

Chapter 5

Conclusion and recommendations

The system [the order] that Senator Murray initiated is essentially a safeguard. It is designed to ensure that there are no major train wrecks down the track. Like all safeguards it operates simply by its very existence. It signals to everybody involved in this that the matter of contracting is being watched. If you say that the Senate is watching it, that adds to the authority of the safeguard.¹

5.1 The Senate order for departmental and agency contracts has now been in operation for five years. Over this time there has been a general improvement in compliance. Regular ANAO auditing has had a key role in not only improving compliance but also raising awareness among agencies of the transparency and accountability principles underpinning the order. The order's operation has also been assisted by the introduction of government policy to promote the transparency of Commonwealth procurement.

5.2 Two notable achievements are the general decline in the use of confidentiality provisions and the now commonplace inclusion of standard disclosure provisions in government contracts. The first suggests the Parliament's concern about the use of confidentiality provisions has been heeded by most agencies. The use of disclosure provisions, which provide explicitly for disclosure of contract information to the Parliament and its committees among others, points to an acceptance, at least at senior levels within agencies, that government contracts are the subject of Parliamentary and public scrutiny.

5.3 While compliance against the order's reporting requirements is now at a generally good level, concerns remain about the continued misuse of confidentiality provisions in contracts and the reliability of the reported data in departmental and agency lists. These concerns raise questions about the extent to which line staff understand the principles and purpose of the order, and about the framework for reporting against the order.

5.4 The major consideration at this stage is whether the best way forward is to be achieved by replacing the order with a single reporting mechanism or by modifying that model with the order remaining in operation. Determining the model of reporting is the first step required before other measures to improve the transparency of contracts can be considered.

A new framework?

5.5 The Committee considers it premature at this point to revoke the order. Compliance problems with the inappropriate use of confidentiality provisions in

1 Mr Evans, *Committee Hansard*, 27 November 2006, p. 13.

contracts, albeit declining but still significant, have continued. These indicate the need to retain an external oversight and scrutiny mechanism, reinforced with regular ANAO auditing, which the order provides.

5.6 The proposed new AusTender system promises to improve the completeness and accuracy of the information available on government contracts. But the history of large scale information projects, like the AusTender upgrade, cautions against sweeping change until new systems have proven themselves.

5.7 Another concern with the new AusTender system is that it would not report on non-procurement contracts. If the order were revoked, this would result in a reduction in the transparency of government contracts.

5.8 Moreover, the Committee considers it unnecessary to revoke the order. As outlined in chapter 4, as the AusTender system is put into operation, departments and agencies will be able to continue to comply with the order by placing required information in the AusTender system. Departments and agencies would simply need to table in the Parliament statements to this effect, rather than produce separate lists as is currently required.

5.9 This model would allow reporting to be rationalised with AusTender operating as the central reporting point, while transparency under the order would be maintained and possibly improved. It would avoid the risks of moving to an unproven system. It would also allow time for new reporting arrangements for non-procurement contracts to be developed if required. ANAO auditing would continue as currently required under the order and would assist agencies moving to the new system. The Senate could consider amending the order if this were required, once AusTender was operational.

Recommendation 1

5.10 The Committee recommends the order be retained while the new AusTender system for reporting procurement contracts is implemented, with departments and agencies tabling statements through their ministers in accordance with paragraph (1) of the order, that they had fulfilled their reporting obligations by placing the information required under paragraph (2) of the order in the AusTender system.

Recommendation 2

5.11 The Committee recommends DOFA, in consultation with ANAO, relevant parliamentary committees and stakeholders, consider reporting arrangements for non-procurement contracts and explore the development of a reporting mechanism comparable to the new AusTender system for this category of contract, and report to the Committee the outcome of this process within six months of the tabling of this report.

Improving compliance – internal measures

5.12 In chapter 3 the Committee identified a number of measures which, if implemented, should improve agency compliance with the order.

Internal controls

5.13 The Committee supports ANAO recommendations that agencies improve the accuracy and completeness of the contract information they report with stronger internal controls for checking that information. Agencies will be required to improve their financial management information systems and data extraction processes in order to meet the requirements of the new AusTender system. The implementation of the new system should offer the opportunity and capacity for agencies to improve reporting controls and data quality assurance for contract information.

Recommendation 3

5.14 The Committee recommends agencies, if they have not done so already, implement ANAO recommendations to improve the accuracy and completeness of contract information with stronger internal controls and quality assurance for checking data, and report that they have done so through their ministers' tabling statements made under paragraph (1) of the order.

Internal reporting

5.15 The Committee considers technical enhancements to internal controls could be complemented with regular internal reporting of procurement activity. Contract information could be included in management reporting and reporting to internal audit and governance committees. This is already being done in some agencies but should become routine across all government bodies involved in contracting activity. The frequency of reporting would depend on the circumstances of individual agencies.

5.16 Internal reporting of this kind on a regular basis would strengthen governance frameworks for contracting. It should also improve data accuracy as the information would be relevant to the regular business and management operations of agencies and managers would have a stake in the quality of the information they receive. This would have flow on benefits for the reliability of contract information reported on AusTender and to the Parliament.

Recommendation 4

5.17 The Committee recommends that to improve data quality and internal governance agencies include procurement and contract activity in regular business and management reporting to agency executives and, where necessary, internal audit and governance committees.

Guidance

5.18 Following ANAO recommendations, DOFA has been working on enhancing its guidance about the use of confidentiality provisions in contracts. The Committee considers this guidance could be improved through using examples from ANAO testing of compliance which illustrate provisions that are classified appropriately and those that are not. Agencies could also use these examples for providing internal guidance.

5.19 Providing line staff with concrete examples should help their understanding of the confidentiality criteria and improve their ability to make the correct decisions on questions of confidentiality when contracts are under negotiation. This, in turn, should improve compliance with the requirements of the order and lead to further reductions in the use of confidentiality provisions in contracts.

Recommendation 5

5.20 The Committee recommends DOFA and agencies consult ANAO on examples from compliance audit testing which illustrate provisions that are classified appropriately and those that are not, for inclusion in guidance and training in relation to the order.

Training

5.21 Training and education are key ingredients for improving compliance with the order. ANAO has found that the level of compliance with the order has been greater in agencies that provide training for staff than those which provide little, if any, training. If the enhanced AusTender system is to be introduced, training staff to meet the requirements of the new system will be critical.

5.22 The Committee considers all agencies covered by the order should ensure staff involved in contract management and completing reporting requirements receive adequate training and guidance to assist them to comply with government procurement policy and the requirements of the order. Smaller agencies, and agencies managing small numbers of contracts, should consider accessing external training provided by DOFA, the APS Commission and other relevant bodies.

Recommendation 6

5.23 The Committee recommends all agencies provide adequate training and education to staff responsible for managing contracts and complying with the order, either through internal training or programs provided externally.

Improving external scrutiny and oversight

5.24 In chapter 4 the Committee identified a number of mechanisms to improve the external scrutiny and oversight of government contracting, particularly by the Parliament and ANAO. If adopted these mechanisms, in combination with the more detailed information expected to be available from the new AusTender system, should

be useful for examining contracts and dealing with claims of commercial commerciality when they arise.

Verification of compliance

5.25 The Committee draws senators' attention to appendix 7 which provides a process chart for agency staff dealing with confidentiality of information in contracts. This is taken from the DOFA guidance on confidentiality of contractors' commercial information, outlined in chapter 2.

5.26 The Committee considers this chart could be a useful point of reference which might assist senators examining contracts containing confidentiality provisions. It could, for instance, help in tracing the decision making process followed during the negotiation of such a contract. It could also help in testing the appropriateness of decisions to treat information as confidential.

5.27 The relevant DOFA guidance should include a note to the effect that the Parliament's committees and members may refer to the process chart to assist the examination of contracts. This should reinforce the importance of agency staff complying with the guidelines when negotiating contracts.

Referral to the Auditor-General

5.28 Refusals by officials to disclose contract details on the grounds of confidentiality or commercial-in-confidence are not an uncommon occurrence during parliamentary examination of issues involving government contracts. Such refusals should only be made by ministers and accompanied by a statement setting out the reason for such a claim and the commercial harm that might result from disclosure. However, this does not always occur. Nor does it necessarily allow for detailed testing of the appropriateness of such a claim or whether the information should have been treated as confidential in the first place.

5.29 The Auditor-General has agreed that senators could ask him to examine contracts where officials or ministers have refused to disclose information based on a claim of commercial confidence. This examination would occur in the context of the next compliance audit of contracts under the requirements of the order.

5.30 While it is open for senators already to ask the Auditor-General to conduct examinations of this type, the Committee is pleased to note the Auditor-General's agreement to do so as part of the compliance activity under the order. The existence of this mechanism strengthens the accountability of government contracts and may influence the way officials and ministers respond to questions from senators and committees.

5.31 The relevant DOFA guidance should be amended to alert officers that the Parliament and its committees and members may resort to using this mechanism where a claim of commercial confidence is raised in relation to a contract.

Recommendation 7

5.32 The Committee recommends DOFA include in guidance advice to the effect that, in relation to a refusal to disclose information based on a claim of commercial confidentiality for a contract, the Parliament, and its committees and members, may:

- **test the validity of any claim by reference to DOFA's process chart for agency staff dealing with confidentiality of information in contracts; and**
- **refer the contract to the Auditor-General for examination.**

ASIO and ASIS

5.33 ASIO and ASIS have not agreed to comply with the requirement to publish contract lists under the order on the ground of national security. Presumably they will continue to refuse to publish this information on the new AusTender system. Even so, it would seem unusual for all contracts of any kind to be excluded.

5.34 In this case, it is important that both agencies are subject to regular compliance auditing by ANAO. Without the ability to scrutinise these agencies' contract information publicly, the Parliament has to be satisfied that each agency is complying with government policy and the requirements of the order. Both agencies would benefit themselves from having ANAO check their contract management, tender and compliance processes regularly.

5.35 The Committee notes ANAO's agreement to audit ASIO and ASIS on a regular cycle and suggests a three-yearly cycle may be appropriate.

Recommendation 8

5.36 The Committee requests ANAO consider including ASIO and ASIS regularly in its compliance audits under the order on a three-yearly basis.

Annual reporting

5.37 DOFA's proposal to rationalise procurement reporting includes discontinuing the requirement for consultancies valued at \$10 000 and above to be included in annual reports. The Committee has confined its attention in this report to the question of whether reporting under the order should continue. It considers the Joint Committee on Public Accounts and Audit may be the most appropriate body to consider the question of annual reporting of consultancies, but notes other legislative and general purpose committees might also wish to contribute to any decision on this matter.

5.38 Suffice it to say, the Committee considers that any decision on the annual reporting of consultancies must carefully take into account the impact on the transparency of consultancies under new reporting arrangements. A reduction in the information currently available on consultancies would be a backward step and counter to the policy trend to make contracting activity more open. The Committee notes ANAO shares this view.

5.39 It may be the case that the question of annual reporting of consultancies should be addressed once the enhanced AusTender is operational and the quality of the reporting on consultancies under the new system can be assessed properly.

5.40 Whatever the decision on annual reporting of consultancies, the Committee considers agencies should note in their annual reports that information on contracts and consultancies is available on-line through the AusTender system. Some agencies are already doing so. This would be a useful reference for public readers interested in government contracting activity. To give effect to this proposal the Department of Prime Minister and Cabinet should make the necessary change in the next issuance of the guidelines for annual reporting.

Recommendation 9

5.41 The Committee recommends the Department of Prime Minister and Cabinet, in the next set of guidelines for annual reporting, include a requirement for agencies to include a note in their annual reports referring readers to the AusTender site for information on contracts and consultancies. Depending on the outcome of any decision on the DOFA proposal to rationalise procurement reporting, it may be necessary for agencies to also include a note explaining changes to reporting requirements for procurement contracts.

Agencies covered under the order

5.42 The Committee reaffirms the view expressed in its first report on the operation of the order that it should be extended to cover CAC Act bodies and that the Department of House of Representatives should comply voluntarily with the order.

CAC Act bodies

5.43 As noted in chapter 2, the government did not agree to the Committee's recommendation in its earlier report that the order be extended to cover CAC Act bodies. The government argued CAC bodies operated under a different legislative framework to FMA Act bodies and that the order's requirements would place an unreasonable burden on commercial operators.

5.44 Since then, the ground has shifted in relation to disclosure and CAC bodies. In 2004 the Minister of Finance issued a directive which included a requirement for certain CAC bodies to report procurement contracts with an estimated liability above \$400 000.² These contracts must be reported on AusTender.

5.45 The ministerial directive continued a trend in extending the accountability framework for procurement to cover CAC bodies. As noted earlier, the government had agreed to the Committee's recommendation that CAC bodies have regard to

2 *Finance Minister's (CAC Act Procurement) Directions*, 1 December 2004. The \$400 000 threshold relates to property or services other than construction services. The threshold for construction services is above \$6 million.

Finance guidance on commercial confidentiality for all new contracts from 2003. The 2004 ministerial directive took this a step further making it mandatory for CAC bodies to apply some parts of the Commonwealth Procurement Guidelines.

5.46 Now that CAC body contracts are reported on AusTender and follow Finance commercial confidentiality guidance, the Committee can see little reason for excluding these bodies from coverage under the order. The streamlined reporting promised under AusTender should reduce much of the burden which might have existed at the time the order was originally adopted. At the very least, procurement contracts entered into by CAC bodies valued at \$400 000 or more should comply with the order, although the Committee recommends the threshold should be set at \$100 000, the same as applies to FMA bodies. If this were to be accepted, the Finance minister's directive would need to be amended to lower the reporting threshold.

5.47 As with its original recommendation for CAC bodies, the Committee appreciates that these bodies should be given reasonable time to establish appropriate systems and processes to meet the order's requirements. It is expected that some of these should already be in place to allow CAC bodies to meet existing reporting and disclosure requirements. The Committee therefore recommends that CAC bodies should be included under the order from the start of the next financial year (i.e. 1 July 2007). This means CAC bodies would be required to report under the order for the 1st time by not later than 1 January 2008. By this time the new AusTender system should have been operational for six months and be capable of supporting this additional reporting.

5.48 The Committee notes that, if the Senate were to accept the Committee's recommendation to include CAC bodies under the order from 1 July 2007, the definition of 'agency' in the order will need to be changed to reflect this at that time.

Recommendation 10

5.49 The Committee recommends that the order be extended to cover CAC Act bodies from 1 July 2007.

Parliamentary departments

5.50 The Committee has always been of the view that transparency should apply to parliamentary departments in the same way as for other agencies. While the order does not cover the parliamentary departments, the Department of the Senate and the Department of Parliamentary Services have elected to comply voluntarily. As noted in chapter 1, the Department of the House of Representatives has not done so on the basis that the department does not comply with Senate orders unless the House of Representatives has passed a similar order.

5.51 The Committee suggests that, in the interests of transparency, the House department should comply voluntarily with the order. To do so on a voluntary basis would in no way imply an erosion of the sovereignty of the House of Representatives and its control over its department. Like other parliamentary departments, the House

department is already subject to the Commonwealth Procurement Guidelines which include instructions for tenders and contracts to alert contractors of disclosure obligations, including to the Parliament and its committees. In the Committee's view, it would be a logical step for the House department to take if it were to comply voluntarily with the order.

5.52 As noted in its previous report on the order, if the Senate accepts the Committee view then the President of the Senate should convey its suggestion to the Speaker of the House of Representatives.

Recommendation 11

5.53 The Committee reaffirms its suggestion that the Department of the House of Representatives comply voluntarily with the order. If the Senate agrees with this suggestion, the Committee requests the President of the Senate convey its suggestion to the Speaker of the House of Representatives.

Ongoing Committee role

5.54 The Committee was instrumental in the establishment of the order in 2001. Since then it has closely monitored the order's operation and made proposals to improve it which the Senate has adopted.

5.55 The Committee considers there remains a strong need for it to have an ongoing role in relation to the future operation of the order. With significant changes expected under the proposed new AusTender system, it is even more important that a committee of the Senate continue to monitor developments in relation to the reporting of government contracts.

5.56 The Committee sees two main areas where it has a role to play. The first relates to monitoring the impact on the transparency of procurement contracts as the new reporting framework is introduced. It is important that the Senate is kept informed of changes in the reporting arrangements for government contracts, particularly if new arrangements result in a reduction in transparency or the capacity for scrutiny.

5.57 The second area of interest for the Committee is in relation to the consideration and development of reporting options for non procurement contracts. It is important that solutions for the transparency and reliability of reporting for procurement contracts also be found for the reporting of non procurement contracts. In view of its experience in the development of the order, the Committee should be involved in the development of any new reporting mechanism for non procurement contracts. As signalled in recommendation 2 above, the Committee considers that DOFA should report back to it on options for non procurement reporting before any decision is made to implement a new mechanism.

5.58 The Committee also considers that DOFA should provide a general report to the Committee on the action it has taken and progress achieved in implementing the

Committee's recommendations. The report should also comment on progress in implementing the new single reporting mechanism and provide a frank appraisal of that system's performance and any problems that have emerged. This general report should be presented to the Committee not later than the end of September 2007. This should allow time for DOFA to implement the Committee's recommendations and consider the operation of the new reporting mechanism, particularly as departments and agencies should have reported contracts on AusTender by the end of August 2007 (in accordance with paragraph (1) of the order).

Recommendation 12

5.59 The Committee recommends DOFA provide a general report on the implementation of the recommendations in this report and the performance of the new single reporting mechanism, by not later than the last day in September 2007.

5.60 A minor amendment to the order will be required to enable the Committee to maintain a watching brief on the operation of the order and relevant developments.

Recommendation 13

5.61 The Committee recommends the Senate amend paragraph (7) of the order, to read: 'The Finance and Public Administration Committee consider the ongoing operation of the order and report on relevant developments from time to time'.

Senator Brett Mason
Chair