

The Senate

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Finance and Public Administration  
References Committee

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Senate order for departmental and agency  
contracts

May 2014

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# Membership of the Committee

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# List of Recommendations

## Recommendation 1

**3.12** The committee recommends the Department of Finance provide to the committee by 1 September 2014:

- a link to a prototype of the AusTender website with agencies' compiled Senate order reports for the 2013-14 financial year; and
- a copy of the revised version of Financial Management Guidance No. 8 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate order on Departmental and Agency Contracts)* in draft form.

## Recommendation 2

**3.24** The committee recommends the Department of Finance amend the title of the report in AusTender to 'Agency reports complying with the Senate order on procurement contracts and use of confidentiality provisions'.

## Recommendation 3

**3.34** The committee recommends that the Senate order be amended:

- to provide that, following the tabling of the Auditor-General's report pursuant to paragraph (5) of the Senate order in 2014, the Auditor-General conduct an audit of compliance with the Senate order biennially for the next four years with reports due no later than 30 September 2016 and 30 September 2018;
- to provide that in the letter of advice tabled pursuant to paragraph (1) of the Senate order, that Ministers must certify that none of the contracts included in the list contain inappropriate confidentiality provisions as measured against the Department of Finance's guidance;
- to reflect legislative changes as a result of the *Public Governance Performance and Accountability Act 2013*, so the Senate order applies to Commonwealth entities; and
- with respect to any further technical aspects of the Senate order which are found, in consultation between the Clerk of the Senate and the committee, to require amendment.



# CHAPTER 1

## BACKGROUND

### Introduction

1.1 In June 2001, the Senate agreed to a procedural order of continuing effect for the production of lists of departmental and agency contracts (Senate order).<sup>1</sup> In effect, the Senate order requires departments and agencies to publish on the Internet lists of contracts to the value of \$100 000 or more with statements of reasons for any confidentiality clauses or claims.<sup>2</sup> The full Senate order is set out at Appendix 1.

### Referral

1.2 As currently drafted, paragraph (7) of the Senate order provides:

The Finance and Public Administration Committee consider the ongoing operation of the order and report on development from time to time.

1.3 On 10 December 2013, the Senate, noting paragraph (7) of the Senate order, referred the following matter to the Senate Finance and Public Administration References Committee (committee) for inquiry and report by 14 May 2014:

The operation of the Senate order for departmental and agency contracts, including:

- a) developments in the online reporting on contracts (including AusTender) which may be relevant to enabling departments and agencies to meet the requirements of the order;
- b) the role of, and reporting by, the Auditor-General under the order; and
- c) any other related matters.<sup>3</sup>

### Background to the Senate order<sup>4</sup>

1.4 The Senate order was introduced in response to an increase in the use of outsourcing arrangements for operations, which had been previously provided solely by government. The outsourcing of functions resulted in a rapid expansion of government contracts and a simultaneous rise in claims that government contracts, or

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1 See, *Journals of the Senate*, No. 192, 20 June 2001, pp 4358-4359.

2 *Oggers' Australian Senate Practice*, H. Evans and R. Laing, Eds, 13<sup>th</sup> Edition, 2012, p. 562.

3 *Journals of the Senate*, No. 9, 10 December 2013, p. 307.

4 The information in this section is drawn from previous committee reports on the development and operation of the Senate order. See, Senate Finance and Public Administration References Committee, *Commonwealth contracts: a new framework for accountability. Final report on the inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, September 2001, p. 3; 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, p. 1.

part thereof, were confidential, in particular commercially confidential. The use of confidentiality clauses in government contracts has the potential to impede scrutiny and accountability of government expenditure.

1.5 The Senate order is designed to address two concerns:

- that significant contracts for services or goods should be available and accessible for scrutiny; and
- that confidentiality provisions should be valid, appropriate and warranted in application and usage.

### **Context of inquiry**

1.6 Prior to the referral of the inquiry, the chair received letters from the Minister for Finance (Minister), Senator the Hon Mathias Cormann, and the Auditor-General, Mr Ian McPhee PSM, regarding the operation of the Senate order. The committee has published both letters on its website.<sup>5</sup>

#### ***Letter from the Minister for Finance***

1.7 In December 2013 the Minister wrote to the chair seeking the committee's support to update the whole-of-government guidance for agencies to meet the Senate order. The guidance – Financial Management Guidance No. 8 *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts* (also referred to as 'FMG 8') – is issued by the Department of Finance (Finance) and was last updated in 2004.

1.8 The Minister referred to the Australian National Audit Office's (ANAO) most recent annual review of the Senate order, which suggested the whole-of-government guidance be updated to enable agencies to reference AusTender when complying with the Senate order. The Minister explained:

This [update to the whole-of-government guidance] would reduce duplication in procurement contract reporting by agencies.

...

The proposed update to guidance will reflect efficiencies and process changes since the 2004 revisions [to the guidance]. Specifically, agencies will now provide a link to an AusTender report for the relevant reporting period while grants, non-procurement contracts and any other contracts not captured by AusTender would still be reported.<sup>6</sup>

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5 Senate Finance and Public Administration References Committee website, at: [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Finance\\_and\\_Public\\_Administration/Senate\\_order](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Senate_order).

6 Correspondence from Minister for Finance, Senator the Hon Mathias Cormann, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 2 December 2013.

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## *AusTender*

1.9 AusTender is the government's procurement information system, providing a central web-based facility for:

- publishing of all publicly available government Approaches to Market (ATMs), Annual Procurement Plans (APPs), Multi-Use Lists (MULs), standing offer arrangements and contracts awarded;
- electronic distribution of ATM documentation and addenda; and
- secure lodgement of tender responses.<sup>7</sup>

1.10 The Commonwealth Procurement Rules require *Financial Management and Accountability Act 1997* (FMA Act) agencies to report procurement contracts valued at or above \$10 000 on AusTender within 42 days of entering the arrangement.<sup>8</sup>

## *Whole-of-government guidance*

1.11 Finance publishes guidance to assist agencies to meet the Senate order requirements.<sup>9</sup> This guidance includes:

- background to the Senate order and the government's policy on compliance with the order;<sup>10</sup>
- a process chart for compliance with the Senate order;
- details on the format and content of internet listing for the purposes of the Senate order, including templates for agencies to use for the internet listing;
- an explanation of what constitutes a 'contract', including discussion on what are 'probably'<sup>11</sup> and 'probably not'<sup>12</sup> contracts for the purposes of the Senate order; and

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7 AusTender, Help webpage, at: [www.tenders.gov.au/?event=public.help.list](http://www.tenders.gov.au/?event=public.help.list) (accessed 9 April 2014).

8 Department of Finance, *Submission 2*, p. 3. See also Commonwealth Procurement Rules, 1 July 2012, paragraph 7.16.

9 Financial Management Guidance No. 8 *Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004, at: [www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.html](http://www.finance.gov.au/publications/fmg-series/08-listing-of-contract-details.html) (accessed 9 April 2014).

10 The government's policy states that compliance with the requirements of the Senate order is subject to: guidelines on the scope of public interest immunity to determine whether information regarding individual contracts will be provided; non-disclosure of information contrary to the *Privacy Act 1988*; and refinements to arrangements and processes for FMA Act agencies to meet the requirements of the Senate order.

11 The following are discussed under the heading *Probably 'contracts' for the purposes of the Senate order*: arrangements under which goods and services have been procured; dealings with interests in land; purchase order; agreements between Australian Government bodies that are separate legal entities; funding agreements; Public Service Act employment contracts.

- information on identification and treatment of confidential contract information.

### ***Letter from the Auditor-General***

1.12 In November 2013, the Auditor-General wrote to the chair requesting the committee consider changes to the Senate order in respect of the annual compliance audits:

The [Senate] Order has proven effective in achieving greater transparency in contractual arrangements entered into by Australian Government agencies...[T]he ANAO has conducted 15 audits of the [Senate] Order since it was introduced, showing a decline in the use of confidentiality provisions and a consequential improvement in access to information. In the most recent audit covering the 2012 calendar year, only four per cent of contracts were reported as containing confidentiality provisions.<sup>13</sup>

1.13 The Auditor-General continued:

Given this trend, it would be appreciated if the Committee was willing to review the need for annual compliance audits. Matters relating to confidentiality would continue to be addressed within the context of the ANAO's audit of Government procurement and grants more generally. If the Committee were to adopt this approach, the ANAO would table a final report on 2013 compliance with the [Senate] Order in September 2014.<sup>14</sup>

### ***Other contract reporting requirements***

1.14 In addition to the Senate order, government agencies are subject to other reporting obligations which may cover the same information as required by the Senate order.

1.15 As noted above, the Commonwealth Procurement Rules require agencies to report procurement contracts valued at or above a specified value on AusTender within 42 days of entering the arrangements.

1.16 In addition, agencies' annual reports must include a summary statement detailing:

- the number of new consultancy services contracts let during the year;
- the total actual expenditure on all new consultancy contracts let during the year (inclusive of GST);

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12 The following are discussed under the heading of *Probably not 'contracts' for the purposes of the Senate order*: standing offer arrangement; heads of agreement/ letter of intent; purchase order; agency agreement; non-enforcement agreement between bodies that are separate legal entities; gift/ grant; employment arrangements; statutory appointments.

13 Correspondence from Mr Ian McPhee, Auditor-General of Australia, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 29 November 2013.

14 Correspondence from Mr Ian McPhee, Auditor-General of Australia, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 29 November 2013.

- the number of ongoing consultancy contracts that were active in the reporting year; and
- the total actual expenditure in the reporting year on the ongoing consultancy contracts (inclusive of GST).<sup>15</sup>

### **Previous committee reports**

1.17 The committee has considered the ongoing operation of the Senate order on two previous occasions.

#### ***Report on the first year of operation of the Senate order***

1.18 In December 2002 the committee reported on the first year of the operation of the order. The committee made 17 recommendations to clarify the wording of the order 'not only to minimise any additional actions that might be required of agencies in terms of compliance with the order, but also to assist interpretation and therefore provide for greater efficiency regarding compliance'.<sup>16</sup> The committee also made recommendations in relation to specific issues raised:

- the definition of a contract;
- commercial confidentiality;
- reporting requirements;
- agencies covered under the order; and
- presentation and disclosure.<sup>17</sup>

#### ***Second report on the operation of the Senate order***<sup>18</sup>

1.19 In February 2007 the committee tabled its second report on the operation of the Senate order. The committee's second report included consideration of a proposal by Finance that, from 1 July 2007, AusTender – which at the time of the inquiry had not been fully implemented and tested – should be the single reporting mechanism for procurement contracts.

1.20 Finance also suggested that as the relevant procurement information will be available through AusTender, the Senate consider revoking the Senate order.

15 See Department of Prime Minister and Cabinet, *Requirements for Annual Reports for Departments, Executive Agencies and FMA Act bodies* (approved by the Joint Committee of Public Accounts and Audit), 24 June 2013, p. 13.

16 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, p. 35.

17 See, 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, Recommendations pp i-iv.

18 This inquiry was conducted under the auspices of the Senate Standing Committee on Finance and Public Administration. For the purposes of this report 'committee' means either the Senate Finance and Public Affairs References Committee or the Senate Standing Committee on Finance and Public Administration.

1.21 The committee recommended the Senate order be retained. While it saw AusTender as potentially improving the completeness and accuracy of information available on contracts, the committee also had several concerns, specifically:

- 'the history of large scale information projects...cautions against sweeping change until new systems have proven themselves';<sup>19</sup>
- AusTender would not report on non-procurement contracts and therefore if the order was revoked it 'would result in a reduction in transparency of government contracts';<sup>20</sup> and
- the promised improvements in data integrity cannot be assumed as a given. Data integrity has continued to be a challenge and data quality under the revised system needs to be tested.<sup>21</sup>

1.22 The committee was open to the AusTender system superseding departmental and agency homepages as the source where required contract information could be accessed.<sup>22</sup>

### **Conduct of inquiry**

1.23 The committee received submissions from Finance and the ANAO. The committee also received correspondence from the Clerk of the Senate, Dr Rosemary Laing, dated 8 January 2014. A full list of submissions, correspondence and additional documents is at Appendix 2 and are available on the committee's website at [www.aph.gov.au/senate\\_fpa](http://www.aph.gov.au/senate_fpa).

1.24 The committee held a public hearing at Parliament House in Canberra on 14 February 2014, where officers from Finance and the ANAO appeared. A full list of witnesses who appeared at this public hearing is at Appendix 3.

1.25 Following the public hearing, the chair, on behalf of the committee, sought advice from the Clerk. A copy of the Clerk's advice, dated 6 March 2014, is also available on the committee's website.

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19 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)*, February 2007, p. 42.

20 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)*, February 2007, p. 42.

21 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)*, February 2007, p. 36.

22 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)*, February 2007, p. 42.

# CHAPTER 2

## DISCUSSION

### Introduction

2.1 This inquiry has considered the two specific matters about the operation of the Senate order for departmental and agency contracts (Senate order) raised by the Minister for Finance (Minister) and the Auditor-General in their correspondence to the committee in late 2013, namely:

- the use of AusTender by agencies for reporting procurement contracts pursuant to the Senate order; and
- the ongoing role of the Auditor-General in monitoring compliance with the Senate order through annual compliance audits.

### AusTender

2.2 As noted in Chapter 1, the Senate order listing is only one of the procurement reporting obligations for agencies. At the public hearing, the Department of Finance (Finance) provided a comparative table of agencies' reporting obligations pursuant to the Senate order, AusTender and Annual Reports.<sup>1</sup>

2.3 Supporting the Minister's request to the committee in December 2013, Finance advocated the rationalisation of procurement reporting requirements for agencies:

Consolidating procurement reporting will clarify agency reporting obligations, and focus agency reporting effort to a single, and centrally supported system...<sup>2</sup>

2.4 Finance proposed that AusTender be used by agencies as a means to comply with the Senate order. AusTender is described in Finance's submission as 'the primary mechanism for public accountability and transparency of procurement information across the Commonwealth'.<sup>3</sup>

2.5 At the public hearing Ms Jan Mason, Deputy Secretary, Business, Procurement and Asset Management, Department of Finance, reiterated the reasons for this rationalisation:

Consolidating the reporting arrangements would see a decrease in reporting complexity, a removal of red tape and a reduction in the administrative burden and costs placed on agencies...

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1 Department of Finance, *AusTender and Rationalising Procurement Reporting Requirements*, 14 February 2014, p. 5.

2 *Submission 2*, p. 2.

3 *Submission 2*, p. 2.

Our views towards rationalisation reflect not only our confidence in the AusTender system but also its use as an accountability mechanism outside of agencies.<sup>4</sup>

2.6 Finance's submission argued that reporting procurement contracts on both AusTender and separately as part of the Senate order involves duplication of unnecessary costs for agencies, the ANAO and Finance. Finance stated that enabling departments and agencies to use AusTender to comply with the Senate order would 'reduce the reporting burden on agencies in a tight fiscal environment'.<sup>5</sup> Furthermore:

In 2012, excluding Finance and ANAO costs, this was estimated as \$6 per contract across 42,500 contracts. Finance anticipates this figure understates agency compliance costs, particularly in large agencies, where the costs in circulation and review by officials is not accurately or easily accounted for.<sup>6</sup>

2.7 In its submission, the ANAO noted that in its most recent audit on the Senate order it suggested Finance update the Senate order guidance to reflect the availability of AusTender as a reporting method for agencies. The ANAO concluded that '[i]f the guidance is updated it will support more complete and accurate public reporting'.<sup>7</sup>

### ***Generation of Senate order reports***

2.8 The relevant contract information for Senate order reports can be extracted from AusTender using the 'Reports' section or the 'Advanced Search' function, both of which can be accessed on the AusTender homepage.<sup>8</sup> The 'Senate order on confidentiality in procurement contracts Report' is now a standard report in the Reports section on AusTender. In order to generate the report, a user needs to select the:

- department or agency; and
- date range for the report;
- date type;
- value range for the report; and
- category of goods or services.<sup>9</sup>

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4 *Committee Hansard*, 14 February 2014, p. 1.

5 *Submission 2*, p. 2.

6 *Submission 2*, pp 2-3.

7 *Submission 1*, p. 3.

8 Department of Finance, *Submission 2*, p. 5; Ms Lynne Ford, Director, AusTender, Department of Finance, *Committee Hansard*, 14 February 2014, pp 7-8.

9 Ms Lynne Ford, Director, AusTender, Department of Finance, *Committee Hansard*, 14 February 2014, p. 8. See also AusTender webpage, Senate Order on Confidentiality in Procurement Contracts Criteria, at: [www.tenders.gov.au/?event=public.reports.CN.SenateOrder.form](http://www.tenders.gov.au/?event=public.reports.CN.SenateOrder.form) (accessed 7 April 2014).

2.9 In terms of the date type that the report can be generated for, Ms Lynne Ford, Director, AusTender, Department of Finance, explained the dates could be sorted by publish date, by the date that the contracts were entered into and by 'active during period'.<sup>10</sup>

2.10 Throughout the course of this inquiry the prospect of pre-generated Senate order lists being made available on AusTender has been alluded to:

[A]gencies will now provide a link to an AusTender report for the relevant reporting period...<sup>11</sup>

If the Committee prefers to retain the Senate Order, for procurement contracts, Finance proposes that a biannual list by agency be published on AusTender consistent with the current Senate Order timeframes.<sup>12</sup>

An option that the committee may like to consider in enhancing reporting processes is for AusTender to generate a Senate order listing on behalf of agencies. This would provide agency listings collectively, rather than separately on agency websites.<sup>13</sup>

2.11 However, the committee was informed that although AusTender currently has the capacity to make these types of reports available, they are not, at present, automatically generated. On this point, Ms Mason indicated that the functionality for AusTender to run automatically generated reports could be created 'relatively easily'.<sup>14</sup>

2.12 In correspondence to the committee the Clerk of the Senate, Dr Rosemary Laing, advised:

If the system is not capable of generating a report – in other words, a list of the reportable contracts – then it is unlikely to be suitable for compliance purposes. If, however, the system is able to generate such reports, then it has the potential to be an efficient means of satisfying the Senate order, if the report is produced grouping contracts by individual agency.<sup>15</sup>

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10 *Committee Hansard*, 14 February 2014, p. 8.

11 Correspondence from Minister for Finance, Senator the Hon Mathias Cormann, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 2 December 2013.

12 Department of Finance, *Submission 2*, p. 2.

13 Ms Jan Mason, Deputy Secretary, Business, Procurement and Asset Management, Department of Finance, *Committee Hansard*, 14 February 2014, p. 1.

14 *Committee Hansard*, 14 February 2014, p. 2.

15 Correspondence from Clerk of the Senate, Dr Rosemary Laing, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 6 March 2014.

2.13 The committee sought clarification from the Minister as to whether it was intended that AusTender would provide pre-generated lists of Senate order contracts. The Minister assured the committee that 'Senators will not be expected to generate reports themselves'.<sup>16</sup> Furthermore, he continued:

Pending the Committee's view, duplication of procurement contract reporting against the Senate Order and on AusTender could be reduced by Finance publishing bi-annually and prominently on AusTender, an aggregated list of relevant procurement contract notices on behalf of agencies. Agencies will reference this list in their Senate Order listings.<sup>17</sup>

2.14 The Minister also proposed changes to the Senate order to reduce duplication of reporting of contracts:

[T]he Committee may like to consider streamlining the Senate Order to capture contracts 'published' in the six month reporting period, rather than contracts 'active' during the past 12 months. This will remove duplicate contracts reported across Senate Order lists. These represented approximately 21,000 of the 30,000 procurement contracts listed in 2012-13. This will provide greater prominence to the current procurement decisions of agencies without the loss of contract information.<sup>18</sup>

### ***Data integrity***

2.15 One particular concern the committee has with using AusTender for complying with the Senate order is ensuring the integrity of the data in AusTender reports. In its submission the ANAO referred to the findings of its annual audits of compliance with the Senate order:

Since 2007, ANAO audits have included a limited comparison of the contract information reported by the audited agencies in the Senate Order listings to the information reported on AusTender. The audits have identified issues with the completeness, accuracy and timeliness of agencies' contract reporting in both media. Examples of this have included agencies inadvertently excluding contracts, double reporting contracts, reporting purchase orders as contracts or, in some instances, not recording the same contract information (such as differing contract periods, values, data and/or types of confidentiality provisions used) consistently in both media.<sup>19</sup>

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16 Correspondence for Senator the Hon Mathias Cormann, Minister for Finance, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 27 March 2014.

17 Correspondence for Senator the Hon Mathias Cormann, Minister for Finance, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 27 March 2014.

18 Correspondence for Senator the Hon Mathias Cormann, Minister for Finance, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 27 March 2014.

19 *Submission 1*, p. 3.

2.16 In its submission Finance expressed confidence in the ongoing accuracy of AusTender. In particular, Finance referred to the rationalisation of reporting obligations as enabling agencies to focus their 'data quality effort'.<sup>20</sup>

2.17 However, Ms Lynne Ford, Director of AusTender, noted that agencies are responsible for the accuracy of data entered into AusTender:

The information is the agency's information and they provide the information to AusTender and they have responsibility for its accuracy.<sup>21</sup>

2.18 In its submission Finance also referred to agencies' responsibility to ensure the correct reporting of data in AusTender, but stated that Finance 'plays an active part in this process to promote compliance through a dedicated and ongoing support program'.<sup>22</sup>

2.19 This ongoing support program includes:

- a central AusTender helpdesk, a 9am-5pm telephone support line and out-of-hours support by arrangement;
- a dedicated agency email address for procurement policy queries;
- regular one-on-one agency AusTender training and refresher sessions;
- a weekly schedule of one-on-one meetings between Finance and agency procurement and policy reporting staff;
- online AusTender user guides and procurement policy documentation; and
- monthly procurement 'frequently asked questions' and procurement bulletins which are circulated to more than 2 500 Australian Public Service staff.<sup>23</sup>

2.20 The Clerk of the Senate indicated that, in her view, data integrity was not an area that needed to be 'actively policed'.<sup>24</sup> The Clerk provided the following explanation for this view:

This may sound surprising but the fact is that chief executives are responsible for effective management of their agencies and are therefore responsible for the accuracy of data provided on such platforms as AusTender. Legislative obligations on chief executives will be strengthened by the new Public Governance and Public Accountability Act and damage to reputation caused by administrative inadequacies is sufficiently career-limiting as to provide a useful incentive to data integrity.<sup>25</sup>

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20 *Submission 2*, p. 4.

21 *Committee Hansard*, 14 February 2014, p. 5.

22 *Submission 2*, p. 3.

23 Department of Finance, *Submission 2*, pp 3-4.

24 Correspondence from Dr Rosemary Laing, Clerk of the Senate, to Senator the Hon Kate Lundy, Chair of Senate Finance and Public Administration References Committee, 6 March 2014, p. 3.

25 Correspondence from Dr Rosemary Laing, Clerk of the Senate, to Senator the Hon Kate Lundy, Chair of Senate Finance and Public Administration References Committee, 6 March 2014, p. 3.

2.21 Finance provided the following further information to the committee on monitoring compliance:

FMA Regulation 7 requires officials performing duties in relation to procurement must act in accordance with the Commonwealth Procurement Rules (CPRs). The CPRs detail the mandatory requirements for reporting information on AusTender at paragraphs 7.5 to 7.19. If an agency does not comply with these requirements, each instance should be reported as noncompliance with FMA Regulation 7. Reported instances of non-compliance with FMA Regulation 7 are included in Finance's report to the Parliament under the category, the commitment of public money by agencies.<sup>26</sup>

### ***Accessibility of AusTender***

2.22 In its submission, Finance provided the following information on the accessibility of the AusTender interface:

The AusTender website has been designed to be accessed across various platforms and by web browsers that are in common use. Its design complies with relevant Web accessibility standards articulated in [Web Content Accessibility Guidelines (WCAG)] 2.0.<sup>27</sup>

2.23 At the public hearing, officers from Finance noted the flexible design of the AusTender site and again highlighted that it can be used on various platforms, including mobile phones and tablet devices. The officers also indicated that an AusTender mobile app 'is coming...somewhere in the future'.<sup>28</sup>

2.24 In terms of the technical aspects of the site, Ms Ford explained:

[AusTender is] a dual site...and the sites are linked by a high-speed IKON connection for database replication. We have virtually a hot site. Indeed, we would move seamlessly between the two sites depending on what was required. It would not be obvious to the users.<sup>29</sup>

2.25 Ms Ford provided the following information on the security of the AusTender website:

In terms of user security, that is password protected. There are certain things you can do on AusTender that you do not need to log in for, but defining your business profile against which business opportunities are notified, taking documents, if you are interested in a tender, and lodging a tender would all be done through an account that is password protected.

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26 Department of Finance, answer to question on notice, 14 February 2014, p. 8.

27 *Submission 2*, p. 5.

28 See Ms Lynne Ford and Ms Yvette Sims, Department of Finance, *Committee Hansard* 14 February 2014, p. 11.

29 *Committee Hansard*, 14 February 2014, p. 6.

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We protect the inputs through secure sockets layer [SSL] technology so that the session between an agency or a public user and AusTender is encrypted. In addition to that, tenders themselves are also encrypted. They are held on the servers in an encrypted state. In the process of opening a tender box, that decryption process happens all within an SSL session, and then that is pulled down behind agency firewalls, the session is closed and the tenders are held encrypted.<sup>30</sup>

### ***Procurement contracts***

2.26 One of the primary limitations of AusTender with respect to the Senate order is that it can only be used for procurement contracts. The Minister, in correspondence to the committee, noted that 'grants, non-procurement contracts and any other contracts not captured by AusTender' would still need to be reported through the current mechanism of the publication of lists on agencies' websites.<sup>31</sup>

2.27 The Clerk of the Senate in correspondence to the committee referred to this matter, outlining how the requirements of the Senate order could be met with respect to different types of contracts:

[T]he committee is aware that the system does not cover non-procurement contracts. A separate mechanism is required to report these, including publication on an agency website. The result may be that the order is satisfied by notification to the Senate of information published in different locations. Letters from ministers might therefore certify that information in relation to procurement contracts may be found on AusTender, in the agency report generated for the purpose, and, in relation to non-procurement contracts, on the agency website. Provision of links in the letter and from the website to AusTender would facilitate access.<sup>32</sup>

2.28 Ms Yvette Sims, Assistant Secretary, Procurement Policy Branch, Department of Finance, also noted that the AusTender platform is being used as a model to build a similar site for grants.<sup>33</sup> The Senate Finance and Public Administration Legislation Committee received a summary of the so-called 'AusGrant' website at the Budget Estimates hearings in May 2013.

AusGrant will cover the outward-facing side of grants activity for the whole of government. So, it will cover the application process—the front end—and the reporting process—the back end. And it will be a single place where grant recipients or grant applicants can go to navigate their way through or into the application processes. And then, at the other end, they and parliament and others can see, through the reporting process, what

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30 *Committee Hansard*, 14 February 2014, p. 6.

31 Correspondence from Senator the Hon Mathias Cormann, Minister for Finance, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, 2 December 2013.

32 Correspondence from Dr Rosemary Laing, Clerk of the Senate, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, 6 March 2014, p. 2.

33 *Committee Hansard*, 14 February 2014, p. 3.

grants have been put in place and how they have gone. So, it will be a significant benefit to the not-for-profit sector but also has significant accountability benefits to parliament.<sup>34</sup>

### ***Threshold for AusTender***

2.29 The Commonwealth Procurement Rules require *Financial Management and Accountability Act 1997* (FMA Act) agencies to report contracts on AusTender which are valued at or above \$10 000.<sup>35</sup>

2.30 During Additional Estimates 2013-14 hearings, the Secretary for the Department of Finance, Mr David Tune, informed the Senate Finance and Public Administration Legislation Committee that the threshold for reporting contracts on AusTender will be lifted from \$10 000 to \$20 000.<sup>36</sup> Mr Tune described the lifting of the reporting threshold as a 'smallish change, which will basically reduce the reporting burden for agencies'.<sup>37</sup>

### ***Public Governance, Performance and Accountability Act 2013***

2.31 In correspondence with the committee the Clerk noted, regardless of the committee's decision in respect of AusTender, the Senate order would need to be updated to reflect changes as a result of the *Public Governance, Performance and Accountability Act 2013* (PGPA Act).

2.32 Currently the Senate order defines 'agency' to mean an agency within the meaning of the FMA Act. On 1 July 2014 the PGPA Act will replace the FMA Act and the *Commonwealth Authorities and Companies Act 1997* (CAC Act), and put in place a single framework for the governance, accountability and performance of Commonwealth entities.

2.33 In its first report on the operation of the Senate order, the committee recommended that, from 1 January 2004, the Senate order be extended to cover CAC Act bodies.<sup>38</sup> The government did not support this recommendation:

The Government is not in favour of extending the Order to CAC Act bodies as they operate under a completely different legislative and governance framework compared with their [FMA Act] counterparts.

This arrangement was endorsed by the Parliament when it enacted a separate legislative framework for these bodies in the form of the CAC Act.<sup>39</sup>

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34 Dr Stein Helgeby, Department of Finance and Deregulation, *Budget Estimates Hansard*, 29 May 2013, p. 34.

35 Commonwealth Procurement Rules, 1 July 2012, paragraphs 7.16 and 7.17.

36 *Additional Estimates Hansard*, 25 February 2014, p. 87.

37 *Additional Estimates Hansard*, 25 February 2014, p. 87.

38 See 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, p. 44.

2.34 In the second report on the operation of the Senate order, the Senate Standing Committee on Finance and Public Administration recommended that the Senate order should apply to CAC Act bodies, as well as to FMA Act bodies.<sup>40</sup> Specifically, that Committee concluded:

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 [Senate] order.<sup>41</sup>

2.35 The government did not support the recommendation, arguing:

The Government is not in favour of extending the coverage of the order to cover CAC Act bodies as they operate under a different legislative and governance framework than those agencies that operate under the *Financial Management and Accountability Act 1997*. CAC Act bodies also commonly operate with financial independence from the Government.

The majority of CAC Act bodies are also not bound by the Commonwealth Procurement Guidelines, and the requirement for them to abide by the Senate Order through the use of the AusTender system could create confusion among agencies.<sup>42</sup>

### **Role of the Auditor-General**

2.36 In its submission, the ANAO provided details on the improvements in the reporting of confidentiality provisions in government contracts over the period the Senate order has been in operation:

Over this period, the proportion of contracts reported as containing confidentiality provisions across Government agencies has declined significantly from 24 per cent for the 2001-02 financial year to four per cent for the 2012 calendar year.<sup>43</sup>

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39 Government Response to 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*, June 2003, p. 7.

40 See 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 (2003-2006)*, February 2007, pp 47-48.

41 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 (2003-2006)*, February 2007, p. 48.

42 Government Response to Senate Standing Committee on Finance and Public Administration Report, *Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-2006)*, 26 August 2008, p. 6.

43 *Submission 1*, p. 2.

2.37 At the public hearing the Auditor-General, Mr Ian McPhee, emphasised his view that the Senate order has brought about real cultural change in agencies:

[W]e have now had 10 years or more of agencies being responsive to the Senate order requirements [and it] is a fair time to embed the thinking. To be frank with you, I think the earlier performance of agencies just stamping everything commercial-in-confidence was a little mindless. I saw it in my own organisation where we had contracts with accounting firms, and it seemed to be a matter of course that that was done. We have gone past that.<sup>44</sup>

2.38 The ANAO's submission noted it is difficult to make 'a definitive assessment of the year on year trends on the appropriateness of use of confidentiality provisions'.<sup>45</sup> However, the ANAO continued:

[The] audits have observed that where there has been inappropriate use of confidentiality provisions, it has been generally due to a lack of understanding in agencies of how to identify, apply and report the various types of confidentiality provisions under the Order.<sup>46</sup>

2.39 At the public hearing the Auditor-General noted that over-reporting of confidentiality provisions was one of the main problems that agencies had in respect of the Senate order:

If anything, there is over-reporting of information that agencies believe to be meeting the requirements of the Senate order. They are misunderstanding, in many cases, the requirements of the order, and across the years we have encouraged Finance to more clearly articulate the requirements. For instance, one of the classic areas where they misreport is where contracts have general requirements of confidentiality—that is, contractors and the agency have to meet the requirements of the Privacy Act, which are general requirements that are on all parties. People misunderstand that to be one of the matters that the Senate order is interested in. It is not. [The Senate] order is going to where people are claiming commercial in confidence, trade secrets or those sorts of confidentiality.<sup>47</sup>

2.40 The ANAO's submission noted that since 2011, the ANAO's audits have not made any new recommendations on the inappropriate use of confidentiality provisions.<sup>48</sup> There was a clear sense of frustration from the Auditor-General at the public hearing as he questioned the further effect of ANAO's annual compliance audits in addressing the inappropriate use of confidentiality provisions:

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44 *Committee Hansard*, 14 February 2014, p. 15.

45 *Submission 1*, p. 2.

46 *Submission 1*, p. 2.

47 *Committee Hansard*, 14 February 2014, p. 13.

48 *Submission 1*, p. 2.

At one level it is understandable that agencies get confused, but I think that after 10 years, during which we have been hammering away through 16 audit reports, there is a limit to how much we can do here. It is really a matter for, firstly, central agency guidance and, secondly, agency training.<sup>49</sup>

2.41 In terms of the guidance provided by Finance to agencies, the Auditor-General indicated that there were some 'problem areas' which could be addressed:

Finance have been responsive when we have suggested directly that they revise the guidance. I noticed in the latest report that there is one area where they have not yet updated the guidance, but by and large it has been updated. Personally I think a little bit more emphasis could be given to these two or three problem areas where agencies get confused. It does not take much to put out a concise note to agencies saying: 'Be aware that these are the common areas of problems. Please review your own performance and basically lift your game.'<sup>50</sup>

2.42 The Clerk of the Senate also referred to the guidance provided to agencies by Finance:

Another issue [for the committee] is the adequacy of the current guidance on confidentiality provisions and whether it incorporates all the lessons derived from the Auditor-General's numerous compliance reports...Clearly, the committee would wish to assure itself of the adequacy of this guidance, and such an assurance could be built into [the Senate] order; for example, by reference to guidance approved by the committee. This mechanism has been used elsewhere, including in relation to the preparation of departmental annual reports in accordance with guidelines approved by the Joint Committee of Public Accounts and Audit.<sup>51</sup>

### ***Ongoing compliance monitoring***

2.43 In correspondence to the committee the Clerk of the Senate also noted the improvement in the proportion of government contracts containing inappropriate confidentiality provisions. The Clerk commented that the ANAO's compliance audits 'appear to have had an educative effect and it may well be that the consumption of resources on annual audits can now only produce diminishing returns'.<sup>52</sup>

2.44 However, the Clerk indicated that the committee should give careful consideration to the implications of the Auditor-General no longer conducting annual compliance audits pursuant to the Senate order:

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49 *Committee Hansard*, 14 February 2014, p. 13.

50 *Committee Hansard*, 14 February 2014, p. 13.

51 Correspondence from Dr Rosemary Laing, Clerk of the Senate, to Senate Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 6 March 2014, pp 3-4.

52 Correspondence from Dr Rosemary Laing, Clerk of the Senate, to Senate Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 8 January 2014, pp 1-2.

It is also apparent, however, that the same problems of mischaracterising contracts as having confidentiality provisions when they do not, or inappropriately applying confidentiality clauses to situations that do not meet the confidentiality test, are continuing to occur. An important question for the committee, therefore, is what quality assurance would be available to the Senate if the annual compliance audits were to cease?<sup>53</sup>

2.45 At the public hearing the Auditor-General indicated that the ANAO, through its general audits of procurement, can 'continue to keep an eye on performance and put our hand up if it looks like there is some backsliding'.<sup>54</sup>

2.46 Ms Edel Kairouz, Executive Director, ANAO, explained how monitoring of confidentiality provisions in government contracts would be taken into account in general audits:

When we are doing our program audits, we apply the confidentiality test in the same way we currently do to the procurements within that program. We would look to see whether or not there were any specific provisions claimed in the contracts and test those against the confidentiality test to see if there were valid reasons for them being claimed. We would apply essentially the same process as we do at the moment and we would report that within the audit report.<sup>55</sup>

2.47 On notice, the Auditor-General expanded on the monitoring work that the ANAO could do outside of its current annual compliance audits and general audit program:

A further element of our approach to procurement related audits would be to undertake an audit of the use by agencies of AusTender. I expect to include this as a potential audit topic in the July 2014 Audit Work Program.

As always, the Committee is able at anytime to make requests to me to undertake particular audits. I have always sought to accommodate requests from the Committee in our program and will continue with this approach in our forward scheduling of audits.<sup>56</sup>

2.48 In further correspondence the Clerk of the Senate proposed another mechanism for encouraging agencies to use confidentiality provisions appropriately:

Currently, the order simply requires Senate ministers to provide letters of advice about the availability of the specified information. It would be consistent with the doctrine and practice of ministerial accountability if the Senate were to require its ministers to also provide a level of quality

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53 Correspondence from Dr Rosemary Laing, Clerk of the Senate, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 8 January 2014, p. 2.

54 *Committee Hansard*, 14 February 2014, p. 15.

55 *Committee Hansard*, 14 February 2014, p. 16.

56 Correspondence from Mr Ian McPhee, Auditor-General of Australia, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 24 February 2014.

assurance in respect of the confidentiality provisions in the listed contracts. In other words, the Senate could require ministers to table letters certifying that a list of the required contract information was available at a particular location (which could be on AusTender in a report generated by Finance for the purpose) AND that none of the contracts include inappropriate confidentiality provisions as measured against central agency guidance...Clearly, before signing such letters, ministers would need appropriate assurances from agency heads who would therefore have a greater incentive to be satisfied of the robustness of their own agency procedures in applying central agency guidance.<sup>57</sup>

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57 Correspondence from Dr Rosemary Laing, Clerk of the Senate, to Senator the Hon Kate Lundy, Chair, Senate Finance and Public Administration References Committee, dated 6 March 2014, pp 2-3. Emphasis in original.



## **CHAPTER 3**

### **COMMITTEE VIEW**

3.1 The committee strongly supports the continuation of the Senate order for the production of lists of departmental and agency contracts (Senate order). Since the introduction of the Senate order there has been a significant decrease in the proportion of government contracts containing confidentiality provisions – from 24 per cent in the 2001-02 financial year to four per cent in the 2012 calendar year.

3.2 The committee's third report into the operation of the Senate order has been narrowly focussed on two matters: the use of AusTender to comply with the order; and an assessment of the ongoing role of the Auditor-General in auditing compliance with the Senate order.

3.3 In forming its recommendations the committee has sought to ensure that the culture of transparency and openness in relation to government contracts, which has developed during the period of operation of the Senate order, is maintained.

#### **AusTender**

3.4 The Minister for Finance is seeking the committee's support to update the whole-of-government guidance developed by the Department of Finance (Finance) to enable agencies to reference AusTender when complying with the Senate order. Currently this guidance is contained in Financial Management Guidance No. 8 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate order on Departmental and Agency Contracts)* (FMG 8).

3.5 The committee encourages initiatives which remove the duplication of agencies' reporting functions. However, in the context of this inquiry, the primary consideration for the committee is ensuring that the proposed AusTender reports are capable of complying with the Senate order.

3.6 Specifically, the Senate order requires that Ministers table a letter advising a list of contracts has been placed on the Internet, with access to the list through the department's or agency's homepage. The committee understands the reference to a 'list of contracts' to mean a compiled list of the agencies contracts in accordance with paragraph (2) of the Senate order.

3.7 The demonstration of AusTender during the public hearing failed to show that AusTender is capable of producing reports that comply with the Senate order. AusTender requires a user to manually input the requirements in paragraph (2) of the Senate order – with respect to dates, agency and contract value – and subsequently generates a list of contracts which meets those parameters. Essentially, a user must perform their own search to extract a list of contracts which meets the requirements of the Senate order from all the other data in AusTender.

3.8 In the committee's view requiring Senators to perform their own searches in AusTender in order to generate the list of contracts undermines the intent of the Senate order to improve transparency. For AusTender reports to comply with the Senate order, the committee's expectation is that there is access to a pre-generated list

of contracts for agencies. Ideally, there would be individual reports for agencies and not a single report of a compilation of all reportable contracts from all reporting agencies. Until this occurs the committee cannot support agencies using AusTender as it currently operates as a means to comply with the Senate order.

3.9 The committee notes the subsequent assurance by the Minister for Finance that AusTender will be modified so Senate order reports will be pre-generated, that is compiled for individual agencies without users needing to set search parameters. However, the committee has not had the opportunity to view this capability. Therefore, the committee requires that Finance provide the committee with a link to a prototype AusTender webpage with agencies' compiled Senate order reports for the 2013-14 financial year. This link should be provided to the committee by 1 September 2014. The committee will then consider whether this modification to AusTender complies with the Senate order.

3.10 Subject to the caveat that the committee is satisfied that AusTender is able to produce reports which comply with the Senate order, the committee provides the following discussion and recommendations with a view to supporting agencies being able to use AusTender for a trial period of 18 months from 1 January 2015 to meet Senate order reporting obligations.

#### ***Finance guidelines***

3.11 In order to facilitate the 18-month trial of AusTender as a mechanism for agencies to comply with the Senate order, the committee supports updating FMG 8. However, given the committee's reservations about the use of AusTender set out above, the committee recommends Finance provide the revised version of FMG 8 to the committee in draft form by 1 September 2014 for consideration and approval by the committee.

#### **Recommendation 1**

**3.12 The committee recommends the Department of Finance provide to the committee by 1 September 2014:**

- **a link to a prototype of the AusTender website with agencies' compiled Senate order reports for the 2013-14 financial year; and**
- **a copy of the revised version of Financial Management Guidance No. 8 *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate order on Departmental and Agency Contracts)* in draft form.**

3.13 Paragraph (1) of the Senate order requires that a Minister's letter of advice state that a list of contracts has been placed on the Internet with access to the list through the department's or agency's homepage. The committee does not propose amending this wording in the Senate order prior to the trial. The committee envisages that for the purposes of the trial, agencies will provide a link to AusTender via the homepages, in addition to the link where non-procurement contracts are listed.

3.14 It is the committee's intention to review the operation of AusTender and its use by agencies to comply with the Senate order at the end of the 18-month trial period. At that time, should the committee take the view that a permanent move be

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made for agencies to use AusTender to report contracts pursuant to the Senate order, the committee will also consider whether the Senate order should be amended to:

- refer to AusTender as a means for agencies to comply with the Senate order;
- provide that any future amendments to FMG 8 (or other Finance guidance to agencies which is relevant to the Senate order) should be considered and approved by the committee; and
- accommodate the Minister's proposal for the Senate order to capture contracts 'published' in the six month reporting period, rather than contracts 'active' during the past 12 months.

### ***Data integrity***

3.15 The committee notes with concern the findings in the Auditor-General's annual reports on compliance with the Senate order on problems with data integrity in respect of agencies reporting pursuant to the Senate order and on AusTender. The committee is also mindful of Finance's position – while assuring the committee of the robustness of data in AusTender – that the integrity of data in AusTender is the responsibility of individual agencies.

3.16 However, the Clerk of the Senate makes an important point that the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) will strengthen the legislative obligations on the agency's head with respect to the accuracy of reporting of data. Further, the committee agrees with the conclusion of the Clerk that the reputational damage that comes as a result of inadequate administrative practices should provide a sufficient incentive for heads of agencies to ensure contract data is accurately reported.

3.17 The committee also believes that there is some validity to Finance's position that a reduced reporting burden will assist improving data quality, that is, allowing agencies to report Senate order contracts using AusTender will increase the accuracy of reporting.

3.18 Following the completion of the 18-month trial, the committee intends to examine closely the performance of agencies using AusTender.

### ***Non-procurement contracts***

3.19 The committee notes that AusTender can only be used to comply with the Senate order in respect of procurement contracts. All other non-procurement contracts required to be reported pursuant to the Senate order will need to be reported using the current mechanism, that is, a list which is accessed via a link on individual agencies' homepage.

3.20 The committee also notes that Finance is currently developing the 'AusGrant' site which, in future, may have some role in fulfilling the reporting requirement for the Senate order in respect of some non-procurement contracts.

### ***New reporting threshold for AusTender***

3.21 The committee would like to put on the record its reservations about implications for the transparency in lifting the reporting threshold AusTender has on contracts valued between \$10 000-\$20 000.

3.22 The committee notes the evidence of Mr John Sheridan, First Assistant Secretary, Technology and Procurement Division, Department of Finance, that contracts that fall in the range of \$10 000-\$20 000 represent 0.7 per cent by value of total contracts.<sup>1</sup> However, the committee acknowledges that lifting the reporting threshold for AusTender to \$20 000 will not impact on compliance with the Senate order due to its reporting threshold of \$100 000.

### ***Title for AusTender reports***

3.23 AusTender contains a vast amount of information which is able to be viewed using a number of categories. It is important that information pursuant to the Senate order is user-friendly and visible on the AusTender website. In the committee's view, while the current title of the Senate order report on AusTender – 'Senate Order on Confidentiality in Procurement Contracts' – is reasonably clear, the committee agrees with the Clerk of the Senate that the report title, could be more explicit.

## **Recommendation 2**

**3.24 The committee recommends the Department of Finance amend the title of the report in AusTender to 'Agency reports complying with the Senate order on procurement contracts and use of confidentiality provisions'.**

### **Amendment of the Senate order**

3.25 During the course of the inquiry the committee reached the conclusion that there are some aspects of the Senate order which should be amended. These matters are discussed below. The committee accepts with gratitude the offer of the Clerk to assist with the drafting of amendments to the Senate order.

### ***Role of the Auditor-General***

3.26 The committee agrees with the Auditor-General that, in terms of the inappropriate use and reporting of confidential clauses in contracts by agencies 'we are over the worst'.<sup>2</sup> The committee is therefore sympathetic to the Auditor-General's view that the need for ongoing annual audits of compliance with the Senate order has diminished.

3.27 However, given the trial of changes to compliance with the Senate order in respect of AusTender, the committee is reluctant to move directly to a model whereby the Auditor-General will monitor compliance with the Senate order through the ANAO's audit of programs more generally. In the committee's view, the oversight by the Auditor-General will be critical in the committee's assessment of the success

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1 See Finance and Public Administration Legislation Committee, *Additional Estimates Hansard*, 25 February 2014, p. 101.

2 *Committee Hansard*, 14 February 2014, p. 13.

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(or otherwise) of agencies' reporting pursuant to the Senate order during the 18-month trial of AusTender.

3.28 The committee therefore prefers a phased approach to changing the role of the Auditor-General. This phased transition would see the Auditor General perform biennial audits for the next four years. That is, the committee expects that the Auditor-General will table a report no later than 30 September 2014 pursuant to the current Senate order. The committee then recommends that the Senate order be amended to reflect that the Auditor-General will table two subsequent reports no later than 30 September 2016 and 30 September 2018.

### ***Certification by Ministers***

3.29 While the committee is recommending the annual audit of compliance by the Auditor-General be phased out, the committee believes that there should be some form of quality assurance mechanism contained within the Senate order as an incentive for agencies to use confidentiality provisions appropriately.

3.30 To this end, the committee believes that the proposal by the Clerk, that Ministers be required to certify in the letters tabled pursuant to paragraph (1) of the Senate order, that none of the contracts in the list include inappropriate confidentiality provisions as measured against the guidance issued by Finance, is appropriate.

### ***Public Governance, Performance and Accountability Act 2013***

3.31 The committee accepts the advice of the Clerk of the Senate that the Senate order will need to be amended to reflect recent legislative changes as a result of the PGPA Act, specifically the reference to an 'agency' being an *Financial Management and Accountability Act 1997* (FMA Act) agency.

3.32 In the previous two reports on the operation of the Senate order the committee has recommended that the order be expanded to cover *Commonwealth Authorities and Companies Act 1997* (CAC Act) bodies. That recommendation was rejected by the government on both occasions on the basis that CAC Act bodies operate under a different legislative scheme to FMA Act agencies. The PGPA Act will bring CAC Act bodies and FMA Act agencies under the same legislative scheme, therefore removing the reason for not extending the operation of the order to CAC Act bodies. The committee therefore supports the order being extended to cover all Commonwealth entities under the PGPA Act.

### ***Technical matter***

3.33 Finally, the committee believes that other technical aspects of the Senate order, for example the committee's name in paragraph (7) of the order, would benefit from review and updating.

**Recommendation 3**

**3.34 The committee recommends that the Senate order be amended:**

- **to provide that, following the tabling of the Auditor-General's report pursuant to paragraph (5) of the Senate order in 2014, the Auditor-General conduct an audit of compliance with the Senate order biennially for the next four years with reports due no later than 30 September 2016 and 30 September 2018;**
- **to provide that in the letter of advice tabled pursuant to paragraph (1) of the Senate order, that Ministers must certify that none of the contracts included in the list contain inappropriate confidentiality provisions as measured against the Department of Finance's guidance;**
- **to reflect legislative changes as a result of the *Public Governance Performance and Accountability Act 2013*, so the Senate order applies to Commonwealth entities; and**
- **with respect to any further technical aspects of the Senate order which are found, in consultation between the Clerk of the Senate and the committee, to require amendment.**

**Senator Kate Lundy**

**Chair**

# **APPENDIX 1**

## **Senate order for departmental and agency contracts**

(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 twelvemonth 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 (3), the Auditor-General be requested to indicate in a report under paragraph (5) 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 Committee consider the ongoing operation of the order and report on relevant developments from time to time.

(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 2**

### **Submissions and Additional Information received by the Committee**

#### **Submissions**

- 1 Australian National Audit Office
- 2 Department of Finance

#### **Answers to Questions on Notice**

- 1 Answer to Question on Notice, Department of Finance, 14 February 2014, received 24 February 2014

#### **Additional Information**

- 1 Correspondence from the Auditor-General to the committee dated 29 November 2013
- 2 Correspondence from the Minister for Finance to the committee dated 2 December 2013
- 3 Correspondence from the Clerk of the Senate to the committee dated 8 January 2014
- 4 Department of Finance, Additional Information, received 14 February 2014
- 5 Correspondence from the Auditor-General to the committee dated 24 February 2014
- 6 Correspondence from the Clerk of the Senate to the committee dated 6 March 2014
- 7 Correspondence from the committee to the Minister for Finance dated 20 March 2014
- 8 Correspondence from the Minister for Finance to the committee dated 27 March 2014



# **APPENDIX 3**

## **Public Hearing**

*Friday, 14 February 2014*

*Senate Committee Room 2S1*

*Parliament House, Canberra*

**Witnesses**

### **Department of Finance**

Ms Jan Mason, Deputy Secretary, Business, Procurement and Asset Management

Ms Yvette Sims, Assistant Secretary, Procurement Policy Branch

Ms Lynne Ford, Director, AusTender

### **Australian National Audit Office**

Mr Ian McPhee PSM, Auditor-General

Dr Andrew Pope, Group Executive Director

Ms Edel Kairouz, Executive Director

Ms Rowena Hayman, Audit Manager