

Chapter 4

Mechanisms for improving compliance and transparency

4.1 The previous chapters have identified a number of areas for improving the operation of the order. These were largely concerned with strengthening internal processes and enhancing guidance and training to improve compliance.

4.2 This chapter examines a number of external mechanisms which might improve the order's operation and strengthen parliamentary scrutiny of government contracts. The chapter also discusses the arguments for shifting to a single reporting mechanism for procurement contracting.

Verification of compliance

4.3 In 2003 the Senate passed a resolution which prescribed that the Senate and its committees would not entertain any claim to withhold information on the grounds of commercial-in-confidence, unless the claim is made by a minister and accompanied by a statement setting out the reason for the claim including any commercial harm which might result from disclosure. In practice, however, this resolution is not always observed or enforced. Nor does it overcome the problem of testing whether the reason for treating information as confidential is appropriate.

4.4 Members of the Committee were interested in developing possible mechanisms senators could use in response to claims of commercial confidentiality during committee inquiries and the estimates process. Senator Murray suggested senators could be provided with a checklist to verify the legitimacy of commercial confidentiality claims.¹

4.5 ANAO suggested the process chart included in DOFA's *Guidance on Confidentiality of Contractors' Commercial Information* would form a suitable guide for this purpose.² A copy of this process chart is provided in Appendix 7.

4.6 ANAO also suggested that DOFA's guidance be amended, to inform departments that should officers withhold contractual information from a committee, senators may use the process outlined in the guidance to verify their claims of commercial confidentiality.³

4.7 The Committee considers this could be a useful reference aid to assist senators with the scrutiny of contracts during inquiries undertaken by Senate committees and estimates hearings.

1 Committee Hansard, 25 March 2004, pp 9-10.

2 ANAO, correspondence, 7 May 2004.

3 ANAO, correspondence, 7 May 2004.

Referral to the Auditor-General

4.8 Senator Murray sought witnesses' views on another mechanism to increase compliance with the accountability principles of the order, through the Senate Estimates process. Senator Murray proposed that:

...where a public officer declined to give evidence on the basis that something is commercial-in-confidence, the committee would be entitled to automatically refer that contract to the Auditor-General for specific inclusion in the department's next review, so it would be reported on.⁴

4.9 Witnesses for the ANAO were concerned that resource constraints may not allow the ANAO to audit every such contract. Instead, the ANAO proposed an alternative arrangement which it thought might be more workable:

Senators could write to the Auditor-General asking him to examine the contract in question in the next audit of the Senate Order. While, this may not produce an immediate answer, as the next audit may be conducted some months after the question was asked, it might have an impact on how witnesses consider responding to the Committee's questions.⁵

4.10 Again the ANAO suggested that DOFA's guidance be amended, to advise departments that this course of action may be taken.

Annual reports

4.11 The Committee revisited the recommendation made in its September 2001 report regarding changes to annual reporting requirements. The recommendation was:

The Committee recommends that annual reports of Financial Management and Accountability Act agencies provide the following information:

- the web address of lists of contracts of \$100 000 or more;
- a report on compliance with the Senate order;
- a report on training completed by officers undertaking procurement functions;
- a report on the inclusion in requests for tender and contracts of advice about public and parliamentary accountability responsibilities; and
- a report on the agency's compliance with mandatory reporting requirements and steps taken to improve the integrity of its data in GaPS.⁶

4 *Committee Hansard*, 25 March 2004, p. 9.

5 ANAO, correspondence, 7 May 2004

6 Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a New Framework for Accountability*, September 2001, p. 29. GaPS – Gazette Publishing System.

4.12 The Government disagreed with this recommendation, largely on the basis that the required information was reported elsewhere.⁷ ANAO tended to concur with the Government view, saying 'the present mechanism for listing contracts with confidential information is a suitable one'.⁸ However, ANAO suggested that some information relevant to the order could usefully be provided in agencies' annual reports. ANAO suggested that:

A solution might be for agencies to include a note in the annual report referring readers to the Internet site where ... all contracts over \$100 000, as required by the Senate Order, are shown.⁹

4.13 The Committee considers the ANAO suggestion a simple, easy, economic solution which would increase the transparency of agency contracts and reporting.

Rationalising reporting regimes – a single reporting mechanism?

4.14 As mentioned in chapter 1, the Committee's preparation of this report coincided with a DOFA proposal to overhaul reporting arrangements for procurement contracts with the introduction of a single reporting mechanism. The proposal has radical implications for the current reporting framework for contracts. If it were to go ahead the single reporting mechanism, based on the AusTender database, would supersede both the order and the existing requirement for consultancies to be reported in annual reports. Both the order and annual reporting requirements would be revoked.

4.15 It is necessary to understand the background to the proposal before examining the arguments for and against its adoption.

Origin of the DOFA proposal

4.16 DOFA's proposal originated in an ANAO audit on the reporting of expenditure for consultancies.¹⁰ The audit examined the three reporting regimes which cover government procurement:

- AusTender – for reporting of contractual commitments \$10 000 and over;
- Senate order – for reporting of contracts valued at \$100 000 and over and their use of confidentiality provisions; and
- Annual reporting – for total aggregate expenditure on consultancies for the financial year and contract details including price for consultancies let in the reporting year valued at \$10 000 or more.

7 Government Response to Senate Finance and Public Administration Reference Committee Report *Commonwealth Contracts: A New Framework for Accountability*, June 2002, p. 5.

8 ANAO, correspondence, 7 May 2004.

9 ANAO, correspondence, 7 May 2004.

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

4.17 For all three regimes the audit found a high incidence of under-reporting and non-compliance. It also detected problems with data integrity and the accuracy of the information reported. ANAO concluded that the three regimes appeared to be working at cross-purposes. The operation of three separate systems with different reporting requirements for different timeframes had caused, the audit found, inconsistency, inefficiency and confusion.¹¹

4.18 Mr Boyd who led the audit explained to the Committee how current reporting arrangements militate against accurate reporting:

A lot of the difficulties we found with the accuracy and completeness of reporting of consultancies both in the Senate order and in annual reports were essentially around the fact that this is a separate exercise performed at different points in time when the reporting is required. It is not something which is in-built and part of the ongoing management of the organisations. Therefore it is treated as being in large part an extra exercise on top of our existing responsibilities.¹²

4.19 To remedy the problem, ANAO recommended:

...that the Department of Finance and Administration and the Department of Prime Minister and Cabinet, in consultation with key Parliamentary Committees, affected agencies and other relevant stakeholders, examine options for improving the accuracy and completeness of reporting of Government procurement, including the merits of rationalising the number of reporting regimes.¹³

4.20 ANAO told the Committee that the key to improving the accuracy of reporting was to use the same data agencies rely upon for their own decision making and management. Mr Boyd explained to the Committee:

Our aim when we examined across the three regimes was to find which data they [agencies] use and what they use it for. Human nature in these things being what it is, if you are relying upon the data yourself for a purpose that

11 ANAO, *Reporting of expenditure on consultancies*, passim. See also Mr Boyd, *Committee Hansard*, 27 November 2006, pp 5-7. DOFA provided the following illustration of how the different reporting requirements can produce apparently inconsistent yet nonetheless valid results under the three regimes:

As an example of something that often leads to confusion, if we have an agency that signed a consultancy contract in August for \$120,000 and it had an option of additional work valued at \$60,000 and the option was utilised in May, and \$10,000 was spent before the end of the financial year, you would have different amounts reported. You would have it reported in AusTender as \$180,000; you would have it reported in the calendar year Senate order listing as \$120,000, and you would have it reported in the financial year Senate order listing as \$180,000. In the annual report it would be reported as \$130,000. You would have three different values reported... [Mr O'Loughlin, *Committee Hansard*, 11 October 2006, p. 14.]

12 *Committee Hansard*, 27 November 2006, p. 7.

13 ANAO, *Reporting of expenditure on consultancies*, p. 68.

you find useful, you will put far more effort into actually making that data complete and accurate so that you can rely upon it yourself in your own decision making. In that sense the agencies do not use the Senate order for their own management decision making. The information that is used out of the three regimes to extend any of it is what is in GaPS-AusTender. ... Our interest was that, if we could actually build this into their ongoing management operations, it would presumably increase the chances of the data being complete and accurate.¹⁴

4.21 The outcome of ANAO's recommendation is DOFA's proposal for a single reporting mechanism, which is discussed below.

DOFA's proposal

4.22 DOFA's proposal to rationalise reporting for procurement contracts involves three elements.¹⁵ The first is for all procurement reporting to be shifted to a single system based on AusTender, currently the central point for all Commonwealth procurement, which will have enhanced data, search and reporting capacity. DOFA outlined to the Committee how it expects the new AusTender system would operate:

The redeveloped system will provide a range of new fields that will supply procurement information that is currently in the Senate order and in annual reports. ... The system will improve the support that agencies get to upload data into AusTender, and this is very important in helping them provide high-quality information about their procurements. ... It also expands the reporting and searching tools that are available to assist agencies and the public to use AusTender information. This means that there will be a variety of more comprehensive views of procurement information available that will make it much easier for senators, for the public and for suppliers to understand the way government is letting its contracts and that will help them to make best use of that.

The new information that we are planning to require agencies to put into AusTender relates to all contracts over \$10,000. Agencies will be required to supply, for all their consultancies, a justification for why the contract is a consultancy, and this is the major field that is currently in the annual report listing for contracts. Agencies will also have to flag any confidentiality clauses in contracts and the reasons for those clauses. Additionally, they will have to provide the reasons for any confidentiality in materials obtained or generated in carrying out the contract. These are the central elements—but not the only elements—of the Senate order.¹⁶

14 *Committee Hansard*, 27 November 2006, p. 7. GaPS was a forerunner of AusTender and has since 2005 become a function of the latter.

15 DOFA, *Discussion Paper: Reporting of Procurement Outcomes*, August 2006 [hereafter *Reporting of Procurement Outcomes*].

16 Mr McIntyre, *Committee Hansard*, 11 October 2006, pp 4-6.

4.23 DOFA is aiming for the new AusTender system to be operating by 1 July 2007, although it concedes some larger departments and agencies (eg. Defence, Centrelink) may take longer to implement the new system.

4.24 The second and third elements of the proposed rationalisation entail revoking the order for contracts and discontinuing the requirement for consultancy reporting in annual reports. DOFA contends that abolishing the order and annual reporting requirements would not only address fragmentation under current reporting arrangements but would also remove duplication and reduce inefficiency.¹⁷ Moving to a single reporting mechanism would, it claims, streamline arrangements.

4.25 However, in response to Committee questioning DOFA modified its position to suggest the order might only need to be partially revoked. Since the new AusTender system will only capture procurement contracts, DOFA indicated the order would only need to be amended to remove that category of contract. DOFA admitted it was feasible that the order could continue to apply to non-procurement matters such as revenue and grant contracts.¹⁸

The case for a single reporting mechanism

4.26 The potential advantages of adopting a single reporting mechanism include:

- Streamlining reporting requirements;
- Providing a central point of reference based on the AusTender system;
- Reducing the reporting and administrative burden on departments and agencies;
- Increasing the transparency of procurement to cover contracts valued at \$10 000 and more;
- Improving data integrity by reducing inconsistency, providing stronger data entry protocols¹⁹ and, as ANAO argued above, drawing on data used routinely in daily business and management operations. DOFA also intends to offer training and assistance to agencies under the new system;
- Automated checking for confidentiality provisions and the reason for such provisions for each contract. These checks are intended to remind staff inputting data of the need to check if a contract contains confidential information. While agency staff could circumvent these checks, to do so

17 *Reporting of Procurement Outcomes*, p. 5 referring to ANAO, *Reporting of expenditure on consultancies*, pp 62-64.

18 Mr Grant, *Committee Hansard*, 11 October 2006, pp 17-18.

19 Mr McIntyre, *Committee Hansard*, 11 October 2006, p. 7.

would leave an audit trail and indicate 'the agency made a conscious choice to do something that they were warned was not in line with the policy';²⁰

- Improved timeliness. According to DOFA, contract data would be available on line in 'real time', that is, 42 days after the award of a contract as opposed to the lag of up to six months for contracts reported under the order and as much as eighteen months in annual reports.²¹ Changes to contracts, such as their value, would also be readily available;²² and
- Enhanced search and reporting capacity with the ability for users to tailor reports to their own needs, eg. searching across agencies or categories of contracts and extracting groups of contracts and more detail on individual contracts.²³

4.27 In setting out the proposal for a single system, DOFA also pointed to the 'significantly different environment now to that which existed during the early development of the Senate order'.²⁴ The Commonwealth procurement guidelines, referred to in chapter 2, provide greater guidance on the importance of transparency and accountability with procurement. DOFA also mentioned the 'large amount of goodwill amongst agencies to comply with the spirit of the order'.²⁵

4.28 ANAO supported this view, adding that the principle of limiting the use of confidentiality clauses only to cases where a sound reason exists (and documenting it) was embedded in government policy. ANAO also noted agencies had invested significantly in complying with the order and there would be little incentive for them to revert to inappropriate practices.²⁶

4.29 While ANAO would not have the regular compliance role under the proposed system which it does under the order, the auditor-general has agreed to ANAO conducting a post-implementation audit of the single reporting system and further audits if required.²⁷

20 Mr McIntyre, *Committee Hansard*, 11 October 2006, p. 5. See also Mr Grant, *Committee Hansard*, 11 October 2006, p. 10: 'Officers will learn to comply very quickly, otherwise they will be breaching the Commonwealth procurement guidelines which are supported by the Finance regulations and the FMA Act'.

21 Mr Grant, *Committee Hansard*, 11 October 2006, p. 3.

22 Mr McIntyre, *Committee Hansard*, 11 October 2006, p. 6.

23 Mr McIntyre, *Committee Hansard*, 11 October 2006, pp 6-7.

24 Mr Grant, *Committee Hansard*, 11 October 2006, p. 3.

25 Mr Grant, *Committee Hansard*, 11 October 2006, p. 10.

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

27 Ms Bird, *Committee Hansard*, 27 November 2006, p. 3.

Concerns about a single reporting mechanism

4.30 A number of factors need to be taken into account in considering a shift to a single reporting mechanism and revoking the order, either fully or partially.

- The proposed AusTender model has yet to be implemented and remains untested. The history of the implementation of new information systems suggests there is often a gap between expected capacity and the challenges and delays which emerge in practice. DOFA noted the new system would require changes to the information technology systems agencies use to register contracts and the business practices they use to extract data.²⁸ It also conceded larger agencies such as the Department of Defence and Centrelink may take longer than most agencies to implement the new system.²⁹
- Training of staff for the new system may take longer to show results than DOFA expects. As discussed in chapter 3, inadequate agency training for implementing the order has been a persistent problem. Although support from agencies for the new system is encouraging, it should be remembered DOFA reported to the Committee in the past that acceptance of the order was stronger in agencies at senior levels than line areas responsible for procurement. This may not be such an issue with the new system, since staff would be using automated core data and not have to input data manually into a different system as occurs currently under the order.
- The promised improvements in data integrity cannot be assumed as given. When the Committee reported on the operation of the order in 2002 a similar model for adopting a single system based on GaPS was mooted but it suffered from data integrity issues.³⁰ Data integrity has continued to be a challenge under the GaPS-AusTender system. As ANAO reports have shown, problems with the accuracy and completeness of data extend beyond the reporting framework and encompass issues ranging from internal business processes to staff training.³¹ Despite the promised enhancements, data quality under the proposed model will remain unknown until tested.
- The increased visibility of procurement contracts under the new system (which will capture contracts valued at \$10 000 or more as opposed to the order's reporting of contracts valued at \$100 000 or more) needs to be offset by the potential reduction in transparency for non-procurement contracts if the order were to be revoked fully. DOFA's discussion paper on the proposed

28 Mr McIntyre, *Committee Hansard*, 11 October 2006, pp 8-9.

29 Mr Grant, *Committee Hansard*, 11 October 2006, p. 9.

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

31 ANAO, *Implementation of the revised Commonwealth Procurement Guidelines*, Audit Report No.21 2006-2007, pp 43-45. See also ANAO reports on compliance audits, listed at the start of chapter 3.

rationalisation noted this potential gap but was silent on how it might be addressed.

- While DOFA appeared to accept that the order could remain in place under the new system if it applied only to non-procurement contracts, this would in effect create a dual reporting system: there would be one system for procurement contracts and another for non-procurement contracts. This would amount to a departure from the single reporting system DOFA advocates. It is unclear whether a dual system might recreate for agencies some of the fragmentation and confusion which the new system is intended to address. However, it would almost certainly fragment the transparency of contract reporting for the purpose of parliamentary and public scrutiny.
- Although the ANAO has agreed to audit the new system once its implemented, this is not the same as the mandatory regular compliance auditing required under the order. Those compliance audits have been instrumental in detecting problems, providing remedies and educating and inculcating agency staff in the principles the order embodies. Ad hoc auditing of the new system may not carry the same weight.

4.31 The Clerk of the Senate also drew the Committee's attention to an element missing under DOFA's proposal but which is central to the function of the order: it would not possess the authority which is invested in the order because it is an accountability mechanism ordered by a house of the Parliament. The Clerk told the Committee:

...by keeping the order in place completely consistent with the AusTender system, you signal to departments and agencies that this is a matter in which the Senate maintains a continuing interest. It is not as though the Senate has vacated the field, and that attaches a certain greater authority and importance to the question of disclosure of contracts...³²

4.32 The Clerk also cautioned against revoking the order in favour of an unproven new system 'until it is clearly demonstrated that the AusTender system actually provides for public disclosure to the same extent of all the information required by the order'.³³ He also advised the Committee the question of reporting for non-procurement contracts would need to be resolved before any change to current arrangements could be accepted.

4.33 In the next section, the Committee discusses a modification to the DOFA proposal involving the AusTender system as a reporting source for the order.

32 Mr Evans, *Committee Hansard*, 27 November 2006, p. 12.

33 Clerk of the Senate, Advice to Committee, 4 September 2006, p. 2. See also the Clerk's subsequent advice, 12 October 2006, p. 1.

An alternative model

4.34 The Clerk recommended retaining the order, at least in the interim, until the AusTender system is fully operational and the Senate is in a better position to assess whether the order should be amended. He advised the enhanced AusTender system could be used by agencies to meet the requirements of the order as it currently stands:

As departments and agencies move into the AusTender system, they could continue to comply with the Senate order by tabling statements, under paragraph (1) of the order, to the effect that they have fulfilled their obligations under the order by placing the required information in the AusTender system. No further action by the departments and agencies would then be required, not even the downloading of the information on the AusTender system to a different site.³⁴

4.35 Under this model, AusTender's online system would supersede departmental and agency homepages as the source where required contract information can be accessed. It would not lead to the duplication DOFA officials appear to be concerned might arise if the new system were to proceed with the order still in place. Apart from that concern, DOFA agreed that the new AusTender system and the order's current requirements would be compatible.³⁵

4.36 Once AusTender was fully operational, the Senate could then consider amending the order to reflect the enhanced reporting capacity of the new system, particularly in relation to the \$10 000 reporting threshold.

4.37 As for the question of reporting of non-procurement contracts, the Clerk suggested DOFA develop a system comparable to the proposed AusTender mechanism to list those contracts. In his view this would be preferable to truncating the order to apply only to non-procurement contracts.³⁶

Committee conclusion

4.38 The alternative model of adopting AusTender as the mechanism for reporting against the current order has the attraction of being straightforward and in line with the thrust of DOFA's proposal for enhanced reporting under AusTender. It would avoid the possible risks of moving immediately to an untested system and allow time for departments and agencies to adjust to AusTender and for any teething problems to be resolved. It would not entail any changes to either the order or the new AusTender

34 Clerk of the Senate, Advice to Committee, 12 October 2006, p. 1. Paragraph 1 of the order requires ministers to table in the Parliament a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's homepage. See appendix 2 for the order.

35 Mr Grant, *Committee Hansard*, 11 October 2006, p. 9.

36 Clerk of the Senate, Advice to Committee, 12 October 2006, p. 2. See also Mr Evans, *Committee Hansard*, 27 November 2006, p. 13.

system, but adjustments could be made if necessary once the new framework had been trialled successfully.

4.39 Retaining the order while a new system for reporting non-procurement contracts is developed would also overcome the accountability gap that would emerge under the current DOFA proposal.

4.40 Under this alternative model reporting would be rationalised and the projected improvements would proceed, while the current transparency for procurement and non-procurement contracts would be maintained and possibly expanded, with its accuracy and completeness improved.

