidence.¹⁰ But most contract information is not confidential: such restrictions only apply to specific information which 'has the necessary quality of confidentiality'.¹¹ Agencies are finding it far from easy to establish exactly what information is confidential.

The ANAO found that the agencies' contract lists are indicating that many contracts contain confidential material, when in fact that material is probably not restricted.

It has been assumed that, as agencies became familiar with the Senate Order and adopted new guidelines on the identification of confidentiality provisions in contracts, confidentiality provisions would be applied to contracts more accurately. However most contracts examined by ANAO—even in the

most recent review—were negotiated before agencies implemented new contracting guidelines. Thus, as the figure shows, non-compliance is still prevalent in agency reporting.



Scope

Consistent with its broad approach to the definition of a contract, the SFPAC also indicated that entities governed by the *Commonwealth Authorities and Companies Act* (CAC Act bodies) should be reporting in the same way as currently required of government departments and agencies. It recommended that this broadening of scope be implemented in 2004.

The future

The SFPAC recommended that the Order be amended to deal with some of the issues mentioned above. On 25 March 2003 Senator Michael Forshaw gave notice of a motion to:

- ensure the provision of more information on the timing of contracts is provided,
- extend the coverage of the Order to CAC Act bodies, and
- require further review of the operation of the Order by the SFPAC in 2003.

The last point recognises that there has not yet been sufficient time for agencies to implement fully the new procedures.

Parliament also awaits a response from the government on a recommendation that there be legislation 'that would put beyond doubt the principle of public access to government contracting

information'.¹² This approach is consistent with that taken in the United States and the ACT.

Endnotes

1. SFPAC, *Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts*, June 2000, p. iii.
2. ANAO, *Audit Report, no. 38, 2000–01*.
3. *ibid*, p. 15.
4. *Senate Debates*, 20 June 2001, p. 24755.
5. New Zealand Ministry of Economic Development, *Government Procurement Policy—Post-Award Transparency*, October 2001.
6. *Public Access to Government Contracts Act 2000*.
7. *Senate Debates*, 27 August 2001, p. 26668.
8. ANAO, 'Senate Order of 20 June 2001 (February 2002)', *Audit Report, no. 33, 2001–02*; 'The Senate Order for Departmental and Agency Contracts (September 2002)', *Audit Report, no. 8, 2002–03*; 'The Senate Order for Departmental and Agency Contracts (Spring 2002)', *Audit Report, no. 32, 2002–03*.
9. SFPAC, *Departmental and Agency Contracts: Report on the First Year of Operation of the Senate Order for the Production of Lists of Departmental and Agency Contracts*, December 2002.
10. Australian Government Solicitor, 'Identifying and Protecting Confidential Information', *Legal Briefing*, no. 64, July 2002.
11. ANAO, *Audit Report, no. 38*, op. cit., p. 56.
12. SFPAC 2002, op. cit., p. 49.

Ian Holland Politics and Public Administration Group Information and Research Services

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