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Finance and Public Administration
References Committee

INQUIRY INTO THE GOVERNMENT'S INFORMATION TECHNOLOGY OUTSOURCING INITIATIVE

ACCOUNTABILITY ISSUES
TWO CASE STUDIES

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SENATE FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE

INQUIRY INTO THE GOVERNMENT'S INFORMATION TECHNOLOGY OUTSOURCING INITIATIVE

TERMS OF REFERENCE

On 29 November 2000 the following matters were referred to the Finance and Public Administration References Committee for inquiry and report:

The Government's information technology (IT) outsourcing initiative in the light of recommendations made in the committee's report, *Contracting out of government services – First Report: Information technology*, tabled in November 1997, and the Auditor-General's report no. 9 of 2000-2001, and the means of ensuring that any future IT outsourcing is an efficient, effective and ethical use of Commonwealth resources, with particular reference to:

(a) the need for:
  (i) strategic oversight and evaluation across Commonwealth agencies,
  (ii) accountable management of IT contracts, including improved transparency and accountability of tender processes, and
  (iii) adequate safeguards for privacy protection and security;

(b) the potential impact on the capacity of agencies to conduct their business;

(c) savings expected and achieved from IT initiatives; and

(d) the means by which opportunities for the domestic IT industry, including in regional areas, can be maximised.

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This report, which comprises two case studies, describes the Committee's efforts to obtain full and accurate information about two publicly funded processes. It is divided into two parts - the Humphry Review and the Health Group tendering process.

INQUIRY INTO THE GOVERNMENT'S INFORMATION TECHNOLOGY OUTSOURCING INITIATIVE

ACCOUNTABILITY ISSUES—TWO CASE STUDIES

Introduction

1.1 From the outset, this Committee has met a number of obstacles that have prevented the inquiry moving steadily forward. In its Interim Report, tabled in April 2001, the Committee drew attention to the apparent lack of understanding in the Australian Public Service (APS) about parliamentary accountability. The report detailed a number of instances where it had experienced difficulties in obtaining relevant documentation. It especially noted that 'Any delays in producing any other requested documents will merely extend the duration of the Committee's inquiry until such time as it is satisfied that it has sufficient information to finalise its inquiry'.[1]

1.2 The Committee continues to experience these difficulties and, regardless of the reasons for this, finds itself having to draw conclusions on matters that would have been resolved quickly and easily if a different attitude had been adopted to providing information to the Committee. The final report, which the Committee advised it hoped to table in June, has therefore been delayed.

Responses to the Interim Report

1.3 The Department of Finance and Administration (DOFA) and the Office of Assets Sales and Information Technology Outsourcing (OASITO) chose to respond to the Interim Report. Both agencies took the opportunity to make clear that they are aware of their accountability obligations and to assert that they have sought to assist the Parliament and its Committees. The Committee has considered DOFA and OASITO's response to the Interim Report but has difficulties in reconciling these assurances with the approach they have taken during this inquiry. The Committee understands that the Information Technology (IT) outsourcing program is a complex and large undertaking, involving vast amounts of documentation, some of which contain sensitive material. Nonetheless, no matter which way one looks at this matter, the Committee has been hindered in its inquiry because of the unhelpful attitude taken, at times, by both DOFA and OASITO.

1.4 The Committee paid careful attention to the agencies' explanations for the delays in providing documents. There is, however, one matter raised in the agencies' responses that the Committee believes should be addressed and which ironically, in the Committee's view, demonstrates their less than helpful approach toward the Committee and its inquiry. The Committee understands that, in theory, once the return to order was passed in the Senate on 26 March 2001, 'the Committee's request in

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1 Senate Finance and Public Administration References Committee, *Inquiry into the Government's Information Technology Outsourcing Initiative, Interim Report,* April 2001, p. 2.

respect of those documents was a matter for the Minister'. The Committee cannot accept, as asserted by DOFA, that there 'was therefore no further action for Finance to take in respect of the Committee'.[2] Indeed there was.

1.5 It was the lateness of DOFA and OASITO in providing the documents listed in the Order to the Committee that, after all, led it to resort to this avenue. Given, the Committee assumes, the close administrative ties and working relationship between the Minister and his departments, the Committee would expect that the department was most active in assisting its Minister expedite the production of this material. The Committee found their argument unconvincing and their attitude unhelpful.

1.6 The Committee repeats its position that the overriding consideration in this matter of the production of documents is the difficulty that it has had in gaining access to material central to its inquiry and in obtaining full and accurate information in a timely way. The Committee believes that it should not have to resort to an Order for the Minister to produce documents that a department and an executive agency have failed to provide. To fulfil its reporting obligations to the Parliament, a Committee needs to be provided with the necessary information.

1.7 The Committee suggests that a far more productive approach would be for the departments and the Minister to work with, and not against, the Committee in seeking ways that can satisfy the Committee's need to have access to certain information while addressing the very real concerns about protecting the confidentiality of material.

Structure and objectives of the report

1.8 Thus, at this late stage of the inquiry, the Committee believes that it is necessary to highlight again some of the difficulties it has faced, and indeed continues to face, in conducting its work. On many occasions, the Committee has been frustrated by the reluctance of officers and agencies to supply, readily and in full, information that the Committee has requested. Valuable resources and time have been lost in the pursuit of documents and in eliciting relevant information from officers at public hearings.

1.9 In this progress report, the Committee deals specifically with three main matters that have, in the view of the Committee, unnecessarily tied up its resources and hampered the passage of this inquiry. The Committee looks first at the Humphry Review and documentation arising from that Review. The Committee then deals with its Order for the evaluation reports for the Health Group and finally its investigation into irregularities in the tendering process for that group. The Committee assesses the information it has at hand to date and notes where there are questions and doubts that, in spite of the numerous opportunities afforded to the witnesses, have still to be answered or clarified. This leaves the Committee to draw its own conclusions on

2 Department of Finance and Administration, Response to the Interim Report, 7 May 2001.

matters that can and should be verified and once revealed would contribute to a thorough and balanced report on IT outsourcing.

The Humphry Review

1.10 During the course of its inquiry into the Government's information technology outsourcing initiative, the Committee's time and attention has been diverted by a number of process and administrative issues relating to and arising from the independent review of the Whole of Government Information Technology Outsourcing Initiative conducted by Mr Richard Humphry, AO.

1.11 In its Interim Report, the Committee briefly dealt with the Humphry Review. This Review, established in November 2000, reported its findings to the Minister for Finance and Administration in December after six weeks of intensive inquiry. At this time, the Committee, which was in the initial stages of its inquiry into IT outsourcing, believed that the material provided to the Humphry Review would be of valuable assistance to it in conducting its inquiry. Indeed, the Committee was of the view that it would be remiss if it did not take full account of the findings of this independent Review and look carefully at the evidence presented to it.

1.12 In correspondence to the Minister on 23 January 2001 and at its first public hearing on 7 February 2001, the Committee asked about the submissions made to the inquiry. Mr Humphry informed the Committee that he had returned the submissions to their respective authors and further that he had not kept copies. This led the Committee to seek clarification about the status of the submissions and their proper disposal.

1.13 For a period of more than four months, from mid-February to late May 2001, the Committee has been impeded in its efforts to gain access to documents it considers important to its inquiry. This documentation is related to the status of the submissions received by the independent reviewer from various parties contributing to the review process, and to the terms of the independent reviewer's contract and the establishment of the independent inquiry.

1.14 To an unnecessary degree, the Committee's time has been taken up by the failure on the part of key personnel concerned with the Review to check and verify the specific provisions of relevant legislation and other legal documents, for example the *Archives Act 1983* and Mr Humphry's letter of appointment and of acceptance, well before the Review called for submissions. This precautionary measure would have established beyond doubt the status of documentation provided to and generated by the Review and avoided much of the confusion that has surrounded this matter.

1.15 The following section sets out a chain of events that highlight the need for those involved in a 'one off' task, such as supporting an independent reviewer, to make sure that they are fully informed about the particular provisions that govern the conduct of that undertaking. It also highlights the need to observe the principles of accountability and transparency in all publicly funded processes, especially when engaged in a unique project like an independent review.

Background and chronology

1.16 The terms of reference for the Review were announced on 14 November 2000 and Mr Richard Humphry, AO, conducted the Review at the request of the Minister for Finance and Administration. On 7 November 2000, Mr Humphry had received from the Minister a letter of appointment and signed and returned the enclosed Deed of Undertaking.

1.17 To conduct the Review, Mr Humphry was provided with high-level secretariat assistance from staff appointed to the Review from DOFA's establishment. He also had access to a steering committee comprised of the Secretary of the Department of the Prime Minister and Cabinet; the Secretary of the Department of Finance and Administration; and the Chief Executive of OASITO.[3]

1.18 To support Mr Humphry in the conduct of the Review, DOFA assigned two Senior Executive Service (SES) officers, one at Band 2 level and one at Band 1 level, one Executive Level 2 officer, one APS Level 6 officer, one APS Level 5 officer and one APS level 2 officer.

1.19 Mr Humphry holds the position of Managing Director of the Australian Stock Exchange (ASX). He is also President of the Remuneration Tribunal and a former Auditor-General of Victoria.[4] In light of Mr Humphry's bureaucratic experience and that expected of the head of the Review secretariat who is a Band 2 SES officer, the Committee is surprised that they did not fully inform themselves about their roles and responsibilities before commencing the Review. The Review team was to assess and receive materials, submissions and other documents, and, in the course of proceeding, would generate its own internal administrative records. A final report was the intended outcome.

1.20 Submissions were invited from interested persons in relation to the Review in an advertisement on Saturday 18 November 2000. The closing date was set down for 11 December 2000. The Review continued through to late December 2000 when the final report was presented to the Minister on or about 28 December. The findings of the Review were released to the public by ministerial press release on 12 January 2001, and the report released the same day. At the same time, the Government advised its acceptance of the recommendations, although some were agreed with qualification.

1.21 As stated above, the Committee wrote to the Minister for Finance and Administration on 23 January 2001 seeking access to all the submissions that had been provided to Mr Humphry. The Committee sought access to these submissions because it regarded them as important reference documents that should not be ignored. In the Committee's view, this documentation would certainly provide the necessary

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3 *Review of the Whole of Government Information Technology Outsourcing Initiative,* Richard Humphry AO, December 2000, Appendix 1.

4 *Who's Who in Australia 2001,* 37th Edition, Information Australia Group Pty Ltd, 2000, p. 915.

insight needed to appreciate and understand the grounds for the independent reviewer's final recommendations.

1.22 The Committee was informed by Mr Humphry at its hearing on 7 February 2001 that all the submissions received by the Review had been listed in the published report, but that they had been returned to submitters. It was understood that no copies had been taken of the originals for retention within DOFA as records. At this stage, the Committee assumed that submissions made to any Commonwealth-funded review would be Commonwealth records and covered under the provisions of the Archives Act.

1.23 Mr Humphry's view did not accord with the Committee's. On 7 February, he told the Committee that he had sought legal advice from the Australian Government Solicitor (AGS) in December 2000 on a number of matters, including the status of submissions made to and records generated by the Review.[5]

1.24 Mr Humphry had asked AGS specifically for advice on whether any prohibitions might be placed on him as an independent reviewer if he wished to return submissions to providers. Mr Humphry's request was made on his behalf by the Review secretariat and was not put in writing.

1.25 Mr Phillip Prior, a DOFA officer and head of the Review secretariat, confirmed that Mr Humphry had asked the secretariat in December to seek legal advice from AGS on the application of the Archives Act.[6] In his evidence, Mr Prior told the Committee that:

> Mr Humphry asked me, when we had a discussion about returning submissions, 'What are the implications of returning these submissions that I choose to return?' I said, 'I think we should take legal advice to be sure'.[7]

1.26 Based on the legal advice, Mr Humphry was under the impression that:

> …these submissions do not form part of the Commonwealth's records and, therefore, are not covered by the Archives Act and, accordingly, they remain the property of those who have written them.[8]

1.27 Mr Humphry pointed out that the submissions were made to him as 'an independent reviewer; they were not addressed to the public at large'. In his view, the

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5 Committee *Hansard*, 7 February, 2001, p. 45, 48–49. Mr Humphry made clear that the range of issues included: the structure of the report and whether it brought to bear any legal issues. 'There were issues of contract and so on that had to be addressed. I wanted to make sure that the report could stand and not create administrative difficulties for the delivery of programs.'

6 Committee *Hansard*, 7 February, 2001, pp. 77-78.

7 Committee *Hansard*, 7 February, 2001, p. 83.

8 Committee *Hansard*, 7 February 2001, p. 45.

submitters would not have expected their submissions to be made public. He told the Committee:

> I believe that the individuals who have prepared the submissions should have their opinions respected. If they are happy to provide that information publicly, I am happy for them to make that decision; but I did not feel that I was in a position to make that decision for them. Also, a number of those submissions that were put to me were marked 'in confidence' and I do not think that the authors of those reports expected the information to go any further.[9]

1.28 Mr Humphry was concerned that after the Review was completed and wound up, there would be 'no place to which the submissions should go'. He indicated to the Committee that he wished 'to protect the interests of the authors of those reports' and believed that the step he had taken in returning the submissions was a correct one. As already noted, he said that he acted as he did on legal advice that submissions would not be regarded as Commonwealth records.

1.29 The Committee understands Mr Humphry's explanation and can appreciate the interpretation he is placing on his role as an independent reviewer and the obligations he has toward those who made submissions to his review. But the Committee notes at this point that he sought legal advice on this matter in December when the Review was drawing to a close. His responsibilities toward submitters and their submissions commenced as soon as he called for submissions. The Committee has no knowledge of the advice given by Mr Humphry to submitters about their submissions.

1.30 Mr Humphry agreed to provide an extract copy of AGS advice which the Committee received on 8 February.

1.31 This advice from AGS dated 20 December 2000 differentiated between records regarded as property of 'the Commonwealth' and submissions made to Mr Humphry as an 'independent reviewer' and not as an 'agent of the Commonwealth'. This advice reads:

> In light of present information, we think the Archives Act would not apply to the submissions. Essentially, the Archives Act will be capable of application in relation to a 'Commonwealth record'. A 'Commonwealth record' includes a record that is the property of the Commonwealth. We think the submissions would not be 'Commonwealth records' because the submissions would be regarded as owned by the persons who prepared them, assuming that there is nothing contrary in the arrangements made between the persons making the submissions and the review team. In this context, we also note that Mr Humphry is an independent reviewer. In those circumstances we do not think he would be regarded as an agent of the Commonwealth. Accordingly, the only other person in whom the property

9 Committee *Hansard*, 7 February 2001, p. 46.

> in the submissions might vest would be Mr Humphry (and not the Commonwealth), assuming no particular arrangements between Mr Humphry and the Commonwealth.[10]

1.32 On 9 February 2001, the Committee wrote to Mr Humphry asking for clarification of AGS comment that it had provided him with advice 'in the light of present information'. The Committee wanted to know about the documents that AGS had relied on in forming its advice.[11]

1.33 Mr Humphry subsequently provided the Committee with a copy of a second letter dated 14 February 2001 from the Deputy Government Solicitor (DGS) addressed directly to him as the Managing Director of the ASX. The DGS reiterated the previous advice:

> In order to be covered by the Archives Act the advice considered that the submissions needed to be able to be treated as 'Commonwealth records'. However, in the light of present information, it was considered that the submissions would not be the property of the Commonwealth and therefore would not be 'Commonwealth records'. Rather the submissions would be regarded as the property of the persons making the submissions.[12]

1.34 The opinion went on to mention possible arrangements between the Review and the submitters, concluding that there was 'nothing in the Archives Act which AGS considered to be contrary' to the December advice. This appears to be an appropriate point in time for the DGS to have established if the terms of the letter of appointment contained a specific clause requiring that documents 'created, derived or provided' to Mr Humphry in conducting the Review become the property of the Commonwealth. However, it confirmed the previous AGS advice without questioning the letter or terms of appointment or revealing what comprised 'present information'.[13]

1.35 The Committee sought advice on the status of records from the Humphry Review from the Assistant Director-General of the National Archives of Australia. After examining the public announcement and terms of reference of the Review, the Committee received preliminary and informal advice from National Archives which concluded that, on the documentation made available and in the absence of evidence to the contrary, the records created or accumulated for the Humphry Review would be Commonwealth records and therefore subject to the Act. The legislation makes clear that records that are the property of the Commonwealth or a Commonwealth institution are known as Commonwealth records and are subject to the *Archives Act 1983*. The Act defines a Commonwealth institution to include an authority of the Commonwealth, that is

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10 Extract of legal advice from Australian Government Solicitor, 20 December 2000, provided by Mr Richard Humphry, 8 February 2001.

11 Correspondence, Mr Richard Humphry, 9 February 2001.

12 Correspondence, Australian Government Solicitor to Mr Richard Humphry, 14 February 2001, p. 1.

13 Correspondence, Australian Government Solicitor to Mr Richard Humphry, 14 February 2001, p. 1.

> 3.(1)(a) an authority, body, tribunal or organization, whether incorporated or unincorporated, established for a public purpose:
>
> … (iii) by, or with the approval of, a Minister;[14]

1.36 It should be noted that both the advice given by AGS and the National Archives qualify their opinions with statements such as 'in light of present information' and 'in the absence of evidence to the contrary'.

1.37 By this time, the Committee wanted to know exactly what documents formed the basis for legal opinion provided on this matter. It was also becoming increasingly interested in identifying and locating legal documentation that would likely have specified the terms of Mr Humphry's engagement including his role, responsibilities and obligations. It had been unable to obtain such information from DOFA at the 7 February public hearing. At the hearing Mr Prior who had by now completed his assignment to the Review secretariat and returned to the department advised 'As far as I am aware, the department does not have a copy of that letter'.[15]

1.38 With these thoughts in mind, the Committee relayed the opinion given by the National Archives to Mr Humphry by letter on 9 February 2001. The Committee was also seeking advice from him regarding the information provided to AGS on which it based its opinion. Although AGS advised that it had considered 'the provisions of the *Archives Act 1983* in detail', it makes no mention of Mr Humphry's letter of appointment.[16]

1.39 Correspondence from Mr Humphry dated 27 February 2001, advised the Committee of his understanding that AGS had been engaged to advise the Minister on and prepare his letter of appointment in November. He had assumed that they would have referred to the letter when providing advice to him on the matter of records.[17] He stated that 'in forming its opinion of 20 December 2000, the Australian Government Solicitor (AGS) was not restricted in any way to access to any relevant information'.[18]

1.40 In the minds of the Committee, Mr Humphry's assumption is reasonable. Though, with such an important matter as submissions to an inquiry, the Committee expects that people involved in this Review would not have relied on assumptions. The Committee later learnt that a copy of the letter was unable to be located by the

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14 *Archives Act 1983, paragraph 3(1)(a)*.

15 Committee *Hansard*, 20 February 2001, p. 218.

16 Extract of legal advice from the Australian Government Solicitor, 20 December 2000, provided by Mr Richard Humphry, 8 February 2001.

17 Correspondence, Mr Richard Humphry, 27 February 2001.

18 Correspondence, Mr Richard Humphry, 27 February 2001.

Review secretariat, so unrestricted access would not necessarily have assisted AGS either. [19]

1.41 The contract or letter of appointment began to assume central importance as the document most likely to clarify and establish the status of material that came under Mr Humphry's charge during the Review.

Requests for legal advice

1.42 DOFA had also sought legal advice on the submissions from a private legal firm, Phillips Fox, shortly after the Minister had received the Committee's letter of 23 January 2001 seeking access to the submissions.[20] Dr Peter Boxall, Secretary, DOFA, informed the Committee on 7 February that DOFA was unaware that Mr Humphry had sought advice earlier on the same matter.[21] This was later contradicted by another DOFA officer, Mr Jamie Clout (paragraph 1.44 refers).

1.43 As in the case of AGS advice, the Committee was interested in establishing just what documents were used as the basis for legal opinion and indeed whether Mr Humphry's contract or letter of appointment had been consulted.

1.44 During the hearings in May, it became clear that, at the time of seeking legal advice, DOFA did not provide Phillips Fox with a copy of the contract letter from the Minister to Mr Humphry. At its public hearing held on 18 May, Mr Clout advised the Committee that he had commissioned legal advice in January 2001 from Phillips Fox on the matter of providing documents requested by the Committee and had briefed them orally. He told the Committee that he had not relied solely on AGS advice,[22] and confirmed that this separate legal advice from Phillips Fox was a second opinion, obtained 'for the specific purpose of drafting the letter for the minister to send back to you [the Committee]'.[23]

1.45 Mr Clout also advised the Committee that he had consulted the Review secretariat as to the content of Mr Humphry's letter of appointment but that they 'came up with a blank'.[24] He informed the Committee that the Review secretariat could not provide him (in January) with a copy of Mr Humphry's letter of appointment for the purpose of clarifying its content.

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19 Committee *Hansard*, 18 May 2001, p. 572.

20 Committee *Hansard*, 7 February, 2001, p. 81. According to Mr Humphry's letter of 31 May 2001, AGS advice dated 20 December was addressed to Mr Robert Irvin of the Review secretariat, and this advice was provided to Mr Humphry and circulated to Mr Prior.

21 Committee *Hansard*, 7 February 2001, p. 81.

22 Committee *Hansard*, 18 May 2001, p. 586.

23 Committee *Hansard*, 18 May 2001, p. 577.

24 Committee *Hansard*, 18 May 2001, p. 588.

1.46 Mr Prior told the Committee on 18 May that AGS had a copy of the draft letter of Mr Humphry's appointment 'on their files', and that he had been subsequently informed that the draft letter was 'not different from the final'.[25] This advice would have been useful if provided when the Committee had sought information from Mr Prior on 7 February, or if he had provided it at estimates or in a letter to the Committee as soon as this was drawn to his attention.

1.47 Mr Prior was asked whether he was aware of the provisions in Mr Humphry's letter of appointment on Commonwealth records. He confirmed that he was certainly aware of the provision at the time 'when we were constructing the letter of appointment'.[26]

1.48 Despite Mr Prior's knowledge of the draft letter of appointment and its contents, this knowledge was not passed on to Mr Clout or the Finance and Public Administration (F&PA) Legislation Committee at the February estimates hearings.[27] The Committee cannot explain why there was an apparent breakdown in communication between Mr Clout and the Review Secretary or the inconsistency in advice given at estimates and to this Committee.

1.49 Mr Clout advised the Committee that as he had no knowledge of the contents of the letter of appointment, he had instructed Phillips Fox to assume that it contained no provisions relating to Commonwealth records. He said:

> I think that the assumption was quite reasonable because I did not have any knowledge of the letter of appointment or of the terms of the letter of appointment when I commissioned the legal advice. At that time logic suggested to me that either the letter of engagement was not specific or, if it was, Mr Humphry had obtained his own legal advice.[28]

1.50 When asked to clarify on what basis he drew that conclusion, he replied:

> Because to make the opposite assumption would assume either that the letter was specific, in which case it would be strange to understand why Mr Humphry behaved the way he did, or that Mr Humphry had sought his own legal advice.

1.51 When asked why he had sought alternative legal advice, Mr Clout told the Committee, 'I may have been being overcautious'.[29] However, on his own admission, Mr Clout had made assumptions about the contents of Mr Humphry's letter of appointment when instructing Phillips Fox. This meant that Phillips Fox provided legal advice based on incomplete documentation and broad suppositions.

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25 Committee *Hansard*, 18 May 2001, p. 586.

26 Committee *Hansard*, 18 May 2001, p. 578.

27 Finance and Public Administration Legislation Committee *Hansard,* 20 February 2001, pp. 218-219.

28 Committee *Hansard*, 18 May 2001, p. 577.

29 Committee *Hansard*, 18 May 2001, p. 587.

Return of 'in confidence' and other submissions

1.52 On 16 May 2001, DOFA finally provided the Committee with a copy of Mr Humphry's letter of appointment.[30] In response to a question from the Committee, DOFA advised that the document was located in the process of preparing an answer to a written question from the Committee dated 7 May.[31]

1.53 On page one of this letter of appointment, the Minister for Finance and Administration, makes clear to Mr Humphry that he:

> … is not engaged as an officer, employee, partner or agent of the Commonwealth and you have no power or authority to bind the Commonwealth. The manner and content of your review is entirely within your own discretion, only its scope being determined by the Terms of Reference.

1.54 While allowing Mr Humphry discretion in conducting the Review, this letter of appointment provided explicit provisions in relation to material that would come under his charge. It stated:

> All material created, derived or provided to you for the purpose of your Review shall be and remain the property of the Commonwealth. Copyright in your report and any drafts shall be the property of the Commonwealth. All information acquired by you in the performance of the Review is confidential and you must comply with the provision of the Crimes Act 1914 and the Privacy Act 1988.[32]

1.55 Although no mention is made of the Archives Act, this provision clearly establishes that material provided to Mr Humphry would remain the property of the Commonwealth.

1.56 Based on a reading of this letter of appointment, the National Archives has advised the Committee that:

> It would appear that these documents support the view that records created, accumulated and acquired by Mr Humphry for the purpose of the Review are the property of the Commonwealth and therefore Commonwealth records.

1.57 It noted, however, that while the letter from Mr Fahey to Mr Humphry is evidence of the terms of offer, there is no evidence of acceptance of the offer on the

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30 See Appendix 1.

31 Committee *Hansard*, 18 May 2001, p. 568.

32 Letter of appointment signed by The Hon John Fahey, MP, Minister for Finance and Administration, to Mr Richard Humphry. (Undated copy).

terms outlined or with agreed variations. It suggested that 'such variations may have altered the sense of paragraph 5 in Mr Fahey's letter'.[33]

1.58 Yet again, the Committee found its line of inquiry thwarted because of incomplete information. The documents provided to the Committee by DOFA did not contain the letter of acceptance nor did they indicate whether there were variations to his letter of appointment. At a hearing on 18 May, Mr Clout told the Committee that the letter sent to the Committee was the letter of appointment to which Mr Humphry had agreed verbally.[34]

1.59 Having considered the provisions of the letter of appointment, the Committee wrote to Mr Humphry requesting his assistance in clarifying two matters. The first matter was in relation to Commonwealth records and the provisions relating to these in Mr Humphry's letter of appointment. The second matter related to the incomplete list of submissions provided in the published Review.

1.60 The Committee received a letter from Mr Humphry on 31 May 2001 in which he states:

> Clearly, AGS had access to this relevant information in formulating any subsequent advice. Indeed, prior to issuing its advice to me on 14 February 2001, AGS specifically discussed my appointment letters (and referred to a copy that AGS itself possessed) with the member of the Secretariat Review who sought that advice on my behalf.

1.61 In this letter, Mr Humphry also informed the Committee that Mr Phillip Prior and Mr Robert Irvin sought AGS advice on 20 December 2000, that AGS's advice of 20 December was addressed to Mr Robert Irvin and circulated to Mr Phillip Prior, and that DOFA has copies of these documents.

1.62 This information sets out Mr Humphry's perspective on the chronology of events, and clarifies who he believed sought advice on his behalf, who had access to information about the terms contained in his letter of appointment, and who in the Review secretariat played an active role in seeking advice on his behalf. Mr Humphry also confirms that DOFA had copies of all the vital documents. Unless Mr Humphry's information to the Committee is inaccurate in some respects, it believes that departmental officers may have misled the Committee.

1.63 The Committee has received conflicting and incomplete information from the parties involved and despite repeated attempts for clarification, it still cannot obtain a straight answer from the Department. The Committee is annoyed and frustrated that so much of its time has been taken up with matters that should have been properly elucidated by departmental officers.

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33 Correspondence, National Archives of Australia, 18 May 2001.

34 Committee *Hansard*, 18 May 2001, p. 567.

1.64 The Committee calls on DOFA to provide all the relevant information by Friday, 13 July 2001 so this matter can be settled before it completes its final report.

Summary

1.65 It is not the role of this inquiry to establish definitely the legal status of the submissions to the Humphry Review. There is however a strong *prima facie* case that the submissions are indeed Commonwealth records and should have been treated as such.

1.66 The advice provided by AGS made no reference to the relevant provisions in Mr Humphry's letter of appointment or associated documents. The Committee has had to undertake a tedious process of oral and written questioning in an effort to establish if Mr Humphry's signed and accepted appointment letter, with its specific reference to documents provided to him in his Review, was referred to AGS when advice on the status of the submissions was sought. The Committee concludes, in the absence of evidence to the contrary (after questioning both Mr Humphry and Mr Prior on a number of occasions) that the letter of appointment was not forwarded to AGS.

1.67 In the Committee's view this document would have been the principal means of establishing with certainty the status of the submissions. The Committee cannot understand why this document did not figure prominently in the legal advice provided by AGS. Given the specificity of the clause in the letter, the Committee is at a loss to explain the two AGS opinions and why it did not explore the meaning of this clause in its advice. It further notes that Phillips Fox, whose advice to DOFA was consistent with AGS advice to the Review, was informed that no such provision existed.

1.68 Moreover, the Committee believes that the legal status of the submissions should have been clarified before the Review called for submissions so that both the Review team and submitters were made fully aware of matters such as who retained ownership, and whether the submissions were covered by any form of privilege. Earlier clarification and greater transparency in the appointment of Mr Humphry and the terms of his appointment would have opened up this matter to public scrutiny and probably avoided the need for costly legal advice. Openness in an undertaking such as an independent review gives credibility and weight to its findings and certainly helps to generate public debate.

1.69 The confusion surrounding the status of the Review records is of concern in itself and the Committee agrees that the Government Solicitor should have a closer look at this matter and make a public determination for future reference. The Committee has difficulty reconciling two AGS opinions that Mr Humphry is an independent reviewer and not an agent of the Commonwealth, with the act of providing advice to him—given their charter to provide advice exclusively to government.[35] The Committee also notes that the credibility of any future AGS advice on the matter to any interested Commonwealth party, such as the National Archives,

35 See 'AGS Online Action Plan', www.ags.gov.au/about/online_action_plan_htm, 27 June 2001.

has been undermined by the strong position taken by Mr Humphry on the matter, backed up by DOFA seeking further advice without checking source documentation.

1.70 The Committee regrets that a significant amount of time and resources have been devoted to resolving this matter of the status of the submissions and in obtaining access to them. The Committee is pleased that it has now finally identified all those who made submissions to the Review and invited them to send a copy of their submission to it. Most submitters have been pleased to provide their submission, only two were outstanding at the time this report was finalised. A few submitters asked that their submission be kept confidential and the Committee has agreed to their request. The Committee thanks all the submitters for their assistance in making this valuable information available to this inquiry.

1.71 The Committee further notes with dismay that the acquisition of these submissions follows its own discovery that the list at Appendix 5 of the report of the Review was incomplete. In response to a request from the Committee, on 16 May DOFA provided a corrected list which also proved to be wrong. A revised list is at Appendix 2.

1.72 The state of confusion surrounding the administrative processes associated with the Review, such as the number of submissions received and the May discovery of the appointment letter which established that it had been in the secretariat since 21 November 2000, has done little to enhance the credibility of the Humphry Review.

The Health Group tendering process

Background—Senate Order for the production of documents

1.73 The interim report detailed the sequence of events which eventually led to two Senate Orders for the production of documents, one passed on 26 March and the other on 3 April, 2001.[36] Among documents included in the Order were the evaluation reports for all IT contracts that had been let, with information identified as commercially sensitive 'blacked out' and the reasons for such claims. Legal advice obtained by OASITO that the disclosure of evaluation reports to the Committee may create a significant risk of litigation to the Commonwealth was also sought. The legal advice had first been referred to in correspondence from OASITO dated 24 January 2001.

1.74 This progress report deals specifically with one group of documents that were the subject of the return to order—evaluation reports for the Health Group.

Production of documents—evaluation reports

1.75 On 4 April, the then Acting Minister for Finance and Administration, Senator Rod Kemp, provided the Committee with the documents ordered to be produced by the Senate. The documentation included the evaluation reports for all contracts let under the Initiative as requested but with substantial sections blanked out. By substantial the Committee means that over half the pages of the reports are completely blank with a number of other pages containing merely headings or subheadings. The documents are mere shells and are of only limited value for the purpose of this inquiry.

1.76 A written statement accompanying the copies of these evaluation reports explained that commercially sensitive material had been blanked out. According to this explanation, OASITO had referred to the draft guidelines prepared by the Australian National Audit Office (ANAO), entitled the 'Use of Confidentiality Provisions in Commonwealth Contracts—The Legal Framework and Guidelines Related to Confidential Information', to assist in the definition of commercially sensitive material.

1.77 In a covering letter accompanying this documentation, Senator Kemp explained that despite the blanking out process he was advised that there was a risk that public release could still damage the Commonwealth's interest and expose it to legal action. He therefore requested that the Committee hold these documents on an *in-camera* basis. The Committee has complied with this request, even though it doubts very much that the material it has received would pose any serious threat.

1.78 Two extracts of legal advice to OASITO that disclosure of evaluation reports to the Committee may create a significant risk of litigation to the Commonwealth

36 See Appendix 3.

were part of the return to order tabled by the Acting Minister on 4 April 2001. Both post-dated the letter that led to the Committee's request. The first advice, 7 February, reads as follows:

> However, in our view, although the documents submitted to the Committee could well be protected by absolute parliamentary privilege, the privilege would be unlikely to extend to other copies of the same document, or to documents relating to the submitted documents. There is therefore a risk that the disclosure of the documents would alert an aggrieved tenderer to the existence and contents of such documents. Disclosure might encourage or assist the tenderer in pursuing other means, including discovery by which IT could obtain proper discovery of either
>
> (a) copies of the same information or documents; or
>
> (b) other documents and information related to the documents submitted to the Committee,
>
> not subject to parliamentary privilege under the Privileges Act.
>
> Certain of these documents, in particular the evaluation reports, might contain highly sensitive confidential information regarding the evaluation and decision-making processes adopted by the Commonwealth. Information of this kind could assist an aggrieved tenderer in bringing a successful claim against the Commonwealth.
>
> Hence, disclosure of the documents, especially the evaluation reports, indirectly to tenderers, through submission to the Committee, could seriously damage the Commonwealth's interests, as to do so would increase the Commonwealth's exposure to litigation.
>
> As discussed in our advice to you…there may be an argument that the disclosure of the documents could be denied on the grounds of public interest immunity. As we have stated, governmental claims to such immunity have the best chance of success where an issue of national security can be raised. We do not think that a claim of public interest immunity is likely to be helped in the context merely of the disclosure potentially increasing the Commonwealth's exposure to litigation.
>
> Failing any reliance on public interest immunity, we recommend that the evaluation reports only be provided to the Committee *in camera* and only on condition that they be kept confidential.
>
> The Committee could nevertheless decide to release the information.
>
> While the interests of public scrutiny of documents would support release to the Committee, our concern focuses on potential risk to the Commonwealth of legal actions from disgruntled tenderers should the Committee decide to make those Reports or parts of them public. Another issue to consider is that some information in the evaluation reports may be confidential to tenderers. An analysis of such information would need to be made on a case-by-case

> basis. We have advised you separately on the confidentiality provisions in the Services Agreements and the RFT provisions.
>
> We recommend that OASITO seek the agreement of the Committee that any release of evaluation reports to the Committee be *in camera* and an undertaking by the Committee not to disclose that material (See SOR 37(3)(b))[37]. However, we appreciate that such an agreement and undertaking may be refused or (if given), later revoked or overruled by the Committee or Senate. We note that, in such an event, the Commonwealth could be exposed to legal challenge by a third party. As discussed, the issue of an order to disclose by the Committee would provide the most protection to the Commonwealth in respect of tenderer confidential information.[38]

1.79 The second, tendered to OASITO on 7 March 2001, covered much of the same ground but also addressed the matter of court proceedings overseas. It noted:

> The Privileges Act would not prevent the use of documents as evidence in court proceedings in other countries. Given the international aspects involved in the tendering, the risk of proceedings elsewhere cannot be disregarded. Nor would the Privileges Act prevent or legally inhibit the taking, in accordance with the terms of a contract, of collateral action beyond the jurisdiction of Australian courts. As discussed in our advice to you dated 5 January 2001, there may be an argument that the disclosure of the documents could be denied on the grounds of public interest immunity. We do not think that a claim of public interest immunity is likely to be upheld in the context merely of the disclosure potentially increasing the Commonwealth's exposure to litigation.

Committee's Order for production of documents

1.80 The Committee was advised by the Deputy Auditor-General on 17 May 2001 that the ANAO had decided not to conduct an audit of the Health Group process in 2001-2002. This decision was taken because of the extensive audit of earlier IT outsourcing contracts and the extent of changes to the outsourcing Initiative that followed.

1.81 This was a matter of concern to the Committee because a serious flaw in the tender process for that group, which it had expected to be examined by the ANAO as part of a wider audit, would now not be subjected to an independent audit. It became public knowledge at hearings on the additional estimates in February 2000 that an unauthorised disclosure of tender information had occurred during the outsourcing of

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37 S.O. 37 (3) (b) If such evidence or documents [that is evidence submitted to, or documents of, committees, which are in the custody of the Senate, which have not already been published by the Senate other its committees] were taken *in camera* or submitted on a confidential or restricted basis, disclosure shall not take place unless the evidence or documents have been in the custody of the Senate for at least 30 years, and, in the opinion of the President, it is appropriate that such evidence or documents be disclosed.

38 Extract of legal advice, undated, provided by Acting Minister for Finance and Administration, Senator the Hon Rod Kemp, 4 April 2001.

that group. As the F&PA Legislation Committee had been denied access to information that would have confirmed claims made by OASITO that the process that followed was appropriate, the Committee was keen for the Health Group to be included in the ANAO's 2001-02 work program.

1.82 One avenue open to the Committee was to refer to the relevant evaluation reports and form a preliminary view of the probity of the Health Group process. If, as claimed and expected, the processes were in order and probity advice properly recorded and followed, the Committee's concerns could be set aside.

1.83 However, the evaluation reports provided on 4 April offered no assistance due to the extensive material deleted from them. In the absence of a planned audit and the evaluation reports, and after consideration of the legal advice provided in the return to order, the Committee agreed to order OASITO to provide the evaluation reports for the Health Group in full.

1.84 On 24 May 2001, the Committee wrote to the Chief Executive of OASITO, Mr Smith, informing him that the Committee had, pursuant to Senate Standing Order 25(15), resolved that the full and complete evaluation reports for the Health Group be lodged with the Committee.[39] In accordance with this resolution, he was directed to provide the following documents to the Committee by 29 May 2001:

- Final Evaluation Report for Tenders for the Provision of Information Technology and Telecommunications Services for the Department of Health and Aged Care, the Health Insurance Commission and Medibank Private Limited;

- Corporate Evaluation Report for Tenders for the Provision of Information Technology and Telecommunications Services for the Department of Health and Aged Care, the Health Insurance Commission and Medibank Private Limited;

- Financial Evaluation Report of Tenders for the Provision of Information Technology and Telecommunications Services for the Department of Health and Aged Care, the Health Insurance Commission and Medibank Private Limited;

- Technical Evaluation Report for Tenders for the Provision of Information Technology and Telecommunications Services for the Department of Health and Aged Care, the Health Insurance Commission and Medibank Private Limited; and

- the Health Group Industry Development Evaluation Report.

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39 S.O. 25 (15) A committee and any sub-committee shall have power to send for persons and documents, to move from place to place, and to meet and transact business in public or private session and notwithstanding any prorogation of the Parliament or dissolution of the House of Representatives. See also S.O. 34 1. The Senate may give a committee power to send for persons and documents, and a committee with that power may summon witnesses and require the production of documents. 2. The chairman of a committee shall direct the secretary attending the committee to invite or summon witnesses and request or require the production of documents in accordance with the orders of the committee.

1.85 In this letter to Mr Smith, the Committee noted that it was aware of previously expressed concerns about the sensitive nature of this and related material and advised him that the Committee had agreed to receive the documents *in camera*.

1.86 Mr Smith was informed that failure to comply with the Committee's directive would be reported to the Senate for resolution under the *Parliamentary Privileges Act 1987* and related resolutions of the Senate agreed to on 25 February 1988, and may be treated as a contempt.[40]

Response to the Committee's Order

1.87 Mr Smith replied in writing on 29 May. He advised the Committee that he had been directed by Mr John Fahey, the Minister for Finance and Administration, not to provide the requested documents on public interest grounds, except in the form previously provided to the Committee by the then Acting Minister for Finance and Administration, Senator Kemp. As indicated in his letter, Mr Smith provided the Committee with the documents it had requested but in the same form as that provided by Senator Kemp on 4 April in response to the Senate's Order for the production of documents. That is, Mr Smith provided copies of the various evaluations reports for the provisions of information technology and telecommunications services for the Department of Health and Aged Care, the Health Insurance Commission and Medibank Private Limited but with the same substantial material excised from the documents as those provided under the Senate's Order for the production of documents.

1.88 The Minister for Finance and Administration also wrote to the Secretary of the Committee in response to the letter of 24 May to Mr Smith. The Minister advised that he had directed Mr Smith not to provide the specific documents on the ground of public interest immunity except in the form already provided to the Senate.

1.89 He referred to the evaluation reports, with the blanked out sections, already provided to the Committee following the Senate's return to Order. He noted, however, that it was his understanding that the Committee now sought the production in full of some of these documents.

1.90 The Minister informed the Secretary that he had reviewed the relevant material with a view to considering whether there were reasons of public interest for not providing the requested documents. He explained that, having regard to legal advice, he was of the view that there were public interest grounds for not providing the document except in the form that the documents had already been provided to the Committee.

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40 See for example Parliamentary Privilege Resolutions Agreed to by the Senate on 25 February 1988 no. 2: 'Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made) only where the committee has made a decision that the circumstances warrant such an order'.

1.91 He offered the following public interest grounds for not providing the documents in full:

> a) the material would disclose matters in the nature of, or relating to opinion, advice or recommendation prepared in the course of and for the purpose of the deliberative processes of government where disclosure would be contrary to the public interest.
>
> — the Evaluation Reports form the basic material which is relied upon in making recommendations to me as Minister. My approval was an essential prerequisite before any contract was entered into with the preferred tenderer for the Departments and Agencies covered by the tender. This evaluation process requires frankness in the comments that are made which would be prejudiced if the reports were made available outside government. I consider that it would, therefore, be contrary to the public interest to release these documents except in the form previously made available; and
>
> b) the information contained in the documents includes information supplied on a confidential basis and, if its confidentiality cannot be maintained, the future supply of similar information necessary for the proper functioning of government could be prejudiced.

1.92 Mr Fahey acknowledged that the Committee had agreed to receive the documents *in camera* but noted that the Committee does not and cannot provide any undertaking that the material provided will always remain as *in camera* evidence. He considered that the Committee's agreement to receive the documents *in camera* did not affect his decision as outlined above.

1.93 In other words, the Minister, already aware that the Committee was in possession of the first set of documents, which it had made clear were far from satisfactory and fell far short of meeting its requirements, directed that the Committee be provided with an identical set of incomplete documents. He made no attempt to approach the Committee in order to reach a compromise that would allow the Committee access to the full documentation while meeting his concerns over his responsibility to protect the confidentiality of the contents of the documents.

1.94 Despite the Minister's refusal to produce the requested documents in full, the Committee, because of the utmost importance of this matter, believed that it should persist with its request for the evaluation reports.

1.95 The Committee acknowledges the tension that exists between the government's responsibility to protect confidentiality and the need for its activities to be open to parliamentary scrutiny. The Committee further recognises that in requesting the production of evaluation reports it was entering an area of high sensitivity.

1.96 The Committee is fully aware of the Auditor General's opinion that:

> …tender evaluation reports may contain some information from tenders that is considered to be confidential. It could be argued that disclosure of some parts of evaluation reports, where the merit of one tender against another is assessed, would not be in the public interest. Disclosure of such information may be considered by tenderers to be an unreasonable cost of doing business with government. The ANAO observes that evaluation reports would generally be treated as confidential as they are part of the deliberative processes of government.[41]

1.97 The Committee understands that the evaluation reports 'might contain highly sensitive confidential information regarding the evaluation and decision-making process adopted by the Commonwealth'. It takes particular note of the concern expressed by the Minister that if the confidentiality of the documents cannot be maintained, 'the future supply of similar information necessary for the proper functioning of government could be prejudiced.' It is aware of the need to protect the confidentiality of these documents and has indicated that it will receive such information *in camera*. It certainly has no intention to release information such as comments made in the evaluation report that would disadvantage any of the tenderers. Besides, the Committee believes that this issue goes to the very heart of government accountability and overrides concerns about commercial confidentiality, especially since the Committee has agreed to proceed with great caution in pursuing this matter.

1.98 The Committee is also conscious of its responsibility to ensure adequate parliamentary scrutiny of government activities and of the need to be fully informed to fulfil its reporting obligations to the Parliament. The Committee, however, on the evidence made available to it, finds itself unable to exercise its responsibility to scrutinise the executive. It emphasises that information contained in the documents it has requested could be fundamental to its investigation and, contrary to the Minister's views, believes that allowing the Committee access to unexpurgated copies of these documents is in the public interest. It is in the public interest to ensure that governments and their administration are held accountable for their activities.

1.99 The Committee believes that the Minister's failure to provide the requested documents in full denies the Committee information it considers necessary for the purpose of its inquiry.

1.100 The Committee did not ask for these documents lightly and before taking further action gave careful consideration to pursuing the matter. After weighing up the merits of both arguments, the Committee was convinced that the public interest would be best served by clarifying the events surrounding the unauthorised disclosure.

1.101 As noted above, the Committee paid careful attention to the Minister's explanation but agreed that the matter was of such importance that it should argue its need for the documents directly with him. The Committee agreed that it would explain

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41 Australian National Audit Office, Audit Report No. 38 2000-2001, *The Use of Confidentiality Provisions in Commonwealth Contracts,* p. 63.

its fundamental concerns and provide a clearer indication of its reasons for requesting the documents. This approach also enabled the Committee to seek the Minister's cooperation to avoid a situation whereby the Minister's refusal to comply with its Order would be reported to the Senate, risking unnecessary disclosure as the matter was debated in the Senate chamber.

1.102 Accordingly, the Chair wrote to the Minister on 8 June, outlining the reasons for its request. In this letter, the Committee explained that during the course of the inquiry serious questions had been raised about the integrity of the Health Group tendering process which it had been unable to resolve. It explained further that the information contained in the requested documents could be fundamental to its investigation. The Committee stated clearly that it was aware of the need to protect the confidentiality of this material; that it would receive the documents *in camera*; and that it had no intention to release information that would cause harm to the reputation of the tenderers.

1.103 On 15 June, the Minister advised the Chair of the Committee that he had taken note of the reasons given for requesting the material. In particular, he cited the reference in the letter to the Committee's concerns about questions of probity that had been raised during the course of the inquiry of the Health Group tendering process. He advised the Chair:

> In light of this information, I have sought and received further legal advice and await Departmental advice. The allegations that you have referred to in your letter are very serious and I will provide my response to the Committee as soon as I am in a position to do so.

1.104 This response indicated that information sought by the Committee would not be available by the time it had arranged for a public hearing regarding its concerns about the Health Group tendering process. The Committee decided to proceed with the public hearing on 19 June in an attempt to clarify some of the issues surrounding the breach of procedure in the tendering process

1.105 **The Committee reports to the Senate the Minister's failure to comply with its Order to produce the evaluation reports of the Health Group, however, the Committee notes the Minister's statement that he is seeking advice following a second approach to him on 8 June 2001. The Committee awaits his final response**.

Unauthorised disclosure

1.106 In the following section the Committee gives an account of an unauthorised disclosure during the tendering process for the Health Group and subsequent events. Again, it highlights some of the difficulties it has met in obtaining information.

1.107 On 27 July 1999, according to evidence presented to this Committee, each tenderer involved in the bidding for the Health Group outsourcing tender was sent by fax information relating only to its bid to check whether OASITO's assessment of that

material was accurate. The following day one of the tenderers contacted OASITO to say that its copy of the assessment was illegible and to request a soft copy. OASITO arranged for a disc containing a copy of the material to be sent to this tenderer. Later that afternoon the tenderer contacted OASITO to inform them that the disc provided to them, 'appeared to contain information relating to other tenderers'. The tenderer advised OASITO that the information had 'immediately been closed, sealed and locked in a safe'. OASITO retrieved the disc. It informed the Minister's office of the disclosure and sought advice from the probity auditor and legal advisers.

1.108 On 29 and 30 July, OASITO received statutory declarations signed by relevant officers from the tendering company, including the individual who had opened the disc, stating that employees from that company had not seen any detailed information relating to other bidders and that the company had not retained any copies of the material. On 30 July, OASITO and the probity auditor met the CEOs of the other two bidders. They informed them of the disclosure and explained the circumstances of the breach and the steps taken to redress it. The tenderers agreed to proceed with the process.

1.109 It is not the aim of the Committee to deal exhaustively with the tendering process, which will be examined in the final report, but to focus on the unauthorised disclosure.

1.110 In this section the Committee examines the evidence presented on the unauthorised disclosure that occurred in the tendering process on 28 July 2001 and subsequent events. The Committee's intention is twofold. Firstly, to clarify the events surrounding the unauthorised disclosure and secondly to demonstrate the difficulties it has experienced in trying to piece together a full and accurate picture of this phase of the tendering process.

1.111 OASITO is the only agency with first hand knowledge of the disclosure and the reaction to it. The intention behind the Committee's questions was to establish that, despite the serious nature of the disclosure that occurred, the integrity of the process was maintained. Unfortunately, the Committee has encountered difficulty in accessing documents and information necessary to establish whether the disclosure was managed appropriately and properly.

1.112 At the public hearing on 18 May 2001, the Committee requested all legal advice concerning the unauthorised disclosure. OASITO refused to provide the advice claiming that it was not their practice to provide legal advice to parliamentary committees. On 19 June, this advice was again requested from OASITO with a response due by 29 June 2001. The Committee is aware that the legal advice surrounding the disclosure may contain sensitive information. OASITO, however, has the opportunity to provide such legal advice *in camera*.

1.113 The Committee is concerned with OASITO's blanket refusal to provide key legal documents. As experience gaining access to legal advice surrounding the Humphry Review has shown, such advice does not necessarily contain confidential

material in the sense of its potential to offend individual privacy or commercial in confidence concerns. Besides, there is always the option for any material regarded as sensitive in advice to be expunged from the material. The Committee would like to stress that often evidence in the form of legal documentation, especially those containing legal advice, is the only means for a Committee to obtain independent, objective and accurate accounts of events that may otherwise remain undisclosed. This evidence provides an opportunity for a Committee to ask relevant and searching questions of agencies. Indeed, knowledge of such advice may frequently be the only means of resolving certain issues. For the purposes of this inquiry, the Committee requires access to the legal advice concerning the unauthorised disclosure to establish whether it was managed appropriately and the integrity of the Health Group tender process maintained.

1.114 Closely related to this matter of access to legal advice are issues surrounding the probity auditor's reports. On 8 February 2000, at an additional estimates hearing, the F&PA Legislation Committee requested a copy of all correspondence with the probity auditor subsequent to the unauthorised disclosure. In its reply, received 4 April 2000, OASITO stated that there were discussions with the probity auditor after the disclosure and that his advice was followed. A copy of a sign-off on the tender process dated 3 September was provided which contained no reference to the unauthorised disclosure.

1.115 On 18 May 2001, the Committee again requested OASITO to provide it with all documentation regarding the probity auditor's advice about the disclosure. In its reply on 7 June, OASITO referred back to the 3 September letter that they had provided to the Legislation Committee the previous year.

1.116 OASITO was invited and requested to bring all relevant documentation to the 19 June hearing so as to minimise the number of questions taken on notice. At the hearing OASITO was again requested to provide the Committee with the probity advice specifically about the disclosure. In reply, Mr Smith of OASITO correctly stated that this request had been taken on notice at the last hearing (18 May 2001). The 3 September advice was again provided as the sole probity auditor advice concerning the Health Group tender process.

1.117 During the same hearing on 19 June, Mr Smith acknowledged that the unauthorised disclosure of information was a 'very serious issue'.[42] He informed the Committee that he moved very quickly to put in place a revised process to make sure such a breach would not happen again. He immediately issued an instruction to the office that 'in future any soft copies of any information leaving OASITO premises would be required to be checked personally by a senior executive service officer

42 Committee *Hansard*, 19 June 2001, p. 612.

before its release'.[43] Further, the then CEO, Mr Hutchinson, initiated a review to be conducted by the probity auditor. He indicated that:

> It is likely that we will need to inject a further overlay of process to ensure that there is no scope for a repeat of this incident. This may lead to additional effort for some of the health group evaluation team but as this process is nearing completion this should not impose too great an imposition on those concerned. [44]

1.118 The Committee requested a copy of this review at the hearing on 19 June and intends to report on this aspect in its final report.

1.119 The Committee understands that the unauthorised disclosure of information was accidental and that OASITO did not want it widely known while the tendering process was still continuing.[45] It is concerned, however, that OASITO has not been forthright in dealing with the matter then and now. In correspondence dated 2 August 1999, Mr Hutchinson, the then CEO of OASITO assured Mr Podger, Secretary of the Department of Health and Aged Care, that he proposed to mention the information confidentiality failure on 27 July 1999 in OASITO's Annual Report for 1999/2000. He stated:

> I seek confidentiality in order to protect progress with implementation of the Government's policy in respect of IT infrastructure outsourcing. To acquit our accountabilities and pre-empt ill-founded suggestions of any cover-up, I propose to mention this incident in OASITO's Annual Report for 1999/2000. This will ensure transparency without jeopardising the progress of the current Health Group tender process.[46]

1.120 Mr Hutchinson was offering assurances to the secretary of another department that his agency would place on the public record an account of the unauthorised disclosure to 'ensure transparency'. As it happens, no mention of the incident appeared in OASITO's Annual Report. Mr Smith explained at an estimates hearing on 30 May 2001 that:

> Going on my own recollection now, the reason for that is that it was fully disclosed in the Senate estimates hearings prior to that, so a full public disclosure of all the issues that were relevant was made available in Hansard. In my view, that had passed the test of making this issue transparent.[47]

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43 Committee *Hansard*, 19 June 2001, p. 609.

44 Answer to Question on Notice, letter from OASITO to Department of Health and Aged Care, 2 August 1999, provided on 7 June 2001.

45 See for example Mr Whithear, Committee *Hansard*, 19 June 2001, p. 608.

46 Answer to Question on Notice, letter from OASITO to Department of Health and Aged Care, 2 August 1999, OASITO, provided on 7 June 2001.

47 Finance and Public Administration Legislation Committee *Hansard*, 30 May 2001, p. 325.

1.121 The Committee believes that this is simply not good enough. An assurance was given and it should have been honoured.

1.122 This failure to observe this assurance forms only a small part of a worrying pattern of behaviour characterised by OASITO's:

- failure or reticence to provide full and frank answers;
- lack of transparency in its processes; and
- reluctance to step forward and open its doors to parliamentary scrutiny.

Late tender

1.123 While the Committee is concerned that a tendering process for a project of this size worth $350 million could be compromised by an inadvertent disclosure, its concerns, however, do not stop with this breach. During the course of the public hearing on 19 June, the Committee became aware of another anomaly—a late tender. Again this only came to light after much prodding from the Committee and when the Chair finally asked, 'But at the point of opening up the tender box at 9 o'clock, how many tenders were in the box?[48] In fact, only two of the three expected tenders were in the box.

1.124 OASITO had sent two letters to the tenderers referring to the closing date for tenders to submit adjustments or refinements to their pricing structure. This was the fourth and final bid. In the first letter, dated 14 July 1999, OASITO had advised the tenderers that they would be required to put information in on Monday, 2 August 1999 but did not specify a time. The second letter, dated 28 July which dealt with a number of other matters, gave the exact time of 9 a.m. as the closing time for the required information. Mr Smith told the Committee that 'There was an element of, perhaps, uncertainty about that time'.

1.125 As it turned out, one of the tenders, the one who had received the disc containing tender information of the other two bidders, did not meet the deadline of 9 a.m. Mr Smith's explanation for this late tender is given in full:

> …the specified time was 9.00 a.m., 2 August. At 9.00 a.m. on 2 August we had only received two sets of pricing and not three. Having discovered that, we put in a process which ultimately led to the third set of pricing being received around 2.30 on that day. OASITO had regard to the late tender policy. We sought legal advice which indicated that we could receive that information later. The process that we established was that the pricing that we had received at 9.00 a.m. was kept unopened—that is sealed—and held in control of the probity auditor representative. One element of the third pricing came in at around midday and the balance by about 2.30 on that day. After that time the three bids were opened.

48 Committee *Hansard*, 19 June 2001, p. 615.

> In accordance with internal procedure we first of all obtained legal advice that said that, yes, in accordance with the late tender provisions of the tender rules we could accept this late pricing. We then put a submission to the then chief executive of the organisation saying that upon legal advice and appropriate action we intended to seal two and consider the third, and open them after all three had been received. The chief executive then exercised his delegation to accept the third set of pricing.[49]

1.126 OASITO informed the Committee that it had taken legal advice on this late tender matter from Blake Dawson Waldron. On 19 June, the Committee requested a copy of this advice by 29 June. The Committee will report further on this advice.

1.127 Mr Smith explained further the reasons behind accepting the third bid as a valid late tender:

> Part of the advice that we gave to the then chief executive was that, in our view, because the other two bids had remained unopened there was no possibility that that information could have been transferred across to the third party and, secondly, because of the nature, size and complexity of this transaction any revised pricing or adjustments to the price would have been, categorically in our view, cleared with the boards of the companies concerned way before 9 a.m. on that morning. So in our best commercial judgment at that time, we said to the chief executive, 'two things have occurred here; this information has been received by two parties and will remain unopened; our tender rules allow us to accept late tenders; and, thirdly, in our best judgment these prices would have been well and truly signed off in the hierarchies of these companies way before 9 a.m.
>
> …
>
> My view and the advice we gave the chief executive, which was accepted, was that there was no possibility that any information could have been transferred or shared in that process, and no-one was getting an advantage over another party. Therefore, in accordance with the late tender policy, it was appropriate to accept that late pricing.[50]

1.128 Mr Yarra strongly defended the decision to accept the third tender as late. He explained that OASITO writes tender rules each time it issues a tender. He stated:

> We write those rules before we commence the process. We applied those rules in this case. Those rules were set up before we commenced the process. The process was not changed.[51]

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49 Committee *Hansard*, 19 June 2001, pp. 615–16.

50 Committee *Hansard*, 19 June 2001, p. 619.

51 Committee *Hansard*, 19 June 2001, p. 620.

1.129 He referred the Committee to the Request for Tender (RFT) where there is a provision for the Commonwealth reserving the right to receive late tenders.[52] The provision from the Health Group RFT reads:

> 14.1.2 The Commonwealth reserves the right at its sole discretion to accept or reject late tenders, or parts thereof, submitted after the closing time and date. The Commonwealth expressly reserves the right at its sole discretion to change the time and date for lodging of tenders. The judgement of the Commonwealth as to the actual time that a tender is lodged is final. Each tenderer will receive a receipt showing the date and time of lodgement.

1.130 The Committee is concerned with this broad provision which stands in stark contrast to, for example, the 1989 edition of the *Commonwealth Purchasing Manual,* which set down in great detail the specific conditions under which any tender missing the closing time would be accepted as a late tender.[53] Unlike OASITO's guidelines, these directives left little room for interpretation and gave certainty to the process.

1.131 For this Committee inquiring into a process that involved at least $350 million of public money, this matter of loose guidelines and unclear procedures assumes a more serious complexion when coupled with the agency's reluctance or inability to give precise and clear details. For example, the following is an extract from the public hearing on 19 June:

> **Senator Buckland—**Who was present when the tender box was opened on that day?
>
> **Mr Whithear—**The probity auditor representative of Mr Mark's firm was in attendance.
>
> **Senator Buckland**—Was anybody else there?
>
> **Mr Whithear**—I recall being present, certainly for parts of the day. I do not recall who else. I know I and my staff were involved but I cannot recall whether others were in attendance or not.[54]

1.132 Later during the same hearing, another Committee member tried to obtain a clearer picture of the opening of the tender box.

> **Senator McLucas**—Can you tell me who was usually present at the opening of a tender box?
>
> **Mr Whithear**—In the IT outsourcing initiative, we have used people from the Competitive Tendering and Contracting Branch in Finance, as I think it was then. We have used the probity's auditor's representative agency at

52 Committee *Hansard*, 19 June 2001, pp. 620 and 624.

53 Department of Administrative Services, *Commonwealth Purchasing Manual*, 1989, pp. 43/B2-43/B3.

54 Committee *Hansard*, 19 June 2001, p. 615.

> least in some cases; I cannot confirm whether it was all. In this case, this was another set of repricing, so it was effectively the fourth time I think that we had received pricing in relation to this tender process. We usually try to make sure there is some sort of independent expertise there as well as our own people.
>
> **Senator McLucas**—Is there a register of those people who were present?
>
> **Mr Whithear**—There could be. There was certainly a register of the documents received; it is usually quite a focused a document.[55]

1.133 This short extract from the public hearing demonstrates the difficulties that this Committee has in eliciting clear, accurate, and detailed information from witnesses. The Committee understands that recollections of the circumstances around the opening of tenders will fade over time. However, OASITO was advised that the purpose of this hearing was to examine the unauthorised disclosure of information during the Health Group tendering process and asked to bring relevant documents. Even without this advance notice, if there were clear, well defined and well understood procedures in place, the witnesses could surely have worked from a general description of the standard process to a more specific explanation of what happened that particular day. The Committee would then have had a solid basis on which to build a better appreciation of what happened.

1.134 Furthermore, while the Committee understands that this incident occurred some time ago, it was a deviation from what would normally happen and therefore recollections are likely to be sharper. Again the Committee drives home the point that a $350 million dollar project was involved. The main concern, though, is that this late tender followed closely on the heels of the unauthorised disclosure and a written record of these events should exist and should be made available to this Committee.

1.135 This lack of transparency makes it very difficult for the Committee to obtain a clear and balanced understanding of events.

1.136 To this stage, the Committee has not been presented with any evidence that suggests that OASITO put in place clear, unambiguous and consistent guidelines governing the conduct of its tendering processes. The Committee remains to be convinced that OASITO formulated a tender strategy that mapped out a schedule for the evaluation process which provided certainty for both tenderers and those involved in the evaluation and which took close account of possible risks.

1.137 The Committee also has some doubts about the interpretation given to advice by the probity auditor for the accepting the late tender. On 19 June, the Committee asked Mr Smith about legal advice given at the time of the disclosure in relation to procedures for continuing the process. Mr Smith recalled that the probity auditor had

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55 Committee *Hansard*, 19 June 2001, p. 627.

advised that OASITO should not extend the closing date. Mr Smith made a clear distinction between extending the closing date and accepting a late tender.[56]

1.138 Mr Whithear added:

> The point that Mr Smith referred to about not extending the closing date I am quite confident referred to the prospect of shifting the date out some way. We were considering a range of options when the disclosure occurred, and I think that was just a point made by Mr Marks [the probity auditor] to ensure equity as best as possible. 'Leave expectations as they are', I think was his advice.[57]

1.139 The Committee notes the distinction made by OASITO between extending the closing date and accepting a late tender. But, as noted earlier, OASITO is yet to provide the Committee with a copy of the probity auditor's advice given at the time of the disclosure. Because of this situation the Committee was prevented from placing on the public record at this hearing on 19 June the exact contents of this advice and was thus constrained in questioning OASITO in detail about this advice and subsequent actions during the opening of tenders.

1.140 The Committee, however, has obtained a copy of this document from the Health Department and with no confidentiality restrictions placed upon it. The advice given by the probity auditor is not as clear cut as OASITO has indicated and does leave room for interpretation. It reads:

> It is currently envisaged that the pricing re-bids are due at 9.00 a.m. on 2 August 1999. I do not believe that it would [be] appropriate to extend this as this violation should not be seen to affect the process.[58]

1.141 The withholding of this document by OASITO from the Committee has not only prevented the Committee from conducting an open and frank inquiry into its contents but creates suspicion in the minds of those inquiring into the tendering process. The Committee has no way of knowing whether there are other key documents relating to the unauthorised disclosure or the late tender being withheld from it.

1.142 The Committee recognises from the RFT that OASITO had the right to accept the late tender. It questions, however, whether this was consistent with the intention of the probity auditor's July advice and given due consideration.

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56 Committee *Hansard*, 19 June 2001, p. 619.

57 Committee *Hansard*, 19 June 2001, p. 616.

58 Additional Information, Stephen Marks & Co Pty Ltd to OASITO, 29 July 1999, provided on 17 May 2001.

1.143 The Committee notes here that OASITO officers were invited and requested to bring all relevant documentation to this hearing so that they would have at hand the material necessary to answer questions fully and without equivocation.

1.144 Limited or incomplete documentation and fragmented information can mislead a Committee and thus undermine the accountability process. The Committee reminds OASITO, in particular, about this possibility. The Committee has no way of knowing whether it is in possession of all the necessary facts for it to draw its own conclusions. It relies on the good offices of agencies involved in this tendering process to ensure that it is fully and properly informed and that the principles of accountability and fairness are upheld.

1.145 The Committee believes that it has not had adequate access to key documents and has not received clear, full and accurate information during its hearings that would enable it to make an informed decision on these numerous important issues about the tendering process for the Health Group. The Committee notes that there is still outstanding the Order for the unexpurgated copies of the evaluation reports, and requests for the legal advice concerning the unauthorised disclosure and all reports and advice provided on the matter by the probity auditor.

Conclusion

1.146 In this progress report the Committee looked at three particular issues - the Humphry Review and documentation arising from the inquiry; the Order for the evaluation reports for the Health Group and the irregularities in the tendering process for that group. The common thread here is a problem that confronts not only this Committee but a number of Parliamentary Committees—lack of accountability.

1.147 Parliamentary accountability is the cornerstone of modern democracy. Over the past few years a number of people have voiced growing concerns about the lack of transparency in decision-making by public administrators and the performance of the service providers. In 1995, the Australian Law Reform Commission (ALRC) and the Administrative Review Council highlighted the importance of public access to information in the joint review of the *Freedom of Information Act 1982*. They argue:

> Access to government information is a pre-requisite to the proper functioning of a democratic society. Without information, people cannot exercise their rights and responsibilities or make informed choices. Information is necessary for government accountability. Limited information can distort the accountability process: governments are questioned about the wrong issues and programs are incorrectly evaluated. Without information people cannot make an informed choice at the ballot box and members of Parliament cannot supervise the Executive.[59]

59 Industry Commission, *Competitive Tendering and Contracting by Public Sector Agencies,* 24 October 1995, p. 87.

1.148 In its Interim Report, the Committee underlined the problems it faced in fulfilling its obligations to scrutinise the government and its administration particularly in obtaining information it considered necessary for its inquiry. This progress report has further underlined these difficulties.

1.149 One of the first significant obstacles to the inquiry started with a simple request from the Committee for access to the submissions to the Humphry Review. After all the questioning and probing, the Committee believes that it still has not got a full and accurate account of the matter.

1.150 The chain of events involving the unauthorised disclosure and the late tender as outlined above raise a number of concerns that warrant much greater attention and analysis. The main areas of concern touch on the following questions:

- whether adequate planning and forethought went into preparing the tendering process;
- whether the terms of the RFT allowed too much discretion or flexibility and were open to broad interpretation;
- whether there were adequate checks and balances in place to ensure the effectiveness and integrity of the process;
- whether the timeframe put undue pressure on the various parties involved to continue with the process;
- whether the overall tender process was rigorous and subject to independent and thorough auditing; and
- whether there was an adequate level of accountability.

1.151 The Committee also has questions about the role of the probity auditor acting as adviser and the level of transparency in the tendering process.

1.152 During the course of the inquiry serious questions were raised about the probity of the Health Group tendering process. The Committee has not been able to resolve these matters to its satisfaction. It believes that it has an overriding responsibility to see that the matter is investigated fully and reported on. The request for documents and information is a genuine attempt on the part of this Committee to clarify some important issues about the very integrity of the tendering process. The information contained in the documents it has requested appears to be central to its investigation. By withholding these key documents from the Committee the Minister has effectively curbed its ability to carry out its duties.

1.153 Based on its experiences so far in this inquiry, the Committee is not confident that it will be able to obtain unfettered access to all the documents relevant to these matters to reach an informed conclusion. The Committee, therefore, agreed to and has requested the Auditor-General to consider examining these matters.

The final report

1.154 The Committee is now preparing a final report to present to the Senate later this year. On the difficult matters such as obtaining access to material including evaluation reports and legal advice, the Committee hopes that it can reach an agreement with the Minister and his departments.

1.155 In the meantime, the Committee has taken a decision not to proceed with an Order through the Senate for the production of documents due to the sensitivity of the documents.

Senator George Campbell

Chairman

APPENDIX 1

LETTER OF APPOINTMENT: RICHARD HUMPHRY AO

MINISTER FOR FINANCE AND ADMINISTRATION

Mr Richard Humphry AO
Managing Director
Australian Stock Exchange
20 Bridge Street
SYDNEY NSW 2000

Dear Mr Humphry Richard,

I write to confirm the terms and conditions of your appointment to conduct Review of the Whole of Government Outsourcing Initiative in accordance with the enclosed Terms of Reference. You will report to me in accordance with the terms of reference by the end of December 2000.

Please note that you are not engaged as an officer, employee, partner or agent of the Commonwealth and you have no power or authority to bind the Commonwealth. The manner and content of your review is entirely within your own discretion, only its scope being determined by the Terms of Reference.

The Department of Finance and Administration will pay you at the rate of $600 per day. The Department will reimburse you the reasonable costs of travel at Business Class, the reasonable costs and expense of accommodation and meals incurred by you while necessarily required to be absent from your usual place of business and other reasonable expenses which are necessarily incurred to perform the independent review. You are responsible for any GST payable on fees, costs and outlays.

As you are not an employee, indemnity for claims arising from your performance of the independent review will be provided by the Department in accordance with the Commonwealth policy on indemnification contained in Finance Circular 1997/19 (copy

enclosed). In essence, provided that you agree that your defence will be controlled by the Commonwealth and that you will provide all assistance required by the Commonwealth in the conduct of the defence and provided that the Department is satisfied that you acted reasonably and responsibly, the Commonwealth will indemnify and keep you indemnified against the costs of legal representation, and any damages and legal costs payable by you to another party (including as a result of a reasonable settlement).

All material created, derived or provided to you for the purpose of your Review shall be and remain the property of the Commonwealth. Copyright in your report and any drafts shall be the property in the Commonwealth. All information acquired by you in the performance of the Review is confidential and you must comply with the provisions of the *Crimes Act 1914* and the *Privacy Act 1988*.

These terms and conditions are offered on the basis that you warrant that to the best of your knowledge, you have no conflict with the interests of the Commonwealth. To this end could you please sign and return the attached Deed of Undertaking with your acceptance. If, during the conduct of the Review, a conflict of interest does arise, you should immediately notify me, making full disclosure of relevant information relating to the conflict and take immediate steps to resolve or otherwise deal with the conflict.

The Commonwealth necessarily reserves the right to reduce the scope of the Review or to terminate your services at will, in which case you will be entitled to be paid for work performed and expenses reasonably incurred to the date of reduction or termination and any costs and expenses directly related to the reduction or termination.

I look forward to your acceptance of these terms.

Yours sincerely

JOHN FAHEY

APPENDIX 2

SUBMISSIONS TO THE HUMPHRY REVIEW

No	Author
1	ACIL Consulting
2	Advantra
3	Australian Federal Police
4	Australian Information Industry Association Limited (AIIA)
5	Australian Institute of Marine Science
6	Australian Nuclear Science & Technology Organisation (ANSTO)
7	Australian Nuclear Science & Technology Organisation (ANSTO) - Combined Unions
8	Australian and New Zealand Association for the Advancement of Science (ANZAAS)
9	Association of Professional Engineers, Scientists and Managers, Australia (APESMA)
10	Australian Securities & Investments Commission (ASIC)
11	John Broome (individual)
12	Bureau of Meteorology
13	Computer Sciences Corporation (CSC)
14	Canberra Business Council Inc.
15	Commonwealth Competitive Neutrality Complaints Office (CCNCO)
16	Community and Public Sector Union (CPSU)
17	Compaq Solutions Marketing Group
18	CSIRO
19	CSIRO Staff Association
20	Department of Industry, Science and Resources

21 Department of Defence

22 Electronic Data System (EDS)

23 Federal Court of Australia

24 Institution of Engineers, Australia

25 Information Industries Development Board (IIDB)

26 ITNewcom

27 Tony Martin (individual)

28 National Library of Australia

29 The Sausage Group

30 SERCO

APPENDIX 3

ORDERS FOR PRODUCTION OF DOCUMENTS

26 March 2001 :

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE—INFORMATION TECHNOLOGY OUTSOURCING INQUIRY—ORDER FOR PRODUCTION OF DOCUMENTS

The Chair of the Finance and Public Administration References Committee (Senator George Campbell), pursuant to notice of motion not objected to as a formal motion, moved—That the Minister representing the Minister for Finance and Administration (Senator Abetz) provide to the Finance and Public Administration References Committee by 26 March 2001 the following documents relating to that committee's inquiry into the Government's information technology (IT) outsourcing initiative:

(a) a copy of the legal advice obtained by the Department of Finance and Administration from Phillips Fox, referred to in evidence at the public hearing on 7 February 2001;

(b) a record of documents generated by the Humphry Review and their current location;

(c) a copy of advice from KPMG on whether the IT outsourcing service contracts contained embedded finance leases;

(d) copies of the evaluation reports for IT contracts that have been let, with information
identified as commercially sensitive 'blacked out' and providing the reasons for such claims;

(e) a copy of legal advice that the disclosure of evaluation reports to the committee may create a significant risk of litigation to the Commonwealth;

(f) a copy of a letter and attachments from the Minister for Finance and Administration (Mr Fahey) dated 20 January 1999 to ministers that gives further detail about the Office of Asset Sales and Information Technology Outsourcing's role in going forward with the implementation of the IT initiative and advice as to whether the letter was provided to the Humphry Review;

(g) details of the transition arrangements and the operation of the Office of Asset Sales and Information Technology Outsourcing (OASITO) for the next 6 months, including:

(i) arrangements with the consultants that OASITO previously had on the books,

(ii) who is to be retained,

(iii) precisely which contracts have been terminated and when, and

(iv) ongoing liabilities in terms of contract commitments after 31 December 2001; and

(h) copies of financial advice from PricewaterhouseCoopers, dated 26 May 2000, and Deloitte Touche Tohmatsu, dated 10 May 2000, on the methodology used to calculate savings.

Question put and passed.

3 April 2001 :

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE—INFORMATION TECHNOLOGY OUTSOURCING INQUIRY—ORDER FOR PRODUCTION OF DOCUMENTS

Senator O'Brien, at the request of the Chair of the Finance and Public Administration References Committee (Senator George Campbell) and pursuant to notice of motion not objected to as a formal motion, moved—

That the Senate—

(a) notes that the order for the production of documents relating to the Finance and Public Administration References Committee inquiry into the Government's information technology outsourcing initiative, which was passed by the Senate on 26 March 2001, has not been complied with; and

(b) requires that the acting Minister for Finance and Administration provide to the Finance and Public Administration References Committee, by no later than the adjournment of the Senate on 4 April 2001, all documents listed in that order.

Question put and passed.

MINORITY REPORT

Introduction

1.1 From the outset, the minority Senators want to place their opposition to the Majority Report *Inquiry into the Government's Information Technology Outsourcing Initiative - Accountability Issues - Two Case Studies* on the public record. This is the second of what might be described as an interim report by the Senate Finance and Public Administration References Committee in the context of its inquiry into the Government's IT Outsourcing Initiative.

1.2 The minority Senators call on the Committee to move as expeditiously as possible to a full and final report in August.

Responses to the Interim Report

1.3 In their response to the Committee's Interim Report, both the Department of Finance and Administration (DOFA) and the Office of Asset Sales and IT Outsourcing (OASITO) acknowledged that they are aware of their accountability obligations to the Parliament. To this end, they both set out a chronology of their interaction with the Committee. The lengths that OASITO has gone to in meeting its obligations to the Committee are obvious from this chronology. Officers from OASITO have also appeared before the Committee on no less than three occasions during the course of this Inquiry – on 7 February, 18 May, and 19 June – and all Senators had the opportunity to put whatever questions they wanted to these officers. In addition, there have been opportunities in other fora, such as Estimates, for Senators to question OASITO further. During the course of the hearing on 19 June, Mr Ross Smith, the Chief Executive, acknowledged OASITO's continuing obligation to respond to the Committee.[1]

1.4 The minority Senators note the frustration that has been experienced by the Committee in obtaining relevant documents related to the Inquiry. However, this has by no means resulted from an attitude of deliberate obstructionism on the part of OASITO and DOFA, or the Minister for Finance and Administration. These issues have been previously explored in the Interim Report, and interested parties are referred to the Minority Report.

1.5 It is not worth rehashing that Report, but broadly there are two concerns:

a) Some of the documents that the Committee has requested, in particular the evaluation reports, are of a commercially sensitive nature. That is why it has been necessary to provide the evaluation reports with parts 'blanked out'. Public disclosure of commercially sensitive documents may have adverse commercial consequences for both the company concerned, as well as the Commonwealth. The concern of relevant companies involved in

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[1] *Senate Finance and Public Administration References Committee Hansard,* 19 June 2001, p. 638.

the IT Outsourcing process as to the implications of publicly releasing such documents is evident in a number of letters provided to the Committee by OASITO.

b) OASITO has received legal advice that the disclosure of the evaluation documents may expose the Commonwealth to 'a significant risk of litigation'.[2] In providing the Senate with evaluation reports that had commercially sensitive information blanked out, the then Acting Minister for Finance and Administration, Senator Rod Kemp, in a letter to Senator Campbell of 4 April stated: …despite the blanking out process I am advised there remains a risk that public release could still damage the Commonwealth's interests and expose the Commonwealth to legal action'. It is for this reason that he requested that, 'the Committee hold these documents on an *in-camera* basis'.

1.6 As far as the production of documents is concerned, it is evident to the minority Senators that DOFA, OASITO, and the Minister for Finance and Administration, have acted not out of a desire to frustrate the Committee in the conduct of its Inquiry but instead to protect the interests of the Commonwealth. In this respect, they are to be commended for their actions.

The Humphry Review

1.7 It was established during the course of evidence to the Committee that Mr Richard Humphry had returned the submissions that he had received during the course of his review to their authors.[3]

1.8 Mr Humphry returned these submissions after receiving legal advice from the Australian Government Solicitor (AGS) that they did 'not form part of Commonwealth records and, therefore, are not covered by the Archives Act and, accordingly, they remain the property of those who have written them'.[4]

1.9 On 14 February 2001, Mr Humphry received further advice from the Deputy Government Solicitor which effectively confirmed the previous advice of the AGS.

1.10 It was subsequently revealed to the Committee that Mr Humphry's letter of appointment stated that: 'All material created, derived or provided to you for the purpose of your Review shall be and remain the property of the Commonwealth'. Mr Jamie Clout of DOFA informed the Committee that Mr Humphry had agreed verbally to the letter of appointment.[5]

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[2] Ross Smith, Correspondence to Finance and Public Administration Committee, 24 January.

[3] *Senate Finance and Public Administration References Committee Hansard,* 7 February 2001, p. 45.

[4] *Senate Finance and Public Administration References Committee Hansard,* 7 February 2001, p. 45.

[5] *Senate Finance and Public Administration References Committee Hansard,* 18 May 2001, p. 567.

1.11 It is reasonable to assume that because the AGS were involved in the drafting of Mr Humphry's letter of appointment, they were aware of its terms, when they provided legal advice to him. Certainly, this is the assumption that Mr Humphry made.[6] In his letter to the Committee of 27 February 2001, he said that, 'in forming its opinion of 20 December 2000, the Australian Government Solicitor (AGS) was not restricted in any way to access to any relevant information'. In a further letter to the Committee from Mr Humphry on 31 May, he clearly states that the AGS had a copy of the letter of appointment in its possession:

> Clearly, AGS had access to this relevant information in formulating any subsequent advice. Indeed, prior to issuing its advice to me on 14 February 2001, AGS specifically discussed my appointment letter (and referred to a copy that AGS itself possessed) with the member of the Secretariat Review who sought that advice on my behalf.

1.12 Mr Phillip Prior of DOFA has confirmed that the AGS were aware that Mr Humphry had returned the submissions, and that they had access to Mr Humphry's letter of appointment. He said:

> … I can confirm with you that they [AGS] were party to the construction of the terms of reference; they were on foot in the secretariat as Mr Humphry decided upon returning those submissions … Since that time I have been made aware by the AGS that they still have on their files a copy of the draft – which is not different from the final, I have been informed – letter of appointment. As far as I am aware, at all points they had access to the content of the letter of appointment.[7]

1.13 Mr Humphry was entitled to act in reliance upon the advice that he received from the AGS. Mr Humphry cannot be held responsible if it should be established that he was provided with incorrect advice from the AGS, particularly in the light of his comments that the AGS were not restricted in their access to relevant information, and also in light of Mr Prior's comment that the AGS had a copy of the letter of appointment on file.

1.14 Whilst the minority Senators acknowledge that it would have been easier for the Committee to obtain submissions to the Humphry Review had they not been returned to their authors, it should be noted that it has not been a fatal impediment to the Committee obtaining the submissions. The Committee has been able to obtain most of the submissions by contacting each submitter independently. Indeed, as of 21 June 2001, the Committee had received 27 out of 30 submissions.

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[6] Richard Humphry, Correspondence to Senate Finance and Public Administration References Committee, 27 February 2001.

[7] *Senate Finance and Public Administration References Committee Hansard,* 18 May 2001, p. 586.

The Health Tender

The Unauthorised Disclosure

1.15 It has been established during the course of evidence that on 28 July 1999, an officer within OASITO inadvertently provided IBM GSA (who was ultimately the successful tenderer) with a diskette that contained confidential pricing information relating to the other two tenderers.

1.16 Upon discovering this inadvertent disclosure, IBM GSA contacted OASITO 'to advise that the information had immediately been closed, sealed and locked in a safe. The tenderer offered at that time to provide statutory declarations to reinforce the fact that the information had not been examined' and returned the diskette to OASITO.[8]

1.17 The statutory declarations were subsequently provided by relevant employees of IBM GSA, on 29 and 30 July.[9] Given the serious consequences of lying in a statutory declaration, and in the absence of any evidence to the contrary, OASITO was entitled to rely upon the accuracy and veracity of these declarations.

1.18 OASITO made no attempt to cover up the fact of the unauthorised disclosure. All of the key stakeholders were informed. Indeed, on the day of the unauthorised disclosure, they informed the office of the Minister for Finance and Administration, the probity auditor (Mr Marks), and their legal advisers (Blake Dawson Waldron) of what had occurred.[10]

1.19 On 30 July, OASITO, in the company of the probity auditor, informed the chief executives of the other two tenderers of what had transpired.[11] Mr Whithear of OASITO, during the course of giving evidence to the Committee, stated that:

> We described the actions that we had taken and planned to take. We showed the chief executives of those organisations the statutory declarations that we had obtained and expressed the view that the statutory declarations would not have been provided lightly and that making false declarations carries with it some penalties and that that gave us a degree of confidence. I can only surmise that that appeared to give those chief executives some comfort as well.[12]

1.20 Each of the two bidders indicated to OASITO that, whilst they were not happy that the unauthorised disclosure had occurred, they wanted the tender process to

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[8] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 613.

[9] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 613.

[10] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 613.

[11] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 613.

12 *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 613.

continue.[13] This advice was not in writing, but a file note was made to this effect.[14] Mr Smith stated to the Committee that:

> Both the tenderers involved said that, in the circumstances, they wanted to proceed. One in particular said that they did not want us to stop the process. They wanted us to proceed; they had invested a lot of money in the tender process; they were happy with the way in which we had decisively and emphatically dealt with the process, and while none of us had wanted it to happen, they wanted us to proceed. The other party said, 'Yes, I understand what is happening; please proceed.' However, one was emphatically saying, 'Please do not terminate the process.' Those file notes were made and signed by Mr Whithear, myself and Mr Marks, the probity auditor.[15]

1.21 Additionally, the Department of Health and Aged Care (DHAC), the Health Insurance Commission (HIC), and Medibank Private were advised of the situation by letter on 2 August, 'and subsequent briefings were provided over the next few days'.[16] Mr Andrew Podger, the Secretary of DHAC, and Dr Harmer, the Managing Director of the HIC, both indicated to OASITO that they wanted the tender process to continue.

1.22 In testifying before the Committee, Mr Podger said:

> I think it is true that I could have turned around and said, 'No, I strongly believe we now should stop and start the whole process again.' That option was open for me to say so. I think it would have been a very difficult call in the light of the fact that at that point there had been expert advice to the office, who had the overall control of the process, and **the three companies concerned had all agreed it should proceed**. It would have been a hard call for me to say, 'No, we should not proceed from this point,' but the opportunity was there. But it was not one I felt I could take, given the evidence that was provided to me by Mr Smith.[17]

1.23 Mr Podger was adamant that the decision to continue with the tender process was appropriate in all the circumstances. He stated that:

> With all the benefit of hindsight, looking back, I am sure I would make the same call again. Given the steps that were taken, I would have said—in the light of the three companies saying we should proceed and the probity auditor saying it was possible and appropriate within the rules to proceed—that we should proceed.[18]

1.24 Similarly, Dr Harmer said:

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[13] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 612.

[14] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 612.

[15] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 612.

[16] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 613.

[17] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 622.

[18] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 623.

> the assurance from the probity officer, the assurance from Blake Dawson Waldron, the legal people, and the assurance that the two companies that were impacted on had agreed that the process should continue—made it very easy for me to say, 'Let's keep going.'

1.25 Mr Smith makes the point that not one of the key stakeholders said that the tender process should be discontinued. He said:

> I should say that all of the key stakeholders, whilst none of them were very happy about this process, agreed to go on. There was not one stakeholder who disagreed with the way in which we should go forward. Not one … We believe that we handled it entirely appropriately in the circumstances. Had one of the players said, 'No way, we are not proceeding,' that would have been a very different circumstance. We would have had to have regard to that and taken whatever decision was appropriate. But not one stakeholder said, 'Do not go on.'

1.26 Following this unauthorised disclosure, OASITO put procedures in place so as to minimise the possibility of a recurrence. Mr Smith says that he, 'immediately issued an instruction to the office that in future any soft copies of any information leaving OASITO premises would be required to be checked personally by a senior executive service officer before its release.'

1.27 On 29 July, OASITO received written advice from the probity auditor setting out a recommended course of action, and on 30 July it received advice from its legal adviser, 'advising of legal risks and proposing a course of action to address the situation.' Mr Smith stated in evidence that: 'My understanding is that we followed that advice to the letter.'

1.28 This was confirmed in evidence provided by the probity auditor, Mr Marks, who said that:

> … once OASITO became aware of the occurrence [the unauthorised disclosure], they immediately notified me, and I held discussions with them in regard to the approach that needed to be adopted. They fully carried out my instructions, requests and advice in regard to that. At that stage, I was quite satisfied that they had done everything that needed to be done in accordance with the advice that I had provided to them.[19]

The Repricing of the Tender

1.29 There were three opportunities for repricing under the health tender. The final repricing occurred after the unauthorised disclosure. There is nothing unusual whatsoever about repricing of government tenders. It provides bidders with an

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[19] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 435.

opportunity to reprice their bids after certain matters have been clarified for them, and they are more aware of the tenderers' requirements.[20]

1.30 This point was made by OASITO's Mr Whithear when he said that the opportunity for repricing was necessary because, '[t]here was some revised information produced by the relevant departments as to what they sought – maybe some changes around the edges of service levels, et cetera – and that attracted different pricing from the bidders'.[21]

1.31 Mr Moran of DHAC described this repricing situation as being 'not abnormal'.[22] Mr Podger said that:

> Mr Moran and I have both worked in the defence department on major contracts and complex contracts, and from time to time it is in the interests of the taxpayer to allow further work on bids in order to get an acceptable business case that it is in the interests of the taxpayer to finance. Or in this case it is in the interests of the taxpayer to purchase this one as against the status quo or an in-house arrangement. But you would stop the whole process if you came to a judgment that that is not likely to occur.[23]

1.32 It is evident that the repricing was in the best interests of the Commonwealth to ensure that it got the best possible deal, based on the requirements of the tenderers.

The Acceptance of the Late Tender

1.33 The closing date for the new pricing was 2 August 1999 at 9.00am. As referred to in the Majority Report, paragraph 1.121, the Committee has received evidence that a late tender was received. At the hearing on 19 June 2001, OASITO revealed that at 9.00am on 2 August 1999 they had 'received two sets of pricing not three', but they maintained their usual policy of not identifying the relevant tenderer.[24]

1.34 OASITO's response was to contact that tenderer, and as a result, '[o]ne element of the pricing came in about 12 o'clock … and the rest of the document came in at 2.30'.[25]

1.35 OASITO revealed that the reason the tender was not received by the due time on the due date was because of a misunderstanding on the part of the tenderer as to the tender box deadline. The tenderers received two letters from OASITO, one indicating the due date was 2 August and the other, 14 days later, indicating that the tender box deadline was 9.00am on that day. **It was OASITO's usual practice to have a**

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[20] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, pp. 483 - 484.

[21] *Senate Finance and Public Administration Committee Hansard*, 18 May 2001, p. 559.

[22] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 491.

[23] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 491.

[24] *Senate Finance and Public Administration Committee Hansard,* 19 June 2001, pp. 615 and 624.

[25] *Senate Finance and Public Administration Committee Hansard,* 19 June 2001, p. 619.

4.00pm or 5.00pm deadline. This resulted in some confusion, and it seems that the tenderer was acting under the assumption that the deadline was in the afternoon.[26]

1.36 Mr Smith testified that prior to accepting the late tender, OASITO had 'obtained legal advice that said that, yes, in accordance with the late tender provisions of the tender rules we could accept this late pricing'.[27]

1.37 The other two tenders were left sealed, and remained in the custody and control of the probity auditor's representative, until the receipt of the third tender.[28] OASITO believes that the probity auditor's representative 'was in contact with him personally, because we were relying on the probity auditor's advice there'.[29]

1.38 Mr Smith is firmly of the view that there was no possibility that the third tenderer could be advantaged in any way by this process, and that there was no conceivable possibility that the third tenderer could have become aware of the other two bidders' pricing details. He stated:

> Part of the advice that we gave to the then chief executive was that, in our view, because the other two bids had remained unopened there was no possibility that that information could have been transferred across to the third party and, secondly, because of the nature, size and complexity of this transaction any revised pricing or adjustments to the price would have been, categorically in our view, cleared with the boards of the companies concerned way before 9 a.m. on that morning. So in our best commercial judgment at that time, we said to the chief executive, 'Two things have occurred here: this information has been received by two parties and will remain unopened; our tender rules allow us to accept late tenders; and, thirdly, in our best judgment these prices would have been well and truly signed off in the hierarchies of these companies way before 9a.m' … The delegate in this case, the previous chief executive, accepted our advice and we accepted the late tender.[30]

1.39 Mr Podger said that whilst he was concerned about the acceptance of the late tender, he was satisfied with Mr Smith's assurance, 'that there had been due process around the late tender and that the other companies had not objected to the process. On that basis, I felt it was a reasonable call for them to make and for me not to question any further'.[31]

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[26] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 619.

[27] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 615.

[28] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, pp. 615 and 617.

[29] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, pp. 617 – 618.

[30] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 619.

[31] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 623.

1.40 Mr Smith established that as far as government tendering is concerned, there is nothing abnormal about accepting a late tender.[32] Under the rules of the tender, as set out in the tender document, OASITO was entitled to accept the late bid. They obtained legal advice to this effect, and Mr Smith says that, 'the probity adviser was with us all the way'.[33] Both the late tenderer and the Commonwealth would have been disadvantaged if the bid had not been accepted. The late tenderer's many months of work, and outlay of a considerable sum of money would have been rendered fruitless. The Commonwealth would have been deprived of the opportunity to assess the late tenderer's bid, and the number of tenderers would have been reduced to only two, thereby restricting the range of bids available to the Commonwealth.

1.41 The ALP Senators have made much of the fact that following the unauthorised disclosure, the probity auditor advised OASITO that the closing date for the repricing bids should not be extended.[34] They have sought to argue that the acceptance of the late tender constituted an extension of the closing date contrary to the advice of the auditor.[35] Their argument is ultimately unconvincing and Mr Smith dealt with it by saying:

> There is a distinction in a purchasing environment between a formal extension of a closing date, where all parties are advised that the date is extended from, say, Monday to Friday and all parties can put their pricing in on the Friday—that is an extension of a closing date—versus an acceptance of a late tender which did not arrive at the specified time. That is not meant to be clever, but under purchasing framework there is a distinction between those.[36]

1.42 It is crucial to note that OASITO informed the other two tenderers of the acceptance of the late pricing bid.[37] Both Mr Smith and Mr Whithear indicated that they did not receive any objections from either of the tenderers.[38] The tenderers were free to raise any objections that they may have had with the Minister for Finance and Administration, and to the best of Mr Smith's knowledge they did not do so. Mr Smith said that:

> … in past processes where tenderers have been unhappy with any part of the process – which I am certainly aware of from my other life in procurement –

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[32] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, pp. 619 – 620.

[33] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 620.

[34] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, pp. 616 – 618.

[35] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 617.

[36] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 617.

[37] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 616.

[38] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 628.

> they would approach ministers to say, 'We're unhappy with this particular element of the process.' I am not aware that they did on this occasion.[39]

The Probity Auditor Sign-Off

1.43 It is particularly significant that the probity auditor, Mr Marks, signed off on the health tender as having no unresolved probity issues.[40]

1.44 Not only did the probity auditor sign-off on the health tender, but so too did all of the other advisers. Mr Whithear said that OASITO, 'obtained sign-offs from all the advisers involved in the process, to the effect that the selection was appropriate, the tender process was run appropriately, and there were no issues to suggest that this contract should not proceed to award'.[41]

1.45 The debate over whether Mr Marks could be categorised as a probity auditor or probity adviser is largely a semantic one. It is a ruse set up by the ALP in a fruitless attempt to cloud the waters, and make it look like Mr Marks has some how acted inappropriately.

1.46 Mr Marks made it clear that the role he took throughout the tender approach was a proactive one. During the course of his testimony he said:

> The way in which probity auditing is characterised basically is by dealing with issues before they become issues. You would look at the draft RFT, make your comments on that, go back to them and say, 'Look, I don't think that if you put the RFT out in that form you're going to have proper probity or process. I would recommend to you that you change the wording of this particular section or that particular section to ensure that there is no disadvantage to any other bidders.' It is a very different role than that of a financial auditor as everybody knows it. Therefore, you are quite involved in the process, while sitting over the top of it. You do not get involved in the day-to-day side of it, but you involve yourself in a review process … The role is very much a proactive role, not a reactive role, as you would get with a financial audit.[42]

1.47 Mr Marks' actions in this respect are supported by comments made by the Auditor-General, Mr Pat Barrett:

> I would expect the probity auditor to be quite proactive in this arrangement. When issues come up that deal with fairness, equity and fair handling, I would expect the probity auditor to comment on the criteria that are being used and, as necessary, give advice based on probity principles, to ensure

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[39] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 628.

[40] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 435.

[41] *Senate Finance and Public Administration Committee Hansard*, 18 May 2001, p. 559.

[42] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 435.

> that the people who are taking the decision at the time take those into account.[43]

1.48 Senator Kate Lundy, clearly not having received the sort of answers to her questions that she had hoped for, made an attempt to impugn the independence of the probity auditor by questioning him about whether he was paid by OASITO to appear before the Committee.[44] Predictably, the probity auditor was not being paid, but any attempt to argue that a payment could have compromised his testimony in any way is offensive.

1.49 **There has been absolutely no evidence provided to the Committee to indicate that the probity auditor has acted in any other way than entirely professionally, independently, and appropriately.**

1.50 The probity auditor's independence was emphasised by Mr Smith when he said that:

> Never at any time did I feel that he thought he could not bring forward anything other than independent advice, and he did that very strongly on several occasions … So whether you call it a probity auditor or a probity adviser, I would have to say to you that the nature of the work that he did and the way in which he behaved in my view was absolutely independent.[45]

1.51 Mr Marks was permitted unfettered access to any material that he wanted. Mr Whithear said that:

> As a general matter of Mr Marks' involvement as probity auditor in these processes, Mr Marks could have access to anything he chose in relation to the process. If we particularly happened to draw an issue to his attention he would reasonably ask to see any relevant information.[46]

1.52 As far as the unauthorised disclosure of the health tender information is concerned, nothing was hidden from Mr Marks. During the course of his testimony Mr Smith said:

> As far as I am concerned, everything that I knew about the incident was passed on personally by me. He had other discussions with other people. He certainly had access to all the files; he had access to everything that was available. He certainly did not come to me and say, 'Mr Smith, I am concerned that I have not got access. Is there anything else?' There was none of that dialogue with me which I would have expected him to do if he had any concerns about questions that he may have asked that were not being answered or access to any documents that he may not have been able

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[43] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 455.

[44] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, pp. 438 – 440.

[45] *Senate Finance and Public Administration Committee Hansard*, 18 May 2001, p. 556.

[46] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 611.

> to get to. That is the nature of the individual but also the nature of his role. He would certainly not have sat back if he was unhappy about the way in which we were treating him in relation to this issue.

1.53 If Mr Marks had any concerns at all about the tender process he was aware that he was free to raise them with the Minister for Finance and Administration.[47] It is significant that Mr Marks says that this right 'was never exercised'.[48]

The Minister's Refusal to Provide the Full and Complete Health Group Evaluation Reports

1.54 The Committee wrote to Mr Smith, in a letter of 24 May 2001, directing him to provide unadulterated copies of the health group evaluation reports. Senator Kemp (as the Acting Minister for Finance and Administration) had previously provided these documents to the Senate, pursuant to an order of the Senate, with commercially sensitive material blanked out. The Minister for Finance and Administration, the Hon John Fahey MP, directed OASITO not to provide this information on the grounds of public interest immunity.

1.55 In his letter of 29 May 2001, the Minister said that he had obtained legal advice and stated the grounds of public interest on which he relied:

> a) the material would disclose matters in the nature of, or relating to opinion, advice or recommendation prepared in the course of and for the purpose of the deliberative processes of government where disclosure would be contrary to the public interest;
>
> > - the Evaluation Reports form the basic material which is relied upon in making recommendations to me as Minister. My approval was an essential prerequisite before any contract was entered into with the preferred tenderer for the Departments and Agencies covered by the tender. This evaluation process requires frankness in the comments that are made which would be prejudiced if the reports were made available outside government. I consider that it would, therefore, be contrary to the public interest to release these documents except in the form previously made available; and
>
> b) the information contained in the documents includes information supplied on a confidential basis and, if its confidentiality cannot be maintained, the future supply of similar information necessary for the proper functioning of government could be prejudiced.
>
> I have noted that the Committee has agreed to receive the documents in camera. However, understandably the Committee does not and cannot

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[47] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 437 and *Senate Finance and Public Administration Committee Hansard*, 18 May 2001, p. 553.

[48] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 437.

> provide any undertaking that the material if provided will always remain as in camera evidence. I do not consider this affects my decision set out above.

1.56 The Minister's citing of public interest immunity considerations is sound, and should in no way be misconstrued as an attempt to cover up processes related to the health tender. OASITO has been more than forthcoming in explaining to the Committee that there was an unauthorised disclosure and the acceptance of a late tender. It has further explained the action that it took, and the authority upon which it relied in taking this action. **From the evidence provided to the Committee it is clear that the health tender process is all above board. There can be no cover up because there is nothing to cover up!**

1.57 It is significant to note that the Minister's actions in this regard are supported by comments made by the Auditor-General in a recently published report. The Auditor-General stated that:

> The ANAO notes that tender evaluation reports may contain some information from tenders that is considered to be confidential. It could he argued that disclosure of some parts of evaluation reports, where the merit of one tenderer against another is assessed, would not be in the public interest. Disclosure of such information may be considered by tenderers to be an unreasonable cost of doing business with government. The ANAO observes that evaluation reports would generally be treated as confidential as they are part of the deliberative processes of government.[49]

1.58 The minority Senators note that at paragraph 1.95 of the Majority Report, it is said that the Committee:

> … is aware of the need to protect the confidentiality of these documents [i.e. the health tender evaluation reports] and has indicated that it will receive such information *in camera.* It certainly has no intention to release information such as comments made in the evaluation report that would disadvantage any of the tenderers.

1.59 Despite this statement, it is crucial to note that it is always open to the Committee or to the Senate to subsequently order the publication of such evidence.

1.60 In response to a further letter from the Committee setting out its reasons for requesting the unadulterated health tender evaluation documents, in a letter of 15 June 2001 the Minister has said that he has 'sought and received further legal advice and await[s] Departmental advice'. He further indicated that he would respond 'to the Committee as soon as I am in a position to do so'.

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[49] ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts,* Audit Report No. 38 2000-01, p. 63.

The Chair's Contradictory Comments

1.61 During the course of the hearing on 19 June, the Chair made the following comment:

> It is hard to make a judgment about the processes, because we are not too sure what time was specified, et cetera, but I shall put to you a scenario so that you understand where the committee is coming from. An event occurs that potentially benefits one of the tenderers involved in the bid. Legal advice is taken by OASITO, there is discussion with the probity auditor, and a set of circumstances and criteria are set down as to how to handle the process from there on, presumably to ensure that nothing else goes wrong with the process.
>
> Then you get to the day on which the tenders are received. Two out of the three tender parties are capable of getting their bid in by the time specified in the letter. For the one tenderer who is the potential recipient or beneficiary of this event that has occurred—whether they were or not is not relevant at this point in time—the process is altered again, from our perspective, to assist them to get their bid in. They ultimately win the bid. The great difficulty in all of this, without being able to get other than blank pages from OASITO to be able to examine some of this information, is to draw any conclusion other than to say that it appears that the process was skewed to assist this particular bidder.[50]

1.62 At the conclusion of the hearing the Chair made this comment:

> … I want to put on the record just for the sake of clarity that there has been a series of questions raised today in respect of the health cluster and in particular with respect to the leak. The committee has been concerned to deal with and look at the integrity of the tender process. Anything that has been raised should not be taken to reflect upon the tenderers or anything that the tenderers in that process have done. I wanted to make that clear in case there was a misconception about the nature of the questioning. Our main concern was about the process rather than the actual role of the tenderers.[51]

1.63 The Chair cannot have it both ways. His implied suggestion, as quoted above, that the successful tenderer benefited from the unauthorised disclosure and acceptance of the tender after the deadline, can only lead to the conclusion that the Chair is suggesting that the successful tenderer made use of the confidential information that they received, and that they framed their bid accordingly, and that they somehow gained some material advantage through the acceptance of the late tender. OASITO has said that the confidential information was provided unintentionally and IBM GSA has provided statutory declarations to the effect that no use was made of the confidential material pertaining to the other two tenderers.

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[50] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, p. 620.

[51] *Senate Finance and Public Administration Committee Hansard*, 19 June 2001, pp. 639 – 640.

1.64 The Chair cannot expect to hypothesise in this manner without casting unfavourable light on the successful tenderer. The minority Senators feel that it was inappropriate to raise this scenario. It is abundantly clear from the evidence provided above that OASITO in no way skewed the tender process to the advantage of the successful tenderer. No special treatment was afforded to IBM GSA. It is clear from the evidence that OASITO would have made the same decisions irrespective of who the tenderer happened to be.

1.65 A further crucial point in this regard is that the other two tenderers were informed by OASITO that there had been an unauthorised disclosure of their confidential pricing information to a third tenderer, and also that a tender had been accepted after the tender box deadline. It should also be noted that the two tenders that were received on time were left sealed until the third tender was received. If these tenderers were dissatisfied with the tender process, or considered that they had been unfairly disadvantaged it is reasonable to conclude that they would have sought legal redress. This point is acknowledged by the Auditor-General who said that: 'Unsuccessful tenderers themselves are able to test the validity of the assessment process in the courts, if they consider that there has been a breach of procedural fairness'.[52] It is significant then that despite the fact that the contract for the health group was signed on 6 December 1999, neither of the two unsuccessful parties have embarked upon a course of legal action. This would seem to indicate that each of them is satisfied that they were not disadvantaged, that they were treated fairly, and that the tender process was conducted with absolute probity.

Australian National Audit Office Audit of the Health Group

1.66 The Australian National Audit Office has decided not to conduct an audit of the health tender in 2001-2002.[53] From the evidence that the Committee has received, and taking into account the post-Humphry Review IT outsourcing environment, it is clear that such an audit is not required.

Senator Alan Eggleston **Senator Ross Lightfoot**
Deputy Chair

27 June 2001

[52] ANAO, *The Use of Confidentiality Provisions in Commonwealth Contracts,* Audit Report No. 38 2000-01, p. 64.

[53] *Senate Finance and Public Administration Committee Hansard*, 17 May 2001, p. 460.