



Audit Report No.29 2011–12

Administration of the Australia Network Tender Process

Introduction

- 2.1 The Australia Network is an overseas television broadcasting service designed to ‘promote Australia's image in the Asia–Pacific region’ and ‘provide consular information to Australians living abroad, particularly in times of crisis’.¹ The service broadcasts in more than 44 countries across Asia, the Pacific and the Indian subcontinent, and includes a range of programs including regional news, English language programs, international documentaries, lifestyle programs, drama, sports and children's programs.²
- 2.2 Since 2001, the Australian Broadcasting Corporation (ABC) has delivered the Australia Network service under two sequential contracts with the Government, administered by the Department of Foreign Affairs and Trade (DFAT). The most recent of these contracts was won by the ABC through a 2005–06 competitive tender process.³

1 Australian Government, *Budget Measures: Budget Paper No. 2 2011–12*, p. 202.

2 Australia Network, ABC, ‘About Us’, < <http://australiannetwork.com/about/> > viewed 18 July 2012.

3 Australian National Audit Office (ANAO) Audit Report No.29 2011–12, *Administration of the Australia Network Tender Process*, pp. 33, 35.

Initiation of the tender process

- 2.3 In November 2010, the Government decided that a competitive tender process would be used to award a new 10 year contract for the continued delivery of the Australia Network. This decision followed an industry consultation process, a review of the ABC's past performance, and a range of departmental advice.⁴ The decision was also in the context of a Government submission sponsored by the Communications Minister (Senator the Hon. Stephen Conroy) proposing that the ABC provide the service on a permanent basis.⁵
- 2.4 Initial advice from DFAT to the then Foreign Minister (the Hon. Kevin Rudd MP) was that the existing ABC contract should be extended by another five years, during which time options for either a longer-term contractual arrangement or further development of the Communications Minister's submission would be explored.⁶ However, through the budget process the Department of Finance and Deregulation (Finance) and the Treasury had indicated that if the service were to continue, a tender process would be the preferred option in order to ensure value for money. Additional advice from DFAT indicated that a new tender would enable the development of more quantifiable KPIs, establish a longer contract period, increase programming flexibility and give the Government greater scope to use the service as a public diplomacy tool.⁷
- 2.5 In early 2011, a Tender Evaluation Board (TEB) was formed consisting of senior officials from DFAT, the Department of the Prime Minister and Cabinet (PM&C), the Department of Broadband, Communications and the Digital Economy (DBCDE), Treasury, and Finance.⁸ A Request For Tender (RFT) was released by DFAT on 4 February 2011, attracting tenders from the ABC and the Australian News Channel Pty Ltd (ANC) – a joint venture of Nine Digital, Seven Media Group and British Sky Broadcasting.⁹ ANC is also the owner and operator of Sky News Australia.¹⁰

4 ANAO Audit Report No.29 2011-12, pp. 37-41.

5 ANAO Audit Report No.29 2011-12, p. 36.

6 ANAO Audit Report No.29 2011-12, p. 40.

7 ANAO Audit Report No.29 2011-12, pp. 40-41.

8 ANAO Audit Report No.29 2011-12, p. 53.

9 ANAO Audit Report No.29 2011-12, pp. 14-15.

10 ANC, 'About Sky News', <<http://www.skynews.com.au/common/corporate/anc.aspx>> viewed 18 July 2012.

Amendment and termination of the tender process

- 2.6 While DFAT had originally planned a six month tender process, in June 2011 significant changes were made to the tender process including: adding a new evaluation criterion to the RFT; replacing the Secretary of DFAT with the Communications Minister as the approver for the tender; and allowing the Communications Minister to make a decision that did not reflect the recommendations of the TEB. The ABC's contract was extended by six months to 8 February 2012 to enable the service to continue while the amended process was completed.¹¹
- 2.7 The Australia Network tender process attracted a high degree of media interest over the course of 2011. Most significantly, a newspaper article on 17 October 2011 contained specific references to the TEB's August 2011 supplementary tender evaluation,¹² and a further newspaper article on 24 October 2011 referred to the ABC's 2010 Performance Review,¹³ which had not been publicly released.¹⁴
- 2.8 On 7 November 2011, the Communications Minister announced that the Government had decided to terminate the tender process on public interest grounds 'due to significant leaks of confidential information to the media'.¹⁵ The Government also announced that it had asked the Australian Federal Police (AFP) to investigate the leaks, and the ABC's contract was extended by another six months (to August 2012) while a decision was made on the long term arrangements for the service.¹⁶ On 5 December 2011, the Government announced that the Australia Network service would be removed from further contestability and be provided by the ABC on a permanent basis.¹⁷
- 2.9 **Table 2.1** below summarises the key sequence of events in the tender process.

11 ANAO Audit Report No.29 2011-12, pp. 43-44.

12 Mark Day and Dennis Shanahan, 'Sky backed for Australia Network: Second tender process calls for move away from Aunty', *The Australian*, 17 October 2011, p. 32.

13 Daniel Flitton, 'Rudd forced tender on Asia service: Ruling overdue on \$223m TV deal', *The Age*, 24 October 2011, p. 4.

14 ANAO Audit Report No.29 2011-12, pp. 104-105.

15 Senator the Hon Stephen Conroy, Minister for Broadband, Communications and the Digital Economy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011; ANAO Audit Report No.29 2011-12, p. 109.

16 Senator Conroy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011.

17 ANAO Audit Report No.29 2011-12, p. 113; Senator Conroy, 'Government decides future for Australia Network', *Media Release*, 5 December 2011.

Table 2.1 Key events in the 2011 Australia Network tender process¹⁸

Date	Event
4 February 2011	Request for Tender announced on AusTender (DFAT11-CPD-02).
25 March 2011	Tender closed.
4 May 2011	Tender Evaluation Board submitted its recommendation to the Secretary of DFAT as the decision-maker for the tender.
6 July 2011	The Government requested tender participants to submit amended tender documentation relating to an additional evaluation criterion, and changed the approver from the Secretary of DFAT to the Communications Minister.
27 July 2011	Closing date for amended tenders.
27 October 2011	The Australian Federal Police requested to investigate the leaking of tender information (not announced until 7 November 2011).
7 November 2011	The Government announced that the tender process had been terminated and that the Australian Federal Police was conducting an investigation into alleged leaks.
5 December 2011	The Government announced that the ABC would provide the Australia Network service on a permanent basis.

Source Australian National Audit Office

Procurement framework

2.10 Expenditure of public money by Australian Government departments is subject to provisions of the *Financial Management and Accountability Act 1997* (FMA Act).¹⁹ Under the associated FMA Regulations, proposals to spend public money must be considered and approved by an appropriately authorised party before contracts can be entered into. An approver must be satisfied that a spending proposal is 'an efficient, effective, economical and ethical' use of Commonwealth resources that is 'not inconsistent with the policies of the Commonwealth'.²⁰

2.11 The Commonwealth Procurement Guidelines (CPGs) – which were recently revised and renamed as the Commonwealth Procurement Rules – provide the core procurement policy framework for departments operating under the FMA Act. The CPGs are issued under the authority of the FMA Regulations, and must be taken into account by Ministers and their agency officials when performing duties related to procurement.²¹ However, the ANAO notes that 'the CPGs are not exhaustive and it is the responsibility of agencies to manage procurement processes in a way that

18 Extracted from ANAO Audit Report No.29 2011-12, p. 45.

19 ANAO Audit Report No.29 2011-12, p. 41.

20 FMA Regulations 1997, Regulation 9.

21 ANAO Audit Report No.29 2011-12, p. 42. See FMA Regulations 1997, Regulation 7.

is proportional to the risk and sensitivity of the various procurements in which they are involved'.²²

Developments taking place since the tender's termination

- 2.12 The Australia Network tender process attracted considerable parliamentary interest. The Auditor-General received two requests to examine the tender process from the Deputy Leader of the Opposition; and one request from the Communications Minister.²³ The Communications Minister indicated in his request that the ANAO's comments on aspects of the tender process may help future tender processes to be as robust as possible.²⁴ These requests, and the broader parliamentary and public interest, resulted in the Auditor-General's performance audit being announced on 24 November 2011.²⁵
- 2.13 On 2 April 2012, the AFP finalised its investigation into the leaks to the media. The AFP informed a Senate committee in May 2012 that the investigation 'did not identify the person or persons responsible for disclosing the material'.²⁶

The ANAO Audit

Audit objective and scope

- 2.14 The objective of the audit was to report on the administration of the Australia Network tender process and to identify lessons learned from the conduct of the process to inform future procurement activities.²⁷
- 2.15 The audit examined the administration of the tender process, and also considered the advice provided to government and the manner in which government decisions were implemented, including compliance with procurement requirements. As the Government played a key role in tender decision-making, and took into account advice from several

22 ANAO Audit Report No.29 2011-12, p. 50.

23 ANAO Audit Report No.29 2011-12, p. 16.

24 ANAO, *Submission 2*, p. [1].

25 ANAO Audit Report No.29 2011-12, p. 16.

26 Andrew Colvin, Deputy Commissioner, Operations, Australian Federal Police, *Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee, Estimates, 24 May 2012, p. 54.

27 ANAO Audit Report No.29 2011-12, p. 16.

departments and advisors engaged by them, the audit report included references to the advice received in several areas.²⁸

- 2.16 The Auditor-General also took the 'extraordinary step' of including in the report references to briefings and submissions provided to Cabinet; Cabinet decisions; the deliberations and recommendations of the TEB; and complaints about the tender process.²⁹ These references were considered to be 'central to understanding the issues involved in the tender process and to provide context for the audit findings, conclusions and lessons learned', and their inclusion was considered to be not contrary to the public interest.³⁰
- 2.17 At the time of the audit, the AFP's investigation into the possible unauthorised disclosure of confidential tender information was underway. The ANAO considered these matters to be outside the scope of its audit, although DFAT's arrangements for the handling of tender information were examined.³¹

Overall audit conclusion

- 2.18 Although the audit found that the administrative arrangements for the tender were 'in the main, effective' and in line with the CPGs,³² the ANAO concluded that the 'manner and circumstances' in which the tender process was conducted 'brought into question the Government's ability to deliver such a sensitive process fairly and effectively'.³³
- 2.19 The following factors contributed to this conclusion:³⁴
- The differing views within government, including at the ministerial and departmental levels, about the decision-making process for the tender. The report noted that 'there was no formal documented decision of government in relation to the approval process in the early stages of the tender. Rather, there were clear indicators of different views being held'.³⁵

28 ANAO Audit Report No.29 2011-12, pp. 16-17.

29 ANAO Audit Report No.29 2011-12, p. 17.

30 ANAO Audit Report No.29 2011-12, p. 17.

31 ANAO Audit Report No.29 2011-12, p. 17.

32 ANAO Audit Report No.29 2011-12, pp. 19, 56, 60, 102, 112.

33 ANAO Audit Report No.29 2011-12, p. 24.

34 These key points were identified by the Auditor-General in his opening statement to the Committee, which was tabled at the public hearing and accepted by the Committee as *Submission 2*.

35 ANAO Audit Report No.29 2011-12, p. 29.

- Issues raised as a result of the Government's changes to the tender process while it was in progress, including changing the nominated approver and including an additional evaluation criterion.³⁶
- Handling of information in briefings prepared for Ministers, which 'should have had greater regard to the confidentiality and sensitivity of the information being provided for what was still a "live" tender process'. Information was therefore 'not as tightly controlled as it should have been'.³⁷ Compliance with the tender's probity arrangements and restriction of confidential tender information to only those who 'have a demonstrable need for such specific information' would have achieved better control of confidential information.³⁸

2.20 The ANAO further noted that the Australia Network tender process 'presented the Australian Government in a poor light and cost the two tenderers – the ANC and the ABC – time and money'.³⁹

'Lessons learned' for future procurements

2.21 In light of the tender process's termination, the audit report did not make any specific recommendations.⁴⁰ However, in fulfilling its objective to identify 'lessons learned' from the conduct of the tender process, the report raised the following three issues:

- Firstly, it is important that, where it is intended that Ministers or Cabinet have a formal role in a tender process, that this be made clear; departments have a role in assisting government to be explicit about this.
- Secondly, information security is critically important to effective tender arrangements and there are accepted ways within government of managing this, namely, by not circulating confidential tender information to any departmental officers, Ministers or their staff, unless they are part of the tender decision-making process or have a demonstrable need for such specific information.
- Finally, all parties involved in the management of a tender process should have regard to the importance of adhering to conventional procurement arrangements and effectively

36 These issues are discussed at ANAO Audit Report No.29 2011-12, pp. 20-21.

37 ANAO Audit Report No.29 2011-12, p. 21.

38 ANAO Audit Report No.29 2011-12, pp. 19, 24.

39 ANAO Audit Report No.29 2011-12, p. 23.

40 ANAO, *Submission 2*, p. [3].

managing the range of risks involved, given they can change significantly over time.⁴¹

- 2.22 In addition, the report suggested that mitigation of perceptions of conflict of interest should be considered when Ministers are performing the role of tender approvers.⁴² Several other suggestions for improvements in the tender process were also noted in various sections throughout the report.

The Committee's review

- 2.23 The Committee held a public hearing on Wednesday 27 June 2012 with the following witnesses:

- Australian National Audit Office
- Department of Broadband, Communications and the Digital Economy
- Department of Foreign Affairs and Trade
- Department of the Prime Minister and Cabinet

- 2.24 The Committee took evidence on the following issues:

- The decision to go to tender
- The clarity of the tender process
- The transparency of the evaluation criteria
- The handling of confidential information
- Conflict of interest perceptions
- Complaint handling processes
- Permanent arrangements for the service

The decision to go to tender

- 2.25 In November 2010, Cabinet decided that the Australia Network service would be put to a competitive open tender process 'to ensure the best possible service in return for its investment'.⁴³ As part of the audit report's

41 ANAO Audit Report No.29 2011-12, p. 24. Bullet points added.

42 ANAO Audit Report No.29 2011-12, p. 24.

43 The Hon Kevin Rudd MP, Minister for Foreign Affairs, 'Australia Network for the Future', *Media Release*, 23 November 2010.

background and context, the ANAO included a record of events leading up to this decision.⁴⁴

- 2.26 The audit report noted that the majority of submissions received during a June–July 2010 industry consultation process did not support an open tender for the service, and considered that ‘if the purpose of the Australia Network was to act as a tool for public diplomacy, the service should remain with the ABC as the national broadcaster’.⁴⁵ As noted above, in a briefing to the then incoming Foreign Minister on 1 October 2010 on the outcomes of the consultation process, DFAT recommended that the ABC’s existing contract to deliver the Australia Network service be extended for a further five years, rather than being put out to tender. The intention would be to then explore options to either move to a longer-term contractual arrangement, or to further develop the submission sponsored by the Communications Minister to permanently transition the service to the ABC.⁴⁶
- 2.27 In December 2011, after the Australia Network tender had been terminated and the future of the service was under consideration, the audit report notes that DFAT (and several other departments) did not support a submission from the Communications Minister that the service should become an ongoing function of the ABC, and instead favoured a competitive open tender process.⁴⁷
- 2.28 The Committee sought to clarify the reasons for this apparent shift in DFAT’s advice towards support for a tender process. DFAT informed the Committee that, in 2010, it had favoured a rollover of the ABC’s contract by a further five years in order to ‘save time and money’.⁴⁸ This position was supported by a performance evaluation which had found that the ABC had met or exceeded most of the contract’s Key Performance Indicators over the previous five years.⁴⁹ DFAT explained that it had never recommended a permanent transition of the Australia Network to the ABC, but had only supported a five-year contract rollover. DFAT argued that a tender process would be ‘the best way of getting value for money’

44 ANAO Audit Report No.29 2011–12, pp. 35–41.

45 ANAO Audit Report No.29 2011–12, p. 38.

46 ANAO Audit Report No.29 2011–12, p. 40.

47 ANAO Audit Report No.29 2011–12, p. 113.

48 Mr Dennis Richardson, Secretary, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

49 Mr Dennis Richardson, Secretary, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

from the service, rather than the proposed permanent transition to the ABC.⁵⁰

Clarity of the tender approval process

2.29 The ANAO found that, over the first five months of the Australia Network tender process, there were unresolved issues concerning the approval arrangements.⁵¹ The report noted that 'key Government Ministers did not hold a common view of the approval processes including any role for government in being consulted on, agreeing to, or making the decision in relation to the preferred tenderer'. This situation eventually led to an amended RFT being issued, which extended the tender process a further five months – adding to costs – before it was finally terminated due to leaks of confidential information to the media.⁵²

2.30 In its response to the draft audit report, PM&C disputed the Auditor-General's finding that there was a 'climate of uncertainty' around the tender approval process:

The Department of the Prime Minister and Cabinet considers that the report inaccurately describes the tender as being conducted in a climate of uncertainty as to the decision-making process. The Prime Minister had advised on 25 January 2011, before the tender was released, that the tender be brought back to Cabinet for decision. Any delays to the tender in order to implement that decision did not arise from uncertainty or lack of clarity.⁵³

2.31 At the public hearing, PM&C stood by these comments, reiterating the department's view that there was no uncertainty about the tender approval process because 'the Prime Minister had made clear – and as the report indicates ministers had agreed in October – that it was to come back to Cabinet'.⁵⁴

2.32 DFAT, on the other hand, indicated that it agreed with the Auditor-General's findings rather than PM&C's assessment of the situation.⁵⁵

50 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

51 ANAO Audit Report No.29 2011-12, p. 19.

52 ANAO Audit Report No.29 2011-12, p. 23-24.

53 ANAO Audit Report No.29 2011-12, p. 28.

54 Ms Renée Leon, Deputy Secretary, Governance, PM&C, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

55 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

- 2.33 Later in the hearing, PM&C acknowledged that there was ‘a divergence between what had been in correspondence between the Prime Minister and the Foreign Minister and what was occurring in the tender process’.⁵⁶
- 2.34 To assist the Committee’s inquiry, the ANAO provided a table summarising the report’s findings concerning the decision-making arrangements for the tender process.⁵⁷ A copy of this table can be found in Appendix C.
- 2.35 One of the three key lessons that the audit report identified in relation to the Australia Network tender process was that ‘it is important that, where it is intended that Ministers or Cabinet have a formal role in a tender process, that this be made clear’ and that ‘departments have a role in assisting government to be explicit about this’.⁵⁸
- 2.36 At the hearing, the Auditor-General expanded on this point, explaining that in this instance it would have been ‘very helpful’ and may have avoided some of the subsequent difficulties if the departments involved had insisted on the Government making a clear decision about the tender approval process.⁵⁹ The Auditor-General noted that it is now ‘not that common for a complex policy challenge to be handled by one agency’, and that better documentation of approval processes is one way in which management of such challenges ‘across borders’ could be improved:
- I am just trying to make the point that if, as part of our submissions to government, we can be quite clear that we would wish them to take a decision about the approval process and document that, minute that, so there is clarity amongst ministers and clarity amongst departments, that would be a good thing.⁶⁰
- 2.37 When asked whether DFAT had made changes to any guidelines or processes in response to the audit findings, DFAT indicated that it had done everything possible to clarify the tender approval process. DFAT’s Secretary stated:
- There is nothing more humanly possible that I or anyone in the department could have done to assist the government in clarifying what was not clarified. And there is nothing that I have learnt

56 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 13.

57 ANAO, *Submission 3*.

58 ANAO Audit Report No.29 2011–12, p. 24.

59 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

60 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 13.

from this exercise that I did not know before, in terms of that particular issue.⁶¹

- 2.38 PM&C indicated that it shared the Auditor-General's view of it being desirable and important that government decisions are well documented, and that one of the department's core ongoing functions was to assist ministers and the cabinet secretary to ensure that cabinet minutes are comprehensive and well documented.⁶²

Transparency of evaluation criteria weightings

- 2.39 The audit report noted that the throughout both the initial and amended Australia Network tender process, tenderers were not given any guidance about the relative importance given to the evaluation criteria that were used to assess the tenders.⁶³ The order of importance given to the evaluation criteria for the initial tender was agreed as part of the Tender Evaluation Plan, approved after the RFT had been released.⁶⁴ The ANAO suggested that 'clearly articulating the order of importance of the evaluation criteria would have assisted tenderers in preparing their tenders'.⁶⁵
- 2.40 At the hearing, the Auditor-General advised the Committee that there was no current guidance for departments about notifying potential tenderers of the relative importance of tender evaluation criteria. He indicated that while it was up to agencies to determine whether or not more weighting would be given to certain criteria than others, in instances where this does occur, its disclosure would enable tenderers to shape their submissions accordingly and 'improve the clarity of communication between departments and tenderers'.⁶⁶
- 2.41 The Auditor-General noted that this issue has been raised previously in other audits, in which tenderers have been sometimes surprised by the amount of weight given to particular evaluation criteria without any public documentation. He agreed with the Committee's suggestion that it could be useful for procurement guidelines to address this issue, and

61 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

62 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 13.

63 ANAO Audit Report No.29 2011-12, p. 63.

64 ANAO Audit Report No.29 2011-12, p. 62.

65 ANAO Audit Report No.29 2011-12, p. 65.

66 Mr Ian McPhee, Auditor-General, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

expressed a willingness to discuss the point further with the relevant departments.⁶⁷

Handling of confidential tender information

- 2.42 As noted earlier, the Australia Network tender was terminated in November 2011 on the basis of leaks of confidential tender information to the media, which were judged to have compromised the tender process.⁶⁸ An investigation by the AFP into the leaks, which was finalised on 2 April 2012, 'did not identify the person or persons responsible for disclosing the material'.⁶⁹
- 2.43 The audit report makes clear that the audit did not directly examine the possible unauthorised disclosure of information that was being investigated by the AFP.⁷⁰ However, the audit did consider the arrangements for handling information by departments, and the report noted several breaches of protocols which had resulted in 'unwise' distributions of confidential tender information to a wide range of ministerial and departmental officers.⁷¹
- 2.44 One particular breach of information security protocols documented by the ANAO concerned the distribution of a draft cabinet submission prepared by DFAT, which included the recommendations and deliberations of the Tender Evaluation Board (TEB). At the time, DFAT officers had understood that it would be Cabinet that would be selecting the preferred tenderer, meaning the provision of this information in the draft submission to Cabinet was necessary.⁷² The draft submission was circulated to at least two DFAT officials and two advisors in the Foreign Minister's office. The draft submission was also transmitted (over the secure CABNET network) to 30 PM&C officers on a group email inbox. The audit report notes that although the PM&C officers who received the email were appropriately cleared to handle Cabinet material, 'there was not a demonstrable need for them to be informed about the deliberations and recommendations of a "live" tender process', and DFAT should

67 Mr Ian McPhee, Auditor-General, *Committee Hansard*, Canberra, 27 June 2012, p. 10.

68 Senator Conroy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011.

69 Andrew Colvin, Deputy Commissioner, Operations, Australian Federal Police, *Committee Hansard*, Senate Legal and Constitutional Affairs Legislation Committee - Estimates, 24 May 2012, p. 54.

70 ANAO Audit Report No.29 2011-12, p. 17.

71 ANAO Audit Report No.29 2011-12, p. 88.

72 ANAO Audit Report No.29 2011-12, p. 77. This point was reiterated by DFAT at the public hearing – see Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 11.

instead have used PM&C's established protocol of uploading documents onto the dedicated CABNET database.⁷³

- 2.45 At the public hearing, the Auditor-General repeated his view that given the sensitivity of the information, 'standard practice' was that there should always be a demonstrable 'need to know' before material is shared,⁷⁴ and in that the case of the 30 PM&C officers who received the draft submission from DFAT this need was not apparent.⁷⁵
- 2.46 Early in the hearing, PM&C firmly pointed out to the Committee that, although it was outside the usual protocols, there was no established link between this circulation of confidential tender material to departmental officers – who are regularly trusted to handle cabinet-in-confidence material – and the unauthorised leaking of information to the media.⁷⁶
- 2.47 PM&C informed the Committee that its protocols for the protection and circulation of Cabinet materials were 'long standing', and that it conducted regular training and information sharing activities with other departments in relation to the protocols.⁷⁷ PM&C further explained that DFAT's method of distributing the draft submission was only a 'slight departure from standard practice' and the only significant difference was that by emailing the document, rather than adding it to the secure database, there was no audit trail as to which of the 30 officers had actually viewed the document. It was emphasised that distributing confidential material via the CABNET email system, while not compliant with PM&C processes, did not amount to treating it with a lack of security, and it was 'still quite a secure way to transmit information in the sense that it is via the secure Cabinet network and it is only going to people who have the clearances to see material over that network'.⁷⁸
- 2.48 DFAT acknowledged to the Committee that in retrospect, distribution of the material could have been 'tighter', and in light of the audit's findings, the department had reinforced the need to follow the PM&C guidelines.⁷⁹ However, DFAT also pointed out that 'the most highly and sensitive material', including tender material, is put on the CABNET network 'all

73 ANAO Audit Report No.29 2011-12, pp. 78-79.

74 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

75 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 11.

76 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 6.

77 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 6.

78 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

79 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 6.

the time', and that given DFAT's understanding at that time the distribution of the material was 'not unreasonable'.⁸⁰

- 2.49 The Auditor-General's report suggests that it is the responsibility of agencies to manage procurement processes in a way that is 'proportional to the risk and sensitivity' of each procurement.⁸¹ This point was reiterated by the Auditor-General at the hearing, adding that 'anything in Australia tending to deal with the media tends to increase the risk quite significantly and reinforces the importance of having fairly sound and tight processes around any tender of that kind'.⁸² In his closing remarks, the Auditor-General added that in the case of the Australia-Network, the risk of confidential information being leaked became higher as the length of the tender process was extended well beyond the time that was originally anticipated.⁸³

Conflict of interest perceptions

- 2.50 As noted earlier, on 24 June 2011 the Government announced several amendments to the Australia Network tender process,⁸⁴ which included, amongst other changes, that the Communications Minister would become the nominated approver for the tender outcome.⁸⁵
- 2.51 The audit report documents a range of advice that was provided by PM&C and DBCDE in the lead up to this decision, including advice concerning the possibility of a perceived conflict of interest arising from the Communications Minister being the tender approver at the same time as holding portfolio responsibility for the ABC.⁸⁶ The Committee took the opportunity to further question the two departments about this issue at its public hearing.
- 2.52 DBCDE told the Committee that its advice to the Communications Minister was that there would be a *perception* of a conflict of interest in his

80 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 11.

81 ANAO Audit Report No.29 2011-12, p. 27.

82 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, p. 8.

83 Mr McPhee, *Committee Hansard*, Canberra, 27 June 2012, pp. 13-14.

84 The Hon Julia Gillard, Prime Minister; The Hon Kevin Rudd, Minister for Foreign Affairs; The Hon Stephen Conroy, Minister for Communications, 'Amendment to the Australia Network tender', *Media Release*, 24 June 2011.

85 The audit report notes that the Communications Minister was first identified as the nominated approver in a newspaper article published on 27 June 2011. This was confirmed by Ministers in later media statements and in the Addendum to the RFT published on 5 July 2011. See ANAO Audit Report No.29 2011-12, p. 87.

86 ANAO Audit Report No.29 2011-12, pp. 84-86.

appointment as the approver of the tender. DBCDE further clarified that the purpose of this advice was not to suggest that DBCDE itself perceived a conflict of interest, but rather to inform the Minister that it was likely that other third parties, such as the media, might perceive a conflict.⁸⁷ The department explained:

In the circumstances, our advice to the Minister was as is characterised in the Auditor's report, that regardless of the legal position that there may be no conflict – which is what I call the reality of conflict – the perception would still be an issue.⁸⁸

- 2.53 PM&C told the Committee that it had advised government that the Minister did not have a personal conflict of interest in being appointed as the tender approver, but that it did not provide advice about possible perceptions.⁸⁹
- 2.54 The audit report noted some lack of clarity at the time of the decision about whether or not PM&C's advice that there would be no apprehended bias in the Communications Minister being appointed as the tender approver had been cleared by the Australian Government Solicitor (AGS).⁹⁰ After initially telling the Committee this advice had come from the AGS, PM&C clarified that the additional text concerning the possibility of a conflict of interest had actually been added *after* the document had been cleared by the AGS. However, it was pointed out to the Committee that although the AGS did not provide the advice, it had been made aware of the proposal under consideration and had not raised any concerns or objections about it with PM&C.⁹¹
- 2.55 The Auditor-General agreed with PM&C's view that it was not necessary for agencies to obtain a legal opinion on every piece of advice provided to government.⁹² The Auditor-General also took the opportunity to reiterate the audit report's suggestion that, in relation to ministers being appointed as approvers for tender processes in which their own portfolio agencies may be submitting tenders, 'any perception of a conflict of interest could be mitigated by the Government agreeing to another Minister, or more than one Minister, approving the tender outcome'.⁹³

87 Mr Peter Harris, Secretary, Department of Broadband, Communications and the Digital Economy, *Committee Hansard*, 27 June 2012, pp. 8-9.

88 Mr Harris, *Committee Hansard*, 27 June 2012, pp. 8-9.

89 Ms Leon, *Committee Hansard*, 27 June 2012, p. 9.

90 ANAO Audit Report No.29 2011-12, p. 85.

91 Ms Leon, *Committee Hansard*, 27 June 2012, p. 9.

92 Mr McPhee, *Committee Hansard*, 27 June 2012, p. 10.

93 Mr McPhee, *Committee Hansard*, 27 June 2012, p. 9.

Complaint handling processes

- 2.56 DFAT received a range of complaints during the later stages of the Australia Network tender process, primarily from the ANC. The ANAO report identified deficiencies in DFAT's handling of these complaints, and noted that the complaints process consequently became a 'source of frustration' for the ANC:

While DFAT responded to the formal complaints in accordance with the procedures outlined in the RFT and Tender Evaluation Plan, the department did not, in all cases, fully appreciate the underlying issues or nature of concerns raised by the ANC ... A greater emphasis on understanding and clarifying with the tenderer, the nature of their concerns or formal complaints, would have better positioned DFAT to investigate and address the issues raised.⁹⁴

- 2.57 The report also suggested that DFAT could have provided additional information in the RFT that would have assisted tenderers at the beginning of the tender process to better understand the complaints procedure.⁹⁵

- 2.58 At the hearing, the Committee asked DFAT whether it agreed with the audit report's findings, and whether its complaint handling processes had been reviewed in light of the issues the report had highlighted. DFAT's response was as follows:

We believe that we handled complaints properly. The people who complained may be unhappy with the response they got, but we are satisfied that the way those complaints were handled was in fact proper.⁹⁶

Permanent arrangements for the service

- 2.59 As noted above, the Government announced on 5 December 2011 that the Australia Network service would be provided on a permanent basis by the ABC, as Australia's national broadcaster.⁹⁷ The Government had previously announced that the ABC's existing contract would be extended

94 ANAO Audit Report No.29 2011-12, p. 103.

95 ANAO Audit Report No.29 2011-12, p. 57.

96 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, pp. 6-7.

97 Senator Conroy, 'Government decides future for Australia Network', *Media Release*, 5 December 2011.

by another six months – until August 2012 – while the long term contractual arrangements were being resolved.⁹⁸

- 2.60 The ANAO report indicated that the implementation model for the new operating arrangements was expected to be determined in 'early 2012'.⁹⁹ At the time of the hearing in June 2012, there had still been no announcement of this model. The Committee asked PM&C to provide an update on the progress that had been made in determining the ongoing administrative arrangements.
- 2.61 PM&C informed the Committee that it was coordinating whole-of-government advice on the options for implementing the ABC's permanent delivery of the service, and that this was being done in consultation with the ABC and with other departments, including DFAT and DBCDE. PM&C further advised that the matter is 'still under consideration by government', and no precise timeframe for its conclusion had yet been established.¹⁰⁰
- 2.62 The ANAO's report suggested that in order for the Commonwealth to preserve or incorporate powers previously contained in the Australia Network contract, changes to the Australian Broadcasting Corporation Act may necessary, or desirable.¹⁰¹ However, when asked about this suggestion, DBCDE advised the Committee that no changes to the legislation were anticipated.¹⁰²

Committee Comment

- 2.63 The Committee acknowledges that, in terms of administrative arrangements, the Australia Network tender process was, for the most part, handled in accordance with the relevant guidelines (the CPGs). It is clear that efforts were made by the departments involved to run a robust tender process and to clarify issues wherever possible, in the context of a difficult tender environment.

98 Senator Conroy, 'Government terminates Australia Network tender process', *Media Release*, 7 November 2011.

99 ANAO Audit Report No.29 2011-12, p. 115.

100 Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

101 ANAO Audit Report No.29 2011-12, p. 115. See also p. 57 of the audit report for a brief background to this potential issue.

102 Mr Peter Harris, Secretary, DBCDE, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

- 2.64 However, the costs of the eventual termination of the Australia Network tender process were substantial, both in dollar terms and in reputational terms. The ANAO report notes that over \$1 million of taxpayers' money was spent by DFAT in administering the tender process and by the ABC taking part in it.
- 2.65 Given these costs and impacts it is important that the lessons from this tender, as identified by the audit report and Committee's investigation, are taken on board to improve future outcomes. These lessons include:
- clarity of tender processes – including decision making;
 - handling of confidential information;
 - conflict of interest management; and
 - risk management in context.
- 2.66 It was unfortunate that it took nearly five months from the release of the RFT for final agreement to be reached between ministers and departments about who would be approving the outcome of the tender process. As documented in the audit report, the issue was only resolved after a media article in April 2011 indicated publicly, for the first time, that the tender would be approved by the Secretary of DFAT. Disagreement about the approver, and the amendments to the tender that resulted from it, contributed to lengthy delays in the process, which, as the Auditor-General noted in his evidence, increased the risk of the process being compromised. The Committee considers that these delays could have been avoided if the original decision for the tender to be approved by Cabinet had been documented and well communicated. Public disclosure of the approval process at the outset of a tender process would reduce the risk of uncertainty even further.
- 2.67 The Committee considers that clarity of the tender process would have also been improved if the order of importance of the tender evaluation criteria was disclosed. This would have improved the transparency of the tender evaluation process and allowed tenderers to supply appropriately targeted information. Despite this not being common practice, the Committee considers it to be good practice.
- 2.68 The Committee agrees with the ANAO's finding that it was 'unwise' for confidential tender information to be distributed as broadly as it was. Although there is no suggestion that the media leaks which led to the tender's termination were caused by this, it is clear not only that the risk of leakage increases the more information is distributed, but also that the investigation by the AFP into the possible source of the leaks would have

been hampered by the relatively wide distribution of confidential information. At a minimum, the standard procedures for distribution of draft cabinet information should have been followed.

- 2.69 The Committee also considered when, if ever, it is appropriate to share confidential tender information with departmental and ministerial staff who do not have a direct role in a tender process. The Probity Plan for the Australia Network tender forbade any such disclosure without consent from the Chair of the TEB.¹⁰³ The audit report notes the importance of live tender information being 'closely held' and any provision to others being made only on a 'demonstrable need to know' basis with appropriate authorisation from a senior departmental officer.¹⁰⁴ However, key departments put to the Committee that, in this case, the disclosure of tender details to a small number of departmental and ministerial staff was considered necessary, as it was in the process of briefing Cabinet Ministers who were at the time thought to be considering the tender outcome.¹⁰⁵
- 2.70 The problems with handling of sensitive information highlighted above may have been hard to avoid given the rapidly changing and indeed confusing environment. However, the Committee considers that there may still be benefits from further clarity and guidance about when and how tender information may be disclosed to ministers, ministerial staff, and departmental staff.
- 2.71 The perception of a conflict of interest in the Communications Minister being responsible for the final approval of a tender process involving the ABC was another issue considered in the audit report. The Committee agrees with the Auditor-General that when possible conflicts of interest – whether perceived or real – have been identified, it is important to manage the risks and consider ways to mitigate them.
- 2.72 In any procurement process, it is important that risks are managed in proportion to the sensitivity of their environment. It is important that departments monitor the environment in which they operate and amend, potentially strengthening, their management strategies as the level of risks increase. Additional effort by the relevant departments to go beyond the basic guidelines to, for example, require departmental officials to sign confidentiality undertakings, could have also been warranted in some circumstances.

103 ANAO Audit Report No.29 2011-12, p. 59.

104 ANAO Audit Report No.29 2011-12, p. 88.

105 Mr Richardson, *Committee Hansard*, Canberra, 27 June 2012, p. 11; Ms Leon, *Committee Hansard*, Canberra, 27 June 2012, p. 12.

- 2.73 Finally, it is concerning that some of the audit's key findings have not been well received by the departments. The audit report provides an important resource for identifying lessons to prevent similar problems from occurring in the future, and the Committee fully supports the Auditor-General's findings.
- 2.74 Responsibility for the problems found in the audit report squarely rests with the parties involved. However, the Committee considers that lessons from this tender process could also be disseminated more broadly.
- 2.75 The Committee suggests that the Government, through the Department of Finance and Deregulation, consider how the identified lessons from the Australia Network tender process might be disseminated more broadly and potentially included in future enhancements to whole-of-government guidelines. Particular issues to consider include:
- Publicly disclosing the approval process at the start of a tender;
 - Disclosing in Requests For Tender any rankings of evaluation criteria;
 - Improving the clarity of when and how tender information may be disclosed to ministers, ministerial staff, and departmental staff;
 - Appropriately handling perceived conflicts of interest; and
 - Improving the transparency of complaint handling processes.

