

Chapter 3

Compliance and other trends since 2002

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

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

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

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

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

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

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

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

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

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

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

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

Trends in compliance

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

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

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

3.8 A number of themes emerge from ANAO audits:

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

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

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

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

8 ANAO Report No. 11, p. 21.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Internal controls

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

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

Internal reporting and monitoring

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

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

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

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

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

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

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

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

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

Guidance on confidentiality criteria

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

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

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

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

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

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

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

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

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

Training

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

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

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

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

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

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

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

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

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

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