

ANAO ACCESS TO RECORDS AND PREMISES

6.1 The Audit Report noted that access to contractors' records had become a more general issue recently with the increasing use of third party service providers to deliver government services. The ANAO referred in the Audit Report to its request that agencies provide for:

- the agency to have access to contractors' records, information and assets directly relevant to contract performance to give the agency an adequate level of control and performance monitoring of contractual arrangements; and
- the ANAO to have an equivalent level of access (but not an unfettered access to contractors' premises) to enable the ANAO to fulfil its statutory responsibility to Parliament.¹

6.2 Defence disagreed with Audit Report Recommendation no. 3, that future major Defence contracts provide the opportunity for direct access by the ANAO to records of transactions of contractors or major subcontractors which support the expenditure of Commonwealth funds.²

6.3 In April 1998, the JCPAA asked Defence to explain its reasons for disagreeing with the ANAO's recommendation.³

6.4 Defence stated that in its opinion, the ANAO had access to adequate documents and information to form a view on the Commonwealth's interests in the management of any major Defence contract.⁴

1 *Audit Report No. 34, 1997-98*, p. 44.

2 *Audit Report No. 34, 1997-98*, p. 45.

3 *Transcript, 29 April 1998*, p. PA 41.

4 Mr Gilbert Watters, Acting first Assistant Secretary, Capital Equipment Program, DAO, *Transcript, 29 April 1998*, p. PA 41.

6.5 In terms of the ANAO's right to audit private organisations Defence commented:

I think it is a matter for the parliament to consider in relation to the role of the audit office rather than a matter for Defence to consider through its contracts.⁵

6.6 In response to a request from the Committee for comment, the Auditor-General stated:

The new Auditor-General Act includes a provision which allows me and my office to seek information in relation to Commonwealth expenditure from private sector suppliers. What it does not do is go the next step and allow access to premises. When this issue was raised, the suggestion was that the provision in the act was sufficient, because if we were to ask [for] information then the onus would be on the relevant agency to make sure that that information was provided. The normal requirement and expectation would be that the contractual arrangements would allow the agency to do so. There are quite a number of contracts which do allow this and a number of contracts which do not.⁶

6.7 The Auditor-General noted that the Minister for Finance and the then Department of Finance endorsed the promulgation, through Commonwealth Procurement Guidelines, of standard contract clauses relating to access to records and premises by the ANAO. These standard access clauses were circulated to agency heads and CEOs of Commonwealth authorities and companies by the Auditor-General, with a recommendation that they be used when developing contracts with third party providers.⁷

6.8 In commenting further the Auditor-General noted:

... there would be very few instances where [the ANAO] would need to have physical access to client's premises. But it is our experience that when an audit question is asked there are normally about 20 other questions that follow. It is in the interests of both the auditee, the supplier and the audit office to overcome and deal with these questions in a

5 Mr Gilbert Watters, Acting first Assistant Secretary, Capital Equipment Program, DAO, *Transcript*, 29 April 1998, p. PA 42.

6 Auditor-General, *Transcript*, 29 April 1998, p. PA 42.

7 Auditor-General, *Transcript*, 29 April 1998, p. PA 42.

*timely fashion Having access to records in [the submarine audit] would have facilitated that considerably.*⁸

6.9 In March 1999, the Committee again raised the matter of Defence's reluctance to include in its contracts an access to premises provision for the ANAO.⁹

6.10 Defence argued that in a fixed price contract environment, it was considered inappropriate to impose an intrusive regime on the contractor.¹⁰

*The Defence view is basically that, if this parliament wishes the Auditor-General to have that facility, it should legislate accordingly because I think it will cause some difficulty for a whole lot of defence contractors, particularly small contractors, to have this blanket ability of the Auditor-General to come in and go onto the premises and inspect the books. The vast majority of things we buy from industry in Australia are on a fixed price basis and are not on a basis where I think it is reasonable to then ask the company to open up their books. They quoted competitively. It was awarded competitively. [Companies] are entitled to be paid what was agreed in the contract.*¹¹

Committee comments

6.11 The Committee notes Audit Report Recommendation No. 3, that future Defence contracts provide for direct access by ANAO to records of transactions of contractors. Defence disagreed with this recommendation and continued to insist that the Auditor-General had sufficient access to Defence records to audit the submarine project.

6.12 The primary responsibility for ensuring sufficient access to relevant records and information pertaining to a contract lies with agency heads in accordance with Section 44 of the *Financial Management and Accountability Act 1997*.

8 Auditor-General, *Transcript*, 29 April 1998, pp. PA 42-3.

9 *Transcript*, 5 March 1999, pp. PA 108, 109.

10 Mr Garry Jones, Deputy Secretary, Acquisition, Defence, *Transcript*, 5 March 1999, p. PA 109.

11 Mr Garry Jones, Deputy Secretary, Acquisition, Defence, *Transcript*, 5 March 1999, pp. PA 109-10.

6.13 Although the Commonwealth Procurement Guidelines issued in March 1998 include a provision that Commonwealth buyers should ensure that, where appropriate, adequate provision is made in contracts for access to records by the ANAO, and buyers are required by the Financial Management and Accountability Regulation to 'have regard' to the Guidelines, such guidance is not mandatory. Further, there is no indication in the Guidelines of the kind of access provision the Auditor-General would prefer.

6.14 While these model clauses have been applied in a number of contracts, the Committee notes that despite the Auditor-General's strong recommendation, many agencies appear not to be prepared to open their own contract management activities to scrutiny.

6.15 The Committee rejects Defence's claim that Defence contracts already provide for adequate Commonwealth access for management of contracts.¹²

6.16 The Committee's view is that some agencies may see a benefit in the reduced accountability that can occur when services are outsourced to the private sector. Because of this, the Committee considers that the Auditor-General—and not the agency concerned—is best placed to judge the matter of whether he has adequate access to documentation to carry out an audit.

6.17 Moreover, the Committee disagrees with Defence that access to premises would raise Defence's net cost of doing business.¹³ It is the experience of the Committee that most contractors expect the Commonwealth to scrutinise expenditure and are surprised when the Commonwealth does not choose to do so.

6.18 The Auditor-General has stated that the need for access to premises of third party service providers is, in practice, likely to be required in very few situations, and has emphasised that such access, where necessary, would contribute to an audit being undertaken in an efficient and cooperative manner.

12 *Audit Report No. 34, 1997-98*, p. 45.

13 Mr Garry Jones, Deputy Secretary, Acquisition, Defence, *Transcript*, 5 March 1999, p. PA 110.

6.19 The Committee considers that it will not always be clear to agencies when contracts with third party providers are entered into, that there may be a later need for the Auditor-General to access premises in order to carry out his statutory responsibility to Parliament. The Committee is also aware that from time to time, agencies are not as cooperative as they could be in assisting the Auditor-General to access contractors' information and records. In the Committee's view, such access is integral to effective management of such contracts and the successful audit of contract outcomes. The Committee therefore makes the following recommendation:

6.20 **Recommendation 5**

The Committee recommends that the Minister for Finance make legislative provision, either through amendment of the Auditor-General Act or the Finance Minister's Orders, to enable the Auditor-General to access the premises of a contractor for the purpose of inspecting and copying documentation and records directly related to a Commonwealth contract, and to inspect any Commonwealth assets held on the premises of the contractor, where such access is, in the opinion of the Auditor-General, required to assist in the performance of an Auditor-General function.

C o n s u l t a n t s e n g a g e d b y A N A O

6.21 A separate, but related issue raised in the Audit Report, was that two consultants engaged by ANAO to assist with the submarine audit had been excluded from access to Commonwealth assets on ASC premises on the basis that they had been former ASC employees, and ASC considered that there was a potential conflict of interest in access being allowed.¹⁴

6.22 The Committee asked the Auditor-General whether or not he regarded potential conflict of interest as justifying a refusal of access.¹⁵

14 *Audit Report No. 34, 1997-98, p. 45.*

15 *Transcript, 29 April 1998, p. PA 72.*

6.23 In his response the Auditor-General stated that he did not agree with the conflict of interest argument:

*Where people are appointed legitimately under the Audit Act and assume the very stringent obligations under that act, it seems to me that, particularly in an area where there are very few people who have any expertise, one is drawing a very long bow indeed to be talking about potential conflicts of interest.*¹⁶

6.24 The Auditor-General emphasised that the problem arose partly because of the uncertainty about authority regarding access to premises from the audit point of view:

*... if ... the issue was only about conflict of interest, then I think we could have had a reasonable discussion and settled that issue.*¹⁷

6.25 When questioned by the Committee, Defence stated that access was denied by ASC and not by Defence and that it was therefore an issue to be taken up with ASC.¹⁸

6.26 When asked by the Committee why it was not concerned about the refusal of access to the Auditor-General, Defence replied that it was due in part to the type of activities to be undertaken during that visit (ie CMACS audit) and that it was Defence's view that such activities could be performed as completely within the Defence Organisation and the Commonwealth's interest protected to Defence's satisfaction:

*We have an Inspector-General's division, which does quite a bit of auditing of major capital projects It is not uncommon for the Inspector-Generals' division to look at the way the Defence Acquisition Organisation does business. We have also instituted within the acquisition organisation an acquisition review program, which takes a very high level review of contracts that are in progress. I think there is probably adequate oversight at the moment of the way in which the acquisition organisation does business.*¹⁹

16 Auditor-General, *Transcript*, 29 April 1998, p. PA 72.

17 Auditor-General, *Transcript*, 29 April 1998, p. PA 73.

18 Mr Gilbert Watters, Acting first Assistant Secretary, Capital Equipment Program, DAO, *Transcript*, 29 April 1998, p. PA 73.

19 Mr Gilbert Watters, Acting first Assistant Secretary, Capital Equipment Program, DAO, *Transcript*, 29 April 1998, p. PA 74.

6.27 When asked by the Committee to consider that there was a difference between Defence's being satisfied that the Commonwealth's interests were being protected and the Auditor-General's being satisfied as to that, Defence stated:

*I think the relationship between the Commonwealth and the ASC is as determined by the contract. If you see a role for the audit office outside that contract I think it is an issue that needs to be pursued under some mechanism other than the contract.*²⁰

6.28 When Defence assured the Committee that provisions existed in the contract for Commonwealth access, the Committee asked how it was that the Auditor-General, as the Commonwealth's representative, could be denied access.²¹

6.29 Defence replied that the activities proposed for the visit by ANAO concerned CMACS audit activities and, while not able to speak for ASC, thought that ASC may have considered that access for the activity had been completed.²²

6.30 In conclusion, Defence put forward the view that Defence, which managed the submarine contract, had access to records, and that the ANAO had access to those records through Defence:

*I am not sure that there is a necessity, as a result of that, for the National Audit office to actually audit the books of a contractor.*²³

6.31 The Committee was later told by ASC that there was dissatisfaction on its part with the ANAO's proposal to employ two former ASC employees as consultants to assist on the ANAO audit, and that ASC had communicated its objection to the ANAO.

6.32 The ANAO advised the Committee that ASC's objections were that the proposed consultants' early departure

20 Mr Gilbert Watters, Acting first Assistant Secretary, Capital Equipment Program, DAO, *Transcript*, 29 April 1998, p. PA 74.

21 Mr John Hyman, Commercial Director, Undersea Warfare Systems, Defence, *Transcript*, 29 April 1998, p. PA 75.

22 Mr John Hyman, Commercial Director, Undersea Warfare Systems, Defence, *Transcript*, 29 April 1998, p. PA 75.

23 Mr Gilbert Watters, Acting first Assistant Secretary, Capital Equipment Program, DAO, *Transcript*, 29 April 1998, p. PA 75.

from the project would render their input obsolete and that concerns were held by ASC over their objectivity and impartiality.²⁴

6.33 ANAO told the Committee that while it was its view that it was auditing the Department of Defence and not ASC, it had advised Defence that it was willing to consider valid reasons for not engaging the two former ASC employees and was also willing to consider other consultants. ANAO stated that it had subsequently sought comments on the two proposed consultants from referees and the comments were favourable. ASC had not elaborated on its reservations, and as it was ANAO's view that it was unclear that valid reasons for not engaging the consultants had been raised by ASC, the consultants had subsequently been engaged.²⁵

C o m m i t t e e c o m m e n t s

6.34 The Committee considers that when appropriate persons are chosen with due consideration, appointed under the Audit Act and bound by the legal obligations that that entails, the argument that there is a conflict of interest associated with their employment is difficult to sustain. In this instance, the Committee agrees that the lack of certainty about the ANAO's authority to access premises did not enhance the ANAO's ability to carry out its audit task.

6.35 It would assist the Committee if when, in the process of an audit, expert consultants are used by ANAO, the process and reasons for choosing them, together with any other relevant information, are set out in the audit report.

24 ANAO, Correspondence, 3 May 1999, p. 2.

25 ANAO, Correspondence, 3 May 1999, p. 2.