The Parliament of the Commonwealth of Australia

Senate

Finance and Public Administration References Committee

INQUIRY INTO THE MECHANISM FOR PROVIDING ACCOUNTABILITY TO THE SENATE IN RELATION TO GOVERNMENT CONTRACTS

June 2000

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PREFACE

The level of information available to the Parliament and to the public about government contracting has not kept pace with the increased rate of contracting out, particularly in the outsourcing of many functions previously performed by government agencies.

A motion by Australian Democrat Senator Andrew Murray, motion no. 489, proposes a means of achieving greater transparency of government contracting, namely by the posting on agency web sites of lists of contracts entered into, indicating whether they contain confidentiality clauses and, if so, the reason for them; together with the independent verification by the Auditor-General of those confidentiality claims. The motion, if successful, would become a Senate order which also required ministers to table letters in the Senate chamber indicating compliance with the order on a six-monthly basis.

In previous reports on the subject of government contracting, the committee has supported the general principle that information be made public unless there are good grounds for withholding it. Put simply, there can be no accountability if there is no information. There appears to be broad support for this notion, but whether the Murray motion is the way to achieve it is what the committee was required by the Senate to investigate.

The committee invited submissions from all portfolios and from other interested persons and held a public hearing on 12 May to elicit the views of agencies which it believed would be affected significantly by the successful passage of the motion. Several potential difficulties were raised with the motion: the very low level of the threshold; the retrospective application; the number and size of the contracts concerned; the potential cost; and the partial duplication with other publicly available information. The committee therefore canvassed briefly various alternatives to the motion but decided that it was not in a position to reach definitive conclusions at this stage.

At the committee's public hearing on 12 May the Australian National Audit Office offered to conduct a performance audit on the use of confidential contract provisions. The offer was followed by a more detailed listing of the audit as a high priority in the draft audit program currently under consideration by the Joint Committee of Public Accounts and Audit. That audit should serve to flesh out many of the issues considered by the committee in this inquiry. In the circumstances, therefore, the committee has decided to await the audit outcome and to report again on Senator Murray's motion, on the basis of the further information arising from the audit.

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CHAPTER 1 INTRODUCTION

Reference

On Wednesday 12 April 2000 the following matter was referred by the Senate to the Finance and Public Administration References Committee, for inquiry and report by 26 June 2000:

'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.'

General business notice of motion 489 reads:

489**Senator Murray:** To move—That—

(1) There be laid on the table, by each minister in the Senate, in respect of each department or 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 an indexed 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 indexed list of contracts referred to in paragraph (1) indicate:

(a) each contract entered into by the department or 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 $10 000 or more;

(b) the contractor and the matters covered by each such contract; and

(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 a party as confidential, and a statement of the reasons for confidentiality.

(3) In respect of each contract identified as containing provisions of the kind referred to in paragraph (2)(c), there be laid on the table by the Auditor-General, within 6 months after the relevant letter of advice is tabled, a report indicating whether, in the opinion of the Auditor-General, the claim of confidentiality in respect of that contract is appropriate.

(4) In this order:

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

"**indexed**" means indexed alphabetically for subject matter of contract and contractor; and

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

Background to the inquiry

For many years, even before the current wave of outsourcing, the Senate has expressed concerns over confidentiality clauses in government contracts. Estimates committees in the 1970s lamented their inability to receive information *in camera* and what sparked their concern was, in the main, information deemed to be commercially confidential.

With the passage of the *Freedom of Information Act 1982* (the FOI Act), there was put in place a legislative regime that enabled the release to the public of much government information but which also recognised a need (via sections 43 and 45) to protect certain information such as the business, commercial or financial affairs of an organisation. The extensive 1995 review of the workings of the FOI Act by, jointly,

the Australian Law Reform Commission (ALRC) and the Administrative Review Council (ARC) examined the business exemptions and concluded by proposing no changes to the public interest test.[1] While the FOI Act has no direct application to the operations of the Senate or its committees it is, nevertheless, virtually the only Commonwealth legislative enactment that addresses the matter of commercial confidentiality and hence provides some guidance on the issues. Its provisions have been tested, with mixed results, in the courts.

The number of contracts entered into on behalf of the government has increased exponentially with outsourcing, with concomitant accountability issues presenting themselves. The committee examined these matters and reported on them in 1998.[2] Nor has the committee been alone in such an examination. There have been a number of inquiries from government instrumentalities, including the Productivity Commission in 1996[3] and the ARC in 1998.[4] All Auditors-General continue regularly to comment on the issues. And in the parliamentary arena, the Victorian Public Accounts and Estimates Committee has recently completed a major study;[5] a New South Wales Legislative Council standing committee examined the employment contract of the Commissioner of Police;[6] and federally the Joint Committee of Public Accounts and Audit is currently examining contract management, in the wake of such much-publicised contractual problems such as the fire on HMAS Westralia and the Collins class submarines.

The ARC report canvassed the option of a separate disclosure regime for government contracts but, in view of the partial disclosure regime in place, concluded:

> in light of these notification arrangements [in the then *Commonwealth (Purchasing and Disposals) Gazette*] and the availability of access to contracts under the FOI Act, a separate disclosure regime may impose costs on agencies which are not warranted by the use that is likely to made of such a regime. [7]

Senate committees have continued to exert pressure on government agencies to release contractual information. In recent budget estimates rounds, commercial confidentiality was a possible issue in the following cases:

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1 ALRC, ARC, *Open Government: a review of the federal Freedom of Information Act 1982,* AGPS, Canberra, 1995, p. 141.

2 Finance and Public Administration References Committee, *Contracting Out of Government Services: Second Report*, 1998, Ch. 5.

3 Productivity Commission, *Competitive Tendering and Contracting by Public Sector Agencies,* Report No. 48, 1996.

4 ARC, *The Contracting Out of Government Services,* Report no. 42, 1998, p. 59.

5 Victorian Public Accounts and Estimates Committee, *Commercial in Confidence Material and the Public Interest,* 2000.

6 New South Wales Legislative Council, General Purpose Standing Committee No. 3, *Report on Inquiry into Contract of Employment of Commissioner of Police,* 2000.

7 ARC, *The Contracting Out of Government Services,* Report no. 42, 1998, p. 59.

- fees and commissions paid in respect of the two Telstra sales to persons contracted by Telstra;
- airline maintenance schedules;
- refusal of salary supplementation to three universities; and
- monthly reports of Employment National.[8]

As the committee outlined in its 1998 report, the Senate can exert an amount of pressure on governments to release information in the public interest. The indexed lists of files procedure, to which the Murray proposal is analogous, is one example. In the interest of greater accountability, and to assist the general public to pinpoint files which might be of relevance to it, Senator Harradine moved, and the Senate agreed, that departments and agencies subject to the FOI Act be required to table copies of their file lists to the Senate.[9] The motion has been varied over the years, following reports from the committee, and is now encompassed in Continuing Order of the Senate no. 6, which requires the six-monthly placing of agency file lists on the agency web pages, along with the tabling in the Senate of letters indicating compliance with the requirement. The committee considers the efficacy of this measure in Chapter 3.

Where information has been denied the Senate on commercial confidentiality grounds, as in the case of the then Department of Administrative Services Casselden Place contract, the Senate has adopted the mechanism of requesting the Auditor-General to consider the appropriateness of the commercial confidentiality claim and the weight of the opposing public interest in disclosure. On that occasion, the Auditor-General came down on the side of disclosure and published the contract, with only one small detail blanked out.[10]

The growing number of contracts being entered into by government agencies and the apparent increase in secrecy provisions therein led to Senator Murray's motion, whose mechanism the committee has been required to consider. If passed by the Senate, the motion would provide for a level of transparency in government contractual arrangements which is currently largely lacking.

Conduct of the inquiry

The committee advertised the reference on its web site and, in addition, sought input from all portfolio ministers, the Auditor-General and the Clerk of the Senate. Submissions were received from two portfolios, from 16 departments or agencies and from two individuals, as indicated in Appendix A. A volume of submissions will be tabled with this report. This report and all submissions are available on the committee's web site at www.aph.gov.au/senate_fpa.

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8 Finance and Public Administration Legislation Committee, *Hansard,* 7 February 2000, pp. 187, 203.

9 *Journals of the Senate,* 28 June 1994, p. 2102.

10 Auditor-General, *Special Investigation into Casselden Place Building, Melbourne,* Audit Report No. 4, 1994-95, AGPS, Canberra, 1994.

On 12 May 2000, the committee held a public hearing at which it took evidence from the Clerk of the Senate and from representatives of the Department of Finance and Administration, the Office for Government Online, the Department of Foreign Affairs and Trade, AusAID, the Department of Industry, Science and Resources, Centrelink and the Australian National Audit Office, as indicated in Appendix B.

The committee warmly thanks those individuals and agencies which assisted it by way of submissions or by their appearance at the public hearing.

Structure of the report

In this report, the committee canvasses briefly in Chapter 2 the matter of what constitutes commercial confidentiality and the situations in which it might override a public interest in disclosure. In Chapter 3, it concentrates on the practical issues related to the implementation of the mechanism proposed in Senator Murray's motion for enforcing disclosure to the Senate of certain contractual details, and the likely cost. In Chapter 4, alternatives to Senator Murray's motion are considered, while in Chapter 5 the committee outlines its conclusions.

CHAPTER 2 ACCOUNTABILITY OF GOVERNMENT CONTRACTING

Introduction

Before considering Senator Murray's proposed notice of motion, the committee will briefly address the perceived problem which the motion attempts to address, namely the lack of transparency in government contracting practices. In the view of many senators, this problem is exacerbated by the rapidly increasing outsourcing of government services. At almost every estimates hearing, information is denied senators on the grounds that it is commercially confidential. Without recourse to an independent arbiter acceptable to both sides, this results in an impasse unsatisfactory to all. In many cases the confidentiality claim may be correct but, without seeing the information, senators are unable to judge the veracity of the assertion of confidentiality. Nor are they able to assess the level of financial risk to which the Commonwealth may be exposed by the use of confidential clauses, if they are denied access to contracts.

The nature of commercial confidentiality

As the committee noted in its previous reports on this subject, definitions of what is meant by commercial confidentiality tend to be general and not specific. The FOI Act allows the following exemptions from disclosure:

> A document is an exempt document if its disclosure under this Act would disclose:
>
> (a) trade secrets;
>
> (b) any other information having a commercial value that would be, or could be reasonably be expected to be, destroyed or diminished if the information were disclosed;
>
> (c) information ... concerning the business, commercial or financial affairs of an organisation or undertaking, being information
>
> (i) the disclosure of which would, or could reasonably be expected to, unreasonably affect ... that organisation or undertaking in respect of its lawful business, commercial or financial affairs;
>
> (ii) the disclosure of which ... could reasonably be expected to prejudice the future supply of information to the Commonwealth ...

If some general understanding of the nature of what is commercially confidential has evolved over the years, less certainty is associated with the other side of the equation, namely the public interest, and when public interest considerations might be considered to outweigh confidentiality claims.

As Professor Mulgan has pointed out, recourse to 'the public interest' appears to be made for the very issues where certainty of judgment is impossible and calls for its definition imply, mistakenly, that it is an objective standard awaiting discovery, given sufficient technical expertise. He claims that assessments of 'the public interest' are inherently contestable.[1]

A pragmatic consideration which the committee has alluded to in previous reports is that, for better or worse, executive claims of commercial confidentiality and/or public interest immunity, however interpreted, are unlikely to be believed because of their suspected use in the past to hide sloppiness, extravagance, incompetence – or worse, in the expenditure of public money.

The present level of accountability associated with government contracts

It has been asserted that the level of accountability presently afforded through annual reporting, the portfolio budget statements, the mandatory gazettal of contract details, freedom of information legislation and through the activities of agents such as the Commonwealth Ombudsman, the Auditor-General and parliamentary committees, is sufficient. The committee disagrees. It considers here the primary accountability vehicles that pertain to the Senate's right to know contractual details.

Financial Management and Accountability Act 1997 (FMA Act)

Under the FMA Act, the agency head is responsible for managing the affairs of the agency, including contracting, in a way that promotes the efficient, effective and ethical use of Commonwealth resources. Agency heads must account for their stewardship to their ministers through an annual report which ministers must table in the Parliament; they may also be requested to account for their contracting activities to a parliamentary committee.

Regulations issued under the FMA Act allow the Minister for Finance and Administration to issue guidelines relating to the procurement of goods and services.[2] Such guidelines are currently published as *Commonwealth Procurement Guidelines* (CPG). The current core policies and principles which underpin the procurement activities of government agencies commence with 'value for money', while 'accountability and reporting' comes a poor fourth. Accountability, according to the CPG, 'involves ensuring individuals and organisations are answerable for their plans, actions and outcomes'. Accountability to whom is not specified. Further, 'Openness and transparency in administration, by external scrutiny through public reporting, is an essential element of accountability.'[3] That public reporting is primarily via notification of certain contract details in the *Gazette*.

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1 R. Mulgan, 'Perspectives on "the Public Interest"', *Canberra Bulletin of Public Administration,* no.95, 1999, pp. 5-7.

2 Financial Management and Accountability Regulations, (Statutory Rules 1997, No. 328), Regulation 7.

3 Department of Finance and Administration, Competitive Tendering and Contracting Group, *Commonwealth Procurement Guidelines: Core Policies and Principles,* March 1998, p. 8.

Gazette Publishing System (GaPS)

Agencies covered by the FMA Act are required to provide, within six weeks of entering into the arrangement, certain details of all contracts, agency agreements or standing offers (with a few exceptions, such as national security considerations) to a value of $2,000 or more for publication in the Commonwealth *Purchasing and Disposals Gazette*. Details required include, where relevant: name of agency; description of goods or services; agency reference; purchase order number; total estimated liability in Australian dollars; date; supplier name, address and Data Universal Numbering System number; and contact officer details. A paper version of the *Gazette* was published from 1985; it has now been replaced by an electronic version, the Gazette Publishing System (GaPS), operated by the Office for Government Online (OGO) and published at www.contracts.gov.au. The details for GaPS are for the most part collected automatically from agencies' financial management systems and bulk-downloaded, though smaller agencies can fill out the mandatory fields manually then post them to the web.

GaPS is a convenient tool for disseminating a great deal of information about government contracts. In addition, it allows for searching on a number of fields. However, it does not include information on the existence of confidentiality clauses, nor the justification for them; nor does it necessarily include information on whether the contract is still running. The description of the matters covered by the contract is often rudimentary. Agencies themselves are responsible for the accuracy of the information they provide, with OGO doing only minimal vetting of it.

Mr Allan, the General Manager of the Government Electronic Business Group of OGO, has indicated that GaPS was designed with the technical capacity to add a few additional fields.[4]

Freedom of Information Act 1982 (FOI Act)

As outlined above, the FOI Act provides the legislative framework for the release of government information, including contractual information, to the public. The provisions of sections 43 outline exemptions which, broadly speaking, cover trade secrets, information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed, and information concerning business or professional affairs that would be affected by disclosure. Section 45 (1) states that a document is exempt if its disclosure would found an action for breach of confidence.

The relationship of section 45 to the general law of confidence has been unclear. Many legal cases and parliamentary committee and other reviews have attempted to clarify the matter. Two cases of particular relevance are *Corrs Pavey Whiting and Byrne v Collector of Customs, Victoria* and *Commonwealth of Australia v John*

4 Finance and Public Administration References Committee, *Hansard*, 12 May 2000, p. 12.

Fairfax & Sons Ltd. In a dissenting judgment in the former, Gummow J posed criteria which are now widely used for judging the existence of an equitable obligation:

> in order to make out a case for protection in equity of allegedly confidential information, a plaintiff must satisfy certain criteria. The plaintiff (i) must be able to identify with specificity, and not merely in global terms, that which is said to be the information in question, and must also be able to show that (ii) the information has the necessary quality of confidentiality (and is not, for example, common or public knowledge), (iii) the information was received by the defendant in such circumstances as to import an obligation of confidence, and (iv) there is actual or threatened misuse of the information.[5]

Where government seeks to enforce a confidence, a fifth criterion, detriment to the public interest, becomes relevant. This was considered in the *Fairfax* case, in which the Commonwealth sought, and was refused, injunctive relief against the publication of leaked defence and international relations material. The High Court observed that the Commonwealth is obliged to act in the broader public interest, and that public discussion and criticism of government actions is not sufficient detriment. Mason J stated that it was 'unacceptable in our democratic society that there should be a restraint on the publication of information relating to government when the only vice of that information is that it enables the public to discuss, review and criticise government action'.[6]

A 1999 review of the Commonwealth FOI Act by the Commonwealth Ombudsman pointed to a worrying trend. When agencies which deal predominantly with personal information were excluded, there was an apparent decline in the number of full disclosures since 1991 and an increase in the number of partial releases for which exemptions were claimed, suggesting a greater use of exemptions in cases of FOI requests for policy information. The Ombudsman concluded that the problems he identified were 'illustrative of a growing culture of passive resistance to the disclosure of information'.[7]

The committee notes in passing the additional powers afforded by the Victorian FOI Act which provides the Administrative Appeals Tribunal (AAT) with the power to order disclosure in the public interest, even though the document falls within an exemption provision. The Victorian AAT has exercised this power in ordering the disclosure of tender documentation, due diligence documentation, full outsourcing contracts and information relating to the monitoring of contractual performance.

While the FOI Act has no direct relevance to the operations of Senate committees, it provides broad well-considered legislative guidelines to the same issues which

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5 *Corrs Pavey Whiting and Byrne v Collector of Customs, Victoria* (1987) 13 ALD 254.

6 *Commonwealth of Australia v John Fairfax & Sons Ltd* (1980) 147 CLR 39.

7 Commonwealth Ombudsman, *Report of Investigation of Administration of FOI in Commonwealth Agencies,* 1999, p. 35.

confront those committees from time to time. Hence both the FOI Act and relevant case law are useful indicators when issues of commercial confidentiality arise.

Annual reports

The annual reporting requirements for FMA Act agencies for 1999-2000 mandate certain coverage of consultancies and contracting:

> The annual report must include a summary statement detailing the number of consultancy services contracts let during the year, and the total expenditure on consultancy services during the year. Further, more detailed, information on consultancy services is also required, either as an appendix to the report, or on request or through the Internet, as set out in Attachment C.
>
> Where applicable, the report must also include a summary statement in relation to competitive tendering and contracting (CTC) undertaken during the year. It is suggested that the statement refer to the total value and period of each contract let in excess of $100,000, the nature of the activity, and the outcome of CTC, including any net savings.[8]

As the CTC requirement will operate for the first time for reports for 1999-2000, the committee is unable to determine how informative the reporting is likely to be. Nor will it be in a position to know whether the reporting is complete and accurate.

The annual reporting provisions for Commonwealth authorities and companies, as provided for in Schedule 1 to the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) and in relevant Finance Minister's Orders, are not so prescriptive, in keeping with the government's view that such agencies should compete on a level playing field with the private sector.

Activities of Auditors-General

All Australian Auditors-General have in recent years been actively reporting on government contracting in their own jurisdictions and in December 1999 their joint council issued a 'Statement of Principles: Commercial Confidentiality and the Public Interest'. That document underscored the essence of the 'problem' that Senator Murray's motion wishes to address:

> the duty of Parliament to oversight the Government raises the prospect that Government activity will be disclosed as being inefficient, uneconomical, ineffective or improper. But that prospect should not be the rationale for a Government refusing Parliament access to information without which it cannot undertake its duty to hold the Government to account.[9]

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8 Department of the Prime Minister and Cabinet, *Requirements for Annual Reports,* May 2000.

9 Australasian Council of Auditors-General, *Statement of Principles, Commercial Confidentiality and the Public Interest,* 1999.

The South Australian Auditor-General, who has particularly considered the implications of government contractual activity, has stated:

> It is the responsibility of the Auditor-General to ensure that the public is fully informed as to the nature and extent of all contracts which alter core government relationships or functions, create unusual or substantial contingent liabilities or which involve material expenditure of funds. While some provisions may be legitimately confidential, in my opinion confidentiality cannot be permitted when the overall impression created would be misleading to the public and the Parliament and where confidentiality impedes the latter in the discharge of its constitutional role of scrutiny of the Executive Government.[10]

In the federal sphere, the Auditor-General has undertaken a considerable number of performance audits of contractual arrangements, many of which have raised confidentiality issues. There appears to have been an emphasis on defence contracting, such as the Collins class submarines[11] and the Jindalee Project[12] for obvious reasons of materiality.

Notwithstanding the excellent job that Auditors-General are already doing, they do not currently scrutinise every commercial confidentiality claim in government contracts. Nor does the Commonwealth Ombudsman, or his state equivalents.

Accountability in the parliamentary arena

The above accountability mechanisms ensure that a certain level of knowledge about most government contracts is already publicly available. Why then, it might be asked, is the additional provision proposed by the Murray motion deemed necessary? The answer lies in fact that relevant information about government contracts, information which would enable senators to establish, for example, the level of risk a particular contract might be exposing the Commonwealth to, or whether a particular use of public money is appropriate, is not always publicly available. Senator Murray has argued that if senators do not know which government contracts contain commercial confidentiality provisions, they are unable to form a view as to which contracts merit closer scrutiny.

Further, they have difficulty using the existing parliamentary scrutiny mechanisms such as question time or committee hearings to question contract provisions without their contribution being castigated as a ‘fishing expedition’.

It is often claimed by public servants that specific legislative provisions prevent them from providing contractual information to Parliament. In the view of the Clerk of the

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10 South Australian Auditor-General, *Report of the Auditor-General for the year ended 30 June 1998, Part A,* pp. 20-21.

11 ANAO, *New Submarine Project,* Audit Report No. 34, 1997-98.

12 ANAO, *Jindalee Operational Radar Network [JORN] Project,* Audit Report No. 28, 1995-96.

Senate, secrecy provisions do not preclude Parliament from insisting on viewing government contracts. He asserted:

> I think the view of the government's legal advisers is now very close to the parliamentary view, which is that a requirement for secrecy does not apply of itself in the parliamentary sphere; that a secrecy requirement ... does not prevent the giving of information to a parliamentary forum, a house or a committee, and that if the information is given and the disclosure of that information is otherwise a criminal offence or a tort, the person who gives it to a parliamentary committee is not liable to prosecution or suit for that act.[13]

This view is supported, inter alia, by the ANAO, which found that Parliament had legitimate right to the information necessary to ensure accountability of Government activities, through independent reviews by agencies such as itself, the Ombudsman or the AAT or via subpoenas. It concluded by presuming that there were no inherent limitations to Parliament's ability to access information – the salient issue being how Parliament becomes aware of the information it requires.

Senate committees, with the exception of legislation committees considering the Appropriation Bills, have the power to consider evidence *in camera*, hence the giving of information to a committee need not equate with 'publishing' the information in the usual sense of that word. What Senate committees may do with *in camera* information is considered in a previous report of the committee.[14]

The practice in other jurisdictions

The committee has been monitoring with interest developments on this front in other Australian jurisdictions. It has noted the recent publishing of certain contracts or key information pertaining to them by the Victorian Auditor-General. His rationale for doing so, in the case of the State Revenue Office information technology contract, was provided as follows:

> One contentious issue that I have had to consider relates to whether, in the public interest, the value of a major outsourcing contract at the State Revenue Office should be disclosed in [an audit] report, or on the grounds of commercial confidentiality, this amount should be concealed from public knowledge. Under the terms of the commercial in confidence contract, the service provider has not consented to such disclosure as this information is regarded as proprietary and its public release could place the contractor at a competitive disadvantage. The State Revenue Office also maintains that reporting such details may influence or dissuade some prospective outsourcing companies when the contract is due for renewal.

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13 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 50.

14 Finance and Public Administration References Committee, *Contracting Out of Government Services: Second Report,* 1998, p. 67.

> While I am aware of the importance of promoting practices that enable the benefits of competition to flow from the operation of a fully competitive market, it is my view that the introduction of contestability and the involvement of contractors in the provision of government services should not provide public sector agencies with an avenue for not disclosing the cost of publicly-funded services ... I have elected to disclose the value of the contract to outsource the Office's information technology services in order to enhance accountability and preserve the public interest in the right to know how their taxes have been spent.[15]

This committee is aware that the Western Australian Commission on Government recommended that all public contracts should be published; and has followed recent debate on the WA Government Financial Responsibility Bill 1998 during which commercial confidentiality became an issue.[16]

On the overseas front, the committee has much anecdotal evidence of an increasingly open approach to disclosure of government contracts and will continue to monitor closely developments elsewhere which might guide practice federally.

15 Victorian Auditor-General, *State Revenue Office,* Special Report No. 58, 1998, p. vii.

16 Western Australian Legislative Council, *Hansard,* 9 May 2000, p. 6614.

CHAPTER 3 THE PRACTICAL APPLICATION OF SENATOR MURRAY'S MOTION

Introduction

At the committee's public hearing on this matter, Senator Murray stated:

> one of my purposes in putting this motion forward for consideration is that there should be a knowledge of what contracts are let, a summary of what provisions there are ... and a summary of whether there are commercial-in-confidence or confidential provisions generally in these contracts so that the parliament could say, 'We are not satisfied with that being so and we would like to look at that contract.'[1]

Senator Murray's motion was driven by what he perceived to be Parliament's frustration with insufficient accountability associated with government contracting and by a belief that 'commercial-in-confidence is used excessively and litters contracts unnecessarily'.[2] He cited, as an example of lack of transparency in general, the experience of the Department of Defence which, on reviewing its file lists for publication in accordance with Senator Harradine's motion, reduced the number of them classified as 'secret' by a massive amount.

In this chapter, the committee considers the practicalities associated with the implementation of Senator Murray's motion, if the Senate were to agree to it.

Definitional issues

A number of witnesses raised with the committee definitional problems in the motion as it stands. They included the definition of 'agency', 'contract', 'fully performed', and provisions regarded as confidential.

Agency

As the committee has found in its monitoring of compliance with the indexed lists of files order, even wording as apparently straightforward as 'agency' can present difficulties in interpretation. Should it include non-budget dependent bodies such as the statutory marketing bodies in Agriculture, Fisheries and Forestry – Australia? Should there be total exclusion of any bodies on security grounds? Should GBEs and government companies be included or excluded? Do we need to distinguish between wholly owned government companies and others? Does the motion require ministers to list contracts by 'agency', however defined, or can he or she present an undifferentiated list aross the portfolio? Or should the order be limited to a prescribed list of agencies, such as those covered in the relevant schedules to the FMA Act and/or the CAC Act?

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1 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 51.

2 ibid., p. 5.

Contract

Of far more significance is what is meant by a contract, for the purposes of the motion. For example, the Australian Bureau of Statistics (ABS) explained the common business practice of negotiating a deed of arrangement and then issuing individual purchase orders under that deed as the need arises. It questioned whether the reporting requirement would encompass the purchase orders, deeds or both.[3]

The Department of Immigration and Multicultural Affairs (DIMA) outlined its wide range of contractual arrangements: contracts for goods and services; consultancy arrangements; grants; standing offers; memoranda of understanding with other Commonwealth agencies; and contracts for the provision of labour services with employment agencies, individuals and AWAs. DIMA suggested that labour service contracts should be excluded from the broad definition of 'government contracts' for the purposes of the motion, due to the significant administrative and resource implications in tracking and reporting them and also because of the personal nature of the information contained.[4]

Another agency to question whether the motion was intended to apply to grants was the Department of Industry, Science and Resources (DISR), which indicated it had hundreds of current grant agreements and that, if the motion were to apply to them, the department would need to redeploy scarce resources to compile and maintain the list.[5]

If the motion goes ahead, the committee stresses that a clear delineation of what 'contracts' are to be included will be required.

Matters covered

It is unclear from the motion as it stands how detailed the 'matters covered by each such contract' should be. Would a brief description, such as 'provision of IT services' suffice? Dr Seddon, a specialist in contract law at the Australian National University, outlined other options: definitions, interpretation, entire agreement clause, variation clause, contractor's obligations, Commonwealth obligations, indemnities, choice of law clause, et cetera; or a more ambitious interpretation entirely, namely a disclosure of a summary of the clauses of the contract. He cautioned, however, that if the latter option were envisaged, a considerable amount of work and skill would be required to do the job properly.[6]

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3 Australian Bureau of Statistics, *Submission,* p. 1.

4 Immigration and Multicultural Affairs portfolio, *Submission,* p. 4.

5 Department of Industry, Science and Resources, *Submission,* p. 5.

6 Dr Nick Seddon, *Submission,* p. 2.

Fully performed

A number of witnesses indicated that contracts were often not completed at the time envisaged at their signing. AusAID, for example, indicated that aid project contracts were often amended to an extended time frame and that it would be a complex process for them to check again and again for reporting purposes as to whether particular contracts had been extended.

Determining confidentiality

While a specific provision requiring the parties to the contract to maintain confidentiality would be easy to identify, 'whether any provisions of the contract are regarded as confidential' presents more problems. As Mr Noonan from DISR pointed out,

> If I were applying that resolution, I would regard it as incumbent on me to write to every supplier and ask, 'Do you regard any provisions of this contract as confidential?' I would guess I would get a very high percentage of affirmative responses, and then I would have to examine each one of those to see whether I thought that claim was a reasonable one or not.[7]

Mr Goldstein of Centrelink added that even for new contracts, the negotiation phase would be extended quite substantially as you tried to work out what was confidential and what was not and it could make closure on a contract quite difficult.[8] DOFA indicated that the majority of contracts had provisions regarding disclosure and it was not a question of one side determining whether provisions were to be regarded as confidential: the parties to the contract would need to consult and, where necessary, seek business and legal advice for potentially every clause, every six months. Given the size of some contracts, and the number of them, this would impose a considerable cost burden.

The number and size of contracts involved

Any assessment of the practicality of Senator Murray's motion must take into consideration the number of contracts potentially involved, and their size. Dr Wright of DOFA indicated that, based on the *Purchasing and Disposals Gazette* which records Commonwealth contracts valued at $2000 or more, there were over 111,000 contracts, of which 42,000 came over the $10,000 threshold. She clarified that, because contracts are generally for longer than one year, an approximation at any one point in time would be that 100,000 contracts would be covered by the motion.[9]

Individual agency estimates of the numbers of 'contracts', however defined, varied widely. Amongst the estimates provided to the committee were the following:

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7 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 33.

8 ibid.

9 ibid., p. 2.

Department of Foreign Affairs and Trade, 175 (a figure which included head agreements but excluded overseas property leases, et cetera);[10] Industry, Science and Resources, 1,971 of a value of $2,000 or greater;[11] Centrelink, nearly 1,500 over $10,000; the Department of Transport and Regional Services, 220 to the value of $10,000 or more in 1998-99; AusAID, over 1200 contracts current at any one time; the Education, Training and Youth Affairs portfolio, approximately 15,000 contracts under one funding program alone, and approximately 300 active outsourced program delivery general service contracts, plus employment contracts and contracts for the supply of goods.

In addition, many contracts are immensely detailed. The ANAO advised the committee that while the terms and conditions of the larger procurement contracts range from about 50 to 75 pages, the detailed specifications supplied as annexes could reach, in old terms, 200 A4 ring binders. Often specific confidentiality provisions applied to the technical specifications.

The proposed $10,000 threshold

Most witnesses and submittors suggested that the $10,000 threshold proposed in the Murray motion was too low[12] and that, as the ABS suggested, reporting at that level would possibly diminish the functionality of the exercise as many relatively minor transactions would come within scope.[13] DISR suggested that, if the motion were directed at the contracting out of government services rather than ordinary supplier contracts for the provision of cleaning services, stationery or freight, a threshold of $1,000,000 might be more appropriate.[14]

The view of Mr McPhee of the ANAO was that:

> $10,000 is probably on the very low side ... I would have thought that you would be looking at much more substantial contractual arrangements because otherwise you will get a lot of contracts which may be confidential only because of pricing elements ... If the proposal were to go forward, I would be looking at a fairly substantial increase in the threshold.[15]

The retrospectivity issue

A number of the larger agencies pointed out that they had no centralised contracting unit. Rather, contract management was devolved to the relevant work area. Any retrospective change to reporting requirements would thus incur substantial

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10 Finance and Public Administration References Committee, *Hansard*, 12 May 2000, p. 19.

11 Finance and Public Administration References Committee, *Hansard*, 12 May 2000, p. 24.

12 See, for example, Australian Prudential Regulatory Authority, *Submission,* p. 1; Immigration and Multicultural Affairs, *Submission,* p. 3.

13 Australian Bureau of Statistics, *Submission,* p. 1.

14 Department of Industry, Science and Resources, *Submission,* p. 5.

15 Finance and Public Administration References Committee, *Hansard*, 12 May 2000, pp. 39-40.

administrative cost. In the circumstances, it was suggested by the Immigration and Multicultural Affairs portfolio that if clause 2(c) of the motion were to be implemented, it should be done prospectively. That portfolio also raised the question of how the Auditor-General would form his view as to the appropriateness of the confidentiality reasons given. It suggested that any such assessment be based on a clear set of guidelines and those guidelines should be known by the contracting entities in advance of their entering into an arrangement.[16] This would imply that the motion specify a future start-up date.

The six-monthly tabling

A number of witnesses drew attention to the fact that an assessment of confidentiality would vary over time. Dr Wright of DOFA pointed out that what constituted a trade secret or intellectual property at a given point in time might not do so three months later. Therefore contracts would need to be assessed not only once but potentially many many times each, for every six-month tabling. The currency of contracts also presented a problem for regular reporting. Amongst others, AusAID indicated that it would be in a position of having to reassess the same contract many times, as by the very nature of overseas development work, contracts were often extended and time frames varied.[17]

Given that the requirement to report details of contracts through GaPS is within six weeks, a requirement to report in a different format on a six-monthly basis would present an administrative inconvenience which could perhaps be avoided.

Technological issues

No technological issues were raised with the committee as impeding the implementation of the motion. The committee is aware that those government agencies without web sites are currently developing them to meet the government requirement that every federal agency be in a position to deliver services electronically by 2001. Implementation would come at a cost, however, as financial management systems would need to be adapted to allow the process to be automated.

The costs of implementing the motion

All agencies which participated in the committee's inquiry indicated that they would face additional costs, were the motion to go ahead. Not surprisingly, they found it difficult to quantify those costs. Only one agency, the Royal Australian Mint, indicated that its administrative costs in complying with the motion would be 'minor'.[18] The ABS noted that it would be a significant administrative burden to

16 Immigration and Multicultural Affairs portfolio, *Submission,* p. 3.

17 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 34.

18 Royal Australian Mint, *Submission,* p. 1.

extract the information manually, until such time as resources could be redirected to put system modifications in place.[19]

DOFA believed the motion was likely to involve 'substantial' and 'significant' costs to both agencies and suppliers and those costs would include the following items: legal and business advice to agencies, repeated every time the contract was changed or renewed; review of confidentiality provisions; changes to financial management systems; enhancement of agency web sites to accommodate the publishing, indexing and sorting of contract information.[20] It estimated the costs to DOFA of the proposed motion to be $10 million this financial year and that applying this estimate across the Commonwealth would result in annual costs in excess of $200 million per annum.[21] The committee is highly sceptical of this estimate, given that the estimates provided by other agencies, based on a $10,000 threshold, ranged from DFAT's $80,000 to Centrelink's $288,467.[22]

The committee notes that when the Administrative Review Council reported on the contracting out of government services in 1998, it recommended against a separate information access regime for contracts, on the basis that it might 'impose costs on agencies which are not warranted by the use that is likely to be made of such a regime'.[23] No putative costs were cited, however. And what needs to be considered in the equation is the intangible 'benefit' of openness and transparency, along with the costs of maintaining secrecy.

The role of the Auditor-General

Senator Murray's motion envisages that the Auditor-General report to Parliament every six months on whether the confidentiality claims, as disclosed on each agency's web site list of contracts, are appropriate. Given the evidence from DOFA, with its experience gained from its Competitive Tendering and Contracting Group, the majority of contracts contain clauses which, if not precisely 'confidentiality' clauses, are clauses which require certain processes to be undertaken before information is disclosed, and therefore, most contracts would be flagged to indicate that they contained commercial-in-confidence provisions. Potentially, therefore, the Auditor-General could have 100,000 contracts to consider every six months. Clearly, this would be a task beyond the present capacity of the ANAO to carry out.

In the committee's public hearing, representatives of the ANAO addressed the practicalities of the motion as it would impinge on them. The Deputy Auditor-General, Ian McPhee, suggested audit approaches which in his view would be more

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19 Australian Bureau of Statistics, *Submission,* p. 2.

20 Department of Finance and Administration, *Submission,* pp. 9-10.

21 Department of Finance and Administration, *Supplementary Submission,* p. 2.

22 Centrelink, *Supplementary Submission,* p. 2.

23 Administrative Review Council, *The Contracting Out of Government Services,* Report no. 42, 1998, p. 59

cost-effective than six-monthly audit reports on confidentiality provisions: reviewing confidentiality provisions in the course of regular performance audits, for example; or programming a particular audit which might look closely at an agency or multi-agency use of confidentiality provisions.[24] He pointed out that Senator Murray's motion was essentially a detective mechanism and that the ANAO would prefer to see an emphasis on preventative measures, with agencies being required to focus on their decisions about confidentiality in the first place.

Other agencies remained unclear over the precise role proposed for the Auditor-General by the motion. The Immigration and Multicultural Affairs submission suggested that if the intention was that the Auditor-General arbitrate on the release of information, it would cause difficulties. It cited the *Commonwealth Procurement Guidelines* which direct that persons undertaking procurement should ensure that the confidentiality of commercially sensitive information is maintained and indicated it would not support any overriding of pre-existing confidentiality provisions in its contracts.[25]

Would more contractual openness deter potential suppliers?

The usual assertion, when the topic of more openness in government contractual arrangements is raised, is that it would deter potential suppliers from bidding for government business. In the Australian context, this can only be speculated upon. The committee notes, however, that the transparency accorded to contractual arrangements in other jurisdictions does not appear to have had that effect.

In its submission to the committee DOFA stated, 'Imposing additional reporting requirements may discourage some suppliers, particularly small and medium enterprises, from participating in the Government market.'[26] During the committee's public hearing Dr Wright expanded on this position, suggesting that the impost of regular additional legal and business advice costs on suppliers at the small end of the market could discourage them from bidding for government business, given their narrow margins. No evidence was presented to confirm this.

The comments of Mr McPhee of the ANAO accord with the committee's subjective view of the matter:

> My discussions ... with the private sector suggest that they are not as concerned about confidentiality as sometimes is made out and I think there is something in the fact that the public sector has a bit of a history of putting 'commercial-in-confidence' on contracts because it is probably something we have tended to do.[27]

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24 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 35.

25 Immigration and Multicultural Affairs portfolio, *Submission,* p. 4.

26 Department of Finance and Administration, *Submission,* p. 11.

27 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 42.

The committee accepts that many private sector firms operate in highly competitive environments and will need to protect their competitive position, if doing business with the government is to be worth their while. As the Auditor-General counselled, 'Adopting a "take it or leave it" approach may simply mean that we might be left with less competition and worse outcomes.'[28]

The parallel with the indexed lists of files procedure

Senator Murray's motion parallels that of Senator Harradine, relating initially to the tabling in the Senate of indexed government agency file lists and now amended to the tabling in the Senate of letters stating that agencies had placed their file lists on the Internet.

The committee has reported three times on aspects of the motion, now Continuing Order of the Senate no. 6. In its most recent report, it indicated it would monitor compliance with the motion and, if necessary, report to the Senate on its findings. For a variety of reasons, it has proved more difficult than expected to conduct that monitoring task and the findings reported here should be regarded as preliminary and not definitive.

Timeliness

A modest failing in compliance with the order has been in terms of timeliness, and specifically, timeliness in the tabling of letters of compliance. The order reads:

> There be laid on the table, by each minister in the Senate, in respect of each department or 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 an indexed list of the titles of all relevant files, including new parts of existing files, created in the preceding six months commencing on 1 January and on 1 July, respectively, has been placed on the Internet.[29]

For the most recent period, letters of advice were tabled by the due date (15 March 2000) by 13 ministers, indicating compliance with the order in respect of either the portfolio or particular agencies therein. Two letters of advice from Senator Alston in respect of the Communications, Information Technology and the Arts portfolio were tabled separately, the first in respect of the department was tabled on 16 March (that is, one day late) and the second was not tabled until the next available sitting day, as was the letter dated 14 March from Minister Wooldridge in respect of the Health and Aged Care portfolio. A timely letter from the Minister of Defence was tabled, indicating an inability to meet the requirements of the order and the reasons why, and promising to indicate compliance by a specified date. He subsequently provided a letter for tabling somewhat later than promised, indicating compliance with the order.

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28 P. Barrett, *Commercial Confidentiality – a Matter of Public Interest,* Presentation to the ACPAC Biennial Conference, 21-23 February 1999, p. 14.

29 Senate, *Standing Orders and Other Orders of the Senate,* Feb 2000, p. 119.

The Attorney-General's portfolio indicated compliance with the order in a letter dated 17 May; compliance by Centrelink was advised on 4 April, the portfolio minister having previously advised that it would be late. No correspondence has been received from the Minister for Veterans' Affairs relating to files for the period 1 July 1999 and 31 December 1999; the committee notes that for the period July-December 1998, the Department of Veterans' Affairs did not comply until 9 August 1999. Nor does it appear that the Department of Foreign Affairs and Trade has provided a letter indicating compliance, although the files lists are available, and other agencies within the portfolio have provided compliance letters.

It is unclear in some cases what proportion of agencies, or even which agencies, were covered by the compliance letters tabled. The committee commends the following for timely tabling of compliance letters and for complete and helpful listings of the agencies covered in the compliance statements:

- Agriculture, Fisheries and Forestry – Australia portfolio;
- Employment, Workplace Relations and Small Business portfolio;
- Environment and Heritage portfolio;
- Finance and Administration portfolio; and
- Treasury portfolio.

The committee accepts that portfolio agencies may, for a variety of reasons, operate in a coordinated way or relatively independently. It would nevertheless be helpful, from the committee's viewpoint, if all letters of compliance followed the lead of the above-named portfolios and spelt out clearly whether a portfolio response was being provided and if so, which agencies were covered in the response and which, if any, were being provided separately, had a nil response, or had been unavoidably delayed and would be provided by a given date.

On this occasion, the committee did not check that file lists had been loaded on the Internet by the date compliance letters were tabled. Its monitoring took place at a later stage and, as indicated below, certain problems emerged, the most serious being that it was not always possible to tell which agencies were covered by the lists provided, nor to which period they related. An indication that the list contains 'all files created in the central office' does not help the committee or others to know which portfolio agencies might be so covered.

Access to the file lists

While most of the file lists were able to be found on the Internet without difficulty, a few presented unnecessary challenges at the time of the committee's checking. The Australia Council files could only be found using the URL provided in the tabling letter and not directly from the home page. The URL provided for the National Archives of Australia file lists in the tabling letter was inoperable. One agency

provided, as its URL, 'under "Publications" or "What's New"' but was nevertheless found successfully.

Content

The order allows for the exclusion from the lists of certain categories of files, including case related files, and files relating to staff or personnel matters or to the internal administration of the agency. File titles may exclude any part which would disclose commercially confidential, identifiably personal or national security matters.

From the titles disclosed, the committee cannot reach a firm decision on how well the order is being complied with. This would require an audit of all files and an independent assessment of whether the exclusions were justified. The committee's scrutiny did disclose a few curious interpretations of the meaning of 'identifiably personal' in the context of the order: for example, the Department of the Prime Minister and Cabinet chose to exclude the names of recipients of state funerals.

Some lists did not clearly indicate the period they covered, or covered a non-standard period. AFFA, for example, had unhelpful labels such as 'list-old B' or 'list new'. The Wheat Export Authority stated on its web site that it could not comply with the order because its files 'contain commercial-in-confidence sensitivities' – apparently a misunderstanding of the order, which requires file titles only and allows for exclusions on such grounds.

Overall compliance

Overall compliance with the order cannot be reliably assessed, in part because the tabled letters and the Internet lists do not always specify which agencies are covered or whether there are legitimate nil entries. And in both timeliness and content terms, compliance is far from perfect. As the committee has pointed out previously, non-compliance with a lawful order of the Senate is a contempt of the Senate. It would be open to the Senate to refuse to deal with a given minister's legislation, for continued flouting of the order. The committee gives notice that it will step up its surveillance of compliance with the order and will, in the first instance, write to any minister who fails to table the required information by the next required date, namely 12 September 2000, to request an explanation for his failure to comply with the order. The committee will review what further steps it will take following an assessment of the initial level of compliance.

Agencies' experiences with the order

From the evidence presented to the committee, many agencies appear to experience massive compliance costs in meeting the requirements of the order and to have a jaundiced view as to its effectiveness in helping users to target FOI requests. The ABS believed it to be 'a resource intensive exercise with little benefit accruing to the ABS internally';[30] the Treasury found compliance with the order onerous, with the process

30 Australian Bureau of Statistics, *Submission,* p. 2.

taking up to ten weeks and involving substantial departmental resources as well as resources from the ministers' offices for clearance;[31] the Department of the Prime Minister and Cabinet found compliance 'a time consuming and resource intensive exercise' taking 40 working days each year.[32]

Immigration and Multicultural Affairs described its procedures in complying with the order as follows:

> the process is commenced two months prior to the tabling date and involves a search of records to identify relevant files relating to policy advising functions and development of legislation and other matters of public administration. Relevant files are reformatted and circulated to all relevant staff for comment. The final report is cleared by the Secretary and the Minister prior to tabling and upload.[33]

DIMA could see only limited apparent benefits to the exercise, indicating that there had been no formal requests for files from outside parties. DOFA estimated that its cost of complying with the order was $100,000 'which includes manually checking, compiling and annotating lists of file titles to ensure the file titles can be disclosed' and that the information on the web site received about 15 'hits' per month.[34] The committee notes that for the period 1 July-31 December 1999, the DOFA web site listed 1,385 file titles.

The committee was pleased to learn that a number of agencies were putting in place, or had already, records management systems which handled the requirement automatically. The Department of Transport and Regional Services found it was able to meet the Senate requirement 'without significant reallocation of resources'[35] while the Department of Industry, Science and Resources estimated that, through automation, the resource requirement was now 'about five person days per year'.[36] The latter department commented, however, that it had not received any feedback on the usefulness of its electronically accessible indexed list of files.

In passing the Harradine motion, the Senate had no intention of imposing a major cost burden on Commonwealth agencies in perpetuity. The committee commends those agencies which have sensibly automated their procedures to produce the required lists and exhorts others to follow their lead.

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31 Treasury, *Submission,* p. 1.

32 Department of the Prime Minister and Cabinet, *Submission,* p. 3.

33 Immigration and Multicultural Affairs portfolio, *Submission,* p. 5.

34 Department of Finance and Administration, *Supplementary Submission,* p. 1.

35 Department of Transport and Regional Services, *Submission,* p. 2.

36 Department of Industry, Science and Resources, *Submission,* p. 5.

No agency seems to have recognised the inherent value of the motion as an example of transparency and accountability in government operations. As the Clerk of the Senate pointed out,

> The requirement for information to be published is a safeguard against malfeasance. As with all safeguards, you cannot measure the effectiveness of the safeguard by attempting to measure how much the information is used ... I would caution against any attempt to say, 'Because we do not have a terribly large number of people looking up this list on the Internet and so on, the safeguard is useless.' That is the way in which safeguards operate.[37]

Lessons for the future

From its Harradine motion monitoring exercise, the committee has become aware of the need for absolute clarity in the wording of Senate orders, a factor which has shaped its conclusions in Chapter 5 in relation to the Murray motion. It also appreciates that, without a monitoring exercise, the value of the order would be diminished.

37 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 45.

CHAPTER 4 POSSIBLE ALTERNATIVES TO SENATOR MURRAY'S MOTION

A number of agencies commented on the level of duplication with existing reporting requirements that the Murray motion presented. In this chapter, the committee considers the Gazette Publishing System (GaPS) and annual reports, and whether they might present viable alternatives to the Murray motion. The committee also considers the option of the mandatory publication of contracts.

Additions to GaPS

As outlined in Chapter 2, Commonwealth agencies covered by the FMA Act are required to gazette contracts they enter into, to a value of $2,000 or more, in the *Commonwealth Purchasing and Disposals Gazette*, a paper version of which existed from 1985. Notification in the *Gazette* is now by means of the electronic *Gazette Publishing System*, GaPS. GaPS has been operative since December 1999. Gazettal must be arranged within six weeks of entering into the contracts.

There are exemptions from reporting: if a chief executive decides that details of a contract or standing offer are exempt matters under the FOI Act, he or she may direct in writing that the details are not to be notified in the *Gazette*.[1] Grounds for exemption include national security, for example. It is unclear to the committee how extensively exemptions are claimed or what capacity there is to ascertain whether the exemptions are appropriate. The practitioners who spoke to the committee indicated that non-gazettal was very rare. In the case of the Department of Foreign Affairs (DFAT), it was suggested that there might be one or two in areas related to security; in the case of AusAID, the committee was told that details of contracts with external advisers for the assessment of tender bids would not be published. In addition, DFAT indicated that contracts arranged at overseas missions were not gazetted.

Details currently published in fourteen mandatory fields include:

- ministerial portfolio, department or agency, division or group, branch or office and postcode of branch or office;
- description of the goods or services sufficient to identify the nature and quantity of the procurement;
- purchase order number, total estimated liability and date (for contracts);
- supplier details;
- contact officer details; and

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1 Department of Finance and Administration, Competitive Tendering and Contracting Group, *Commonwealth Procurement Guidelines: Core Policies and Principles,* 1998, p. 10.

- Australian and New Zealand Standard Commodity Classification (ANZSCC) for the goods or services procured.

In addition there are non-mandatory fields, covering the authorising officer, date of authorisation, supplier ACN and postal address and agency reference number.

To a large extent, the published information is picked up automatically from agencies' financial management systems and provided automatically to the GaPS web site.

GaPS is readily searchable, by agency, commodity classification, contract value, supplier name and contract or Gazette date. Files can also be downloaded for unlimited searching.

Information is not currently provided to GaPS relating to confidentiality clauses in contracts. It was suggested to the committee that to avoid duplication of published information, it might be appropriate to consider the addition of other required fields in GaPS rather than to require separate lists to be maintained on agencies' web sites. OGO representatives indicated that GaPS had been set up with the ability to add extra fields, so that in technological terms, refinements to the system to encompass the information required by the Murray motion would be possible.

As Mr Allan of OGO pointed out, however, the technology is only one part of the equation. Business processes in agencies would need to be altered to accommodate changed reporting requirements then GaPS itself would need to go through a validating and testing process to handle the new data. He suggested that, were the changes to be implemented, he would prefer to see a pilot program, offline, before implementation.

At the request of the committee, the ANAO made a brief review of the information available through GaPS. That review highlighted a problem which the committee itself had noted in its examination, that the mandatory field for 'description of content' was, in the cautious expression of the ANAO, 'not completed in such a way as to be very informative'.[2]

The review confirmed other features of GaPS which appeared strange to the committee. No contract expiry date is required; no indication of whether the contract has been discontinued; nor whether the contract continues across financial years. As Mr Allan pointed out, however, contracts have slippages and different milestone requirements. One-off reporting at the time of the letting of a contract could be handled technically. He stressed that if the tracking of contracts was required, it would require extra effort and extra fields, and extra work on the process definition, the scoping and then the implementation requirements.

Just as the committee had difficulty eliciting possible costs of compliance with the Murray motion, no ballpark figure was provided for the costs of altering GaPS to

2 Australian National Audit Office, *Supplementary Submission,* 2 June 2000, p. 1.

accommodate Senator Murray's concerns. In part, this is because there would be different costing regimes for separate fields to handle a tick box for the existence of confidentiality provisions and a text box citing the justification for those provisions on the one hand, and for the more problematic contract completion provisions on the other. The committee notes the comment from the ANAO, 'On the basis of evidence given to the committee and on our review, it is clear enough that GaPS functionality and reporting could be enhanced'.[3] If an augmented GaPS were to be preferred to a stand-alone Senate order, the timing of its implementation would need to be considered. Given that there will almost certainly be amendments to GaPS in the foreseeable future, it might be a less costly option to defer the introduction of additional confidentiality reporting requirements until such time as other changes are made.

The major drawback advanced regarding the augmentation of GaPS in place of the Murray motion is that a decision by government to agree to the changes could always be rescinded at some future date.

Additions to annual reporting requirements

Another option suggested as a possible alternative to the Murray motion was the augmentation of the requirement to report on contracts in annual reports. The requirement for the 1999-2000 year, as outlined in Chapter 2, involves a summary statement in relation to competitive tendering and contracting undertaken during the year. The requirements suggest that 'the statement refer to the total value and period of each contract let in excess of $100,000, the nature of the activity, and the outcome of CTC, including any net savings'.

As this is the first year in which this specific requirement will operate, it is not possible to comment on how well the requirement will be met. It appears to the committee that the requirement will present many of the same operational difficulties as have been claimed for the Murray motion. In particular, as a new requirement, financial management systems will need to be amended to enable agencies to handle the requirement automatically, although it is unclear to the committee how such systems would be able to determine the 'outcome' of the CTC. The 'period of each contract' will raise definitional problems, however the higher reporting threshold should ensure that only fairly significant contracts are reported on.

Nevertheless, as a mandatory reporting requirement for FMA Act agencies, it should be possible to extend the requirement to cover Senator Murray's confidentiality information, were the government disposed to do so, at not excessive additional cost in financial or staffing resource terms as it is probable that many agencies will not yet have adapted their financial management systems to track this information.

The obvious major disadvantage to using annual reports for this kind of disclosure is that it might be sixteen months from the letting of a contract to the reporting on it, at

3 Australian National Audit Office, *Supplementary Submission* , p. 2.

which stage any subsequent parliamentary or Auditor-General examination might be irrelevant. Also, annual reporting requirements are revised periodically and there would be no guarantee any requirement to report on contracts remained in force.

Publication of all contracts

The simplest means of avoiding the difficulties potentially associated with the Murray motion would be for all government contracts to be published. This could be effected by publication on web sites or by an in principle decision to release contracts sought under FOI. Such clauses and conditions as were deemed confidential could be omitted, with a phrase explaining each omission and the grounds on which the omission was made.

Such a practice would have a great deal to commend it. It would provide a degree of transparency that is currently lacking in government contracting practices and yet would provide reasonable protection for trade secrets and intellectual property. In conjunction with the information available via GaPS, it would alert parliamentarians to contracts with excessive numbers of secrecy provisions, which could then be investigated.

And such a practice would not be revolutionary. As the committee noted in its previous report on contracting, some jurisdictions publish contracts in their totality once they are signed, most Australian states are moving towards more openness in contracting, and there is considerable support for such a development in the federal jurisdiction. It could be asserted that the publication of contracts is becoming 'world's best practice' in jurisdictions which value openness in government.

If one were to be totally pragmatic about this, it is clear that governments do not have a good track record in keeping sensitive information confidential, so continued efforts at attempting to do so could be viewed as self-defeating. As Tony Harris, a former NSW Auditor-General, pointed out to the committee in its previous inquiry, major contracts have hundreds of contract lawyers and business advisers involved in them and the capacity to keep provisions secret is highly doubtful.[4]

An argument against the publication of contracts, however, and one which the committee does not take lightly, is that, were publication to be mandated, there would be a risk that the amount and accuracy of information documented in them would diminish.[5]

Other preventative measures

In evidence to the committee, representatives of the Australian National Audit Office suggested that, rather than recommending the adoption of a 'detective' approach such

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4 Finance and Public Administration References Committee, *Hansard,* 20 May 1997, p. 378.

5 Australian National Audit Office, in Finance and Public Administration Legislation Committee, *Examination of Budget Estimates 1999-2000: Additional Information Received,* vol. 3, p. 488.

as the Murray motion, the committee might do well to consider preventative measures. They suggested that the focus should be on requiring agencies to consider more closely decisions about the need for confidentiality clauses in contracts and to limit their overuse.[6] The committee takes the view that no public sector agency could be unaware of the views of parliamentary committees and individual parliamentarians as expressed over many years on this point. The lead must come from government and in the first instance, the committee would like to see the Procurement Guideline principles revamped to discourage agencies from the 'automatic' use of unnecessary confidentiality clauses.

In its submission to the committee, the Department of the Prime Minister and Cabinet proffered a suggestion as to how it could help by including advice on these issues in the proposed revised guidelines for the official conduct of public servants, in relation to contact with the Parliament.[7] The committee warmly welcomes this offer.

The Clerk of the Senate advanced the view that the existence of the Murray motion or an amended version of it would, if passed, itself have a preventative effect on the overuse of confidentiality provisions in contracts.[8] The committee suspects that this would only be the case if more confidential claims were audited.

The committee was heartened by the comment from the Royal Australian Mint that it 'would generally seek to avoid circumstances necessitating contract provisions that require the parties to maintain confidentiality'.[9] Other agencies provided examples of standard clauses used in their contracts, which enable the contracting agency to disclose the terms of the contract to the Auditor-General or a parliamentary committee if required.[10] It is unclear to the committee how widespread this practice is.

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6 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 38.

7 Department of the Prime Minister and Cabinet, *Submission,* p. 3.

8 Finance and Public Administration References Committee, *Hansard,* 12 May 2000, p. 47.

9 Royal Australian Mint, *Submission,* p. 1.

10 See, for example, Agriculture, Fisheries and Forestry – Australia, *Submission,* Attachment A.

CHAPTER 5 CONCLUSIONS

The committee is in agreement with Senator Murray in his concern that there is an apparently increasing level of secrecy provisions in government contracts and that this is an undesirable trend. It is not entirely convinced that Senator Murray's motion is the most appropriate way to handle the situation, for a number of reasons.

Senator Murray's motion is designed to do three things: to identify those government contracts which contain confidentiality provisions or clauses which either party to the contract deems confidential; to provide a reason for the confidentiality claim; and for such claims to be independently verified by the Auditor-General. A related issue is Senator Murray's concern to uphold the right of parliamentary committees to access contract provisions, in confidence if necessary, to assure themselves that the contract provisions are proper. Senator Murray does not question that there are legitimate reasons to maintain confidentiality of certain contract provisions; he merely wants the Senate to be told of their existence, in broad terms.

In its inquiry, the committee identified a number of problems with the motion as it stands. Firstly, it was told that the majority of contracts contain confidentiality provisions, either by way of specific confidentiality clauses or through clauses which oblige the parties to consult prior to any release of information, with the inference being that one or both parties might object to the release of pricing information, trade secrets, intellectual property or the like. Hence a list of contracts with a check box to indicate the presence of confidentiality provisions would be all but pointless, as in most cases the box would be checked.

Nor can the committee see particular merit in the listing of reasons for such confidentiality. In most cases such reasons could be inferred from the nature of the contract. In an example provided by the Department of Foreign Affairs and Trade, the pricing and other benefits regime in its travel contract would be fiercely guarded by the airline providers – and it would not require a great deal of acumen to deduce that a contract listed as providing air travel services would be legitimately deemed to be confidential on pricing grounds, at least for a period of time.

If neither the existence of confidential information nor the reasons for it are likely to be particularly surprising, the committee cannot see merit in replicating an already extant, albeit less than perfect, list of contracts in GaPS through the mechanism of the compliance with a Senate order for agencies to place an augmented list on their web sites. If the Murray motion were passed, the chief merit of the tabling of compliance letters in the Senate and the posting of contract lists on agency web sites would be that the requirement to do so would be out of the hands of the government of the day. The committee does not discount the advantages of such a step and will revisit the proposal following the tabling of the Auditor-General's report discussed below.

The real strength of the Murray motion lies in the monitoring role of the Auditor-General. While the six-monthly reporting procedure would be unworkable, given the number and complexity of contracts involved, some level of scrutiny and reporting is

clearly desirable. As has become abundantly clear to the committee through its monitoring of the indexed list of files procedures, without the ability to audit an agency's entire files, it is not in a position to know how accurate the lists are. In that case, however, the provision of any information is better than none. In the case of contracts, that initial threshold has already been crossed by GaPS and, in future, by the annual reports. The committee notes that the Auditor-General has already taken Senator Murray's concerns into consideration and has listed as a potential performance audit for 2000-2001 the use of confidential contract provisions. The audit would consider the use of confidentiality provisions in contracts by a number of agencies and assess the scope to improve current arrangements in the interests of both departmental administration and accountability.[1]

The committee **requests** that the Auditor-General take into consideration the following matters in the course of his audit, and report on them to the extent that he can do so:

- the extent and type of confidentiality provisions entered into;
- whether those confidentiality provisions were entered into at the request of the agency or the contractor;
- the extent to which indemnities are being offered or risk transferred to the Commonwealth in 'secret' provisions and the potential financial exposure of the Commonwealth as a result;
- the extent of the use of clauses requiring an agency to consult with the contractor before disclosing contract provisions;
- whether any contract provisions had been inappropriately claimed to be confidential, as ascertained through FOI or parliamentary requests and, if so, on what grounds;
- whether the chief executive has issued directions that the details of any contract not be notified in the *Gazette,* on the grounds that its details are exempt matters under the FOI Act;
- whether any contracts which should have been notified in the *Gazette* were not so notified;
- examples of appropriate confidentiality claims;
- details of the training supplied to officers negotiating contracts;
- confidentiality dispute resolution; and
- any difficulties encountered in conducting the audit.

1 Australian National Audit Office, *Audit Work Program 2000-2001* [draft]

The committee further **requests** that the Auditor-General brief the committee on the results of his audit, so that the committee can consider what steps should be taken with regard to Senator Murray's motion.

The committee **suggests** that Senator Murray's motion not be proceeded with, until such time as the Auditor-General has briefed the committee on the results of his audit. The committee is of the view that it would be unwise for the motion to go ahead immediately, given the lack of clarity of some of the terms used and the potential cost to agencies of retrospectively checking on the status of contract provisions in potentially 100,000 contracts. Following clarification by the Auditor-General of the issues outlined above, the committee will be in a better position to consider whether Senator Murray's motion should be supported, amended, or whether the very real issues it raises could be better addressed by other means. Contrary to the views expressed by a few agencies, the committee does NOT believe that the present accountability measures are sufficient. It will report again on the reference following the tabling of the Auditor-General's report.

As an interim measure, the committee **suggests** that agencies entering into contracts from henceforward bear in mind a possible future requirement to comply either with the terms of an amended Murray motion or with an enhanced GaPS or with enhanced annual reporting requirements. It **encourages** agencies to be proactive in publishing their contracts, with such deletions of legitimately confidential information as they see fit. In the case of agencies with large numbers of contracts, they might wish to consider the merit of voluntarily listing on their web site brief details (such as value, contractor's name, intended contract timeframe, and availability indication) of a number of their largest contracts.

The committee notes the suggestions of the Administrative Review Council (ARC)[2] and Joint Committee of Public Accounts and Audit (JCPAA)[3] that a codified list of commercial-in-confidence issues be drawn up, the ARC preferring authorship by the Attorney-General's Department, the JCPAA by DOFA. In its 1998 inquiry into contracting, the Australian Law Reform Commission provided the committee with a broad outline of the information which could be protected on the grounds of its commercial character. In its report, the committee considered the question of codification but was not convinced it would be particularly helpful. It remains of that view. Nearly twenty years of legal opinion that have emerged from relevant FOI challenges suggest just how difficult it would be to pin down circumstances in which the public interest could legitimately override commercial interests. The broad guidelines already available from such sources as the Australasian Council of Auditors-General, FOI advice from the Australian Government Solicitor, and from the CTC web site are probably as specific as would be of practical benefit.

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2 ARC, *The Contracting Out of Government Services,* Report no. 42, 1998, p. 73.

3 JCPAA, *Corporate Governance and Accountability Arrangements for Commonwealth Government Business Enterprises,* 1999, p. 83.

The committee also **suggests** that all agencies adopt the practice of including in their contracts a standard clause specifically alerting the contractor to the agency's obligation to provide the contract to a parliamentary committee if requested to do so. Such a clause would alert contractors to the accountability requirements of doing business with government and hence should figure prominently in the thinking of all business and legal contracting advisors. If such provision to a parliamentary committee were on a confidential basis, it would under present standing orders prohibit legislation committees considering the estimates from access to them. Given that those committees may consider the material in the course of their scrutiny of agencies, the estimates limitation is of little consequence.

The committee is not convinced, however, that parliamentary committees have the time, will or expertise, or can contract in appropriate expertise, to wade through and understand the minutiae of huge contracts. Nor would it like to see them engage in costly and futile 'my contract lawyer is better than yours' exercises as a matter of course. This is not to deny the occasional need for such exercises but, as a general rule, this committee would prefer to see the examination of contractual arrangements left to the undoubted expertise of the Auditor-General.

Of course, that raises the question of what the Auditor-General would do, were he to uncover questionable confidentiality provisions. Section 37 of the Auditor-General Act prohibits him, inter alia, from including in a public report any information which would unfairly prejudice the commercial interests of any body or person, or that would prejudice the security, defence or international relations of the Commonwealth. Subsection 37 (3) also prohibits the Auditor-General from disclosing to Parliament or to committees of Parliament information he cannot include in a public report. Representatives of the ANAO have indicated that this constraint is more apparent than real, and that the Auditor-General had not experienced difficulties to date in reporting on the generalities of cases. In such cases, the committee has great faith in the efficacy of an auditorial 'shot across the bows' to the agency concerned. It also believes the discipline induced by a regular perusal of contractual practices by the ANAO should in time bring about more openness, whether or not specific contracts are in fact shown to parliamentary committees in confidence or published without the legitimately confidential details.

While awaiting the tabling of the Auditor-General's report on the use of commercial confidentiality provisions, the committee gives notice that it will closely monitor any cases of refusal to provide contractual information to Parliament or its committees on commercial confidentiality grounds. If the case is not a trivial one, it will consider requesting that the Auditor-General include the agency concerned in its performance audit of the use of confidentiality provisions in government contracts.

The committee notes the government's repeatedly stated preference for a holistic approach to the handling of government contracting issues and its intention to wait for

the tabling of another report before acting.[4] Whilst a holistic approach has much to commend it, contractual issues are not standing still. The committee is particularly concerned that agencies which seek advice on best practice may be getting mixed messages. The emphasis from the Department of Finance and Administration seems to be about getting the best possible financial deals, whilst that from the Australian Government Solicitor relates more to how to handle the legal ramifications of contracting; the committee has received anecdotal evidence that they may sometimes be at odds. Nor is the committee persuaded that the external business advice sought by agencies on major contracts is likely to be a particularly informed source of advice on matters such as the public interest.

From the committee's viewpoint, the most important message to be conveyed is that the devolution of responsibility for the efficient, effective and ethical use of public money needs to go hand in hand with a transparent demonstration of accountability for the use of those public resources. No transparency currently exists relating to secrecy clauses in contracts. As the Auditor-General regularly points out, there is a need to strike a balance between the appropriate nature and level of accountability and the imperative to achieve cost-effective outcomes.[5] The committee believes that the balance has tipped too far in the direction of short-term cost saving and wishes to see the balance redressed. If that transparent demonstration of accountability for the use of public money implies more costly contracting, so be it. Secrecy also has a massive cost, as this inquiry has amply demonstrated. Additional transparency provisions may be a cost that we have to meet, to ensure an acceptable level of accountability.

Senator George Campbell

Chairman

4 See, for example, Department of Finance and Administration, *Submission,* p. 10.

5 See, for example, P.Barrett, *Developing an Effective Approach to Public Auditing,* ANAO, 2000, p. 16.

APPENDIX A

Submissions received

1	Clerk of the Senate
2 & 2A	Australian National Audit Office
3 & 3A	Centrelink
4 & 4A	Department of Finance and Administration
5	Australian Prudential Regulation Authority
6	Australian Bureau of Statistics
7	Office for Government Online
8	Department of Agriculture, Fisheries and Forestry - Australia
9	Royal Australian Mint
10	Treasury
11	Immigration and Multicultural Affairs portfolio
12	Department of Transport and Regional Services
13	Department of Industry, Science and Resources
14	Dr Nick Seddon
15	Department of the Prime Minister and Cabinet
16	Minister for Aboriginal and Torres Strait Islander Affairs
17	Minister for Education, Training and Youth Affairs
18	Department of Foreign Affairs and Trade, Australian Agency for International Development, and Austrade
19	Department of Family and Community Services
20	Department of Employment, Workplace Relations and Small Business

APPENDIX B

Public Hearing and Witnesses

Friday, 12 May 2000, Canberra

Department of Finance and Administration
Dr Diana Wright, General Manager, Resource Management Framework Group

Department of Communications, Information Technology and the Arts
Mr Gary Allan, General Manager, Government Electronic Business Group, Office for Government Online
Mr Saul Schneider, Assistant Manager, Electronic Commerce, Office for Government Online

Australian Agency for International Development (AusAID)
Mr Ian Anderson, Assistant Director-General, Contract Services Group
Mr Laurence McCulloch, Director, Pacific Contracts and Policy Section, Contract Services Group

Centrelink
Mr Michael Goldstein, General Manager, Contestability and Contracts

Department of Foreign Affairs and Trade
Ms Elizabeth Brown, Director, Financial Management and Accounting Section, Finance Management Branch
Mr Keith Hardy, Manager, Competitive Tendering and Contracting Unit, Finance Management Branch
Ms Catherine Heaps, Executive Officer, Competitive Tendering and Contracting Unit, Finance Management Branch

Department of Industry, Science and Resources
Mr Philip Noonan, Head of Corporate Division
Mr Steven Brown, Manager, Corporate Procurement

Australian National Audit Office
Mr Ian McPhee, Deputy Auditor-General
Mr Russell Coleman, Executive Director, Corporate Management Branch

Mr Harry Evans, Clerk of the Senate