

The Senate

Standing Committee on
Finance and Public Administration

Departmental and agency contracts

Second report on the operation of the Senate
order for the production of lists of departmental
and agency contracts (2003–06)

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RECOMMENDATIONS

Recommendation 1

5.10 The Committee recommends the order be retained while the new AusTender system for reporting procurement contracts is implemented, with departments and agencies tabling statements through their ministers in accordance with paragraph (1) of the order, that they had fulfilled their reporting obligations by placing the information required under paragraph (2) of the order in the AusTender system.

Recommendation 2

5.11 The Committee recommends DOFA, in consultation with ANAO, relevant parliamentary committees and stakeholders, consider reporting arrangements for non-procurement contracts and explore the development of a reporting mechanism comparable to the new AusTender system for this category of contract, and report to the Committee the outcome of this process within six months of the tabling of this report.

Recommendation 3

5.14 The Committee recommends agencies, if they have not done so already, implement ANAO recommendations to improve the accuracy and completeness of contract information with stronger internal controls and quality assurance for checking data, and report that they have done so through their ministers' tabling statements made under paragraph (1) of the order.

Recommendation 4

5.17 The Committee recommends that to improve data quality and internal governance agencies include procurement and contract activity in regular business and management reporting to agency executives and, where necessary, internal audit and governance committees.

Recommendation 5

5.20 The Committee recommends DOFA and agencies consult ANAO on examples from compliance audit testing which illustrate provisions that are classified appropriately and those that are not, for inclusion in guidance and training in relation to the order.

Recommendation 6

5.23 The Committee recommends all agencies provide adequate training and education to staff responsible for managing contracts and complying with the order, either through internal training or programs provided externally.

Recommendation 7

5.32 The Committee recommends DOFA include in guidance advice to the effect that, in relation to a refusal to disclose information based on a claim of commercial confidentiality for a contract, the Parliament, and its committees and members, may:

- test the validity of any claim by reference to DOFA's process chart for agency staff dealing with confidentiality of information in contracts; and
- refer the contract to the Auditor-General for examination.

Recommendation 8

5.36 The Committee requests ANAO consider including ASIO and ASIS regularly in its compliance audits under the order on a three-yearly basis.

Recommendation 9

5.41 The Committee recommends the Department of Prime Minister and Cabinet, in the next set of guidelines for annual reporting, include a requirement for agencies to include a note in their annual reports referring readers to the AusTender site for information on contracts and consultancies. Depending on the outcome of any decision on the DOFA proposal to rationalise procurement reporting, it may be necessary for agencies to also include a note explaining changes to reporting requirements for procurement contracts.

Recommendation 10

5.49 The Committee recommends that the order be extended to cover CAC Act bodies from 1 July 2007.

Recommendation 11

5.53 The Committee reaffirms its suggestion that the Department of the House of Representatives comply voluntarily with the order. If the Senate agrees with this suggestion, the Committee requests the President of the Senate convey its suggestion to the Speaker of the House of Representatives.

Recommendation 12

5.59 The Committee recommends DOFA provide a general report on the implementation of the recommendations in this report and the performance of the new single reporting mechanism, by not later than the last day in September 2007.

Recommendation 13

5.61 The Committee recommends the Senate amend paragraph (7) of the order, to read: 'The Finance and Public Administration Committee consider the ongoing operation of the order and report on relevant developments from time to time'.

Chapter 1

Background

1.1 The Senate order for departmental and agency contracts is one of several measures that the Senate introduced in recent years to improve openness and transparency in relation to the expenditure of public funds.¹ The need for such measures became evident over time, with the markedly increased use of 'outsourced' arrangements to provide what traditionally had been solely government operations. Increased outsourcing, through contract arrangements with private sector organisations, had created an environment in which the scrutiny of government expenditure had become more challenging.

1.2 Two principal concerns emerged: one, that significant contracts for services or goods should be available and accessible for scrutiny; and two, that confidentiality provisions were valid, appropriate and warranted in application and usage.

1.3 To ensure government expenditure is scrutinised effectively, it is essential that information within government contracts is not inappropriately withheld from the parliament and the public. Senator Murray made this case to the Senate in August 1999:

Accountability can be exacted only where those whose responsibility it is to call government to account are themselves possessed of, or are able to obtain, the information necessary to make considered judgments. Information is the key to accountability.²

1.4 The Senate order for departmental and agency contracts responds to this need for information. Essentially, the order requires that agencies list on their Internet site details of all contracts to the value of \$100,000 or more. The order specifies that the list indicate for each contract whether any confidentiality provisions have been agreed, and if so, the reasons for the confidentiality arrangements.³ Underlying these specific requirements, the order aims to enforce the basic accountability principle that information regarding government expenditure should be available for public scrutiny, unless there is sound reason for it not to be.

1 Other measures include procedural orders of continuing effect nos. 7 (Senate and Senate Select committees – claims of commercial confidentiality) and 10 (Agency advertising and public information projects), *Standing Orders and Other Orders of the Senate*, September 2006.

2 Senator Murray, Adjournment Speech, *Senate Hansard*, 26 August 1999, p. 7888.

3 The Department of Finance and Administration (DOFA) in conjunction with the Australian National Audit Office (ANAO) has developed guidelines specifying when and how confidentiality provisions should apply. See the discussion of DOFA guidance in Chapter 2.

Second report

1.5 This is the Committee's second report as required under the Senate order for departmental and agency contracts. The first report in 2002 dealt with the first year's operation of the order. A summary of its findings and recommendations is provided later in this chapter.

1.6 This report covers the operation of the order since 2002. It covers a longer period than the second year of operation as required under the order. This reflects the Committee view that there would be benefit in allowing time for departments and agencies to bed down procedures to comply with the order. Extra time was also seen as useful to allow the government's enhanced accountability principles to be assimilated into the routine work of line staff negotiating and managing contracts. A report limited to the second year's operation might have only provided a snapshot of some of the issues. This report therefore presents a survey over a reasonable period of time of trends and issues with the order's operation and identifies areas for improvement.

1.7 The report is also timely in that it considers the Department of Finance and Administration's (DOFA) recent proposal to adopt a single reporting regime for procurement. The proposal is an attempt to rationalise the overall framework for procurement reporting. However, under this model the order would be revoked, along with the requirement for consultancies to be reported in annual reports. Whether DOFA's proposal represents an advance for accountability and transparency is a major question the Committee examines later in this report.

Committee approach

1.8 In considering the operation of the order, the Committee has reviewed Australian National Audit Office (ANAO) performance audits of agency compliance with the order and evidence collected through the estimates process. Three public hearings were held in Canberra on 25 March 2004, 11 October 2006 and 27 November 2006. The Clerk of the Senate and officers from ANAO and DOFA appeared at these hearings and are listed in Appendix 1. The Committee has also taken account of evidence tendered to the Joint Committee on Public Accounts and Audit.

Report structure

1.9 The rest of this chapter outlines the development and requirements of the order, before summarising the Committee's first report, its findings and recommendations.

1.10 Chapter 2 addresses developments relating to the order since 2002, in particular the government response to the first report and amendments to the order.

1.11 Chapter 3 analyses compliance with the order, while chapter 4 discusses proposals for improving the operation of the order and the broader accountability framework for government contracts.

1.12 Chapter 5 presents the Committee's conclusions and recommendations.

Development of the order

1.13 The issue of accountability in relation to government contracts was formally referred to the Committee on 12 April 2000 when the Senate agreed to a motion moved by Senator Murray. Three reports relating to the motion were subsequently published:

- The Committee's report *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, tabled on 26 June 2000;⁴
- The ANAO's Audit Report No.38 2000-2001, *The Use of Confidentiality Provisions in Commonwealth Contracts*, tabled on 24 May 2001;⁵ and
- The Committee's report *Commonwealth contracts: a new framework for accountability*, tabled on 26 September 2001.⁶

1.14 The motion became a Senate order on 20 June 2001, and took effect from 1 July 2001. Appendix 2 contains the original order.

1.15 On 27 September 2001, the order was amended to include changes recommended in the Committee's report on a new framework for accountability in relation to Commonwealth contracts. These included changes to contract details required in agencies' Internet lists, and to the details required in the ministers' letters. Appendix 3 contains the order as amended.

1.16 In accordance with the requirements of the original and the amended order, the Committee reported on the first year of operation of the order in December 2002. That report is discussed below. Amendments to the order in response to the Committee's recommendations were made on 18 June 2003, 26 June 2003 and 4 December 2003. Appendices 4–6 contain the order as amended.

Requirements of the order

1.17 The order requires that ministers table in the Senate a letter on behalf of each agency they administer, advising that a list of the agencies' contracts has been placed on the Internet. Ministers are required to table these letters twice each year, within two months of the end of the financial and calendar years. If agencies' Internet lists do not fully comply with the order (see below), ministers are required to specify in their letter the extent and reasons for non-compliance and when full compliance is expected.

4 http://www.aph.gov.au/senate/committee/fapa_ctte/completed_inquiries/1999-02/acnt_contract/report2/report2.pdf.

5 <http://www.anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69BCA256A56002785D5>.

6 http://www.aph.gov.au/senate/committee/fapa_ctte/completed_inquiries/1999-02/acnt_contract/report2/report1.pdf.

Where no contracts relevant to the order have been entered into, ministers are still required to table a letter indicating that this is the case.

1.18 Departments and agencies are required to compile the list of contracts and publish it on their Internet site. The agencies covered by the order are those within the meaning of the Financial Management and Accountability Act 1997.

1.19 The order specifies that the list must:

- be published on the Internet for both the financial and calendar years, with access through the department or agency homepage;
- include all contracts to the value of \$100,000 or more entered into or not fully performed during the previous twelve months, by that department and its agencies;
- indicate the following information for each contract:
 - the name of the contractor, amount of the consideration, subject matter of the contract, commencement date and duration of the contract; and
 - whether parties have agreed to maintain confidentiality of any of the contract's provisions, or whether there are any other requirements of confidentiality, and the reasons for the confidentiality;
- indicate the relevant reporting period and the twelve-month period relating to the contract listing; and
- provide an estimate of the cost of complying with the order and a statement of the method used to derive the estimate.

1.20 In addition to the transparency created by the Internet lists and ministers' letters, the order aims to achieve a further layer of accountability by requesting a response from the Australian National Audit Office (ANAO). The Auditor-General is requested to evaluate a sample of the contracts listed by agencies and report to the Senate whether confidentiality provisions have been used inappropriately in those contracts. The order also requests that the Auditor-General examine a sample of contracts not included in the Internet lists and determine whether the contracts should have been listed. The order therefore not only requires that agencies take action to ensure openness and transparency in relation to government contracts, but also ensures that agencies' progress in this area is regularly monitored.

Government responses

1.21 The Government's response to the order and its amendments has been generally favourable. In response to both the original and amended orders, the Government agreed that agencies would comply with the order on the following terms:

- agencies will use the Department of Prime Minister and Cabinet's guidelines on the scope of public interest immunity (in Government Guidelines for

Official Witnesses before Parliamentary Committees) to determine whether information regarding individual contracts will be provided;

- agencies will not disclose information if disclosure would be contrary to the Privacy Act 1988, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed; and
- compliance with the Senate order will be progressive as agencies covered by the Financial Management and Accountability Act 1997 refine arrangements and processes to meet the requirements.⁷

Report on the first year of operation of the order

1.22 The Committee reported on the order's first year of operation, that is 1 July 2001 to 30 June 2002, in December 2002.⁸ The report set out 17 recommendations for changes to the order and for ongoing agency compliance and reporting. This section summarises the issues raised in the Committee's 2002 report, and the recommendations made.

1.23 In general, the Committee concluded that the order is an important mechanism for improving accountability, and that most agencies had responded positively to the order. The Committee stated that:

... the establishment of the order has been a catalyst for action on the part of government agencies to ensure greater accountability and transparency in relation to government contracting.⁹

1.24 However, the Committee found that there was room for improvement in some agencies' response to the order, stating:

...in taking a literal and over-cautious response [and] approach to the letter of the Senate order, some agencies may still be resisting the spirit of the accountability requirements of the Senate.¹⁰

Issues in the first year of operation

1.25 Issues raised following the first year of operation of the order included matters relating to: (1) agency compliance with the order, (2) the definition of a contract within the order, (3) inappropriate use of commercial confidentiality provisions, (4)

7 Senator Ian Campbell, Senate Order on Government Agency Contracts, Government Response, *Senate Hansard*, 27 August 2001, p. 26668.

8 Senate Finance and Public Administration References Committee, *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 (hereafter *Report on the first year of operation of the Senate order*).

9 *Report on the first year of operation of the Senate order*, p. 33.

10 *Report on the first year of operation of the Senate order*, p. 35.

the reporting requirements of the order, (5) the scope of agencies covered by the order and (6) the frequency of ANAO audits. A summary of the Committee's findings in relation to each of these issues is provided below.

(1) Agency compliance

1.26 The Committee found that compliance with the order during its first year of operation varied across agencies. While most agencies had compiled a list of contracts and published it on their Internet site, only around half had actually met all the order's requirements.¹¹ Similarly, although letters of advice were received from most ministers, there were a number of deficiencies including late tabling of letters and failure to indicate agency non-compliance with the order.¹²

1.27 The Committee concluded that it would be appropriate for the ANAO, in consultation with the Department of Finance and Administration (DOFA), to develop guidelines for agencies to use in complying with the order.¹³

(2) Definition of a contract

1.28 In the first year of the order's operation, most agencies adopted a broad definition of the term 'contract' when complying with the order. The Committee's 2002 report notes the concern expressed by some ministers about this approach. The Committee heard that restricting the range of contracts covered by the order would make compliance more efficient for agencies. Specifically, several agencies indicated that confining the order to procurement related contracts only would align the order's requirements more closely with the Gazette Publishing System (GaPS) which is used for reporting government procurement related contracts.¹⁴

1.29 While noting these views, the Committee concluded that a broad interpretation of the term 'contract' was consistent with the objectives of the order and its accountability principles. As such, the Committee advised that all government contracts, based on their legal status rather than the title of the arrangements, should be covered by the order.¹⁵

(3) Commercial confidentiality

1.30 In the first year of operation, a high proportion of contracts listed by agencies as having confidentiality provisions were found to be inappropriately categorised. The ANAO advised the Committee that this situation reflected contracts having been

11 *Report on the first year of operation of the Senate order*, p. 15.

12 *Report on the first year of operation of the Senate order*, p. 14.

13 *Report on the first year of operation of the Senate order*, p. 35.

14 *Report on the first year of operation of the Senate order*, p. 17.

15 *Report on the first year of operation of the Senate order*, p. 36.

negotiated before the new accountability framework was in place. The incidence of inappropriate confidentiality provisions was therefore expected to decline over time.¹⁶

1.31 The ANAO's audit reports informed the Committee that some agencies were not addressing confidentiality issues prior to contracts being signed. Some agencies reported difficulty negotiating contracts, due to contractors' insistence on confidentiality provisions.

1.32 The Committee concluded that DOFA, in consultation with the ANAO, should develop best practice guidelines on commercial confidentiality, and that this guidance should be used by procurement and contracting officers as part of the contract negotiation process.¹⁷

1.33 Other commercial confidentiality issues considered in the Committee's 2002 report included the use of general disclosure clauses to categorise contracts as confidential, and the changing nature of confidentiality over time, which was an issue for some agencies. The Committee concluded that the use of general disclosure clauses was questionable in an environment of openness and transparency. To achieve maximum transparency the Committee recommended that agencies distinguish between specific and generic commercial confidentiality provisions.¹⁸

(4) Presentation and reporting requirements

1.34 In its 2002 report, the Committee acknowledged that maintaining contract lists on the Internet and reporting twice-yearly had been resource intensive for agencies, particularly given changes to the order since its inception. The Committee reiterated that the intention of twice-yearly reporting was to encourage agencies to keep their contract lists up to date. Further, this level of reporting reflected the Committee's wish to be assured:

...that agencies are complying with the spirit of the order both practically and in terms of a cultural shift towards transparency and disclosure of information about government contracts.¹⁹

1.35 However, the Committee recognised that in the long-term annual reporting may be more appropriate. The Committee considered that the Auditor-General could advise the Committee when satisfied that annual reporting would be adequate.²⁰

1.36 The Committee's 2002 report also noted agencies' preference for reporting periods that align with calendar and financial years. Agencies were also concerned

16 *Report on the first year of operation of the Senate order*, p. 23.

17 *Report on the first year of operation of the Senate order*, p. 38.

18 *Report on the first year of operation of the Senate order*, p. 39.

19 *Report on the first year of operation of the Senate order*, p. 41.

20 *Report on the first year of operation of the Senate order*, p. 42.

about the short timeframe between the end of the reporting period and required listing and tabling dates. The Committee concluded that reporting periods for the order should be aligned with calendar and financial years, with the tabling date for Ministers' letters amended accordingly.²¹ The Committee encouraged agencies to structure their systems and processes to enable continual additions to the contract lists, thus minimising the workload required to meet the specified reporting dates.²²

1.37 Other reporting issues raised in the Committee's 2002 report included the difficulty of locating contract lists on some agencies' websites and the advantages of including additional information, such as date information, in relation to each contract.²³

(5) Agencies covered by the order

1.38 Agencies covered by the order are those within the meaning of the *Financial and Management Accountability Act 1997* (the FMA Act). The Committee's report on the order's first year of operation considered whether bodies subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) should also be covered by the order. While acknowledging that incorporating CAC Act bodies under the order may not be straightforward, the Committee considered that including these agencies was in line with the order's aims of ensuring openness and accountability in relation to all government expenditure.²⁴

1.39 Two other matters were raised in the Committee's 2002 report concerning the agencies covered by the order:

- while parliamentary departments are not covered by the order, all departments except the Department of the House of Representatives had chosen to comply with the order;²⁵
- the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence (ASIS) had not published contract lists on their websites, arguing that their contracts should be exempt on the basis of national security concerns.²⁶

1.40 Both the Department of the Senate and the Department of Parliamentary Services have complied voluntarily with the order. The Department of the House of Representatives, on the other hand, has refused to on the ground that 'as a matter of

21 *Report on the first year of operation of the Senate order*, p. 41.

22 *Report on the first year of operation of the Senate order*, p. 43.

23 *Report on the first year of operation of the Senate order*, pp 46–47.

24 *Report on the first year of operation of the Senate order*, p. 44.

25 *Report on the first year of operation of the Senate order*, p. 29.

26 *Report on the first year of operation of the Senate order*, p. 29.

principle this Department does not acknowledge nor comply with Senate Orders unless the House of Representative has passed a similar order'.²⁷

1.41 The Committee suggested that the Department of the House of Representatives should comply with the order, and recommended that the ANAO and DOFA discuss with ASIS and ASIO options for future compliance.²⁸

(6) Frequency of ANAO audits of compliance

1.42 As outlined previously, the order requests that the ANAO audit agency compliance with the order. The frequency of these audits was considered following the order's first year of operation, with the Committee concluding that 'no change should be made to the order's request for six-monthly ANAO audits of compliance at this stage'.²⁹ The Committee undertook to review the frequency of the audits, after the ANAO completed its fourth audit.

Recommendations following the first year of operation

1.43 Keeping in mind that agencies had already complied with one set of amendments to the order, the Committee concluded after the first year of operation that:

...wholesale changes to the order at this stage would weaken its intent and undermine the progress being made towards development of a new culture of openness and accountability in relation to government contracting.³⁰

1.44 The Committee's recommendations therefore aimed to minimise any additional workload for agencies, and to assist efficiency by clarifying the existing requirements of the order.³¹

1.45 Relating directly to the order, the Committee recommended a number of amendments, including changes to:

- include in the Internet list the commencement date of each contract, the duration of each contract, and the relevant reporting period and twelve-month period relating to the contact list;
- alter the required reporting periods to align with financial and calendar years and amend the tabling date for Ministers' letters accordingly;
- extend the order to cover CAC Act bodies from 1 January 2004; and

27 For the Committee's discussion on this point, see *Report on the first year of operation of the Senate order*, p. 29 and p. 45.

28 *Report on the first year of operation of the Senate order*, pp 45–46.

29 *Report on the first year of operation of the Senate order*, p. 48.

30 *Report on the first year of operation of the Senate order*, p. 35.

31 *Report on the first year of operation of the Senate order*, p. 35.

- require the Committee to report on the second year of operation of the order.

1.46 More generally, in relation to agency implementation of the order, the Committee recommended that:

- agencies include all government contracts, as might be deemed to be contracts in law, in their contract list;
- agencies record a generic entry where they have a large number of similar types of contracts;
- guidance be developed for agencies regarding the content, presentation and format of the contract lists, and the methods for indicating the nature of commercial confidentiality;
- any additional reporting requirements resulting from the above guidelines be included as additional information collected in the GaPS system;
- agencies continue to report at six-monthly intervals, with the Auditor-General to advise the Committee when annual reporting would be adequate;
- agencies develop systems and processes that enable continual additions to their contract lists;
- bodies subject to the CAC Act extend DOFA's commercial confidentiality guidelines to all new contracts;
- the Department of the House of Representatives comply with the order; and
- the ANAO and DOFA discuss with ASIO and ASIS options for compliance with the order.

1.47 The Government response to these recommendations, and consequential amendments to the order, are summarised in the next chapter.

Summary of progress

1.48 The order has been in operation for five years. Progress in agency compliance with the order can be summarised as follows:

- Most agencies are complying with the reporting requirements and have established appropriate systems and processes to meet the order's requirements;
- The number of confidentiality provisions in contracts has generally declined;
- The misuse of confidentiality provisions in contracts has also started to fall but still remains at a level for concern about the extent to which line staff understand the new accountability framework surrounding government contracting; and
- Doubts hang over the completeness and accuracy of the information agencies are reporting to the Senate.

1.49 The chapters that follow, especially chapter 3, discuss these issues in detail and measures to address them.

Chapter 2

Developments related to the order since 2002

Introduction

2.1 There have been a number of important developments relevant to the operation of the order since the Committee reported in December 2002:

- the government responded favourably to the Committee's report on the first year of operation, agreeing to most of the Committee's recommendations;
- the Senate agreed to three sets of amendments to the order;
- DOFA issued three sets of guidance relevant to the order; and
- the ANAO, DOFA, ASIO and ASIS discussed and agreed on a process for examining whether ASIO and ASIS contracting arrangements comply with relevant legislative and policy requirements.

2.2 This chapter examines each of these in turn.

2.3 A more recent development, mentioned in chapter 1, concerns a DOFA proposal for a single reporting mechanism for government procurement. This is discussed in chapter 4 in relation to measures for improving compliance and transparency.

Government response to the 2002 report

2.4 In its response to the Committee's 2002 report, the Government reiterated its commitment to transparency and accountability in Commonwealth contracting. The Government agreed to comply with the spirit of the order, on the same terms as the original and the amended order.¹ That is, agencies would not provide information contrary to the *Privacy Act 1988*, other statutory provisions or where a confidentiality undertaking had already been given, and agency compliance with the order would continue to be progressive.

2.5 Of the 17 recommendations made in the Committee's report, the Government disagreed with two – Recommendations 7 and 11. In relation to Recommendation 7 (that agencies develop systems and processes that allow for continual additions to contract listings), the Government's view was that ongoing transparency is largely provided by agencies under the requirement to gazette procurement-related contracts in GaPS. The government considered any further system development in order to

1 Government Response to Senate Finance and Public Administration References Committee Report, *Departmental and agency contracts*, June 2003 (hereafter 'Government response'), p. 1.

comply with the Committee's recommendation would need to be balanced against the cost of implementing and administering such systems.²

2.6 Recommendation 11 concerned the extension of the order to cover CAC Act bodies from 1 January 2004. The Government was not in favour of extending the order, noting that CAC Act bodies operate under a different legislative and governance framework to FMA Act agencies.³

2.7 The Government also sought clarification of the intention and scope of Recommendation 2 — that agencies with a large number of similar types of contracts record a generic entry for this type of contract. The Committee's response to this request took into account advice from the Clerk of the Senate, Mr Harry Evans, and the ANAO.⁴ The Committee confirmed that the intention of the recommendation was to 'enable departments and agencies to combine similar contracts into one entry',⁵ and that 'this should be achieved in a format that has the least possible impact on transparency'.⁶

2.8 The Committee agreed with the Clerk's suggestion that certain contract details could be recorded in terms of the range covered by the individual contracts under the generic entry. The Committee's view was that the move to generic reporting should proceed at first on a limited basis, and should be restricted to grants and funding agreements. The Committee noted that generic entries for such contracts might need to be sub categorised, by the type of grant and by the program under which the grant was made, and that such approaches should be included in DOFA's guidance to departments and agencies.⁷

2.9 The Government's response to Recommendation 2 noted that the decision to list relevant contracts individually or generically would remain at the discretion of the agency.

Amendments to the order

2.10 The Senate agreed to amend the order for departmental and agency contracts on 18 June 2003 and 26 June 2003. The first set of amendments reflected recommendations made in the Committee's 2002 report. The second amendment was a minor change, to ensure consistency in the definitions given in the order.

2 Government response, p. 2.

3 Government response p. 6.

4 Mr Harry Evans, Clerk of the Senate, correspondence, 13 June 2003; ANAO correspondence, 3 September 2003.

5 Finance and Public Administration References Committee, correspondence, 17 October 2003.

6 Finance and Public Administration References Committee, correspondence, 17 October 2003.

7 Finance and Public Administration References Committee, correspondence, 17 October 2003.

2.11 In moving the first set of amendments, the chair of the references committee, Senator Forshaw, noted that in response to Government concerns the order had not been extended to CAC Act bodies. Senator Forshaw further noted that 'this order is the subject of ongoing review and report by the Committee and this is a matter that no doubt can be considered by the Committee in due course'.⁸

2.12 In its report on the first year of operation of the order, the Committee undertook to review the frequency of ANAO audits of agency compliance. The Auditor-General provided advice to the Committee on this matter in September 2003,⁹ and ANAO officers briefed the Committee on it in December 2003. The Committee agreed that the frequency of the audits be reduced from once every six months to once every twelve months, with audits to be provided to the Senate by 30 September each year. An amendment to the order to effect this change was adopted by the Senate on 4 December 2003.

Procurement and confidentiality guidelines

2.13 As noted above, DOFA has released three sets of guidance relevant to the order since the Committee's 2002 report. This section provides an overview of each guidance.

Guidance on Confidentiality of Contractor's Commercial Information

2.14 This guidance was published in February 2003. It aims to assist agencies 'ensure that they enter into appropriate commitments to maintain confidentiality of commercial information in the context of procurement processes'.¹⁰

2.15 The guidance emphasises the accountability principles governing Commonwealth contracting, and states:

The principle of Accountability and Transparency suggests that contracting information should not be confidential unless there is sound reason, informed by legal principle, for maintenance of the confidentiality of that information. It places the onus on Commonwealth officials to make a specific assessment of whether information should be kept confidential before agreeing to make any contractual commitment of confidentiality.¹¹

2.16 An important feature in this guidance is the emphasis placed on agency staff addressing whether confidentiality clauses are appropriate *during* contract

8 Senator Michael Forshaw, *Senate Hansard*, 18 June 2003, p. 11709.

9 ANAO correspondence, 11 September 2003.

10 Department of Finance and Administration, 2003, *Guidance on Confidentiality of Contractor's Commercial Information*, p. 3.

11 Department of Finance and Administration, 2003, *Guidance on Confidentiality of Contractor's Commercial Information*, p. 4.

negotiations, rather than after the event as a response to the order's Internet listing requirement.

2.17 The guidance sets out four initial criteria for agencies to apply in deciding whether information should be kept confidential. It notes that *all* of the criteria must be met if information is to be treated as confidential. The criteria are:

Criterion 1: that the information to be protected must be identified in specific rather than global terms;

Criterion 2: that the information must have the necessary quality of confidentiality;

Criterion 3: that disclosure would cause detriment to the contractor or other third party; and

Criterion 4: that the information was provided under an understanding that it would remain confidential.¹²

2.18 In addition to specifying these criteria, the guidance provides:

- explanation of the criteria and guidance on establishing whether the criteria have been met;
- the appropriate process for dealing with confidential information in contracts, from the initial tender documentation through to post contract considerations;
- examples which demonstrate the application of the confidentiality criteria in determining the appropriateness of confidentiality claims; and
- model clauses for use in tender documents and contracts.

2.19 These confidentiality criteria are intended to be the key point of reference in the drafting of contracts and should have a major bearing on agency compliance with the Senate order.

Guidance on the Listing of Contract Details on the Internet

2.20 This second set of guidelines, *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)* was published in January 2004. The Committee recommended in its 2002 report that DOFA develop guidelines of this sort. The guidance covers the following topics:

- the Government's policy in relation to compliance with the order;
- the format and content of the Internet listing, including advice in relation to the presentation of generic entries;
- what constitutes a 'contract' for the purposes of the order, with examples given;

12 Department of Finance and Administration, 2003, *Guidance on Confidentiality of Contractor's Commercial Information*, p. 5.

-
- the identification and reporting of confidential contract information, including specified categories for reporting the reasons for any confidentiality provisions;
 - requirements for Ministers' letter of compliance,
 - the audit requirements of the order; and
 - templates for agencies' Internet lists and for Ministers' letters of compliance.

2.21 The guidance is essentially intended to help agencies comply with the specific requirements of the order. However, by referring to the principles underlying the order, and to the related *Guidance on Confidentiality of Contractor's Commercial Information*, it also draws agencies' attention to the transparency and accountability principles which underpin the requirements of the order.

Commonwealth procurement guidelines

2.22 DOFA's third set of guidance, *Commonwealth procurement guidelines*, was issued in January 2005. It establishes the government's policy procurement framework and includes important new prescriptions on procurement procedures.

2.23 Accountability and transparency feature as one of the four pillars of the procurement framework (the other pillars are the principle of value for money, encouraging competition and efficient, effective and ethical use of resources). This section of the guidelines sets out requirements for disclosure and reporting, including the Senate order. Among other things, the guidelines state:

Steps need to be taken to plan for, and facilitate, appropriate disclosure of procurement information. In particular, officials should:

- include provisions in request documentation and contracts that alert prospective providers to the public accountability requirements of the Australian Government, including disclosure to the Parliament and its Committees;
- where relevant, include a provision in contracts to enable the Australian National Audit Office to access contractors' records and premises to carry out appropriate audits (model access clauses have been developed for agencies to tailor and, where appropriate, incorporate into relevant contracts);
- consider, on a case-by-case basis, any request by a potential supplier for material to be treated confidentially, only entering into commitments to maintain confidentiality of contractors' information where these are appropriate, and having regard to the Finance publication *Guidance on Confidentiality of Contractors' Commercial Information*;

- be aware of the requirements for the disclosure of information consistent with the *Freedom of Information Act 1982*.¹³

2.24 The guidelines also refer to the requirements for the Order, annual reports and disclosure by officers to the Parliament and its committees.

ASIO and ASIS

2.25 In accordance with the Committee's recommendation following the order's first year of operation, DOFA and ANAO discussed with ASIO and ASIS options for compliance by these agencies. All parties agreed that:

...the best option would be for the ANAO to examine ASIO and ASIS contracting processes to confirm their compliance with all relevant legislative and policy requirements. This will be done as part of the ANAO's next audit of agencies' compliance with the Order.¹⁴

2.26 The results of the evaluation were included in ANAO Audit Report No.10 2004-2005 for the 2003 calendar year. While it is recognised that ASIS and ASIO may be exempt from listing their contract details publicly, it was expected that these agencies would adhere to the principle of accountability in relation to government contracting. In its audit, the ANAO expected that these agencies would have in place the following mechanisms for accountable contract management:

- an up-to-date set of Chief Executive Instructions with instructions on spending of public money and procurement;
- procedures for the identification and recording of contracts;
- tender and contract templates, which had been updated in accordance with Finance guidance; and
- an up-to-date formal instrument of financial delegations.¹⁵

2.27 The audit findings raised significant accountability concerns. For example, both agencies advised that their Director-Generals had determined that contract details should remain confidential for security reasons. However, neither agency had appropriate documentation recording these determinations. ASIO's procurement manual was significantly out of date (September 1995) and as a result 'did not reflect the new accountability environment, nor did it incorporate the latest Finance guidance on procurement'.¹⁶ ASIO did not have a formal register for its contracts and ASIS had only recently developed one. Neither agency had satisfactory tender and contract templates for use in contract negotiations.

13 DOFA, *Commonwealth procurement guidelines – January 2005*, Financial Management Guidance No. 1, p. 20.

14 Department of Finance and Administration correspondence, 18 February 2004.

15 ANAO Report No.10, p. 38.

16 ANAO Report No.10, p. 38.

2.28 At a general level, the audit findings highlight the kind of governance and internal management shortcomings that can occur and persist in an accountability and transparency vacuum. The findings therefore indicate the advantages of regular, ongoing monitoring of such agencies' adherence to accountability principles.

2.29 ANAO agreed with the Committee's view and indicated it would 'make the necessary arrangements to audit ASIO's and ASIS's contracting processes on a regular cycle'.¹⁷

2.30 The Committee learnt at its hearing with ANAO in November 2006 that no further audit work has been conducted in either agency in relation to the order since the original 2004 audit. It remained unclear to the Committee whether ANAO had put in place any arrangements to audit these agencies on a regular basis, or whether DOFA had been monitoring these matters.

2.31 Because of the lack of external scrutiny that comes from listing contracts on the Internet, these agencies are at some risk of not maintaining contracting processes and practices consistent with the order's requirements and the government's own policy on enhanced accountability in this area. Due to the secretive nature of their work and culture, ASIO and ASIS may also be at more risk than other agencies of unnecessarily or inappropriately treating government contract information as confidential.

2.32 For these reasons the Committee considers that the ANAO should establish arrangements with ASIO and ASIS to audit their contracting process on a regular basis, and DOFA should engage in discussion to ensure its guidelines and directions are well understood. In view of the two years that have passed since these agencies were audited, a three-yearly cycle may be suitable.

17 ANAO correspondence, 7 May 2004.

Chapter 3

Compliance and other trends since 2002

3.1 A key part of the order's accountability regime is the regular ANAO auditing of department and agency compliance with the order. The audits lend teeth to the order's overarching transparency and scrutiny function and provide critical and useful data to the Parliament and DOFA. They also provide an important assurance and educational role for the order's effective operation.

3.2 Under the order, the ANAO reports on department and agencies Internet lists and whether departments and agencies have used confidentiality provisions inappropriately in their contracts. The audits discuss 'whether agency policies and procedures are in place to ensure that the contract lists on the Internet are accurate'.¹ The audits also examine a sample of contracts listed as confidential to determine whether the use of such provisions was appropriate and contracts excluded from the Internet listing because the whole contract was deemed confidential to assess whether the contracts should have been listed.

3.3 The ANAO has completed six compliance audits since the Committee reported in December 2002. These are:

- Audit Report No. 32 2002-2003, covering agency compliance for the reporting period 19 August 2001 to 18 August 2002;²
- Audit Report No. 5 2003-2004, covering the reporting period 4 February 2002 to 3 February 2003;³
- Audit Report No. 31 2003-2004, covering the financial year 2002-2003;⁴
- Audit Report No. 10 2004-2005, covering the calendar year 2003;⁵
- Audit Report No. 11 2005-2006, covering the calendar year 2004;⁶ and
- Audit Report No. 5 2006-2007, covering the calendar year 2005.⁷

1 Mr Watson, ANAO, *Committee Hansard*, 25 March 2004, p. 2.

2 ANAO, *The Senate Order for Departmental and Agency Contracts (Spring 2002 Compliance)*, Audit Report No. 32, 2002-2003 (hereafter ANAO Report No. 32).

3 ANAO, *The Senate Order for Departmental and Agency Contracts (Autumn 2003)*, Audit Report No. 5, 2003-2004 (hereafter ANAO Report No. 5-03).

4 ANAO, *The Senate Order for Departmental and Agency Contracts (Financial Year 2002-2003 Compliance)*, Audit Report No. 31, 2003-2004 (hereafter ANAO Report No. 31).

5 ANAO, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2003 Compliance)*, Audit Report No. 10, 2004-2005 (hereafter ANAO Report No. 10).

6 ANAO, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*, Audit Report No. 11, 2005-2006 (hereafter ANAO Report No. 11).

3.4 These bring to eight the number of ANAO audits conducted since the commenced operation in 2001. They cover more than 90 cent of contracts into which Australian Government agencies have entered and more than 90 per cent of all contracts listed as containing confidentiality provisions.⁸

3.5 This chapter summarises department and agency compliance with the order for the period 2002 to 2005 based on audit reports. General trends are listed first, followed by a discussion of specific issues.

Trends in compliance

3.6 Agency compliance over time presents a mixed picture. While there have been definite improvements against specific requirements of the order, a number of concerns remain.

3.7 In discussing the degree of progress, Mr Coleman of the ANAO recently told a joint parliamentary committee:

... generally, the overall policy frameworks in agencies have improved over time, as you would expect, and therefore they do, from a policy and procedural context, have a broad understanding of what the rules are, and also advise the marketplace of those rules. The failings relate to the understanding of and application by agencies and individuals of those policy frameworks.⁹

3.8 A number of themes emerge from ANAO audits:

- The majority of agency Internet lists generally comply with the reporting requirements of the order. Fine tuning of some agency listings could improve presentation to ensure all requirements of the order are met;
- The processes used by the majority of agencies in compiling their Internet lists and ensuring the lists are complete are generally satisfactory; and
- Most agencies have an identifiable path to their Internet list, although some listings remain difficult to locate.

3.9 The audits also reveal the order has been instrumental in achieving two significant improvements.

3.10 First, most agencies have revised their contracting policies and documentation to align with the order's transparency principles. Nearly all agencies now have standard contract templates which provide for disclosure of information if requested by a House of the Parliament or its committees. This is an important achievement. Not

7 ANAO, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2004 Compliance)*, Audit Report No. 5 2006-2007(hereafter ANAO Report No. 5-06).

8 ANAO Report No. 11, p. 21.

9 Joint Committee on Public Accounts and Audit, *Committee Hansard*, 22 May 2006, p. 2.

only do the disclosure provisions comply with government guidelines but their inclusion in contracts also reflects the prime purpose of the order, namely to ensure public disclosure of information in Commonwealth contracts.

3.11 Second, the number of contracts listed by agencies as containing specific confidentiality provisions and/or other requirements of confidentiality has generally declined. From a high of about 60 per cent of the listed contracts that ANAO reviewed in 2002, the figures have trended down, albeit unevenly, as the following figures show:

- 24 per cent of contracts (spring 2002);
- 26 per cent of contracts (autumn 2003);
- 15 per cent of contracts (financial year 2002–2003);
- 19 per cent of contracts (calendar year 2003);
- 18 per cent (calendar year 2004); and
- 17 per cent (calendar year 2005).

3.12 Commenting on the result for the 2005 calendar year, ANAO reported:

This is consistent with the trend over a number of years that indicates a progressive reduction in the number of contracts listed as containing specific confidentiality provisions. This reflects the Government's policy that contracting information should not be treated as confidential, unless there is a sound reason for doing so.¹⁰

3.13 While the reduction in the confidential information contained in contracts may not seem dramatic, the important point to note is that it has *not increased*. When it is remembered the order was a response to a perceived expansion in confidentiality provisions in contracting, the reversal of that trend, even if modest, is significant.

3.14 On the other hand, ANAO audits have also revealed two significant problems which qualify the progress of compliance with the order's requirements.

3.15 First, offsetting the decline in the number of contracts containing confidential information is an ongoing problem of contract information wrongly classified as 'confidential'. While things have improved since the first years of the order, when about 85 per cent of confidentiality provisions ANAO tested were found to not comply, the problem has persisted.

3.16 The most recent audit for the 2005 calendar year showed a marked improvement from the 2004 calendar year. For 2005 73 per cent of confidentiality provisions were listed appropriately compared with 42 per cent in 2004.

10 ANAO, Report No.5-06, p. 13.

3.17 Nonetheless, over a quarter of contracts still contained information inappropriately classified as confidential. The audit found confusion among agency staff about how to treat different categories of confidential information contained in contracts. ANAO also found the requirements of the order remained poorly understood in some of the audited agencies.¹¹ ANAO told the Committee the errors in contracts reflected to some extent 'poor judgement, but increasingly we find it is just misunderstanding'.¹²

3.18 The second problem relates to the omission of consultancies from agencies' lists of contracts and the data integrity questions that result. Consultancies valued at \$100,000 or more are required to be reported under the order like any other contract of the same value. However, a recent ANAO audit of the reporting of expenditure on consultants found that 55 per cent of the 73 agencies audited had *not* reported consultancies in their lists of contracts.¹³ Six of the agencies that were subject to the 2004 compliance audit had entirely omitted reporting consultancies in their lists. 24 per cent of consultancies valued at \$100,000 or more that were reported in agency annual reports were *not* reported against the order, while a further 39 per cent were reported *inaccurately*.¹⁴

3.19 These findings suggest agencies have significantly under-reported contracts required to be listed by the order. The audit also found data integrity problems with the reporting of consultancies in annual reports and on the government's online gazettal system, AusTender. In a 2006 audit report ANAO also found similar problems with accuracy, timeliness and compliance of reporting in relation to the revised Commonwealth Procurement Guidelines issued in 2005 (discussed in chapter 2). As ANAO observed, the low compliance with contract reporting requirements reinforces the findings in audits on consultancies and compliance with the order.¹⁵

3.20 The most recent ANAO report for the contracts that were listed in the 2005 calendar year found the under-reporting of consultancies had been corrected.¹⁶ However, in evidence to the Committee ANAO expressed misgivings about the completeness and accuracy of agency lists of contracts. Mr Boyd, who led ANAO's audit of consultancy reporting told the Committee:

...currently the level of integrity in that data is at a very low level for something that has been in place for a long period of time and that has been

11 ANAO, Report No.5-06, p. 14.

12 Mr Coleman, *Committee Hansard*, 27 November 2006, p. 8.

13 ANAO, *Reporting of expenditure on consultancies*, Audit Report No.27 2005-2006, January 2006, p. 59.

14 *Reporting of expenditure on consultancies*, p. 65.

15 ANAO, *Implementation of the revised Commonwealth Procurement Guidelines*, Audit Report No.21 2006-2007, pp 43-45.

16 ANAO Report No.5-06, p. 22.

subject to regular audit by the ANAO. We would have expected by this stage that agencies would be doing far better.¹⁷

3.21 These problems highlight areas for improvement. Confusion about the application of confidentiality criteria points to a need for more training and guidance. The omission of required information and data quality concerns suggest that internal checks and controls are inadequate. The Committee discusses possible measures to address these issues in the sections that follow.

3.22 The integrity of reporting under the order extends to a wider consideration of the reporting framework for procurement generally. This is the focus of chapter 4.

Internal controls

3.23 The detection of under-reporting of consultancies highlights the importance of agencies having strong internal controls for reconciling order listings against other reporting mechanisms such as AusTender information and contract details recorded on financial management information systems. If cross-matching of this kind had been in place, it is likely the omission of consultancies from the order lists would have been detected and corrected earlier, as would the cases of inaccurate data recorded on the order lists.

3.24 A need to strengthen internal controls has been a recurring ANAO recommendation in its compliance audits on the order.¹⁸ ANAO's 2007 report on the revised procurement guidelines also detected shortcomings in internal business processes that caused or contributed to errors in contract reporting and recommended these be reviewed and improved where necessary.¹⁹ The Committee supports recommendations for stronger controls and processes. It considers these measures would help to detect any omissions and mistakes in contract lists and should improve the reliability of the data that is reported.

Internal reporting and monitoring

3.25 Agencies could also reinforce internal controls by strengthening their internal oversight and auditing of compliance with policy. While DOFA and ANAO contribute by way of guidance and external audit, the ultimate responsibility for ensuring compliance with the order and other accountability measures rests with agencies, particularly chief executive officers. While this reflects the wider model of devolution

17 Mr Boyd, *Committee Hansard*, 27 November 2006, p. 6 and see also his discussion of the audit on p. 5.

18 See, for example, ANAO Report No.11, pp 27-28.

19 ANAO, *Implementation of the revised Commonwealth Procurement Guidelines*, Audit Report No.21 2006-2007, p. 45.

of responsibilities under the FMA Act, it does little to assuage criticism that there is no mechanism for enforcing DOFA guidelines.²⁰

3.26 ANAO indicated to the Committee there is scope for agencies to improve the internal transparency of their procurement and contracting activities. In discussing compliance issues with the order, Mr Coleman told the Committee:

One of the things we have observed in some of our work in this area—and we are just completing an audit on the implementation of the Commonwealth procurement guidelines...—is a lack of inclusion of contracting type activity in day-to-day or month-by-month management reports. It is an issue that we are continuing to encourage agencies to build into their processes. We are finding some agencies are more willing to do that. If these reports go to senior management, hopefully greater attention will be paid to these sorts of issues.²¹

3.27 Regular reporting of this kind to internal audit and governance committees and agency executives would provide greater assurance and oversight of procurement activity. Agencies and their staff would have an incentive in ensuring the accuracy and timeliness of this information as it would be directly relevant to their operations. The capacity for regular reporting and monitoring should be available from internal information management systems, particularly if improvements to business processes and contract registries proposed under DOFA's rationalisation of procurement reporting are implemented. These improvements are discussed in chapter 4.

3.28 The Committee considers agencies should, if they are not doing so already, include contracting and procurement activity in regular management reporting. This would strengthen internal governance, improve data accuracy and be in line with developments in external reporting on procurement.

Guidance on confidentiality criteria

3.29 As mentioned earlier, ANAO's latest compliance audit found that confusion and misunderstanding within agencies over the correct application of confidentiality criteria had resulted in contracts containing inappropriate confidentiality provisions. The audit also found that confusion over the distinction between the confidentiality criteria in DOFA guidance (described in chapter 2) and general confidentiality provisions (known under the order as 'other requirements of confidentiality') had led to errors.²² In addition to agencies doing more to comply with the order, ANAO

20 See the discussion of this point in relation to the order in *Committee Hansard*, Additional Budget Estimates, 15 February 2005, pp 29-33.

21 *Committee Hansard*, 27 December 2006, p. 8.

22 One of the key distinctions, in short, is that confidential information must be identified *specifically* and not in global terms, whereas 'other requirements of confidentiality' relate to information which may be obtained or generated in the carrying out of the contract and *cannot* be identified specifically when the contract is entered into.

suggested DOFA could refine its guidance about the use of confidentiality provisions.²³

3.30 A difficulty with providing guidance on a topic of this nature is that while it needs to be as precise as possible it cannot be overly prescriptive or narrowly defined. The Clerk observed to the Committee:

I think the guidelines about what confidentiality provisions might cover necessarily have to be fairly broad because of the wide range of circumstances they have to cover.²⁴

3.31 The use of examples found in ANAO testing of audits might help in illustrating to line staff provisions which are classified appropriately and those which are not. While DOFA's guidance on confidentiality lists categories of information which qualify as confidential and those that are not, these categories are generic and broad. These lists might be more useful if fleshed out with examples taken from contracts, with sensitive detail omitted as necessary.

3.32 Agencies which have been subject to ANAO compliance audit might also use for their own internal training examples from their own contracts which ANAO has identified as reflecting appropriate and inappropriate use of confidentiality provisions.

Training

3.33 Training and education are fundamental for reforming practice and implementing new policy of the kind envisaged under the order. ANAO has found the overall extent of compliance with the Senate order has been greater in agencies that provided training for staff. With DOFA and the Australian Public Service Commission providing courses and guidance, there is now little reason for agencies not to be providing some form of training which addresses the accountability requirements for contracting and compliance with the order.

3.34 However, ANAO audits have revealed a marked degree of variation in the training agencies provide staff. Questioning of agencies through the Senate estimates process has also shown training across agencies is uneven, with some agencies providing no training at all. The reasons for not providing training have largely related to the small size of agencies and/or the limited extent of contracting activity.

3.35 While there has been general progress with compliance with the order, ANAO still sees training as vital. Mr Coleman recently observed:

There is an ongoing need for awareness and training, essentially, and to reinforce the importance of these requirements in not all but most of the agencies.²⁵

23 ANAO, Report No.5-06, p. 14 and pp 32-39.

24 Mr Evans, *Committee Hansard*, 27 November 2006, p. 11.

25 Joint Committee on Public Accounts and Audit, *Committee Hansard*, 22 May 2006, p. 2.

3.36 As discussed in the section above, training and guidance in relation to interpreting and applying confidentiality criteria is a critical area where line staff could be assisted more.

3.37 The Committee considers that all departments and agencies covered by the order need to make a serious commitment to ensuring staff, particularly those in procurement line areas, receive training, guidance and support for complying with the order. Regardless of the size of the agency or number of contracts involved, staff need to be educated and supported with adequate training. In the case of smaller agencies or bodies managing small numbers of contracts, staff should be able to access external training that DOFA, the APS Commission and other bodies provide.

3.38 The expected introduction of a new reporting system for procurement contracts (discussed in the next chapter), and the training associated with its implementation, should also provide an ideal opportunity for agencies to address staff training needs.

Chapter 4

Mechanisms for improving compliance and transparency

4.1 The previous chapters have identified a number of areas for improving the operation of the order. These were largely concerned with strengthening internal processes and enhancing guidance and training to improve compliance.

4.2 This chapter examines a number of external mechanisms which might improve the order's operation and strengthen parliamentary scrutiny of government contracts. The chapter also discusses the arguments for shifting to a single reporting mechanism for procurement contracting.

Verification of compliance

4.3 In 2003 the Senate passed a resolution which prescribed that the Senate and its committees would not entertain any claim to withhold information on the grounds of commercial-in-confidence, unless the claim is made by a minister and accompanied by a statement setting out the reason for the claim including any commercial harm which might result from disclosure. In practice, however, this resolution is not always observed or enforced. Nor does it overcome the problem of testing whether the reason for treating information as confidential is appropriate.

4.4 Members of the Committee were interested in developing possible mechanisms senators could use in response to claims of commercial confidentiality during committee inquiries and the estimates process. Senator Murray suggested senators could be provided with a checklist to verify the legitimacy of commercial confidentiality claims.¹

4.5 ANAO suggested the process chart included in DOFA's *Guidance on Confidentiality of Contractors' Commercial Information* would form a suitable guide for this purpose.² A copy of this process chart is provided in Appendix 7.

4.6 ANAO also suggested that DOFA's guidance be amended, to inform departments that should officers withhold contractual information from a committee, senators may use the process outlined in the guidance to verify their claims of commercial confidentiality.³

4.7 The Committee considers this could be a useful reference aid to assist senators with the scrutiny of contracts during inquiries undertaken by Senate committees and estimates hearings.

1 *Committee Hansard*, 25 March 2004, pp 9-10.

2 ANAO, correspondence, 7 May 2004.

3 ANAO, correspondence, 7 May 2004.

Referral to the Auditor-General

4.8 Senator Murray sought witnesses' views on another mechanism to increase compliance with the accountability principles of the order, through the Senate Estimates process. Senator Murray proposed that:

...where a public officer declined to give evidence on the basis that something is commercial-in-confidence, the committee would be entitled to automatically refer that contract to the Auditor-General for specific inclusion in the department's next review, so it would be reported on.⁴

4.9 Witnesses for the ANAO were concerned that resource constraints may not allow the ANAO to audit every such contract. Instead, the ANAO proposed an alternative arrangement which it thought might be more workable:

Senators could write to the Auditor-General asking him to examine the contract in question in the next audit of the Senate Order. While, this may not produce an immediate answer, as the next audit may be conducted some months after the question was asked, it might have an impact on how witnesses consider responding to the Committee's questions.⁵

4.10 Again the ANAO suggested that DOFA's guidance be amended, to advise departments that this course of action may be taken.

Annual reports

4.11 The Committee revisited the recommendation made in its September 2001 report regarding changes to annual reporting requirements. The recommendation was:

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

- the web address of lists of contracts of \$100 000 or more;
- a report on compliance with the Senate order;
- a report on training completed by officers undertaking procurement functions;
- a report on the inclusion in requests for tender and contracts of advice about public and parliamentary accountability responsibilities; and
- a report on the agency's compliance with mandatory reporting requirements and steps taken to improve the integrity of its data in GaPS.⁶

4 *Committee Hansard*, 25 March 2004, p. 9.

5 ANAO, correspondence, 7 May 2004

6 Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a New Framework for Accountability*, September 2001, p. 29. GaPS – Gazette Publishing System.

4.12 The Government disagreed with this recommendation, largely on the basis that the required information was reported elsewhere.⁷ ANAO tended to concur with the Government view, saying 'the present mechanism for listing contracts with confidential information is a suitable one'.⁸ However, ANAO suggested that some information relevant to the order could usefully be provided in agencies' annual reports. ANAO suggested that:

A solution might be for agencies to include a note in the annual report referring readers to the Internet site where ... all contracts over \$100 000, as required by the Senate Order, are shown.⁹

4.13 The Committee considers the ANAO suggestion a simple, easy, economic solution which would increase the transparency of agency contracts and reporting.

Rationalising reporting regimes – a single reporting mechanism?

4.14 As mentioned in chapter 1, the Committee's preparation of this report coincided with a DOFA proposal to overhaul reporting arrangements for procurement contracts with the introduction of a single reporting mechanism. The proposal has radical implications for the current reporting framework for contracts. If it were to go ahead the single reporting mechanism, based on the AusTender database, would supersede both the order and the existing requirement for consultancies to be reported in annual reports. Both the order and annual reporting requirements would be revoked.

4.15 It is necessary to understand the background to the proposal before examining the arguments for and against its adoption.

Origin of the DOFA proposal

4.16 DOFA's proposal originated in an ANAO audit on the reporting of expenditure for consultancies.¹⁰ The audit examined the three reporting regimes which cover government procurement:

- AusTender – for reporting of contractual commitments \$10 000 and over;
- Senate order – for reporting of contracts valued at \$100 000 and over and their use of confidentiality provisions; and
- Annual reporting – for total aggregate expenditure on consultancies for the financial year and contract details including price for consultancies let in the reporting year valued at \$10 000 or more.

7 Government Response to Senate Finance and Public Administration Reference Committee Report *Commonwealth Contracts: A New Framework for Accountability*, June 2002, p. 5.

8 ANAO, correspondence, 7 May 2004.

9 ANAO, correspondence, 7 May 2004.

10 ANAO, *Reporting of expenditure on consultancies*, Audit Report No.27 2005-2006, January 2006.

4.17 For all three regimes the audit found a high incidence of under-reporting and non-compliance. It also detected problems with data integrity and the accuracy of the information reported. ANAO concluded that the three regimes appeared to be working at cross-purposes. The operation of three separate systems with different reporting requirements for different timeframes had caused, the audit found, inconsistency, inefficiency and confusion.¹¹

4.18 Mr Boyd who led the audit explained to the Committee how current reporting arrangements militate against accurate reporting:

A lot of the difficulties we found with the accuracy and completeness of reporting of consultancies both in the Senate order and in annual reports were essentially around the fact that this is a separate exercise performed at different points in time when the reporting is required. It is not something which is in-built and part of the ongoing management of the organisations. Therefore it is treated as being in large part an extra exercise on top of our existing responsibilities.¹²

4.19 To remedy the problem, ANAO recommended:

...that the Department of Finance and Administration and the Department of Prime Minister and Cabinet, in consultation with key Parliamentary Committees, affected agencies and other relevant stakeholders, examine options for improving the accuracy and completeness of reporting of Government procurement, including the merits of rationalising the number of reporting regimes.¹³

4.20 ANAO told the Committee that the key to improving the accuracy of reporting was to use the same data agencies rely upon for their own decision making and management. Mr Boyd explained to the Committee:

Our aim when we examined across the three regimes was to find which data they [agencies] use and what they use it for. Human nature in these things being what it is, if you are relying upon the data yourself for a purpose that

11 ANAO, *Reporting of expenditure on consultancies*, passim. See also Mr Boyd, *Committee Hansard*, 27 November 2006, pp 5-7. DOFA provided the following illustration of how the different reporting requirements can produce apparently inconsistent yet nonetheless valid results under the three regimes:

As an example of something that often leads to confusion, if we have an agency that signed a consultancy contract in August for \$120,000 and it had an option of additional work valued at \$60,000 and the option was utilised in May, and \$10,000 was spent before the end of the financial year, you would have different amounts reported. You would have it reported in AusTender as \$180,000; you would have it reported in the calendar year Senate order listing as \$120,000, and you would have it reported in the financial year Senate order listing as \$180,000. In the annual report it would be reported as \$130,000. You would have three different values reported... [Mr O'Loughlin, *Committee Hansard*, 11 October 2006, p. 14.]

12 *Committee Hansard*, 27 November 2006, p. 7.

13 ANAO, *Reporting of expenditure on consultancies*, p. 68.

you find useful, you will put far more effort into actually making that data complete and accurate so that you can rely upon it yourself in your own decision making. In that sense the agencies do not use the Senate order for their own management decision making. The information that is used out of the three regimes to extend any of it is what is in GaPS-AusTender. ... Our interest was that, if we could actually build this into their ongoing management operations, it would presumably increase the chances of the data being complete and accurate.¹⁴

4.21 The outcome of ANAO's recommendation is DOFA's proposal for a single reporting mechanism, which is discussed below.

DOFA's proposal

4.22 DOFA's proposal to rationalise reporting for procurement contracts involves three elements.¹⁵ The first is for all procurement reporting to be shifted to a single system based on AusTender, currently the central point for all Commonwealth procurement, which will have enhanced data, search and reporting capacity. DOFA outlined to the Committee how it expects the new AusTender system would operate:

The redeveloped system will provide a range of new fields that will supply procurement information that is currently in the Senate order and in annual reports. ... The system will improve the support that agencies get to upload data into AusTender, and this is very important in helping them provide high-quality information about their procurements. ... It also expands the reporting and searching tools that are available to assist agencies and the public to use AusTender information. This means that there will be a variety of more comprehensive views of procurement information available that will make it much easier for senators, for the public and for suppliers to understand the way government is letting its contracts and that will help them to make best use of that.

The new information that we are planning to require agencies to put into AusTender relates to all contracts over \$10,000. Agencies will be required to supply, for all their consultancies, a justification for why the contract is a consultancy, and this is the major field that is currently in the annual report listing for contracts. Agencies will also have to flag any confidentiality clauses in contracts and the reasons for those clauses. Additionally, they will have to provide the reasons for any confidentiality in materials obtained or generated in carrying out the contract. These are the central elements—but not the only elements—of the Senate order.¹⁶

14 *Committee Hansard*, 27 November 2006, p. 7. GaPS was a forerunner of AusTender and has since 2005 become a function of the latter.

15 DOFA, *Discussion Paper: Reporting of Procurement Outcomes*, August 2006 [hereafter *Reporting of Procurement Outcomes*].

16 Mr McIntyre, *Committee Hansard*, 11 October 2006, pp 4-6.

4.23 DOFA is aiming for the new AusTender system to be operating by 1 July 2007, although it concedes some larger departments and agencies (eg. Defence, Centrelink) may take longer to implement the new system.

4.24 The second and third elements of the proposed rationalisation entail revoking the order for contracts and discontinuing the requirement for consultancy reporting in annual reports. DOFA contends that abolishing the order and annual reporting requirements would not only address fragmentation under current reporting arrangements but would also remove duplication and reduce inefficiency.¹⁷ Moving to a single reporting mechanism would, it claims, streamline arrangements.

4.25 However, in response to Committee questioning DOFA modified its position to suggest the order might only need to be partially revoked. Since the new AusTender system will only capture procurement contracts, DOFA indicated the order would only need to be amended to remove that category of contract. DOFA admitted it was feasible that the order could continue to apply to non-procurement matters such as revenue and grant contracts.¹⁸

The case for a single reporting mechanism

4.26 The potential advantages of adopting a single reporting mechanism include:

- Streamlining reporting requirements;
- Providing a central point of reference based on the AusTender system;
- Reducing the reporting and administrative burden on departments and agencies;
- Increasing the transparency of procurement to cover contracts valued at \$10 000 and more;
- Improving data integrity by reducing inconsistency, providing stronger data entry protocols¹⁹ and, as ANAO argued above, drawing on data used routinely in daily business and management operations. DOFA also intends to offer training and assistance to agencies under the new system;
- Automated checking for confidentiality provisions and the reason for such provisions for each contract. These checks are intended to remind staff inputting data of the need to check if a contract contains confidential information. While agency staff could circumvent these checks, to do so

17 *Reporting of Procurement Outcomes*, p. 5 referring to ANAO, *Reporting of expenditure on consultancies*, pp 62-64.

18 Mr Grant, *Committee Hansard*, 11 October 2006, pp 17-18.

19 Mr McIntyre, *Committee Hansard*, 11 October 2006, p. 7.

would leave an audit trail and indicate 'the agency made a conscious choice to do something that they were warned was not in line with the policy';²⁰

- Improved timeliness. According to DOFA, contract data would be available on line in 'real time', that is, 42 days after the award of a contract as opposed to the lag of up to six months for contracts reported under the order and as much as eighteen months in annual reports.²¹ Changes to contracts, such as their value, would also be readily available;²² and
- Enhanced search and reporting capacity with the ability for users to tailor reports to their own needs, eg. searching across agencies or categories of contracts and extracting groups of contracts and more detail on individual contracts.²³

4.27 In setting out the proposal for a single system, DOFA also pointed to the 'significantly different environment now to that which existed during the early development of the Senate order'.²⁴ The Commonwealth procurement guidelines, referred to in chapter 2, provide greater guidance on the importance of transparency and accountability with procurement. DOFA also mentioned the 'large amount of goodwill amongst agencies to comply with the spirit of the order'.²⁵

4.28 ANAO supported this view, adding that the principle of limiting the use of confidentiality clauses only to cases where a sound reason exists (and documenting it) was embedded in government policy. ANAO also noted agencies had invested significantly in complying with the order and there would be little incentive for them to revert to inappropriate practices.²⁶

4.29 While ANAO would not have the regular compliance role under the proposed system which it does under the order, the auditor-general has agreed to ANAO conducting a post-implementation audit of the single reporting system and further audits if required.²⁷

20 Mr McIntyre, *Committee Hansard*, 11 October 2006, p. 5. See also Mr Grant, *Committee Hansard*, 11 October 2006, p. 10: 'Officers will learn to comply very quickly, otherwise they will be breaching the Commonwealth procurement guidelines which are supported by the Finance regulations and the FMA Act'.

21 Mr Grant, *Committee Hansard*, 11 October 2006, p. 3.

22 Mr McIntyre, *Committee Hansard*, 11 October 2006, p. 6.

23 Mr McIntyre, *Committee Hansard*, 11 October 2006, pp 6-7.

24 Mr Grant, *Committee Hansard*, 11 October 2006, p. 3.

25 Mr Grant, *Committee Hansard*, 11 October 2006, p. 10.

26 Mr Coleman, *Committee Hansard*, 27 November 2006, p. 8.

27 Ms Bird, *Committee Hansard*, 27 November 2006, p. 3.

Concerns about a single reporting mechanism

4.30 A number of factors need to be taken into account in considering a shift to a single reporting mechanism and revoking the order, either fully or partially.

- The proposed AusTender model has yet to be implemented and remains untested. The history of the implementation of new information systems suggests there is often a gap between expected capacity and the challenges and delays which emerge in practice. DOFA noted the new system would require changes to the information technology systems agencies use to register contracts and the business practices they use to extract data.²⁸ It also conceded larger agencies such as the Department of Defence and Centrelink may take longer than most agencies to implement the new system.²⁹
- Training of staff for the new system may take longer to show results than DOFA expects. As discussed in chapter 3, inadequate agency training for implementing the order has been a persistent problem. Although support from agencies for the new system is encouraging, it should be remembered DOFA reported to the Committee in the past that acceptance of the order was stronger in agencies at senior levels than line areas responsible for procurement. This may not be such an issue with the new system, since staff would be using automated core data and not have to input data manually into a different system as occurs currently under the order.
- The promised improvements in data integrity cannot be assumed as given. When the Committee reported on the operation of the order in 2002 a similar model for adopting a single system based on GaPS was mooted but it suffered from data integrity issues.³⁰ Data integrity has continued to be a challenge under the GaPS-AusTender system. As ANAO reports have shown, problems with the accuracy and completeness of data extend beyond the reporting framework and encompass issues ranging from internal business processes to staff training.³¹ Despite the promised enhancements, data quality under the proposed model will remain unknown until tested.
- The increased visibility of procurement contracts under the new system (which will capture contracts valued at \$10 000 or more as opposed to the order's reporting of contracts valued at \$100 000 or more) needs to be offset by the potential reduction in transparency for non-procurement contracts if the order were to be revoked fully. DOFA's discussion paper on the proposed

28 Mr McIntyre, *Committee Hansard*, 11 October 2006, pp 8-9.

29 Mr Grant, *Committee Hansard*, 11 October 2006, p. 9.

30 *Report on the first year of operation of the Senate order*, p. 18.

31 ANAO, *Implementation of the revised Commonwealth Procurement Guidelines*, Audit Report No.21 2006-2007, pp 43-45. See also ANAO reports on compliance audits, listed at the start of chapter 3.

rationalisation noted this potential gap but was silent on how it might be addressed.

- While DOFA appeared to accept that the order could remain in place under the new system if it applied only to non-procurement contracts, this would in effect create a dual reporting system: there would be one system for procurement contracts and another for non-procurement contracts. This would amount to a departure from the single reporting system DOFA advocates. It is unclear whether a dual system might recreate for agencies some of the fragmentation and confusion which the new system is intended to address. However, it would almost certainly fragment the transparency of contract reporting for the purpose of parliamentary and public scrutiny.
- Although the ANAO has agreed to audit the new system once its implemented, this is not the same as the mandatory regular compliance auditing required under the order. Those compliance audits have been instrumental in detecting problems, providing remedies and educating and inculcating agency staff in the principles the order embodies. Ad hoc auditing of the new system may not carry the same weight.

4.31 The Clerk of the Senate also drew the Committee's attention to an element missing under DOFA's proposal but which is central to the function of the order: it would not possess the authority which is invested in the order because it is an accountability mechanism ordered by a house of the Parliament. The Clerk told the Committee:

...by keeping the order in place completely consistent with the AusTender system, you signal to departments and agencies that this is a matter in which the Senate maintains a continuing interest. It is not as though the Senate has vacated the field, and that attaches a certain greater authority and importance to the question of disclosure of contracts...³²

4.32 The Clerk also cautioned against revoking the order in favour of an unproven new system 'until it is clearly demonstrated that the AusTender system actually provides for public disclosure to the same extent of all the information required by the order'.³³ He also advised the Committee the question of reporting for non-procurement contracts would need to be resolved before any change to current arrangements could be accepted.

4.33 In the next section, the Committee discusses a modification to the DOFA proposal involving the AusTender system as a reporting source for the order.

32 Mr Evans, *Committee Hansard*, 27 November 2006, p. 12.

33 Clerk of the Senate, Advice to Committee, 4 September 2006, p. 2. See also the Clerk's subsequent advice, 12 October 2006, p. 1.

An alternative model

4.34 The Clerk recommended retaining the order, at least in the interim, until the AusTender system is fully operational and the Senate is in a better position to assess whether the order should be amended. He advised the enhanced AusTender system could be used by agencies to meet the requirements of the order as it currently stands:

As departments and agencies move into the AusTender system, they could continue to comply with the Senate order by tabling statements, under paragraph (1) of the order, to the effect that they have fulfilled their obligations under the order by placing the required information in the AusTender system. No further action by the departments and agencies would then be required, not even the downloading of the information on the AusTender system to a different site.³⁴

4.35 Under this model, AusTender's online system would supersede departmental and agency homepages as the source where required contract information can be accessed. It would not lead to the duplication DOFA officials appear to be concerned might arise if the new system were to proceed with the order still in place. Apart from that concern, DOFA agreed that the new AusTender system and the order's current requirements would be compatible.³⁵

4.36 Once AusTender was fully operational, the Senate could then consider amending the order to reflect the enhanced reporting capacity of the new system, particularly in relation to the \$10 000 reporting threshold.

4.37 As for the question of reporting of non-procurement contracts, the Clerk suggested DOFA develop a system comparable to the proposed AusTender mechanism to list those contracts. In his view this would be preferable to truncating the order to apply only to non-procurement contracts.³⁶

Committee conclusion

4.38 The alternative model of adopting AusTender as the mechanism for reporting against the current order has the attraction of being straightforward and in line with the thrust of DOFA's proposal for enhanced reporting under AusTender. It would avoid the possible risks of moving immediately to an untested system and allow time for departments and agencies to adjust to AusTender and for any teething problems to be resolved. It would not entail any changes to either the order or the new AusTender

34 Clerk of the Senate, Advice to Committee, 12 October 2006, p. 1. Paragraph 1 of the order requires ministers to table in the Parliament a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's homepage. See appendix 2 for the order.

35 Mr Grant, *Committee Hansard*, 11 October 2006, p. 9.

36 Clerk of the Senate, Advice to Committee, 12 October 2006, p. 2. See also Mr Evans, *Committee Hansard*, 27 November 2006, p. 13.

system, but adjustments could be made if necessary once the new framework had been trialled successfully.

4.39 Retaining the order while a new system for reporting non-procurement contracts is developed would also overcome the accountability gap that would emerge under the current DOFA proposal.

4.40 Under this alternative model reporting would be rationalised and the projected improvements would proceed, while the current transparency for procurement and non-procurement contracts would be maintained and possibly expanded, with its accuracy and completeness improved.

Chapter 5

Conclusion and recommendations

The system [the order] that Senator Murray initiated is essentially a safeguard. It is designed to ensure that there are no major train wrecks down the track. Like all safeguards it operates simply by its very existence. It signals to everybody involved in this that the matter of contracting is being watched. If you say that the Senate is watching it, that adds to the authority of the safeguard.¹

5.1 The Senate order for departmental and agency contracts has now been in operation for five years. Over this time there has been a general improvement in compliance. Regular ANAO auditing has had a key role in not only improving compliance but also raising awareness among agencies of the transparency and accountability principles underpinning the order. The order's operation has also been assisted by the introduction of government policy to promote the transparency of Commonwealth procurement.

5.2 Two notable achievements are the general decline in the use of confidentiality provisions and the now commonplace inclusion of standard disclosure provisions in government contracts. The first suggests the Parliament's concern about the use of confidentiality provisions has been heeded by most agencies. The use of disclosure provisions, which provide explicitly for disclosure of contract information to the Parliament and its committees among others, points to an acceptance, at least at senior levels within agencies, that government contracts are the subject of Parliamentary and public scrutiny.

5.3 While compliance against the order's reporting requirements is now at a generally good level, concerns remain about the continued misuse of confidentiality provisions in contracts and the reliability of the reported data in departmental and agency lists. These concerns raise questions about the extent to which line staff understand the principles and purpose of the order, and about the framework for reporting against the order.

5.4 The major consideration at this stage is whether the best way forward is to be achieved by replacing the order with a single reporting mechanism or by modifying that model with the order remaining in operation. Determining the model of reporting is the first step required before other measures to improve the transparency of contracts can be considered.

A new framework?

5.5 The Committee considers it premature at this point to revoke the order. Compliance problems with the inappropriate use of confidentiality provisions in

1 Mr Evans, *Committee Hansard*, 27 November 2006, p. 13.

contracts, albeit declining but still significant, have continued. These indicate the need to retain an external oversight and scrutiny mechanism, reinforced with regular ANAO auditing, which the order provides.

5.6 The proposed new AusTender system promises to improve the completeness and accuracy of the information available on government contracts. But the history of large scale information projects, like the AusTender upgrade, cautions against sweeping change until new systems have proven themselves.

5.7 Another concern with the new AusTender system is that it would not report on non-procurement contracts. If the order were revoked, this would result in a reduction in the transparency of government contracts.

5.8 Moreover, the Committee considers it unnecessary to revoke the order. As outlined in chapter 4, as the AusTender system is put into operation, departments and agencies will be able to continue to comply with the order by placing required information in the AusTender system. Departments and agencies would simply need to table in the Parliament statements to this effect, rather than produce separate lists as is currently required.

5.9 This model would allow reporting to be rationalised with AusTender operating as the central reporting point, while transparency under the order would be maintained and possibly improved. It would avoid the risks of moving to an unproven system. It would also allow time for new reporting arrangements for non-procurement contracts to be developed if required. ANAO auditing would continue as currently required under the order and would assist agencies moving to the new system. The Senate could consider amending the order if this were required, once AusTender was operational.

Recommendation 1

5.10 The Committee recommends the order be retained while the new AusTender system for reporting procurement contracts is implemented, with departments and agencies tabling statements through their ministers in accordance with paragraph (1) of the order, that they had fulfilled their reporting obligations by placing the information required under paragraph (2) of the order in the AusTender system.

Recommendation 2

5.11 The Committee recommends DOFA, in consultation with ANAO, relevant parliamentary committees and stakeholders, consider reporting arrangements for non-procurement contracts and explore the development of a reporting mechanism comparable to the new AusTender system for this category of contract, and report to the Committee the outcome of this process within six months of the tabling of this report.

Improving compliance – internal measures

5.12 In chapter 3 the Committee identified a number of measures which, if implemented, should improve agency compliance with the order.

Internal controls

5.13 The Committee supports ANAO recommendations that agencies improve the accuracy and completeness of the contract information they report with stronger internal controls for checking that information. Agencies will be required to improve their financial management information systems and data extraction processes in order to meet the requirements of the new AusTender system. The implementation of the new system should offer the opportunity and capacity for agencies to improve reporting controls and data quality assurance for contract information.

Recommendation 3

5.14 The Committee recommends agencies, if they have not done so already, implement ANAO recommendations to improve the accuracy and completeness of contract information with stronger internal controls and quality assurance for checking data, and report that they have done so through their ministers' tabling statements made under paragraph (1) of the order.

Internal reporting

5.15 The Committee considers technical enhancements to internal controls could be complemented with regular internal reporting of procurement activity. Contract information could be included in management reporting and reporting to internal audit and governance committees. This is already being done in some agencies but should become routine across all government bodies involved in contracting activity. The frequency of reporting would depend on the circumstances of individual agencies.

5.16 Internal reporting of this kind on a regular basis would strengthen governance frameworks for contracting. It should also improve data accuracy as the information would be relevant to the regular business and management operations of agencies and managers would have a stake in the quality of the information they receive. This would have flow on benefits for the reliability of contract information reported on AusTender and to the Parliament.

Recommendation 4

5.17 The Committee recommends that to improve data quality and internal governance agencies include procurement and contract activity in regular business and management reporting to agency executives and, where necessary, internal audit and governance committees.

Guidance

5.18 Following ANAO recommendations, DOFA has been working on enhancing its guidance about the use of confidentiality provisions in contracts. The Committee considers this guidance could be improved through using examples from ANAO testing of compliance which illustrate provisions that are classified appropriately and those that are not. Agencies could also use these examples for providing internal guidance.

5.19 Providing line staff with concrete examples should help their understanding of the confidentiality criteria and improve their ability to make the correct decisions on questions of confidentiality when contracts are under negotiation. This, in turn, should improve compliance with the requirements of the order and lead to further reductions in the use of confidentiality provisions in contracts.

Recommendation 5

5.20 The Committee recommends DOFA and agencies consult ANAO on examples from compliance audit testing which illustrate provisions that are classified appropriately and those that are not, for inclusion in guidance and training in relation to the order.

Training

5.21 Training and education are key ingredients for improving compliance with the order. ANAO has found that the level of compliance with the order has been greater in agencies that provide training for staff than those which provide little, if any, training. If the enhanced AusTender system is to be introduced, training staff to meet the requirements of the new system will be critical.

5.22 The Committee considers all agencies covered by the order should ensure staff involved in contract management and completing reporting requirements receive adequate training and guidance to assist them to comply with government procurement policy and the requirements of the order. Smaller agencies, and agencies managing small numbers of contracts, should consider accessing external training provided by DOFA, the APS Commission and other relevant bodies.

Recommendation 6

5.23 The Committee recommends all agencies provide adequate training and education to staff responsible for managing contracts and complying with the order, either through internal training or programs provided externally.

Improving external scrutiny and oversight

5.24 In chapter 4 the Committee identified a number of mechanisms to improve the external scrutiny and oversight of government contracting, particularly by the Parliament and ANAO. If adopted these mechanisms, in combination with the more detailed information expected to be available from the new AusTender system, should

be useful for examining contracts and dealing with claims of commercial commerciality when they arise.

Verification of compliance

5.25 The Committee draws senators' attention to appendix 7 which provides a process chart for agency staff dealing with confidentiality of information in contracts. This is taken from the DOFA guidance on confidentiality of contractors' commercial information, outlined in chapter 2.

5.26 The Committee considers this chart could be a useful point of reference which might assist senators examining contracts containing confidentiality provisions. It could, for instance, help in tracing the decision making process followed during the negotiation of such a contract. It could also help in testing the appropriateness of decisions to treat information as confidential.

5.27 The relevant DOFA guidance should include a note to the effect that the Parliament's committees and members may refer to the process chart to assist the examination of contracts. This should reinforce the importance of agency staff complying with the guidelines when negotiating contracts.

Referral to the Auditor-General

5.28 Refusals by officials to disclose contract details on the grounds of confidentiality or commercial-in-confidence are not an uncommon occurrence during parliamentary examination of issues involving government contracts. Such refusals should only be made by ministers and accompanied by a statement setting out the reason for such a claim and the commercial harm that might result from disclosure. However, this does not always occur. Nor does it necessarily allow for detailed testing of the appropriateness of such a claim or whether the information should have been treated as confidential in the first place.

5.29 The Auditor-General has agreed that senators could ask him to examine contracts where officials or ministers have refused to disclose information based on a claim of commercial confidence. This examination would occur in the context of the next compliance audit of contracts under the requirements of the order.

5.30 While it is open for senators already to ask the Auditor-General to conduct examinations of this type, the Committee is pleased to note the Auditor-General's agreement to do so as part of the compliance activity under the order. The existence of this mechanism strengthens the accountability of government contracts and may influence the way officials and ministers respond to questions from senators and committees.

5.31 The relevant DOFA guidance should be amended to alert officers that the Parliament and its committees and members may resort to using this mechanism where a claim of commercial confidence is raised in relation to a contract.

Recommendation 7

5.32 The Committee recommends DOFA include in guidance advice to the effect that, in relation to a refusal to disclose information based on a claim of commercial confidentiality for a contract, the Parliament, and its committees and members, may:

- **test the validity of any claim by reference to DOFA's process chart for agency staff dealing with confidentiality of information in contracts; and**
- **refer the contract to the Auditor-General for examination.**

ASIO and ASIS

5.33 ASIO and ASIS have not agreed to comply with the requirement to publish contract lists under the order on the ground of national security. Presumably they will continue to refuse to publish this information on the new AusTender system. Even so, it would seem unusual for all contracts of any kind to be excluded.

5.34 In this case, it is important that both agencies are subject to regular compliance auditing by ANAO. Without the ability to scrutinise these agencies' contract information publicly, the Parliament has to be satisfied that each agency is complying with government policy and the requirements of the order. Both agencies would benefit themselves from having ANAO check their contract management, tender and compliance processes regularly.

5.35 The Committee notes ANAO's agreement to audit ASIO and ASIS on a regular cycle and suggests a three-yearly cycle may be appropriate.

Recommendation 8

5.36 The Committee requests ANAO consider including ASIO and ASIS regularly in its compliance audits under the order on a three-yearly basis.

Annual reporting

5.37 DOFA's proposal to rationalise procurement reporting includes discontinuing the requirement for consultancies valued at \$10 000 and above to be included in annual reports. The Committee has confined its attention in this report to the question of whether reporting under the order should continue. It considers the Joint Committee on Public Accounts and Audit may be the most appropriate body to consider the question of annual reporting of consultancies, but notes other legislative and general purpose committees might also wish to contribute to any decision on this matter.

5.38 Suffice it to say, the Committee considers that any decision on the annual reporting of consultancies must carefully take into account the impact on the transparency of consultancies under new reporting arrangements. A reduction in the information currently available on consultancies would be a backward step and counter to the policy trend to make contracting activity more open. The Committee notes ANAO shares this view.

5.39 It may be the case that the question of annual reporting of consultancies should be addressed once the enhanced AusTender is operational and the quality of the reporting on consultancies under the new system can be assessed properly.

5.40 Whatever the decision on annual reporting of consultancies, the Committee considers agencies should note in their annual reports that information on contracts and consultancies is available on-line through the AusTender system. Some agencies are already doing so. This would be a useful reference for public readers interested in government contracting activity. To give effect to this proposal the Department of Prime Minister and Cabinet should make the necessary change in the next issuance of the guidelines for annual reporting.

Recommendation 9

5.41 The Committee recommends the Department of Prime Minister and Cabinet, in the next set of guidelines for annual reporting, include a requirement for agencies to include a note in their annual reports referring readers to the AusTender site for information on contracts and consultancies. Depending on the outcome of any decision on the DOFA proposal to rationalise procurement reporting, it may be necessary for agencies to also include a note explaining changes to reporting requirements for procurement contracts.

Agencies covered under the order

5.42 The Committee reaffirms the view expressed in its first report on the operation of the order that it should be extended to cover CAC Act bodies and that the Department of House of Representatives should comply voluntarily with the order.

CAC Act bodies

5.43 As noted in chapter 2, the government did not agree to the Committee's recommendation in its earlier report that the order be extended to cover CAC Act bodies. The government argued CAC bodies operated under a different legislative framework to FMA Act bodies and that the order's requirements would place an unreasonable burden on commercial operators.

5.44 Since then, the ground has shifted in relation to disclosure and CAC bodies. In 2004 the Minister of Finance issued a directive which included a requirement for certain CAC bodies to report procurement contracts with an estimated liability above \$400 000.² These contracts must be reported on AusTender.

5.45 The ministerial directive continued a trend in extending the accountability framework for procurement to cover CAC bodies. As noted earlier, the government had agreed to the Committee's recommendation that CAC bodies have regard to

2 *Finance Minister's (CAC Act Procurement) Directions*, 1 December 2004. The \$400 000 threshold relates to property or services other than construction services. The threshold for construction services is above \$6 million.

Finance guidance on commercial confidentiality for all new contracts from 2003. The 2004 ministerial directive took this a step further making it mandatory for CAC bodies to apply some parts of the Commonwealth Procurement Guidelines.

5.46 Now that CAC body contracts are reported on AusTender and follow Finance commercial confidentiality guidance, the Committee can see little reason for excluding these bodies from coverage under the order. The streamlined reporting promised under AusTender should reduce much of the burden which might have existed at the time the order was originally adopted. At the very least, procurement contracts entered into by CAC bodies valued at \$400 000 or more should comply with the order, although the Committee recommends the threshold should be set at \$100 000, the same as applies to FMA bodies. If this were to be accepted, the Finance minister's directive would need to be amended to lower the reporting threshold.

5.47 As with its original recommendation for CAC bodies, the Committee appreciates that these bodies should be given reasonable time to establish appropriate systems and processes to meet the order's requirements. It is expected that some of these should already be in place to allow CAC bodies to meet existing reporting and disclosure requirements. The Committee therefore recommends that CAC bodies should be included under the order from the start of the next financial year (i.e. 1 July 2007). This means CAC bodies would be required to report under the order for the 1st time by not later than 1 January 2008. By this time the new AusTender system should have been operational for six months and be capable of supporting this additional reporting.

5.48 The Committee notes that, if the Senate were to accept the Committee's recommendation to include CAC bodies under the order from 1 July 2007, the definition of 'agency' in the order will need to be changed to reflect this at that time.

Recommendation 10

5.49 The Committee recommends that the order be extended to cover CAC Act bodies from 1 July 2007.

Parliamentary departments

5.50 The Committee has always been of the view that transparency should apply to parliamentary departments in the same way as for other agencies. While the order does not cover the parliamentary departments, the Department of the Senate and the Department of Parliamentary Services have elected to comply voluntarily. As noted in chapter 1, the Department of the House of Representatives has not done so on the basis that the department does not comply with Senate orders unless the House of Representatives has passed a similar order.

5.51 The Committee suggests that, in the interests of transparency, the House department should comply voluntarily with the order. To do so on a voluntary basis would in no way imply an erosion of the sovereignty of the House of Representatives and its control over its department. Like other parliamentary departments, the House

department is already subject to the Commonwealth Procurement Guidelines which include instructions for tenders and contracts to alert contractors of disclosure obligations, including to the Parliament and its committees. In the Committee's view, it would be a logical step for the House department to take if it were to comply voluntarily with the order.

5.52 As noted in its previous report on the order, if the Senate accepts the Committee view then the President of the Senate should convey its suggestion to the Speaker of the House of Representatives.

Recommendation 11

5.53 The Committee reaffirms its suggestion that the Department of the House of Representatives comply voluntarily with the order. If the Senate agrees with this suggestion, the Committee requests the President of the Senate convey its suggestion to the Speaker of the House of Representatives.

Ongoing Committee role

5.54 The Committee was instrumental in the establishment of the order in 2001. Since then it has closely monitored the order's operation and made proposals to improve it which the Senate has adopted.

5.55 The Committee considers there remains a strong need for it to have an ongoing role in relation to the future operation of the order. With significant changes expected under the proposed new AusTender system, it is even more important that a committee of the Senate continue to monitor developments in relation to the reporting of government contracts.

5.56 The Committee sees two main areas where it has a role to play. The first relates to monitoring the impact on the transparency of procurement contracts as the new reporting framework is introduced. It is important that the Senate is kept informed of changes in the reporting arrangements for government contracts, particularly if new arrangements result in a reduction in transparency or the capacity for scrutiny.

5.57 The second area of interest for the Committee is in relation to the consideration and development of reporting options for non procurement contracts. It is important that solutions for the transparency and reliability of reporting for procurement contracts also be found for the reporting of non procurement contracts. In view of its experience in the development of the order, the Committee should be involved in the development of any new reporting mechanism for non procurement contracts. As signalled in recommendation 2 above, the Committee considers that DOFA should report back to it on options for non procurement reporting before any decision is made to implement a new mechanism.

5.58 The Committee also considers that DOFA should provide a general report to the Committee on the action it has taken and progress achieved in implementing the

Committee's recommendations. The report should also comment on progress in implementing the new single reporting mechanism and provide a frank appraisal of that system's performance and any problems that have emerged. This general report should be presented to the Committee not later than the end of September 2007. This should allow time for DOFA to implement the Committee's recommendations and consider the operation of the new reporting mechanism, particularly as departments and agencies should have reported contracts on AusTender by the end of August 2007 (in accordance with paragraph (1) of the order).

Recommendation 12

5.59 The Committee recommends DOFA provide a general report on the implementation of the recommendations in this report and the performance of the new single reporting mechanism, by not later than the last day in September 2007.

5.60 A minor amendment to the order will be required to enable the Committee to maintain a watching brief on the operation of the order and relevant developments.

Recommendation 13

5.61 The Committee recommends the Senate amend paragraph (7) of the order, to read: 'The Finance and Public Administration Committee consider the ongoing operation of the order and report on relevant developments from time to time'.

**Senator Brett Mason
Chair**

Appendix 1

Witnesses at public hearings

Thursday 25 March 2004 – Canberra

Australian National Audit Office

Mr John Hawley, Executive Director, Assurance Audit Services Group

Ms Suzanne Hinchcliffe, Director, Assurance Audit Services Group

Mr Michael Watson, Group Executive Director
Assurance Audit Services Group

Department of Finance and Administration

Mr Jonathan Hutson, Division Manager, Financial Framework Group

Mr Richard Loudon, Branch Manager, Procurement

Wednesday 11 October 2006 – Canberra

Department of Finance and Administration

Mr John Grant, Division Manager, Procurement Division

Mr Duncan McIntyre, Branch Manager
Procurement Reporting and Systems Branch

Mr Steve O'Loughlin, Branch Manager, Procurement Policy Branch

27 November 2006 – Canberra

Australian National Audit Office

Ms Sheila Margaret Bird, Group Executive Director

Mr Bill Bonney, Audit Manager

Mr Brian Thomas Boyd, Executive Director

Mr Russell Charles Coleman, Executive Director

Department of the Senate

Mr Harry Evans, Clerk of the Senate

Appendix 2

Senate Order (20 June 2001)

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

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

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

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

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

(d) an estimate of the cost of complying with this order.

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

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

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

(6) In this order:

"**agency**" means an agency within the meaning of the *Financial Management and Accountability Act 1997*;

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

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

Appendix 3

Senate Order (27 September 2001)

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

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

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

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

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

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

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

(a) the list is not up to date;

(b) not all relevant agencies are included; and

(c) contracts all of which are confidential are not included.

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

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

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

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

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

(9) In this order:

"agency" means an agency within the meaning of the Financial Management and Accountability Act 1997;

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

"previous 12 months" means the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be;

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

Appendix 4

Senate Order (18 June 2003)

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

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

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

(b) the contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;

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

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

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

(a) the list is not up to date;

(b) not all relevant agencies are included; and

(c) contracts all of which are confidential are not included.

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

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

and indicating whether any inappropriate use of such provisions was detected in that examination.

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

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

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

(9) In this order:

"agency" means an agency within the meaning of the Financial Management and Accountability Act 1997;

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

"previous 12 months" means the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be;

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

Appendix 5

Senate Order (26 June 2003)

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

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

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

(b) the contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;

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

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

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

(a) the list is not up to date;

(b) not all relevant agencies are included; and

(c) contracts all of which are confidential are not included.

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

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

and indicating whether any inappropriate use of such provisions was detected in that examination.

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

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

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

(9) In this order:

"agency" means an agency within the meaning of the Financial Management and Accountability Act 1997; and

"previous 12 months" means the period of 12 months ending on either 31 December or 30 June in any year, as the case may be.

Appendix 6

Senate Order (4 December 2003)

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

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

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

(b) the contractor, the amount of the consideration and the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;

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

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

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

(a) the list is not up to date;

(b) not all relevant agencies are included; and

(c) contracts all of which are confidential are not included.

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

(5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, by not later than 30 September each year, a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

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

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

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

(9) In this order:

"agency" means an agency within the meaning of the Financial Management and Accountability Act 1997; and

"previous 12 months" means the period of 12 months ending on either 31 December or 30 June in any year, as the case may be.

Appendix 7

Process chart dealing with confidentiality of information in contracts

7.1 Process chart dealing with confidentiality of information in contracts



