

# Chapter 1

## Background

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

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

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

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

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

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

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

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

## **Second report**

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

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

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

## **Committee approach**

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

## **Report structure**

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

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

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

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

### **Development of the order**

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

- The Committee's report *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, tabled on 26 June 2000;<sup>4</sup>
- The ANAO's Audit Report No.38 2000-2001, *The Use of Confidentiality Provisions in Commonwealth Contracts*, tabled on 24 May 2001;<sup>5</sup> and
- The Committee's report *Commonwealth contracts: a new framework for accountability*, tabled on 26 September 2001.<sup>6</sup>

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

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

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

### **Requirements of the order**

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

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4 [http://www.aph.gov.au/senate/committee/fapa\\_ctte/completed\\_inquiries/1999-02/acnt\\_contract/report2/report2.pdf](http://www.aph.gov.au/senate/committee/fapa_ctte/completed_inquiries/1999-02/acnt_contract/report2/report2.pdf).

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

6 [http://www.aph.gov.au/senate/committee/fapa\\_ctte/completed\\_inquiries/1999-02/acnt\\_contract/report2/report1.pdf](http://www.aph.gov.au/senate/committee/fapa_ctte/completed_inquiries/1999-02/acnt_contract/report2/report1.pdf).

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

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

1.19 The order specifies that the list must:

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

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

## **Government responses**

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

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

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

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

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

1.22 The Committee reported on the order's first year of operation, that is 1 July 2001 to 30 June 2002, in December 2002.<sup>8</sup> The report set out 17 recommendations for changes to the order and for ongoing agency compliance and reporting. This section summarises the issues raised in the Committee's 2002 report, and the recommendations made.

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

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

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

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

## ***Issues in the first year of operation***

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

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

8 Senate Finance and Public Administration References Committee, *Departmental and agency contracts, Report on the first year of operation of the Senate order for the production of lists of departmental and agency contracts*, December 2002 (hereafter *Report on the first year of operation of the Senate order*).

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

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

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

*(1) Agency compliance*

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

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

*(2) Definition of a contract*

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

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

*(3) Commercial confidentiality*

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

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

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

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

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

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

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

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

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

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

#### *(4) Presentation and reporting requirements*

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

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

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

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

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

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

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

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

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

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

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

#### *(5) Agencies covered by the order*

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

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

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

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

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

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

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

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

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

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



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

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

*(6) Frequency of ANAO audits of compliance*

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

***Recommendations following the first year of operation***

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### **Summary of progress**

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

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

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

