

The 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

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Senator Tsebin Tchen

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Senator Chris Schacht (until 30 June 2002)

Senator Winston Crane (until 30 June 2002)

Committee address:

Finance and Public Administration Committee
SG 60
Parliament House
CANBERRA ACT 2600

Telephone: (02) 6277 3530
Fax: (02) 6277 5809
E-mail: fpa.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate_fpa

Secretariat:

Secretary: Alistair Sands (from 19 August 2002)
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Recommendations

Recommendation 1

The Committee recommends that agencies include all government contracts in contract listings, including procurement contracts, lease arrangements, sales contracts, certain grants and funding agreements, certain employment contracts, demand-driven contracts with an expected whole-of-life value of at least \$100,000 and other arrangements that might be deemed to be contracts at law. (paragraph 3.20)

Recommendation 2

The Committee recommends that agencies with large numbers of similar types of contracts (for example, agreements under a particular piece of legislation) record a generic entry for this type of contract in their contract listings, including a notation setting out the nature of that type of contract in general terms. (paragraph 3.21)

Recommendation 3

The Committee recommends that the Department of Finance and Administration, in consultation with the Australian National Audit Office and agencies, develop advice for agencies on a means of indicating the nature of commercial confidentiality as it applies to individual contracts, and that this be included in updates to the whole-of-government best practice guidance on determining commercial confidentiality for contracts. (paragraph 3.29)

Recommendation 4

The Committee recommends that any additional requirements that may be required under the order as a result of guidelines developed by the ANAO should, as far as possible, be included as additional information to be collected in the GaPS system. This might include provision to indicate the nature of commercial confidentiality for each contract, that is, either (1) where specific contract provisions have been agreed by the parties to be kept confidential, and/or (2) where the parties have agreed to a general non-disclosure clause for the contract. (paragraph 3.30)

Recommendation 5

The Committee recommends that paragraph (9) of the order be amended to align the twelve month period covered by each set of listings with the end of the calendar and financial years. This would mean that listings would cover the previous twelve months ending on either 31 December or 30 June, as the case may be. (paragraph 3.36)

Recommendation 6

The Committee recommends that reporting under the order continue at six-monthly intervals. The Committee requests that the Auditor-General suggests to the Committee that the frequency of reporting under the order be changed to once every twelve months rather than twice-yearly, when the Auditor-General considered that this was appropriate. (paragraph 3.40)

Recommendation 7

The Committee recommends that agencies develop systems and processes that allow for continual additions to contract listings as new contracts are entered into or amendments to existing contracts made. (paragraph 3.47)

Recommendation 8

The Committee recommends that paragraph (1) of the order be amended to provide for ministers' letters to be tabled by not later than two calendar months after the last day of the financial or calendar year. That is, by not later than the last day of February (for calendar year listings) and 31 August (for financial year listings). (paragraph 3.48)

Recommendation 9

The Committee recommends that bodies subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) extend the DOFA commercial confidentiality best practice guidance to all new contracts entered into from 1 January 2003. (paragraph 3.54)

Recommendation 10

The Committee recommends that the Auditor-General write to bodies subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act), suggesting that they apply to all new contracts entered into from 1 January 2003 the DOFA commercial confidentiality best practice guidance. (paragraph 3.55)

Recommendation 11

The Committee recommends that the Senate order for the production of lists of departmental and agency contracts be extended to cover CAC Act bodies from 1 January 2004. (paragraph 3.56)

Recommendation 12

The Committee suggests that the Department of the House of Representatives comply with the Senate order for the production of lists of departmental and agency contracts. If the Senate agrees with this suggestion, the Committee recommends that its suggestion be conveyed to the Speaker of the House of Representatives by the President of the Senate. (paragraph 3.59)

Recommendation 13

The Committee recommends that the Auditor-General and the Department of Finance and Administration discuss with ASIO and ASIS the options for compliance with the order. (paragraph 3.64)

Recommendation 14

The Committee recommends that paragraph (2(b)) of the order be amended to include the following additional information:

- contract commencement date;
- duration of the contract;
- the relevant reporting period; and
- the twelve-month period relating to the contracts. (paragraph 3.71)

Recommendation 15

The Committee recommends that the Australian National Audit Office, in consultation with the Department of Finance and Administration, develop guidelines for the content, presentation and format of contract listings that will ensure the provision of comprehensive information about contracts in a user-friendly template. (paragraph 3.75)

Recommendation 16

The Committee recommends that paragraph (7) of the order be amended to provide for consideration and report on the second year of operation of the order by the Finance and Public Administration References Committee. (paragraph 3.86)

Recommendation 17

The Committee commends its recommendations to the Senate. If accepted, the Committee recommends that the order passed by the Senate on 27 September 2001 be amended to read as follows:

7 Departmental and agency contracts

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later **2 calendar months after the last day of the financial and calendar year**, 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 home page.
- (2) The list of contracts referred to in paragraph (1) indicate:

- (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
 - (b) the contractor, the amount of the consideration, the subject matter of each such contract, **the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings**;
 - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
 - (d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.
- (3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:
- (a) the list is not up to date;
 - (b) not all relevant agencies are included; and
 - (c) contracts all of which are confidential are not included.
- (4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.
- (5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
- (7) The Finance and Public Administration References Committee consider and report on the first and **second** years of operation of this order.
- (8) This order has effect on and after 1 July 2001.
- (9) In this order:

“**agency**” means an agency within the meaning of the *Financial Management and Accountability Act 1997*; and

“**previous 12 months**” means the period of 12 months ending on either 31 December or 30 June, as the case may be.

(20 June 2001 J.4358, amended 27 September 2001 J.4994)

(paragraph 3.87)

Chapter 1

Introduction

Background

1.1 Like many other governments, over the past decade the Commonwealth has increasingly outsourced functions that were previously the sole responsibility of government. This has resulted in a rapid expansion in the number of government contracts. Government contracts with a large number of confidentiality clauses have been of increasing concern to the Senate because of the implications for accountability of government expenditure. The Senate order is a direct response to these developments.

1.2 The major trend influencing public sector accountability internationally in recent times has been convergence of the public and private sectors resulting from public sector reforms aimed at ensuring greater contestability of public sector services. Convergence has occurred in a range of areas including accounting, auditing, financial management and service delivery. In Australia, National Competition Policy has been a major driver of changes aimed at ensuring value for money from government expenditure on goods and services. Competitive tendering and contracting (CTC) has developed as the means by which contestability of services in the public sector has been implemented.

1.3 The Joint Committee of Public Accounts and Audit (JCPAA) report, *Contract Management in the Australian Public Service*, October 2000, stated that CTC was ‘the process of selecting the most preferred provider of goods and services from a range of bidders by seeking offers and evaluating these against predetermined selection criteria’. It further noted that CTC was ‘used interchangeably with the term ‘outsourcing’ to explain the arrangement whereby a contracting agency enters into a contract with a supplier from outside that agency for the provision of goods and or services which typically were provided by the government agency’.¹

1.4 According to Mr Pat Barrett, Auditor-General for Australia, outsourcing has been the most significant of the recent public sectors reforms introduced with a view to more efficient and effective service delivery, in terms of its far-reaching effects on governance arrangements. In a recent speech, he discussed the implications for accountability frameworks resulting from convergence of the public and private sectors in response to demands for more effective service delivery and new technologies.

1 *Contract management in the Australian Public Service*, October 2000, Joint Committee of Public Accounts and Audit, p. 5

Convergence, and other external trends, including the impact of new technologies, have added a new level of complexity to traditional accountability frameworks. This has reinforced the importance of implementing robust and responsive corporate governance approaches. While the achievement of value for money outcomes is well established as a public sector priority, the opportunities offered by new service delivery arrangements, and more flexible funding initiatives, including the use of private financing, produce additional challenges for accountability and, consequently, for governance.²

1.5 The Auditor-General went on to point out the very different legal and accountability requirements under which the public and private sectors operate. A key distinction is that Commonwealth agencies are primarily accountable to the Executive and the Parliament, while private sector companies are responsible to shareholders.

For the public sector, legal responsibilities are defined by specific functional statutes as well as general requirements outlined in legislation such as the *Financial Management and Accountability Act 1997* and the *Commonwealth Authorities and Companies Act 1997*. By contrast, private sector organisations have specific obligations under corporations law and trade practices legislation, as well as relevant State/Territory legislation.³

1.6 The key to public sector accountability is openness and transparency. Convergence has increased the tension inherent in the obligation on the part of government for accountability and the desire of private contractors to keep commercial information secret. The Senate has recorded its frustration over many years with the conflict between commercial considerations and contractors' wish to maintain competitive advantage, and the need for access to information about government contracts by parliament and the public. As the Auditor-General notes:

The ANAO has found that value for money results from public-private sector partnerships can be particularly difficult to demonstrate where commercial-in-confidence provisions of contracts apply... [The ANAO considers that] the Commonwealth needs to take a proactive and consistent stance to the scrutiny of contracts involving public funds, to ensure transparency, accountability and the ethical use of resources is demonstrated.⁴

1.7 The 'reverse onus' principle places the responsibility on those wishing to maintain confidentiality to justify that position. The principle is central to open and accountable government and applicable to all government information.⁵ In line with

2 Mr Pat Barrett, AM, Auditor-General for Australia, *Auditing in a changing governance environment*, Senate Occasional Lecture Series, 21 June 2002, pp. 6-7

3 *ibid*, p. 8

4 *ibid*, p. 9

5 Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a new framework for accountability*, September 2001, p. 4

this principle and to counter the tension noted above, it has been suggested that business, commercial or financial information should generally be available in the public domain unless disclosure would prejudice the competitive position of the contractors.

1.8 In this regard, the JCPAA recommended that ‘all CEOs under the *Financial Management and Accountability Act 1997* should, whenever claiming commercial-in-confidence, issue a certificate stating which parts of a contract and why these parts are to be withheld’.⁶

1.9 The Commonwealth Government agreed with the JCPAA that contractual commercial information should not be considered inherently confidential, stating in its response to that report that decisions to withhold information needed to be fully substantiated with reasons as to why the information should not be disclosed. However, it did not agree with the recommendation for a certificate because it considered that there were already sufficient accountability requirements (including amongst these, the Senate order for department and agency contracts).

1.10 Some State governments have taken action regarding confidentiality and the disclosure of contract information. The new arrangements in the ACT and Victoria are examples of different approaches to disclosure.

- The ACT’s *Public Access to Government Contracts Act 2000* which requires that information about government contracts with a value of more than \$50,000 be made available to the public, limits information that can be made confidential and excluded from the public by:
 - establishing a model confidentiality clause for use in relation to information that the parties agree should be confidential;
 - establishing a register of contracts containing confidentiality clauses; and
 - requiring agencies to provide a copy of confidentiality clauses to the ACT Auditor-General for examination.
- The Victorian Government Central Register of Government Contracts, established in 2000, provides full-text access to government contracts with a value of more than \$10 million and access to summaries of contracts with a value of more than \$100,000. The use of confidentiality clauses is restricted to conform to the principles for disclosure under the *Freedom of Information Act 1982* (FOI Act), that is, to protect trade secrets, or if a private contractor were to be unreasonably exposed to disadvantage. Further, even where confidential clauses are permitted, they must be time-limited.⁷

6 Joint Committee of Public Accounts and Audit, *Contract Management in the Australian Public Service*, October 2000, p. 42

7 Mr Dan McLennan, ‘The Online Revolution in Government Contracting’, *Law Institute Journal*, July 2002, p. 80

1.11 The Auditor-General considered that the challenge is to achieve a balance between the interest of all parties. He emphasised the importance of sound process to manage the increased complexity and risks inherent in the new environment and considered that a more pragmatic approach to accountability was required. In his view, minimum requirements for the new environment are:

- a shared understanding of what is acceptable behaviour in a public sector context; and
- appropriate corporate governance arrangements to manage adherence where this is critical to the success of the initiative or material to the risks involved.⁸

1.12 It follows that the ability of parliament to scrutinise the efficiency and effectiveness of outsourced operations is crucial to accountability. The Auditor-General stated that:

...agreeing governance structures and demonstrating accountability are particular challenges in the new business environment. Agencies can outsource functions — in full or in part; however, Parliament insists that they cannot outsource their responsibility or overall accountability.⁹

1.13 In resolutions dating back to 1971, the Senate has reiterated that the operations of bodies in receipt of public funds are open to parliamentary scrutiny. Its view is that, while the means of delivery of public services may have changed, the need for the Government to account for the provision of goods and services that are funded from the public purse remains.

1.14 The Clerk of the Senate has described the Senate order as ‘a significant step towards reasserting parliamentary scrutiny over government contracting at the federal level’.¹⁰ More recently, the order has been described in the media as ‘arguably the most important accountability requirement to have emerged from the Parliament for ages’.¹¹

1.15 The order exemplifies the view that an adequate level of transparency and parliamentary scrutiny is vital to ensuring that government contracting processes are properly documented and that effective competition and value for money are being achieved.

8 Mr Pat Barrett, AM, Auditor-General for Australia, *Auditing in a changing governance environment*, Senate Occasional Lecture Series, 21 June 2002, p. 26

9 *ibid*

10 Mr Harry Evans, Clerk of the Senate, *Senate Order for Scrutinising Government Contracts*, 33rd Conference of Australian and Pacific Presiding Officers and Clerks, Brisbane, Qld, July 2002

11 Ms Verona Burgess, ‘Making the Reps more accountable’, *The Canberra Times*, Sunday 13 October 2002

Reference

1.16 Accountability in relation to Commonwealth government contracts has been a matter of formal interest to the Senate since 12 April 2000 when the issue was first referred to the Senate Finance and Public Administration References Committee (the Committee):

The mechanism contained in general business notice of motion no. 489, standing in the name of Senator Murray, providing for accountability to the Senate in relation to government contracts.¹²

1.17 Between April 2000 and September 2001, three reports relating to Senator Murray's motion were published:

- The Committee's first report on the mechanism proposed in the motion, *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*, 26 June 2000.¹³ The report raised a number of issues but left final recommendations until the results of a performance audit on the use of confidentiality provisions in Commonwealth contracts by the Australian National Audit Office (ANAO) were known.
- Audit Report No.38 2000-2001, *The Use of Confidentiality Provisions in Commonwealth Contracts* (ANAO Audit Report No.38)¹⁴, tabled in the Parliament on 24 May 2001.
- The Committee's second report on the mechanism proposed in the motion, *Commonwealth contracts: a new framework for accountability*, 26 September 2001.¹⁵

1.18 The motion became a Senate order on 20 June 2001 in the first sitting week following the tabling of the ANAO report. The order's wording differed from the original motion to reflect some of the Committee's concerns described in its June 2000 report. These mainly related to the resources and time required for its implementation. The order took effect from 1 July 2001. Appendix 1 contains the original order.

1.19 The Committee's second and final report on the order took account of Audit Report No.38 and proposed amendments to the original order. The amendments included changes to:

- advise the value of the contract, a nil return and whether all departments and agencies for which a minister was responsible were covered by the letter;

12 *Journals of the Senate*, No. 112, 12 April 2000, p. 2619

13 http://www.aph.gov.au/senate/committee/fapa_ctte/acnt_contract/contract.pdf

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

15 http://www.aph.gov.au/senate/committee/fapa_ctte/acnt_contract/murrayfinal.pdf

- provide for ministers to report on non-compliance in any or all of the agencies for which s/he was responsible;
- clarify the reporting period for letters tabled on the tenth sitting day of the spring and autumn sittings;
- provide the basis for estimates of compliance costs; and
- recognise that contracts not listed on agency websites should also be open to scrutiny by the Auditor-General.¹⁶

1.20 On the day following the Committee's final report, the Senate agreed to the proposed amendment. The order was renamed the *Order of the Senate for Department and Agency Contracts*. Appendix 2 contains the amended order.

What the order requires

1.21 Both Ministers and their departments must respond to the order. Ministers must table a letter in the Senate on behalf of each agency administered by that minister (or by a minister in the House of Representatives represented by that minister) by the tenth day of the spring and autumn sittings. The letter must advise that a list of contracts meeting the order's requirements (see below) has been placed on the Internet, with access to the list through the department or agency homepage.

1.22 If the list does not fully comply with the order's requirements, the minister must indicate the extent of, and reasons for, non-compliance and when full compliance can be expected. If it is the case that no contracts qualifying for listing have been entered into during the previous twelve months, ministers must also indicate this in their letter.

1.23 Departments must:

- compile a list of 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;
- publish the list on the Internet at six-monthly intervals (by the tenth day of the spring and autumn sittings of parliament), with a readily accessible path from the departmental website;
- include the following information about each contract on the list:
 - the name of the contractor;
 - the amount of consideration;
 - the subject matter of each contract;

16 Senate Finance and Public Administration References Committee, *Commonwealth contracts: a new framework for accountability*, September 2001, p. 27

- an indication of whether parties have agreed to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and the reasons for the confidentiality; and
- an estimate of the cost of complying with the order and an explanation of how the estimate was made.

1.24 For the purposes of the order, the following definitions apply:

- ‘agency’ means an agency covered under the *Financial Management and Accountability Act 1997*; and
- the twelve-month period for which contracts must be recorded means the period of twelve months that ends on the day before the first day of sitting of the autumn or spring sittings, as the case may be.

Government response

1.25 In response to both the original (June 2002) and amended (September 2002) orders, the Government agreed that agencies would comply with the spirit of the order but included the following caveats:

- that information regarding individual contracts would not be provided where disclosure would be contrary to the public interest, legislative requirements or undertakings given; and
- that agency compliance would be progressive as agencies refined arrangements and processes to meet the requirements.

1.26 In its first response the Government also referred to the legal implications of complying with the order in light of advice from the Australian Government Solicitor (the AGS) that information published on the Internet would not be provided with absolute privilege. The Committee considered this matter in its second report on the order and concluded that the order fell within the Senate’s powers and that there was ‘no doubt that the published lists of contracts would attract parliamentary privilege’.¹⁷

1.27 In response to the amended order, the Government also indicated that:

- the reporting period presented a challenge to agencies, especially those with a large number of contracts, in terms of providing little time for them to complete preparations to enable the tabling and publishing deadlines to be met; and
- the classification of commercial-in-confidence material could change over time and agencies might need to periodically reassess their classification of contractual material.

17 Senate Finance and Public Administration References Committee, *Commonwealth contracts: a new framework for accountability*, September 2001, p. 18

Commonwealth Procurement Guidelines (CPGs)

1.28 Updated *Commonwealth Procurement Guidelines* (CPGs) issued in October 2001 included new requirements regarding accountability. They referred to the order and noted the Government's agreement to compliance with the spirit of the order, and also stipulated that agencies should:

- include provisions in tender documentation and contracts that alert prospective providers to the public accountability requirements of the Commonwealth, including disclosure to parliament and its committees; and
- consider, on a case by case basis, what might be commercial-in-confidence when designing any contract.¹⁸

1.29 The CPGs were reissued in February 2002 but with no material changes regarding accountability.

Compliance advice — the Department of Finance and Administration (DOFA)

1.30 DOFA has provided advice to agencies to assist compliance with the order as follows:

- interpretation of what constitutes a contract for the purposes of the order (based on advice received from the AGS on 28 August 2001); and
- guidelines to assist agencies to understand and apply definitions of confidentiality, with reference to the guidelines set out in Report No.38 by the Australian National Audit Office and an AGS Legal Briefing of 4 July 2002, *Identifying and Protecting Confidential Information*.¹⁹

1.31 DOFA is currently preparing further best practice guidelines to help agencies classify information in terms of confidentiality, including criteria for what might be classified as confidential for use in operational areas. DOFA expects this advice to be finalised by the end of 2002.

ANAO Performance Audits

1.32 Paragraph (3) of the original order and paragraph (5) of the amended order, request the ANAO to evaluate a selection of the contracts listed in accordance with the order for the appropriate use of confidentiality provisions. Paragraph (6) of the amended order requested the ANAO to evaluate contracts not listed in accordance with the order, and to determine whether they should have been. The order requests the ANAO to undertake performance audits for each six-month reporting period, within six months of the tabling date for ministers' letters.

18 *Commonwealth Procurement Guidelines*, September 2001, subsection 1.2

19 <http://ags.gov.au/publications/briefings/index.html>

1.33 The Auditor-General has tabled two reports in accordance with this request covering compliance with the order for the first and second six months of its operation. These are:

- Senate Order of 20 June 2001 (February 2002);²⁰ and
- The Senate Order for Department and Agency Contracts (September 2002).²¹

1.34 The main conclusion from the audits was that the overall response to the Senate order from agencies has been positive. The ANAO considered that there were also indications that a number of agencies were developing, progressively, more detailed guidance to assist staff in determining aspects of contracts that might need to be protected as confidential. In the ANAO's view, this was a step in the right direction but it considered that agencies still had some way to go in applying guidance in a manner expected by parliament. Chapter 2 contains more detail about the findings in the two ANAO audits.

This report

1.35 This report fulfils the requirement of part (7) of the order to consider and report on the first year of operation of the order, that is, from 1 July 2001 to 30 June 2002.

1.36 The Committee has undertaken the following action in respect of this reporting requirement:

- review of contract lists on agency websites and letters tabled by Ministers in respect of agency compliance during the first year of operation of the order;
- requests to Ministers for information on any difficulties or issues faced by departments in relation to compliance with the order;
- ongoing consultation with the ANAO and formal requests for information from the Auditor-General in respect of his two performance audits of agency compliance with the order; and
- consultation with the Business Services Group and the Procurement Branch of the Department of Finance and Administration on the order in general, and on the review of the Gazette Publishing System (GaPS) for procurement related contracts for goods and services.

1.37 Chapter 2 sets out the main issues that have arisen regarding compliance with the order. It includes:

- a summary of compliance with the order during its first year of operation; and
- views expressed on a range of issues in relation to the order by ministers, by the Auditor-General and by government officials.

20 <http://anao.gov.au/WebSite.nsf/Publications/4A256AE90015F69BCA256B6A0079BF39>

21 <http://www.anao.gov.au/WebSite.nsf/Publications/D60861DF0DB128B6CA256C36007918D3>

1.38 Chapter 3 contains the Committee's conclusions on specific issues as well as on the operation of the order in general. It also includes recommendations for changes to the order and on ongoing reporting and compliance monitoring.

Chapter 2

Issues

Introduction

2.1 A significant factor affecting agency ability to achieve compliance was each agency's interpretation of what constituted a contract under the order. Ministers referred to differences in interpretation between agencies and an unnecessary level of complexity. This matter is dealt with in more detail later in this chapter.

2.2 Agencies claimed that a number of other matters relating to the requirements of the order have also caused confusion and/or differences in interpretation amongst agencies. These have a bearing on the contract listings published by agencies and will also be dealt with separately and in more detail later in this chapter. They include:

- confidentiality issues;
- reporting requirements; and
- presentation and disclosure issues.

2.3 Two other matters raised in discussion and correspondence with agencies and the ANAO also considered separately and in more detail later in this chapter are:

- Commonwealth agencies covered by the order; and
- the frequency of ANAO audits of compliance in relation to the order.

2.4 In the first section of the chapter, the Committee discusses general trends in compliance and draws on:

- the outcomes of the first two performance audits of the order undertaken by the Australian National Audit Office (the ANAO); and
- the Committee's review of agency compliance during the first twelve months of operation of the order.

Compliance — general trends

2.5 Compliance with the order during its first year of operation varied across agencies for a number of reasons. The size of the task and the need for new processes and arrangements to obtain the information required for compliance have been major issues for a number of agencies.

2.6 In terms of the processes used to create contract listings, the ANAO set out the following actions that would be expected of agencies:

Agencies would be expected to have:

- adopted/developed policy and procedures for recording contracts;

- allocated responsibility for recording/listing contracts on the agency's website;
- implemented a system (for example, a contracts register) for the recording and reporting of the relevant information of all contracts (website and GaPS¹);
- developed appropriate controls for identifying those contracts with confidentiality provisions and the reasons for confidentiality (including discussing with suppliers as necessary); and
- implemented procedures for reconciling the listing with independent records and checking of the information listed, and updating the agency's website (timeliness, accuracy, completeness).²

2.7 The Committee held a briefing with the ANAO at which it asked the ANAO to comment on trends regarding compliance with the order. The ANAO prefaced its remarks by stating that its comments would necessarily be based on the audits of the agencies it had examined to date. However, because it had completed or was undertaking audits for many of the larger agencies, it considered it could comment on broad trends.

2.8 The ANAO stated that it had not detected any deliberate slowness regarding compliance on the part of any agency it had audited. However, it considered that agency compliance by the required reporting dates (17 September 2001 and 21 March 2002) had been affected by the timing of the Government's responses to the order (late August 2001 and early June 2002). As the ANAO stated in its most recent audit report:

Some agencies advised that they had been ready to comply with the Order, as amended, but decided to wait until the Government had responded to the Order before they did so.³

2.9 The order requires publication of contract listings covering a period of twelve months ending on the day before the first day of the autumn or spring sittings, as the case may be. For the second reporting period (that is, the period associated with the tabling of letters by ministers by the tenth day of the autumn 2002 sitting — 21 March 2002), both the original and amended orders were relevant. As the ANAO noted in its second audit report, the fact that agencies were found to be in different stages of achieving compliance with the order even after two reporting periods was to be expected. One reason was that arrangements and processes to meet the requirements were still at any early stage. This reflected the Government's response to

1 Gazette Publishing System (GaPS), an online database operated by the Office for Government Online and published at www.contracts.gov.au

2 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, p. 36

3 *ibid*, p. 33

the original order (restated in its response to the amended order) that compliance would be progressive as agencies ‘...refine arrangements and processes to meet the requirements [of the order]’.⁴

2.10 Another reason for less than full compliance might have been because, on advice from the Department of Finance and Administration (DOFA) on 18 October 2001 and again on 15 February 2002, some agencies continued to comply with the original Senate order until the Government had responded to the amended order:

As a result, it would not be unreasonable to expect most agencies to have complied with the requirements of the original Order and some agencies to have partly, or fully, complied with the amended Order.⁵

2.11 In its second audit, the ANAO stated that, of the six agencies audited in detail, all had ‘implemented various arrangements and procedures for the required information to be recorded and reported’ including ‘allocating responsibility for the coordination and preparation of the Internet listing to appropriate personnel.’ But only one agency (DOFA) ‘had revised relevant policies and chief executive instructions relating to procurement and contracts to reflect the Senate Order requirements’.⁶

2.12 Nevertheless, in its briefing, the ANAO told the Committee that agencies have responded in a positive way to the order. It said that agencies were progressively changing their contracting practices in response to the need to comply with the order in a way that reflected the intent of the order.

2.13 The ANAO went on to say that it appeared that agencies were now commencing contract negotiations on the premise that all contract information should be considered non-confidential and that the onus was on contractors to make a case for information to be treated otherwise. In most cases, agencies also were making potential contractors aware of the new accountability framework, including the Senate order, at the start of negotiations.

2.14 In a briefing with the Committee, DOFA advised that compliance for the first and second reporting periods for that department and its agencies had required more time and resources than for the third and most recent reporting period. It considered that compliance was becoming easier and more routine as officers became more familiar with the new systems and processes established to assist compliance. In response to a specific request from the Committee, DOFA advised that the time required for that department to comply with the order had reduced from approximately 66 days for the first tabling to approximately 12 days for the most recent tabling in

4 Government response to the Senate Order for Department and Agency Contracts (27 August 2001), p. 1

5 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, p. 32

6 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, pp. 36-37

September 2002. The associated cost to the department had also reduced from approximately \$20,000 to approximately \$3,700.⁷

2.15 In their individual responses to the Committee, ministers confirmed that agencies were changing their practices regarding government contracts by:

- establishing contracts registers;
- developing new processes and arrangements to collect, classify and prepare the information required for listings; and
- developing and providing advice to contractors at the start of negotiations about the need for accountability to parliament and its committees, including through the Senate order.

Ministerial compliance – letters of advice tabled in the Senate

2.16 For the 2001 spring sittings (reporting date 17 September 2001), most ministers advised the Committee by the required date that lists of contracts had been published on agency websites. There were deficiencies in the advice from ministers, however, including:

- incomplete lists of agencies for which ministers were responsible;
- failure to provide Internet addresses indicating the location of lists; and
- failure or lateness in tabling letters of advice.

2.17 For the 2002 autumn sittings (reporting date 21 March 2002), letters of advice were received from more ministers. A number of issues still remained, however. These included:

- incomplete lists of agencies for which ministers were responsible;
- failure to provide Internet addresses indicating the location of lists;
- late tabling of letters (letters were not received from some ministers until the end of May);
- failure to table letters by some ministers, although lists of contracts had been published on departmental websites;
- lack of compliance with paragraph (4) of the amended order that requires ministers to indicate that no contracts of \$100,000 or more had been entered into or remained unfulfilled, if that were the case; and
- failure to indicate non-compliance with some aspects of the order and the reasons for this, as required by paragraph (3) of the order.

7 Department of Finance and Administration, Correspondence, 5 December 2002

Agency compliance – Internet lists of contracts

2.18 By the end of the first twelve months of the order's operation, most agencies had established lists of contracts on their websites that complied either wholly or in part with the original and amended orders. All lists included the names of contractors and most included the subject matter and amount of consideration for each contract in accordance with paragraph (2)(b) of the order.

2.19 In its two audits of compliance, the ANAO found that most agencies had generally complied with the requirements of the original Senate order or the order as amended, and that 'a high proportion of agencies had placed their lists on the Internet either by, or shortly after, the due date'.⁸ It noted that most agencies were well placed to meet the additional requirements for the spring 2002 listing because:

- a relatively large proportion of agencies (26 per cent) had already complied fully with the additional requirements of the amended order; and
- a number of other agencies indicated that they had been ready to comply with the order, as amended, but were waiting until the Government had responded to the order before varying the information provided in their listing.

2.20 The ANAO's desk-top review of all agencies for the second reporting period found that:

- more agencies (74 per cent) had compiled the listing in accordance with the original (20 June 2001) order than had done so in accordance with the amended (27 September 2001) order (26 per cent);
- about 50 per cent of agencies complying with both versions of the order had met the requirements, including the due date; and
- agencies had been more timely in publishing lists by the due date for the second reporting period, with 90 per cent having listed within four weeks of the due date. All agencies required to comply with the order had listed their contracts on the Internet within eight weeks of the due tabling date. This was an improvement over the spring 2001 reporting period when six agencies had not listed by the time the audit report was prepared.⁹

Definition of a contract

2.21 In the view of most agencies, the order's lack of specificity in defining what constitutes a contract had resulted not only in differences in interpretation between agencies, but also in the need for considerable additional resources due to the greater operational complexity required for compliance. Agencies pointed out that this also added to the time pressures to comply with the order.

8 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, p. 15

9 *ibid*, pp. 33-35

2.22 DOFA advised the Committee that, as part of its role to provide whole-of-government advice to *Financial Management and Accountability Act 1997* (FMA) bodies on procurement related policy issues, it wrote to agencies on 28 August 2001 with Australian Government Solicitor (AGS) legal advice on the definition of ‘contract’ for the purposes of the order.¹⁰

2.23 Most agencies followed the advice provided by the AGS that, because the order does not define ‘contract’, a broad definition of the order should apply. This meant that arrangements should be categorised as ‘contracts’ on their legal status rather on than the name given to the arrangement. Using this interpretation, a wide range of agreements could fall under the order, including lease arrangements, certain grants and funding agreements and certain employment contracts (these do not include Certified Agreements (CAs) or Australian Workplace Agreements (AWAs)).

2.24 In accordance with the AGS advice, most agencies have included not only procurement type contracts on their lists but a range of other contracts, including grants and funding agreements. Ministers stated that most agencies were responsible for many more grants and funding agreements than procurement type contracts and that use of a broad definition for ‘contract’ greatly increased the extent of the compliance task in relation to the order. This was because including such arrangements on the list not only required that information about them be recorded (in accordance with the specifications of the order), but also that agencies determine whether each grant or funding agreement conformed to the legal definition of a contract.¹¹

2.25 The Department of Defence was an exception to this, however, advising the Committee that its listings contained *only* procurement type contracts. It indicated that these equated to purchase orders notified in GaPS. Procurement type contracts form the bulk of contracts let by Defence and its contract listings, compiled using information obtained from GaPS, are very large.

2.26 In their responses to the Committee, some ministers indicated their concern that a broad definition of a contract was at odds with the original intent of the order. In its briefing, DOFA advised the Committee that its listings included many lease agreements since a number of its contracts were of that nature. Its view was that the

10 Department of Finance and Administration, Correspondence, 10 September 2002

11 A contract is an agreement made between two or more parties whereby legal obligations are created which the law will enforce. For an agreement to be deemed a contract, it must contain the following six elements:

- intention to create legal relationships;
- offer and acceptance;
- form or valuable consideration;
- legal capacity;
- genuine consent; and
- legality of objects

order had been developed in relation to procurement related contracts and that grants and funding agreements had not been intended for capture under the order.

2.27 In his letters of 14 March and 10 September 2001, Minister Minchin requested that the Committee consider amending the order to confine its scope to procurement related contracts on the grounds of efficiencies that would arise, in particular, from closer alignment of the order with the GaPS system. Agencies, generally, supported the Minister's view. For example, the Attorney-General put the matter as follows:

The Department believes that the intention of the Senate Order is for agencies to report procurement arrangements. Accordingly, the Department believes that the definition of a contract for the purposes of the Senate Order should be limited to include contracts of a procurement nature, including appropriate Memoranda of Understanding, and consistent with the definition used by agencies when reporting contractual arrangements through the Gazette Publishing System (GaPS).¹²

2.28 The Department of Transport and Regional Services (DTRS) claimed that confining the definition of a contract to procurement related contracts would not affect transparency in relation to grants because discretionary grants were already published in its annual report.¹³

2.29 Agencies suggested that streamlined reporting requirements might consist of:

- either enhanced GaPS and annual reports only (that is, no separate reporting under the order); or
- enhanced GaPS and annual reports and a separate published list of contracts with confidentiality provisions, depending on the extent of commercial confidentiality indicators included in the enhanced GaPS system.

2.30 During its briefing with the Committee, DOFA emphasised the advantages of linking the order's reporting requirements to GaPS. It pointed to the considerable duplication involved in reporting contract information in three separate reporting systems, that is, for the order, in GaPS and in annual reports. It emphasised the potential for cost savings and efficiencies that would result from a single reporting mechanism and argued that this could be achieved through an enhanced GaPS system. It stated that the present redevelopment of GaPS included enhancements that would allow agencies to comply with the Senate order's requirements. DOFA advised the Committee that many agencies had developed processes to provide contract information to GaPS automatically through linking their financial information management systems (FMISs) to GaPS, allowing provision of information efficiently.

12 The Hon Daryl Williams AM QC MP, Attorney-General, Correspondence, 6 September 2002

13 Parliamentary and Legal Services Branch, Department of Transport and Regional Services, Correspondence, 4 September 2002

2.31 DOFA explained that reporting through GaPS had two other major advantages:

- GaPS provided realtime reporting for all government procurement related contracts. Information in GaPS was therefore more current than the contract listings published in compliance with the order, other than for a period of six weeks immediately following publication of listings under the order, since GaPS allowed up to six weeks for inclusion of new contracts.
- GaPS retained contract information indefinitely at present, although the search facility allowed contract information to be retrieved for specific three-month periods only. By contrast, the order requires a new list of contracts (entered into or not fully performed over the previous twelve months) to be provided every six months. Options being explored as possible enhancements to GaPS included changing search function parameters, and the deletion and archival (after a period of time) of information about completed contracts.¹⁴

2.32 However, in further information provided to the Committee, DOFA confirmed that the integrity of data included in GaPS was an issue, although it considered agencies were improving in that regard. It advised that agencies were responsible for the accuracy of data provided to GaPS and for maintaining and updating this information. DOFA said that it was not in a position to provide quality assurance of GaPS information because the information often reflected each agency's recording systems. It considered, however, that recent improvements in the integrity of GaPS data were, in part, the result of the provision of more feedback from DOFA to agencies on the information provided to GaPS. Its view was that this had prompted agencies to assume greater ownership of the information provided to GaPS and to respond to specific issues raised.

2.33 DOFA also noted that the information obtained for the purposes of compliance with the Senate order was collected for that purpose only and that efficiencies that would flow from linking to information in other reporting systems, such as GaPS, were limited. It advised that, although the intention of some of the options being explored for enhancements to GaPS was to collect information required under both systems, acceptance and implementation of the proposed enhancements remained a matter for agencies. That is, while DOFA was working towards building a facility that agencies could use to report both for the purposes of the Senate order and for GaPS reporting, agencies retained the right to decide whether they would prefer to use the system or not.

2.34 In correspondence, the ANAO stated that it was not clear to it why a distinction should be drawn between procurement and other contracts, 'other than for administrative reasons'. It noted that 'the principles articulated in ANAO Audit Report No.38 and subsequently endorsed by the FPA Committee, apply to all forms of

14 GaPS records can be deleted at present for specific reasons only, such as data error, and agencies must request deletion in writing

contracts including those for the procurement and sales of goods and services, and grants'.¹⁵

2.35 During its briefing with the Committee, the ANAO recognised the administrative efficiencies that would flow from confining the order to procurement related contracts but considered that other contracts, such as sales contracts, might usefully be captured under the order. It stated that it had no information on the number of sales contracts that might contain confidentiality provisions and that the same could be said for grants and funding agreements.

2.36 DOFA explained that GaPS has the capacity to capture information about disposals, although it was not the main purpose of the system. It stated that it did not usually collect information on disposals and that it did not know the extent of disposals reporting. However, in response to a specific request from the Committee for such information, DOFA advised that a total of 66 disposals with a value of \$100,000 or more had occurred in that department over the life of the order.¹⁶

2.37 Regarding employment contracts, the ANAO considered that while it was not appropriate for the order to capture Certified Agreements and Australian Workplace Agreements, other employment contracts should be captured. An example would be contracts for IT specialists.

2.38 The ANAO also considered that building leases should be captured under the order if the agency was bearing the bulk of the risk.

2.39 The Clerk of the Senate, Mr Harry Evans, suggested that confining the order to procurement related contracts 'would partly defeat its purpose' and that transparency was desirable for all kinds of government contracting. In relation to grants and funding agreements, he suggested that, for large numbers of similar types of contracts (for example, agreements under a particular piece of legislation) generic entries 'noting the existence of such contracts and recording their nature in general terms' would be appropriate.¹⁷

2.40 The Clerk of the Senate saw no difficulty in agencies standardising the information they included in listings for the order and that compiled for GaPS, 'provided that there [was] no expectation that the order [would] be changed to conform with GaPS.'¹⁸

Demand-driven contracts

2.41 Another issue raised in responses to the Committee was that of demand-driven contracts, that is, contracts whose final cost cannot be estimated until

15 ANAO, Correspondence, 29 August 2002, p. 4

16 Department of Finance and Administration, Correspondence, 5 December 2002

17 Mr Harry Evans, Clerk of the Senate, Correspondence, 30 October 2002

18 *ibid*

after they are completed. Agencies advised that the cost of unfulfilled demand-driven contracts, such as those involving health and personal services, was unknown and that it could be difficult to estimate the value or expected usage for contracts based on hourly or daily rates. It was claimed that, while the order's requirements could be met for fixed price and completed contracts, they were difficult to meet for demand-driven contracts. The Department of Veterans' Affairs stated that most of its contracts were standing offer arrangements for health and personal support services accessed by veterans as needed. It said that it was difficult to estimate usage and the expected value of contracts in advance and that it intended to report expenditure on such demand-driven contracts retrospectively and within the limits of confidentiality. That is, it would not report individual price schedules.

Primarily this view would be taken in circumstances where the Commonwealth may wish to keep information confidential to protect its interests. For example, negotiation of hospital services across Australia is conducted on a State by State basis. Any release of information such as individual pricing schedules could significantly impair DVA's to maintain competitive bidding, potentially resulting in increased costs across the provision of the service.¹⁹

2.42 The ANAO preferred that listings include demand-driven contracts and that agencies estimate whole-of-life value for these contracts. It considered that notations could be added subsequently to indicate how estimates for these sorts of contracts compared with ongoing outlays.

2.43 In further information provided to the Committee, DOFA advised that demand-driven procurement related contracts were listed in GaPS and that GaPS required that estimates of the value of such contracts were provided.

2.44 The Clerk of the Senate agreed with the ANAO's view that agencies should list contracts that were expected to exceed \$100,000, with a notation to that effect.²⁰

Commercial confidentiality

2.45 The Committee's review of overall compliance with the order during its first year of operation found that most agencies had indicated whether contracts were subject to confidentiality. However, reasons for confidentiality were not always stated or, if they were, varied in their level of detail and relationship to the recommendations developed by the ANAO in its report on confidentiality provisions (Audit Report No.38, 2000-2001).²¹

19 The Hon Danna Vale MP, Minister for Veterans' Affairs and Minister Assisting the Minister for Defence, Correspondence, 12 September 2002

20 Mr Harry Evans, Clerk of the Senate, Correspondence, 30 October 2002

21 ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts*, Audit Report No.38, 2000-2001

2.46 In addition, some agencies appeared to list contracts as confidential on the grounds of general disclosure clauses, although most indicated their willingness to make further information about contracts available to parliament on an ‘in camera’ basis, if necessary.

2.47 In response to the Committee’s request for information, agencies called for a clearer definition of, and a standard, simplified agency-wide approach to confidentiality. Some would prefer the order to be more specific in terms of the level of detail required. Some agencies had obtained independent legal advice on determining confidentiality. The Attorney-General stated that Commonwealth-wide guidance and the inclusion of high-level advice in the *Commonwealth Procurement Guidelines* (CPGs) would assist agencies to identify and report on confidentiality.²²

2.48 Most agencies indicated that they had used three main source documents to determine contract confidentiality:

- ANAO Audit Report No.38, 2000-2001 (endorsed by this Committee in September 2001);²³
- an AGS Legal Briefing on identifying and protecting confidential information (includes a template based on the ANAO criteria for determining confidentiality);²⁴ and
- the *Commonwealth Procurement Guidelines and Best Practice Guidance* (February 2002).²⁵

2.49 The ANAO considered that it was appropriate for agencies to use the criteria set out in its Audit Report No.38, or legal advice consistent with them, until guidance issued by DOFA to assist agencies to determine confidentiality was available.²⁶ The Committee understands that the release of best practice guidance on commercial confidentiality for contracts by DOFA, in its role as provider of whole-of-government to FMA bodies, is imminent.

2.50 Ministers advised that agencies were still in the process of developing systems and processes so as to be able to fully comply with the order regarding confidentiality. From its detailed audit of selected agencies for the second reporting period, the ANAO concluded that, until the end of this period, it was still ‘a relatively difficult task’ for agencies to identify potential contract confidentiality provisions, and the

22 The Hon Daryl Williams AM QC MP, Attorney-General, Correspondence, 6 September 2002

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

24 <http://www.ags.gov.au/publications/briefings/index.html>

25 http://www.finance.gov.au/ctc/publications/purchasing/cpg/commonwealth_procurement_guide.html

26 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, p. 48

reasons for confidentiality.²⁷ Nevertheless, the ANAO was able to confirm ministers' advice that systems and processes were being developed.²⁸

2.51 The changing nature of confidentiality over time was an issue for agencies. DOFA said that confidentiality for particular clauses needed to be viewed 'in the context of the specific contract, the work to be performed, the nature of the industry from which the service is being sought and the level of detail that is provided'.²⁹

2.52 The Department of Defence suggested that identification of individual provisions as commercial-in-confidence did not add value, in particular, 'because confidential information is not a constant and will change over time'. They considered that the order could be 'potentially misleading' since information could be out of date, at least in part, from time to time. It argued that information about value, subject matter and the contractor's name should be enough to identify contracts of interest.³⁰ DTRS also said that information about a contract at a point in time could not be guaranteed for the life of the contract. It was concerned that the order did not seem to reflect the fact that confidentiality can change throughout the life of the contract. It drew attention to the fact that the law in relation to confidentiality is based on equitable rather than contract law principles, so that decisions as to what constitutes confidentiality could be open to dispute in court.³¹

2.53 Only one agency, the Department of Agriculture, Fisheries and Forestry (AFFA), indicated that it considered that there was 'sufficient information available to agencies concerning the confidentiality of contracts', referring specifically to ANAO Audit Report No.38, the AGS advice and the CPGs.³²

2.54 Some agencies referred to difficulties negotiating contracts due to contractors' insistence on confidentiality on the grounds of the unreasonable harm to business interests that could follow disclosure. For example, the Department of Immigration, Multicultural and Indigenous Affairs said protracted negotiations could be costly and impact on overall value for money, especially where staff did not have the capacity or knowledge to disagree with suppliers on the need for confidentiality.³³

27 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, p. 28

28 *ibid*, p. 15

29 Senator, The Hon Nick Minchin, Minister for Finance and Administration, Correspondence, 10 September 2002

30 Senator, The Hon Robert Hill, Minister for Defence, Correspondence, 28 August 2002

31 Parliamentary and Legal Services Branch, Department of Transport and Regional Services, Correspondence, 4 September 2002

32 Mr Michael J Taylor, Secretary, Department of Agriculture, Fisheries and Forestry Australia (AFFA), Correspondence, 3 September 2002

33 Minister for Immigration and Multicultural and Indigenous Affairs, Correspondence, 22 August 2002

2.55 During its briefing with the Committee, the ANAO stated that it had not found evidence that the order was resulting in long, protracted contract negotiations. The ANAO noted that the order did not require disclosure of the text of contracts, but rather required an indication of whether confidentiality existed in relation to contracts and the reasons for this. Neither has this been a stumbling block in other jurisdictions. Publication of government contract information is a mandatory requirement in some countries (for example, New Zealand and the United States) as well as some Australian states, as noted in Chapter 1.

2.56 Further, in its second audit, the ANAO stated that pricing information that was not detailed enough to allow competitors to determine the cost structures and profit margins of suppliers did not warrant protection as confidential. Of seven contracts without specific provisions protecting information as confidential that were examined in its detailed audit of six agencies listings, the ANAO considered that pricing information in four contracts was confidential because:

- the price was detailed enough to allow competitors to determine the cost structures and profit margins of the supplier; and/or
- the daily or hourly rates of the subcontractor shown in the contract were of commercial value to the supplier, which may cause detriment to the supplier should they be disclosed...

In general, the pricing information in the other contracts included prices for services and items but rarely included the costs to the contractors of providing the service or item. It would therefore be unlikely to reveal the profit (or loss) margins for the contractor and would not have provided sufficient information for a competitor to ascertain the profit position or viability of the business. In these cases, the ANAO considered it unlikely that the commercial information would have the necessary quality of confidentiality, to warrant being protected as confidential.³⁴

2.57 The ANAO advised the Committee that, as the length of time the order had been in place increased, it expected to find a decreasing incidence of breaches of the appropriate determination of contract commercial confidentiality. In its second audit report, it concluded that low compliance in the first and second reporting periods with respect to the suggested criteria for determining confidentiality, was the result of contracts having been negotiated before the new accountability framework was in place. All contracts examined by the ANAO were negotiated before 31 December 2001, that is, within a short time of the Senate's approval of the amended order (27 September) and well before the Government's response (5 June 2002). The contracts examined were therefore negotiated in quite different circumstances, but are appropriately included on agency listings because they fall within the specified reporting period.

34 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, p. 53

This high proportion of contracts classified inappropriately was not unexpected, given that the majority of contracts were entered into by agencies before they had started to make the changes necessary to put into place the new accountability framework and without guidance to determine if information in a contract should be protected as confidential.³⁵

2.58 The ANAO also concluded that guidance on determining confidentiality needed to be more comprehensive to assist consistency in assessments. Its second audit stated that ‘most [agencies’] policies reflected the guidance in the CPGs that agencies should alert contractors to the accountability requirements of the Commonwealth, including disclosure to Parliament and its committees, and that they should consider, on a case-by-case basis, what might be commercial-in-confidence when designing any contract’.³⁶

2.59 However, it found that some agencies were still not advising potential contractors of the need to identify potentially confidential information for consideration before the contract was signed. The ANAO therefore considered that comprehensive guidance should be provided to individual procurement and contracting officers to enable them to assess what information in, or associated with, a contract is confidential, as part of the contract negotiation process.³⁷

2.60 Referring to the guidance it had been developing to assist agencies to appropriately classify commercial information, DOFA said that the guidelines would include tests and criteria that should assist resolution of differences in interpretation of commercial confidentiality between agencies. It stressed the need for flexibility so that confidentiality could be determined on a case-by-case basis, and noted that the CPGs already made this point.

2.61 Some agencies raised the issue of general ‘non-disclosure’ clauses³⁸ in relation to the order’s requirement for agencies to report ‘any other requirements of confidentiality’. DOFA advised that it had received legal advice (which it provided to agencies) that the amendments to section 2(c) in the amended order were intended to clarify that the scope of the order included confidentiality clauses of a general nature.³⁹

35 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8 2002-2003, p. 61

36 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8 2002-2003, p. 15

37 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, pp. 43, 47

38 That is, a clause requiring the contractor ‘to maintain confidentiality of the Commonwealth material and the Contract Material (being the product of the contract)’ but not ‘any clauses, provisions or parts of the contract itself’

39 The Department of Finance and Administration, additional information, 30 October 2002

2.62 In correspondence to the Committee, the ANAO advised that it considered that ‘confidentiality clauses of a general nature are designed principally to protect Commonwealth information that may be obtained by the contractor in carrying out the contract’. It also stated that, in some cases, similar clauses had been used to protect the contractor’s information.⁴⁰

2.63 The ANAO’s second audit cited examples of this practice in all six agencies’ contracts that were examined in detail. For example, specific findings in relation to the appropriateness of the use of confidentiality provisions for contracts examined from the Family Court of Australia (FCA) were:

Five of the six contracts were listed as being confidential on the Internet but no statement of reason was provided. The FCA advised the ANAO that the contracts did not contain any confidential information but had been listed on the Internet because they contained general disclosure clauses designed to protect Commonwealth information obtained during the performance of the contract. The ANAO agreed that in assessing the information against the Senate-endorsed criteria, there was no information in the contract that could be considered as confidential.⁴¹

2.64 The ANAO suggested in its correspondence that, because the new framework required agencies to specify contract information that is considered confidential, they should not have to rely on general disclosure clauses to protect confidential information. Further, it advised that interpreting the order as inclusive of general confidentiality clauses would result in many agencies indicating confidentiality provisions for most contracts for the spring 2002 reporting period.⁴² This is because many contracts had been negotiated prior to the establishment of the new accountability framework at a time when many contracts included general disclosure clauses.

2.65 The ANAO suggested that, if the Committee wished this interpretation of the order, it might consider requesting agencies to include separate columns in contract listings. It suggested that one column might denote ‘whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions’ and another might indicate whether there were other requirements of confidentiality attaching to the contract. It suggested that the order might include ‘suitable explanations’ regarding what should be included in each column. It considered that this would allow a distinction to be made between the two types of confidentiality, but noted that further changes to the order, especially if applied retrospectively, may add to agencies’ workload.

40 ANAO, Correspondence, 29 August 2002

41 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, pp. 31, 46, 60

42 ANAO, Correspondence, 29 August 2002, p. 4

The ANAO notes that any changes to what agencies expected to list on the Internet would add to their workload, particularly if the changes were applied to contracts already listed on the Internet, as well as new contracts.⁴³

2.66 It further advised, in additional information provided to the Committee, that at least one agency was already setting out commercial confidentiality information for individual contracts in separate columns in its contract listings, in the manner suggested above.

2.67 One agency, the Department of Health and Ageing, advised the Committee that it had interpreted 'any other requirements' as attaching to the provisions of the contract. On this basis, it had concluded that non-disclosure clauses did not fall within the intended scope of the order.⁴⁴

2.68 The Clerk of the Senate considered that the order's reference to 'any other requirements of confidentiality' referred to 'separate agreements with contractors for confidentiality which are not included in the terms of the contract itself.' He considered that agencies could include a notation in contract listings that included generic confidentiality clauses.⁴⁵

2.69 The Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS) argued that contracts let by those agencies should be exempt from listing on the grounds of national interest. ASIO told the Committee that, in accordance with the Government response to the order, it had consulted the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity (in *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters*, November 1989) to determine whether contract information should be listed. It had concluded that it was not appropriate to disclose information about any of its existing contracts. However, it advised that it would continue to evaluate contracts on a case-by-case basis and, if no security concerns were present, would develop a contract listing in accordance with the order. Further, it offered to provide contract details in a confidential briefing to the Joint Parliamentary Committee on ASIO, ASIS and Defence Signals Directorate (DSD).⁴⁶

2.70 DTRS also considered that there was potential for conflict between the order's 'expectation of openness' and the 'converse expectation expressed in the Commonwealth Protective Security Manual.'⁴⁷

43 ANAO, Correspondence, 29 August 2002, p. 5

44 Senator Kay Patterson, Minister for Health and Ageing, Correspondence, 20 August 2002

45 Mr Harry Evans, Clerk of the Senate, Correspondence, 30 October 2002

46 The Hon Daryl Williams AM QC MP, Attorney-General, Correspondence, 17 September 2002

47 Parliamentary and Legal Services Branch, Department of Transport and Regional Services, Correspondence, 4 September 2002

Reporting requirements

2.71 The ANAO's second audit of the order noted that most agencies are reporting on calendar and financial years and that many had not clearly identified the reporting period covered by the lists, nor the twelve month period relating to the contracts. The ANAO noted that this would make it difficult to find a contract listing and/or to ascertain whether the listing was current.⁴⁸

2.72 These mirrored the Committee's findings from its review of contract listings as at June 2002. The review found that agencies were generally not complying with the order but were listing contracts entered into or not fully performed for the 2000-2001 financial year, rather than for the twelve months prior to the first sitting day of the 2002 autumn sitting.

2.73 Agencies were unanimous in their opposition to the present reporting period, which they considered confusing, impractical and adding unnecessary complexity to compliance. Part (2)(a) of the order requires Ministers to table letters of advice and agencies to publish lists of contracts on their websites by not later than the 10th sitting day of the spring and autumn sittings. This means that the reporting date varies from sitting period to sitting period, for example:

- 12 February 2001 to 11 February 2002, for the autumn 2002 period; and
- 19 August 2001 to 18 August 2002, for the spring 2002 period.

2.74 The majority of agencies strongly argued for the reporting period to be aligned with the end of the calendar year (for spring sittings) and the financial year (for autumn sittings). They said that this would reconcile with other reporting requirements, including annual reports, portfolio budget statements and with the Senate order for agencies' indexed lists of files, as well as with accrual budgeting practices.

2.75 In addition, many agencies expressed concern about the amount of time available between the end of the reporting period and the required date for tabling of letters of compliance and publication of lists. Although some agencies agreed that timing pressures would be eased when new contract registers and information management systems designed to assist the order's reporting requirements were fully implemented, the task remains large for agencies with a large number of contracts.

2.76 These agencies stated that there was not enough time between the end of the reporting period and the required tabling and publication dates to satisfactorily manage the compliance process. Amending the reporting period would streamline the process by allowing more time for checking lists for accuracy and completeness and for ministerial briefing prior to the tabling of ministers' letters and publication of the contract lists.

48 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8 2002-2003, p. 40

2.77 DOFA emphasised that twice-yearly reporting was significant in terms of agency workload, time and resources. It noted that the order had been modelled on the Senate order for indexed lists of departmental and agency files that specified six-monthly reporting but that these reports were due at the end of the calendar and financial years. It argued that an enhanced GaPS system could provide the primary reporting tool for the order, at least in relation to procurement related contracts so that, if regular audits occurred, separate reporting of these contracts under the order would not be required. It noted that, at present, ongoing liaison was necessary for the purposes of reviewing the confidentiality status of every contract, prior to each six-monthly reporting period for the order. It considered that the need for this process would be obviated if GaPS were used as the order's reporting tool, since agencies were already responsible for maintaining the currency of contract information in GaPS. However, as noted earlier, DOFA emphasised that agencies could use their discretion as to whether to use the GaPS facility for the purposes of reporting under the Senate order. It noted that some agencies might find it more convenient and efficient to use systems set up specifically for compliance reporting under the order.

2.78 The Department of the Prime Minister and Cabinet suggested reducing the order's requirement to record details of contracts entered into during the past twelve months to a six-month timeframe, with a view to alleviating the present duplication of reporting for contracts that have been fully performed.

2.79 The ANAO considered that reporting at the end of calendar and financial years 'would assist all agencies to comply with the order more efficiently'.⁴⁹

Agencies covered under the order

2.80 The order specifies that agencies subject to the Act are those within the meaning of the *Financial Management and Accountability Act 1997* (the FMA Act), that is, budget-dependent bodies. In line with the Committee's objective of ensuring openness and accountability regarding all government contracting expenditure, there is a question as to whether the order should be widened to cover bodies subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act). That is, Commonwealth statutory authorities and companies that are 'independent self-funded' bodies in which the Commonwealth has at least a direct controlling interest but which are expected to follow commercial management practices (including for procurement).

2.81 Bodies covered under each Act are subject to different legislative and policy frameworks. For example, an important difference is that the CPGs are part of the FMA Act but are not included in the CAC Act.

2.82 During the briefing with the Committee, the ANAO stated that, for maximum accountability, it would be preferable if CAC Act bodies were subject to the order. However, it suggested that, at this stage, it might be useful to continue to confine the order to FMA bodies, until the new accountability framework is more fully

49 ANAO, Correspondence, 29 August 2002, p. 3

established. The aim would be to resolve initial difficulties and ensure that implementation issues are clarified as far as possible as a result of experience with FMA bodies.

2.83 The Clerk of the Senate advised that the order was not extended to CAC Act bodies because ‘the requirement to operate commercially in the marketplace’ was considered ‘sufficient discipline’ and because it was considered inappropriate to impose additional requirements on commercial operators.⁵⁰

2.84 Parliamentary departments, although they are agencies under the FMA Act, are not Departments of State administered by ministers and, as a result, are not included in the order. However, all the parliamentary departments, except the Department of the House of Representatives, have chosen to comply with the order.⁵¹ The Clerk of the Senate noted that the order was not extended to parliamentary departments ‘precisely because of the refusal of the Department of the House of Representatives to voluntarily comply with, or even to acknowledge, any order emanating from the Senate’.⁵²

2.85 As noted above, ASIO and ASIS have not listed contracts on their websites, claiming exemption on the grounds of national security concerns. In its second audit of compliance, the ANAO noted that ‘ASIO advised that it would continue to consider contracts on a case-by-case basis and that, where national security concerns were not present, contracts would be listed in accordance with the Senate order. ASIS advised that the Director-General had deemed that the disclosure of any contract details would constitute a type of communication that would be in breach of section 30 of the *Intelligence Services Act 2001*’.⁵³

Presentation and disclosure issues

2.86 Agencies differ in their approach to updating contract listings on their websites. The ANAO advised that ‘some agencies appeared to be updating their contract listings from time to time (mainly with corrections) while other agencies are updating, or may wish to update, the Internet list as new contracts are entered into, or for example, at the same time they update GaPS’. It also advised that ‘most agencies appear to be updating the lists twice yearly on a once-only basis’.⁵⁴

50 Mr Harry Evans, Clerk of the Senate, Correspondence, 30 October 2002

51 The Department of the House of Representatives advised that ‘as a matter of principle this Department does not acknowledge nor comply with Senate Orders unless the House of Representatives has passed a similar order’. See *The Senate Order for Department and Agency Contracts (September 2002)*, ANAO Audit Report No.8 2002-2003, p. 30, footnote 18

52 Mr Harry Evans, Clerk of the Senate, Correspondence, 30 October 2002

53 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8 2002-2003, p. 30

54 ANAO, Correspondence, 20 August 2002, p. 5

2.87 This report has noted previously that all agencies are developing and refining processes to make information gathering, collation and publication for the order more efficient, including establishing contract registers and developing responsibilities and processes for recording and maintaining information on contract lists. In their responses to the Committee, ministers indicated that, in addition to establishing listings, maintaining them was also resource intensive, especially in light of the changing nature of confidentiality throughout the life of a contract, and to ensure compliance with internal deadlines. They also referred to the significant impact on resources and internal systems and processes that had resulted from ongoing changes to the order since its inception.

2.88 The Department of Family and Community Services was concerned that large contracts that were expected to extend beyond one year would stand out in contract listings. It suggested that agencies might report the term of contracts so as to prevent attention being drawn to them.

2.89 The Committee was advised that some listings were very difficult to find on agency websites and that not all letters tabled by ministers included information to enable agency listings to be located. Some agencies suggested that some additional information might enhance the utility of listings, for example:

- date information for each contract; and/or
- a means of differentiating between new and ongoing contracts.

2.90 In further information provided to the Committee, DOFA advised that GaPS required the start date of procurement related contracts to be recorded. It noted that the inclusion of contract end dates was one of the options being considered as an enhancement to GaPS.

2.91 In correspondence, the ANAO advised the Committee that it was important that agencies 'should ensure that, in updating the list, they [did] not remove fully performed contracts entered into during the last 12 months until the date of the next listing'.⁵⁵ It favoured identification of the reporting period for listings and inclusion of date information for individual contracts. It considered that it would be useful to increase uniformity across agencies in terms of presentation of information, including the potential standardisation of listings formatting and information about access to listings.

2.92 The Clerk of the Senate considered that the twice-yearly tabling of ministers' letters, including a report on whether lists were up to date, was 'an incentive for agencies to keep their lists as up to date as possible.' He considered that reducing the requirement for tabling of letters and publication of lists to only once every twelve months would remove this incentive and could result in agencies allowing the currency of listings to fall behind until just before the tabling date. He suggested that a sensible approach would be for agencies to update contract listings continually and to

55 ANAO, Correspondence, 20 August 2002, p. 5

table ministerial letters by the due date with an indication of the currency of listings, to allow senators to seek further information if they wished. Regarding the period covered by the order, the Clerk of the Senate could see no problem with requiring tabling of letters and publication of listings on the first sitting days after 1 January and 30 June.⁵⁶

Frequency of ANAO audits of compliance

2.93 The order requests the ANAO to undertake a twice-yearly examination of:

- agency contract listings for compliance with the order, and to report on the appropriateness of the use of confidentiality provisions in contract listings examined by the audit; and
- contracts identified by ministers in their tabling advice as not having been included in listings because they had been deemed wholly confidential, and to report on the appropriateness of their exclusion from listing.

2.94 The audit is required to be completed within six months of the date set for ministers to table their letters of advice.

2.95 The audits are resource intensive and the Committee considered whether the frequency of ANAO audits regarding the order should be revisited. The ANAO told the Committee that the timing of the first two audits (spring 2001 and autumn 2002) meant that they had encompassed many contracts that had been agreed before establishment of the new accountability framework. It considered that, given that the order was still at a relatively early stage, it would be appropriate for the third and fourth audits (that is, spring 2002 and autumn 2003) to be undertaken and that audit frequency could then be reviewed, subject to the outcomes of these audits.

56 Mr Harry Evans, Clerk of the Senate, Correspondence, 30 October 2002

Chapter 3

Conclusions and recommendations

General comments on the order

3.1 The order has been in place for a relatively short period of time, becoming effective on 1 July 2001. The Committee has closely monitored the order over its short history and, soon after it became operational, recommended changes to the order that were accepted by the Senate and implemented as of 27 September 2001. These amendments attempted to ease the burden of compliance and were in response to information obtained from a number of sources including:

- submissions received from agencies for the Committee's inquiry into the mechanism for providing accountability to the Senate in relation to government contracts, in response to Senator Murray's draft general business notice of motion no. 489 (the inquiry concluded with the publication of its second report on the order, *Commonwealth contracts: a new framework for accountability*, 26 September 2001);¹
- compliance issues that were identified by agencies immediately following the first tabling date for ministers' letters; and
- the Government response to the original order of 20 June 2001, received on 27 August 2001.

3.2 The Committee considers 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. It notes that the new requirements regarding accountability that were included in the revised *Commonwealth Procurement Guidelines* (CPGs) of October 2001 are in response to the order.

3.3 The Committee notes the views of some ministers and agencies that they understood the original focus of the order to be procurement oriented. It acknowledges that key factors at the time of the establishment of the order were concerns by the Senate about the increasing proportion of public funding on outsourcing and the associated rise in claims for government contracts (either fully or in part) to be denoted as commercial-in-confidence. Consequently, the Senate had voiced its concern over a number of years that government accountability and the proper scrutiny by parliament of government programs and expenditure appeared to be in jeopardy.

1 http://www.aph.gov.au/senate/committee/fapa_ctte/acnt_contract/murrayfinal.pdf

3.4 However, the Committee considers that the order was formulated with three objects that made its focus broader than procurement related contracts. These were:

- The need to develop:
 - a practical and reasonable set of guidelines to determine what could be appropriately classified as commercial-in-confidence (subsequently addressed in the Australian National Audit Office (the ANAO) Audit Report No.38 and recently refined and published as best practice guidance by the Department of Finance and Administration (DOFA) in its role as provider of whole-of-government advice on the order and procurement related contracts to *Financial Management and Accountability Act 1997* (FMA) bodies); and
 - processes for contract tendering and management that took account of the accountability of government agencies to parliament and its committees (addressed in ANAO Audit Report No.8, 2002-2003 on the Senate order and now being refined by DOFA).
- The decision to make information about government contracts automatically available, rather than on request at, say, budget estimates hearings. The Senate was aware that the practice of automatically publishing government contract information (often with threshold contract values, for administrative savings) had been occurring for some time in other countries such as the United States and New Zealand.
- The Senate's determination to ensure maximum disclosure and minimum withholding of information concerning expenditure by government of public funds.

3.5 The Committee also understands that the following basic principles informed the development of the order and its operation:

- the order should capture all contracts (that is, it was not intended to be confined to procurement related contracts);
- confidentiality clauses should be specifically identified and the reasons for confidentiality stated;
- the ANAO should examine the appropriateness of commercial-in-confidence classification of contracts and contract clauses, according to agreed guidelines (outlined in Audit Report No.38 and now being refined by DOFA); and
- while not specified in the order, the intention was that contracts (in whole and in part) should be available for parliamentary scrutiny and, with the exception of clauses classified as commercial-in-confidence, for disclosure if requested.

3.6 The Committee notes that the ANAO's second and most recent audit of compliance with the order (Audit Report No.8, 2002-2003) concluded that most agencies had generally complied with the requirements of the original Senate order or the order as amended. It further notes the ANAO's view that the processes followed

by the six agencies audited in detail provided ‘a reasonable level of confidence’ that contract listings for most agencies were likely to be complete or nearly complete.²

3.7 The Committee appreciates that most agencies have responded positively to the order and that changes in contracting practices are occurring as a result. The Committee notes, however, that, in taking a literal and over-cautious response approach to the letter of the Senate order, some agencies may still be resisting the spirit of the accountability requirements of the Senate. It considers that understanding and reacting positively to the spirit of the order will hasten progress and a satisfactory outcome. The Committee is pleased to learn that, as agencies become more familiar with the new systems and processes established to assist compliance, reporting should become more routine. It acknowledges, however, that, if the order remains as at present, there will be ongoing costs associated with compliance in relation to the time and resources required for compliance by each agency.

3.8 The Committee is mindful that agencies have already complied with one set of amendments to the original order and appreciates that agencies have responded in good faith to the order. On balance, it considers 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.

3.9 The Committee concludes that a better and more appropriate response is for the Senate to continue to allow the ANAO to exercise its judgement regarding compliance with the order, as set out in paragraphs (5) and (6) of the order. Consistent with this, the Committee considers that it is appropriate for the ANAO, in consultation with DOFA and agencies, to develop guidelines in relation to compliance with specific aspects of the order, and to advise the Committee if difficulties persisted. This would mean that the order would require amendment only in the event that the ANAO is unable to resolve difficulties regarding its interpretation of implementation by agencies.

3.10 The Committee therefore does not intend to change the order radically but rather to recommend to the Senate some clarification of the present wording. Its purpose is not only to minimise any additional actions that might be required of agencies in terms of compliance with the order, but also to assist interpretation and therefore provide for greater efficiency regarding compliance.

3.11 In the rest of this chapter, the Committee sets out its conclusions and recommendations regarding specific issues raised with the order.

2 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, p. 15

Definition of a contract

3.12 The Committee understands that ministers and agencies have legitimate concerns regarding:

- differences in interpretation amongst agencies of what constitutes a contract for the purposes of the order; and
- the duplication and overlap that results from different reporting requirements in relation to the Senate order, the Gazette Publishing System (GaPS) and annual reports.

3.13 Although it is clear that administrative efficiencies would result from confining the order to procurement related contracts, the Committee is not persuaded that the scope of the order should be restricted.

3.14 The Committee's view is that all government contracts must be transparent and it does not wish to limit the range of contracts covered by the order. It considers that monitoring of the incidence of commercial confidentiality in relation to **all** government contracts should continue for some time, at least until reliable statistics on the application of commercial confidentiality to different types of contracts can be quantified.

3.15 It appears to the Committee that agencies' contract listings, for the most part, reflect an understanding of, and demonstrate compliance with, the order as it was intended. The Committee's view is that agencies are acting appropriately by adhering to the broad interpretation of 'contract' proposed by the Australian Government Solicitor (the AGS) in its advice to DOFA. That advice stated that arrangements should be categorised as 'contracts' on their legal status rather than the name given to the arrangement so that the order would cover lease arrangements, certain grants and funding agreements and certain employment contracts.

3.16 The Committee makes the following comments about these and other types of contracts:

- In light of advice from DOFA that it does not know the extent of reporting of disposals, and from the ANAO that it has no knowledge about the incidence of commercial confidentiality attaching to disposals, the Committee considers '**sales' contracts** should continue to be included under the order.
- Similarly, the Committee considers that government contracts not captured under other arrangements should also be transparent and that the order is an appropriate instrument for this. Therefore, with the exception of Certified Agreements and Australian Workplace Agreements, other **employment contracts** should be included under the order.
- The Committee is aware of the Commonwealth's increasing use of **building leases**. The Committee notes that the Joint Standing Committee on Public Works, in its *Sixty-Fifth Annual Report* (December 2002), called for a thorough review of the functions of that committee and the *Public Works Committee Act 1969*. It further notes that, in referring the matter of review to the relevant

minister, the Joint Standing Committee on Public Works has specified ‘the referral of annual reports and the examination of leasing as matters of concern’.³ The Committee considers that the Senate order should also apply to contracts for building leases.

- The Committee accepts that certain agencies are party to many **grants and funding arrangements** and that there would be a need to determine whether each such arrangement conforms to the definition of a contract, if they were to continue to be covered by the order. The Committee understands that information about such contracts must be provided at present if requested by parliament, for example, through the budget estimates process. However, it considers automatic publication of information preferable to provision of information on an ad hoc basis. Therefore, on the grounds of maximum transparency and accountability of government contracting, it considers that grants and funding agreements that qualify as ‘contracts’ should remain covered by the order, at least for the time being. It considers the suggestion by Mr Harry Evans, the Clerk of the Senate, that large numbers of similar types of contracts (for example, agreements under a particular piece of legislation) be recorded by way of a generic entry setting out their nature in general terms has merit.
- The Committee received evidence of uncertainty as to the status of various arrangements entered into by departments that might not be termed contracts, such as Deeds of Agreement. The Committee notes that descriptors assigned to such arrangements are not legally determinative but, nevertheless, may be contracts at law. As such they would fall within the purview of the Senate order. The Committee considers that, in the interests of transparency and disclosure, departments should include all Deeds of Agreement and other such arrangements that could legally be considered contracts in contract listings, thus conforming with AGS advice.

3.17 The Committee is supportive of actions that would reduce duplication and provide opportunities for administrative efficiencies in relation to complying with the order, the Gazette Publishing System (GaPS) and for annual reports. It encourages the continued development of enhancements to GaPS relating to the order’s requirements, in particular, through including indicators of, and statements of reasons for, commercial confidentiality for contracts recorded in GaPS. It understands that DOFA and the ANAO have had consultations about this matter and supports this approach. It supports actions such as linking agencies’ records of contract listings required under the order with GaPS with a view to streamlining agencies’ reporting requirements.

3.18 Having considered the views of agencies concerning demand-driven contracts, the Committee concludes that listings should include contracts of this sort that are expected to have a value of \$100,000 or more. It notes that GaPS includes information about procurement related demand-driven contracts. It considers that agencies should provide estimates of the expected ‘whole-of-life’ value of all contracts, with subsequent listings having notations, indicating either updated

3 *Sixty-fifth Annual Report*, Joint Standing Committee on Public Works, December 2002, p. 37

estimated expenditure on, or actual values of, such contracts. The Committee would be surprised if expenditure on these sorts of contracts were not estimated as part of normal business.

3.19 In summary, the Committee does not consider it necessary for the order to include a definition of ‘contract’. To avoid doubt, it advises that contract listings should include all government contracts, including procurement contracts, lease arrangements, sales contracts, certain grants and funding agreements, certain employment contracts, demand-driven contracts with an expected whole-of-life value of at least \$100,000 and other arrangements that might be deemed to be contracts at law.

Recommendation 1

3.20 The Committee recommends that agencies include all government contracts in contract listings, including procurement contracts, lease arrangements, sales contracts, certain grants and funding agreements, certain employment contracts, demand-driven contracts with an expected whole-of-life value of at least \$100,000 and other arrangements that might be deemed to be contracts at law.

Recommendation 2

3.21 The Committee recommends that agencies with large numbers of similar types of contracts (for example, agreements under a particular piece of legislation) record a generic entry for this type of contract in their contract listings, including a notation setting out the nature of that type of contract in general terms.

Commercial confidentiality

3.22 The Committee understands that the high proportion of breaches regarding commercial confidentiality for government contracts found in the two completed ANAO audits can be partly explained by the fact that the listings included many contracts that had been negotiated prior to the new accountability framework. It is satisfied that fewer breaches are likely in future.

3.23 The Committee supports DOFA’s development of best practice guidance on commercial confidentiality. It agrees with the ANAO that guidance of this type should be provided to individual procurement and contracting officers to enable them to assess what information in, or associated with, a contract is confidential, as part of the contract negotiation process. It notes that the guidance adds to the existing accountability framework articulated through the CPGs. It understands that the advice will reflect the Government’s response to the Joint Committee of Public Accounts and Audit report on contract management that ‘any decision to withhold information on

commercial-in-confidence grounds needs to be fully substantiated, fundamentally stating the reasons why such information should not be disclosed'.⁴

3.24 It considers that, with the benefit of this guidance, agency officials should be better placed to deal with contractors with whom protracted negotiations over confidentiality claims might have been expected. The Committee notes that the order's requirement to indicate the commercial confidentiality status of a contract is not as onerous as that of some jurisdictions that require publication of the full contract text.

3.25 Regarding general disclosure clauses, the Committee agrees with the ANAO that the new accountability framework makes their continued use questionable. It also notes the view of the Clerk of the Senate that the words 'any other requirements of confidentiality' referred to 'separate agreements with contractors for confidentiality which are not included in the terms of the contract itself'.⁵

3.26 In the interests of maximum transparency, it considers that it would be useful for agencies to distinguish between specific and generic commercial confidentiality as suggested by both the ANAO and the Clerk of the Senate. It understands the difficulties associated with applying additional requirements retrospectively and considers that this requirement should apply for new contracts only.

3.27 As stated earlier, the Committee's preference is for the order to remain less prescriptive and for the ANAO to provide guidance, where necessary, to assist with compliance. Therefore, rather than amending the order, the Committee requests that DOFA, in consultation with ANAO, consider developing advice for agencies to indicate the specific nature of confidentiality. For example, DOFA may wish to discuss with agencies the suggestion by the ANAO to describe commercial confidentiality in two columns - the first denoting commercial confidentiality that is due to provisions within a contract requiring the parties to maintain confidentiality of any of its provisions, and the second denoting separate agreements for confidentiality on 'other grounds'. Alternatively, agencies may wish to include a notation next to individual contract listings describing the nature of commercial confidentiality, in cases where it applies.

3.28 The Committee understands that the whole-of-government best practice guidance on commercial confidentiality being developed by DOFA will be ongoing. It considers that specific advice on indicating the nature of commercial confidentiality for individual contracts could be provided in updates to this guidance.

4 Government response, *Contract management in the Australian Public Service*, October 2000 Joint Committee on Public Accounts and Administration

5 Mr Harry Evans, Clerk of the Senate, Correspondence, 30 October 2002, p. 2

Recommendation 3

3.29 The Committee recommends that the Department of Finance and Administration, in consultation with the Australian National Audit Office and agencies, develop advice for agencies on a means of indicating the nature of commercial confidentiality as it applies to individual contracts, and that this be included in updates to the whole-of-government best practice guidance on determining commercial confidentiality for contracts.

Recommendation 4

3.30 The Committee recommends that any additional requirements that may be required under the order as a result of guidelines developed by the ANAO should, as far as possible, be included as additional information to be collected in the GaPS system. This might include provision to indicate the nature of commercial confidentiality for each contract, that is, either (1) where specific contract provisions have been agreed by the parties to be kept confidential, and/or (2) where the parties have agreed to a general non-disclosure clause for the contract.

Reporting requirements

Relationship with GaPS

3.31 Recommendation 2 in the Committee's September 2001 report⁶ contained suggestions for specific amendments to GaPS. The Committee notes that development of enhancements to GaPS, including for indicators of commercial confidentiality in response to the order, is in progress and that the new system may be operational by early next year. It strongly supports this work and the development of links between GaPS and reporting requirements under the order with a view to streamlining reporting for both systems. It would appreciate early advice from DOFA on the outcomes of the GaPS enhancements process.

3.32 However, the Committee understands that, for some agencies, there are substantial inconsistencies between the information available in GaPS and that provided in contract listings compiled under the order. It is concerned that the integrity of data included in GaPS is an issue, although it appreciates that there have been improvements in this regard. Further, it notes that the final design of the enhancements and the proposed new GaPS system is still subject to development and consultation with agencies and it understands that some additional fields proposed for inclusion in GaPS might remain optional. It also notes that it will be up to agencies to decide whether they wish to use the GaPS system for the purposes of reporting under the order and that some may find it more convenient or efficient to use other systems that may have been established for this purpose.

6 Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a new framework for accountability*, September 2001

3.33 Given that enhancements to GaPS are still not finalised, and in view of the Committee's decision not to change the scope of the order, it does not accept the proposition that government contract information should be reported solely through GaPS. It therefore endorses continued separate reporting to the Senate of the requirements under the order.

Reporting period

3.34 The Committee understands that agencies consider that the present reporting requirements impose significant timing pressures regarding preparation and quality assurance of contract listings, in particular, on agencies with a large number of contracts. It notes the ANAO's finding that there was 'scope for improvement in the processes for ensuring completeness of contract numbers and the accuracy of the information relating to the contracts containing confidential information'.⁷ It accepts that matching reporting under the order with other existing reporting requirements might provide opportunities for administrative efficiencies.

3.35 The Committee concludes that the reporting period for the order should be changed to align with calendar and financial years.

Recommendation 5

3.36 The Committee recommends that paragraph (9) of the order be amended to align the twelve-month period covered by each set of listings with the end of the calendar and financial years. This would mean that listings would cover the previous twelve months ending on either 31 December or 30 June, as the case may be.

Reporting frequency

3.37 The Committee agrees with the Clerk of the Senate that extension of the reporting time to once every twelve months instead of twice-yearly could establish a perverse incentive that might result in the currency of contract listings lapsing and updating occurring only just before the required reporting date. In addition, a pattern of timely compliance can not yet be verified, since the new GaPS design is not finalised, agency practice is not yet standardised, and implementation of the Senate order is not yet complete.

3.38 The Committee accepts that six-monthly reporting of contract listings imposes resource and workload pressures on departments and that reporting twice-yearly results in some duplication of reporting over a twelve month period. The Committee wishes to be assured, however, 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. Its intention is to ensure that compliance with the spirit of the order is not subjugated to administrative processes that result in a

7 Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a new framework for accountability*, September 2001, pp. 15-16

last-minute rush to update contract listings just before the required reporting date. Its view is that the onus is on agencies to demonstrate that they are responding accordingly.

3.39 The Committee recognises, however, that in the long term it may be more appropriate for reporting under the order to occur once every twelve months rather than twice-yearly. It considers that it would be appropriate for the Auditor-General to suggest to the Committee that the frequency of reporting under the order could be reduced to once every twelve months, when the Auditor-General considered that this was appropriate. The Committee therefore recommends no change to the requirement for letters of advice from ministers and publication of contract listings every six months at this time.

Recommendation 6

3.40 The Committee recommends that reporting under the order continue at six-monthly intervals. The Committee requests that the Auditor-General suggests to the Committee that the frequency of reporting under the order be changed to once every twelve months rather than twice-yearly, when the Auditor-General considered that this was appropriate.

Reporting dates

3.41 The Committee wishes to clarify the intent of the order and, in doing so, to relieve the pressure that some agencies have experienced concerning publication of listings and tabling of ministers' letters by the tenth sitting days of spring and autumn sittings. It understands that agencies would like more time to brief ministers and for preparation and checking of listings prior to the tabling date for ministers' letters and publication of listings.

3.42 The Committee's intention, in requiring both twice-yearly reporting and a reporting date early in the autumn and spring sittings, was to encourage agencies to maintain the currency of contract listings and to provide for timely advice from ministers on the status of listings. It did not necessarily expect that listings would be completely up to date at the time of the tabling of ministers' letters or of publication of lists. Paragraph (3) of the order provides for ministers to explain why listings might not be up to date, and to indicate when up to date listings could be expected.

3.43 The Committee considers that this approach is appropriate and recommends that it continue. It agrees with the Clerk of the Senate that a process of continually adding to listings is in the best interests of agencies because it would provide flexibility and the opportunity for agencies to report at any time on the status of contract listings. It considers it appropriate for ministers' letters to continue to indicate that:

- contract listings (covering a specific twelve-month period for a financial or calendar year) have been published on the Internet; and

- for contracts that were not up-to-date at the time of listing, the reasons for this and when they could be expected to be up-to-date.

3.44 The Committee therefore encourages agencies to structure their systems and processes to provide for continual addition to contract listings. It concludes that ministers' letters should continue to be tabled with information about contract listings for the previous twelve months (aligned with financial and calendar years, as recommended earlier in this chapter), as presently required by the order.

3.45 The Committee would prefer that ministers tabled letters and agencies published lists soon after the end of the financial or calendar year, rather than later. It accepts that a fixed reporting date is preferable to variable dates tied to sitting periods. It does not consider it essential that reporting dates coincide with sitting days.

3.46 It therefore concludes that ministers should table letters in the Senate with advice on their agencies' contract listings (including explanations as to the status of listings as required under paragraph (3) of the order) by not later than two calendar months after the last day of the financial or calendar year. That is, by not later than **the last day of February (for calendar year listings) and 31 August (for financial year listings)**.

Recommendation 7

3.47 The Committee recommends that agencies develop systems and processes that allow for continual additions to contract listings as new contracts are entered into or amendments to existing contracts made.

Recommendation 8

3.48 The Committee recommends that paragraph (1) of the order be amended to provide for ministers' letters to be tabled by not later than two calendar months after the last day of the financial or calendar year. That is, by not later than the last day of February (for calendar year listings) and 31 August (for financial year listings).

Agencies covered under the order

FMA and CAC Act bodies

3.49 The Committee understands that the inclusion of bodies subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) under the order might not be straightforward and would require liaison between ministers and each CAC Act agency board. It also understands that there may be an issue as to whether partly owned Commonwealth companies would be required to adhere to the order in the same way as wholly owned companies, in light of the different annual reporting requirements that are applicable to each of these types of bodies.

3.50 Moreover, in light of the fact that FMA bodies are still implementing policies, systems and processes for the new framework, it concludes that confining the order to these bodies until the new arrangements were fully established has been sensible.

3.51 However, the Committee considers that, for maximum accountability, CAC Act bodies should be covered under the order. It considers that solutions to issues raised by CAC Act agency boards regarding compliance with the order should be able to be negotiated. It appreciates that it is reasonable to give notice of a requirement for compliance under the order to allow affected agencies to establish appropriate systems and processes and to resolve any issues that they may have regarding compliance.

3.52 Therefore, the Committee recommends that CAC Act bodies be included under the order in twelve months time, that is, from 1 January 2004. This means that CAC Act bodies would be required to report under the order for the first time by not later than 31 August 2004. By that date, ministers should have tabled letters regarding compliance with the order by CAC Act bodies for which they were responsible, and listings of contracts entered into (or not fully performed) by CAC Act bodies for the financial year ending 30 June 2004 published. The Committee further considers that, in preparation for the requirement to comply with the order from 1 January 2004, CAC Act bodies should extend DOFA's best practice commercial confidentiality guidance to all new contracts entered into from 1 January 2003. It considers that the Auditor-General could write to CAC Act bodies, separately, along these lines.

3.53 The Committee also notes that, if the Senate accepts the Committee's recommendation to include CAC Act bodies under the order from 1 January 2004, the definition of 'agency' in the order will need to be changed to reflect this at that time.

Recommendation 9

3.54 The Committee recommends that bodies subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) extend the DOFA commercial confidentiality best practice guidance to all new contracts entered into from 1 January 2003.

Recommendation 10

3.55 The Committee recommends that the Auditor-General write to bodies subject to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act), suggesting that they apply to all new contracts entered into from 1 January 2003 the DOFA commercial confidentiality best practice guidance.

Recommendation 11

3.56 The Committee recommends that the Senate order for the production of lists of departmental and agency contracts be extended to cover CAC Act bodies from 1 January 2004.

Parliamentary Departments

3.57 The Committee considers that transparency should apply to parliamentary departments in the same way as for other agencies. It appreciates that, with the exception of the Department of the House of Representatives, parliamentary departments have chosen to comply with the order. It understands that, under the constitution, the Senate cannot give an instruction to the Department of the House of Representatives. It notes, however, that parliamentary departments, like all FMA Act agencies, are subject to the CPGs. As previously noted, these now include instructions to agencies to alert contractors to the accountability requirements of the Commonwealth, including disclosure to Parliament and its committees, and the requirement to consider, on a case-by-case basis, what might be commercial-in-confidence when designing contracts.

3.58 The Committee considers it would be preferable if all parliamentary departments included lists of contracts on the Internet. It suggests that the Department of the House of Representatives should comply with the order and place a list of its contracts on the Internet. If the Senate agrees with this suggestion, the Committee requests that its suggestion be conveyed to the Speaker of the House of Representatives by the President of the Senate.

Recommendation 12

3.59 The Committee suggests that the Department of the House of Representatives comply with the Senate order for the production of lists of departmental and agency contracts. If the Senate agrees with this suggestion, the Committee recommends that its suggestion be conveyed to the Speaker of the House of Representatives by the President of the Senate.

ASIO and ASIS

3.60 The Committee notes that the Australian Security Intelligence Organisation (ASIO) and the Australian Secret Intelligence Service (ASIS) have not yet listed any contracts on their websites, claiming exemption on the grounds of national security concerns.

3.61 While it understands that ASIO would be prepared to make contract details available in a confidential briefing to the Joint Committee on ASIO, ASIS and Defence Signals Directorate (DSD), this does not meet the order's transparency and public disclosure intent. The Committee is concerned at the lack of transparency in relation to contracts let by ASIO and ASIS and considers that there would be many 'common stores' contracts that could be listed under the order. It therefore does not accept that a blanket exemption (on national security grounds) should apply to these agencies.

3.62 The Committee also considers that exemption from compliance with the order should not affect the administration of ASIO and ASIS contracts and that the confidentiality guidelines being prepared by DOFA should apply to these agencies.

3.63 The Committee notes that ASIO and ASIS are subject to audit by the ANAO in the same way as other agencies and considers it would be appropriate for the ANAO and DOFA to discuss compliance with the order with them. It therefore requests that this consultation occur.

Recommendation 13

3.64 The Committee recommends that the Auditor-General and the Department of Finance and Administration discuss with ASIO and ASIS options for compliance with the order.

Presentation and disclosure issues

3.65 As noted above, the Committee's intention in recommending twice-yearly listings and reporting dates early in sitting periods was to ensure that the currency of contract listings was kept up to date. The Committee notes that one of the actions expected of agencies in terms of establishing contract listings by the ANAO was implementation of a system (for example, a contracts register) for the recording and reporting of the relevant information of all contracts. It understands that agencies are still in the process of establishing processes and systems to assist compliance with the order. It agrees with the Clerk of the Senate that continually adding to listings would relieve pressures associated with the need to have contract listings completely up to date by a specific time by allowing ministers to table letters advising the status of contract listings on a fixed date.

3.66 The Committee notes the ANAO's finding that there was 'scope for many agencies to improve the presentation and readability of their Internet listings' and that listings were best prepared where agencies had established contract registers and used appropriate quality assurance processes.⁸

3.67 It is also concerned that not all agencies are complying with the existing requirements of the order regarding providing ready access to contract lists. It concludes that agencies that have not already complied with the order's requirement to include precise information on their home pages to enable efficient access to contract listings should do so without delay. It also considers that each set of listings should be published with indications of: (i) the relevant reporting period; and (ii) the twelve-month period, relating to the listings.

3.68 The Committee considered suggestions from agencies and the ANAO for additional information that might improve the utility and transparency of listings. It notes that the order does not require date information to be recorded for each contract. It agrees with the ANAO that 'date information provides important contextual information' regarding the currency of the contract and that this could 'assist users of

8 ANAO, *The Senate Order for Department and Agency Contracts (September 2002)*, Audit Report No.8, 2002-2003, pp. 35, 38

the information on the Internet'.⁹ It also notes that a contract start date is a mandatory requirement for procurement-related contracts recorded in GaPS.

3.69 The Committee also considers that the Department of Family and Community Services' suggestion to record the term of each contract, with a view to explaining the size of some contracts, has merit.

3.70 It therefore concludes that contract listings would benefit from additional information regarding dates and contract duration. It does not wish to unduly increase agencies' workload for compliance with the order but considers it likely that such information is already available on agencies' systems. In the interests of reducing the compliance burden, it suggests that the requirement for this additional information be mandatory for all new contracts only, but that, where the information is readily available for existing contracts, agencies should make every effort to include it in future contract listings.

Recommendation 14

3.71 The Committee recommends that paragraph (2(b)) of the order be amended to include the following additional information:

- **contract commencement date;**
- **duration of the contract;**
- **the relevant reporting period; and**
- **the twelve-month period relating to the contracts.**

3.72 The Committee also considers that some other contract information, if published as part of contract listings, would be useful. The Committee's preference is not to make the order more prescriptive. Instead, the Committee requests that the ANAO, in consultation with DOFA, develop guidelines for listings that will ensure the provision of a comprehensive set of information as well as user-friendly presentation for each contract. The Committee would expect to intervene and consider amendments to the order only in the event that insufficient information was provided by agencies to enable ANAO to undertake robust audits of compliance.

3.73 The Committee understands the difficulties that retrospectivity would pose for agencies and agrees that any other new requirements regarding presentation, disclosure and updating of listings should be prospective.

3.74 Additional requirements that could be considered by the ANAO include:

- standard formats for contract lists; and
- differentiation between new and ongoing contracts.

9 ANAO, Correspondence, 29 August 2002, p. 5

Recommendation 15

3.75 The Committee recommends that the Australian National Audit Office, in consultation with the Department of Finance and Administration, develop guidelines for the content, presentation and format of contract listings that will ensure the provision of comprehensive information about contracts in a user-friendly template.

Frequency of ANAO audits of compliance

3.76 The Committee reiterates its satisfaction with the positive response to the order from the bulk of those agencies that have been assessed so far, and appreciates that a period of adjustment to the new accountability framework is still underway. It has already noted that the ANAO's compliance audits reflect the relatively recent establishment of the order, particularly in relation to the appropriateness of commercial confidentiality for contracts.

3.77 Given this, the Committee agrees with the ANAO that it would be appropriate for a further two six-monthly audits to be completed before the frequency of audits was reviewed. These are the audit presently underway (spring 2002), and the following audit (presently that associated with tabling of letters by ministers by the tenth day of autumn sittings 2003, that is 5 March 2003).

3.78 The Committee notes that, if the Senate accepts the Committee's recommendation to change both the reporting period (to align with financial and calendar years) and reporting dates (to be not later than 2 calendar months after the last day of the financial and calendar years), the fourth audit would be of contract listings associated with the tabling of letters by ministers by not later than 28 February 2003, for the period of twelve months ending on 31 December 2002.

3.79 The Committee concludes that no change should be made to the order's request for six-monthly ANAO audits of compliance at this stage. It reiterates that these audits should cover:

- agency contract listings for compliance with the order, and the appropriateness of the use of confidentiality provisions in contract listings examined by the audit; and
- contracts identified by ministers in their tabling advice as not having been included in listings because they had been deemed wholly confidential, and the appropriateness of their exclusion from listing.

3.80 The Committee undertakes to review the frequency of audits after the fourth audit is completed, with a view to either reassessing their frequency or, alternatively, leaving decisions on the timing of future audits to the discretion of the Auditor-General.

Conclusion

3.81 In its September 2001 report, the Committee stated that the combination of the Senate order, the GaPS system and annual reports provided a less satisfactory alternative to legislation to ensuring government accountability. The Committee had previously recommended, as the key feature of its report on IT outsourcing,¹⁰ that legislation be enacted to provide for information relating to Commonwealth contracts to be held in the public domain (unless there were sound reasons for withholding it).

3.82 The Committee notes that the Government has not yet responded to its report on IT outsourcing. It urges the Government to consider the recommendations in that report, in particular, the recommendation for legislation that would put beyond doubt the principle of public access to government contracting information.

3.83 In the meantime, this report has reconsidered the order in light of agencies' experiences over the first twelve months of its operation, in the context of promoting disclosure of government information and with a view to better coordinating and reducing duplication in reporting under the order, GaPS and annual reports. It has attempted to clarify the terms of the order and to acknowledge the progress being made towards a new culture of openness and accountability in relation to government contracting resulting from the new requirements.

3.84 The Committee proposes only minor amendments to the order in an attempt to resolve difficulties in interpretation and implementation experienced during the first year of its operation. They include changes:

- to amend the reporting period for letters tabled in the Senate by ministers, to coincide with calendar and financial years;
- to amend the reporting date for letters tabled in the Senate by ministers, to be not later than 2 calendar months after the last day of the financial and calendar years. That is,
 - for the reporting period of 1 January to 30 June, ministers' letters should be tabled and contract listings published by not later than 31 August; and
 - for the reporting period of 1 July to 31 December, ministers' letters should be tabled and lists published on agency websites by not later than the last day of February; and
- to include additional information (contract commencement date, duration of the contract, relevant reporting period and the twelve month period relating to the contract listings) to enhance the context of the listings.

3.85 In light of the relatively recent introduction of the order, the ongoing development of agency systems and processes to assist compliance, and the fact that best practice guidance on the determination of commercial confidentiality for

10 Senate Finance and Public Administration References Committee, *Re-booting the IT agenda in the Australian Public Service*, August 2001

contracts is only just becoming available, the Committee undertakes to review the order at the conclusion of the second twelve months of its operation.

Recommendation 16

3.86 The Committee recommends that paragraph (7) of the order be amended to provide for consideration and report on the second year of operation of the order by the Finance and Public Administration References Committee.

Recommendation 17

3.87 The Committee commends its recommendations to the Senate. If accepted, the Committee recommends that the order passed by the Senate on 27 September 2001 be amended to read as follows:

7 Departmental and agency contracts

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than **2 calendar months after the last day of the financial and calendar year**, 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 home page.
- (2) The list of contracts referred to in paragraph (1) indicate:
 - (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
 - (b) the contractor, the amount of the consideration, the subject matter of each such contract, **the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings**;
 - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
 - (d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.
- (3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:
 - (a) the list is not up to date;
 - (b) not all relevant agencies are included; and
 - (c) contracts all of which are confidential are not included.
- (4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

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- (5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
 - (6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
 - (7) The Finance and Public Administration References Committee consider and report on the first and **second** years of operation of this order.
 - (8) This order has effect on and after 1 July 2001.
 - (9) In this order:

“**agency**” means an agency within the meaning of the *Financial Management and Accountability Act 1997*; and

“**previous 12 months**” means the period of 12 months ending on either 31 December or 30 June, as the case may be.

(20 June 2001 J.4358, amended 27 September 2001 J.4994)

Senator Michael Forshaw

Chair

Appendix 1 – Senate Order (20 June 2002)

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, 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 home page.
- (2) The list of contracts referred to in paragraph (1) indicate:
 - (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
 - (b) the contractor and the subject matter of each such contract;
 - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, and a statement of the reasons for confidentiality; and
 - (d) an estimate of the cost of complying with this order.
- (3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.
- (5) This order has effect on and after 1 July 2001.
- (6) In this order:

"agency" means an agency within the meaning of the *Financial Management and Accountability Act 1997*;

"autumn sittings" means the period of sittings of the Senate first commencing on a day after 1 January in any year; and

"spring sittings" means the period of sittings of the Senate first commencing on a day after 31 July in any year.

Appendix 2 – Senate Order (27 September 2002)

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, 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 home page.
- (2) The list of contracts referred to in paragraph (1) indicate:
 - (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
 - (b) the contractor, the amount of the consideration and the subject matter of each such contract;
 - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
 - (d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.
- (3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:
 - (a) the list is not up to date
 - (b) not all relevant agencies are included
 - (c) contracts all of which are confidential are not included.
- (4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.
- (5) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (6) In respect of letters including matter under paragraph (2A), the Auditor-General be requested to indicate in a report under paragraph (3) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
- (7) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.
- (8) This order has effect on and after 1 July 2001.
- (9) In this order:

"agency" means an agency within the meaning of the *Financial Management and Accountability Act 1997*;

"autumn sittings" means the period of sittings of the Senate first commencing on a day after 1 January in any year;

"previous 12 months" means the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be;

"spring sittings" means the period of sittings of the Senate first commencing on a day after 31 July in any year.