COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE

Reference: The government's information technology outsourcing initiative

MONDAY, 21 MAY 2001

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SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE

Monday, 21 May 2001

Members: Senator George Campbell *(Chair)*, Senator Watson *(Deputy Chair)*, Senators Buckland, Lightfoot, Lundy and Ridgeway

Participating members: Senators Abetz, Allison, Brandis, Brown, Calvert, Carr, Chapman, Conroy, Coonan, Crane, Eggleston, Faulkner, Ferguson, Ferris, Gibson, Harradine, Harris, Knowles, Mason, McGauran, Murphy, Murray, Payne, Tchen, Tierney and Watson

Substitute member: Senator Eggleston for Senator Watson

Senators in attendance: Senators Buckland, George Campbell, Lightfoot, Lundy and Watson

Terms of reference for the inquiry:

For inquiry into and report on:

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.

WITNESSES

Committee met at 1.03 p.m.

CROMPTON, Mr Malcolm Woodhouse, Federal Privacy Commissioner, Office of the Federal Privacy Commissioner

PRIDMORE, Mr Brant Layton, Director, Compliance, Office of the Federal Privacy Commissioner

CHAIR—I call the meeting to order and declare open the eighth public meeting of the Senate Finance and Public Administration References Committee inquiry into the government's information technology outsourcing initiative. I welcome my Senate colleagues and witnesses. The committee prefers all evidence to be given in public. However, you may at any time request that your evidence or part of your evidence be given in private, and the committee will consider any such request. I should point out, however, that evidence taken in camera may subsequently be made public by order of the Senate. Before we commence, I wish to advise for the record that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. I also remind witnesses that the giving of false or misleading evidence may constitute a contempt of the parliament. I now invite the Mr Crompton and Mr Pridmore to the table. Do you wish to make an opening statement?

Mr Crompton—No, I do not; thank you very much.

Senator LUNDY—The first thing I wanted to turn to arises out of the Auditor-General's report into IT outsourcing. There were a series of observations and subsequent recommendations about management of privacy. I was wondering if you could give the committee a general update into the responses to each of those recommendations as identified.

Mr Crompton—In my papers here I have a list of the recommendations, so we might go through those one by one in a moment, if that is what you want to do.

Senator LUNDY—That would be terrific, yes, please.

Mr Crompton—It is probably important to remember that we are not the Audit Office and we are not involved in the discussions that might be happening between the Audit Office and the individual agencies audited by the Audit Office. So I may be giving you only a partial analysis of that. But the major change that is about to happen is the fact that the Privacy Amendment (Private Sector) Act will come into effect and completely change the legal arrangements between a Commonwealth agency, one of the contractors to the Commonwealth agency and the application of the Privacy Act, including the operations of this office. So, in terms of anything that we are dealing with, that is an overriding fairly major change that changes the future compared with the past.

Senator LUNDY—Sorry, just to clarify, that commencement date is 1 July?

Mr Crompton—It is 21 December this year.

Senator LUNDY—Okay, sorry.

Mr Crompton—The reason you probably thought that was that the act commencement clauses essentially said 1 July 2000 or 1 July 2001 or a year after enactment, whichever is the later. What has happened is that it took longer than expected to get through the parliamentary processes last year, which meant that that second clause kicked in. That is why it takes effect on 21 December this year.

Senator LUNDY—Thank you. Sorry, keep going.

Mr Crompton—Where we are now doing is looking forward in the sense of trying to make those provisions work. It means that the guidelines put out by the first Privacy Commissioner, Kevin O'Connor, in 1994 will be largely overtaken by those events. One of the things we will have to do between now and 21 December is issue a new advisory, if you like. Because there is this new set of provisions in place in the act, it is not a matter of updating what Kevin O'Connor has said. A lot of what he was dealing with has been not swept away but certainly changed by these new provisions. So we will have to rewrite it and we are currently in the process of doing that. I think those two things largely change a number of the things that the Auditor-General was concerned about.

Going below that, as we have said in our submission, we have been able to see the contractual clauses in each of the contracts relating to each of the IT outsourcing clusters to make sure that they do have appropriate clauses in there as measured against Kevin O'Connor's guidelines. If you like, our system has been to make sure that we had a close working arrangement worked out with OASITO so that it was doing the right thing as it went through outsourcing. Then, as we have done our audits since then, we have been checking that it in fact happened. The first checkpoint was to make sure OASITO knew what to do, and we were checking that they were doing it at that first level. The second level was to then be periodically checking contracts—that in fact they were there. The next level down after that is to see that the contracts are being abided by. Just in terms of the efflux of time that is the thing. The Auditor-General's report was saying that there has not been much of that—it would appear from his report—happening, although the implication was that it was getting under way. Our audit program is now moving into also checking in that area—in other words, that the contractual provisions are actually being abided by.

There is probably only one other thing that needs to be said, which is that, as Kevin O'Connor said in the actual document at the time and as we have said in our submission, the undertaking of outsourcing can create new privacy risks which therefore need to be managed. His guidelines set about managing that, and the changes to the act further set about managing that. But you then have to look at whether the privacy risk has actually come to pass. As far as I am aware, we have not actually had any of those risks coming to pass. It is not as though something has gone wrong with an IT outsourcing contract, as far as I am aware, certainly not at a sufficiently large scale for us to know about it. That probably rounds out the update that I can give you on the audit report.

Senator LUNDY—I have a couple of questions arising from that in terms of the process that you have been engaged in—like raising the issues, making sure that the contracts, or the requests for tenders effectively, have the appropriate guidance in them, then checking the contract clauses—and in terms of the contracts to date. Given there are two more than were

actually audited out there in the myriads of small agency contracts, have you seen all of those clauses as well—the small agency clauses as well as the big clustered contracts?

Mr Crompton—I cannot answer that off the top of my head. I am not sure whether Brant Pridmore knows the answer to that question; if not, we will take it on notice.

Mr Pridmore—We probably have not seen every contract. A normal part of our audit process is that when we look at anybody's operation we examine the contracts to make sure there are the appropriate sort of clauses in place to protect the privacy of people's information. We can provide you with details of exactly what we have and have not seen. We have just kicked off an audit process where we will be looking at a number of clusters with which we have had these sort of OASITO RFT type dealings in the past. We will be examining those in more detail fairly shortly.

Senator LUNDY—So is that like the group 8 contract and health group contract?

Mr Pridmore—That is right, yes.

Senator LUNDY—You had not looked at them specifically?

Mr Pridmore—We have seen them in the RFT stage.

Senator LUNDY—Right. But you have not seen it since the contracts were signed?

Mr Pridmore—I do not think so, but I would like to be able to confirm that.

Senator LUNDY—Just on that point, we heard last week that the Audit Office had decided, through a resetting of priorities, not to pursue a full audit of the group 8 and health group contracts in the same way they did with these, which means you are not going to have the benefit of the Audit Office giving you guidance or the department guidance—or guidance to whoever—on what the outstanding privacy issues are. Can you tell me, as far as your audit process goes, what you are using as your guide for your investigations for those outstanding contracts that have not been audited by the Audit Office?

Mr Crompton—Again, Brant Pridmore might be able to give more detail. But we need to undertake a risk assessment process before we decide which audits we will undertake in any one year and we do try to swap audit proposals with the Audit Office to make sure that we are not trampling on each other's patch. Quite clearly, having the Audit Office undertaking work changes the risk profile compared with if the Audit Office was not undertaking work, and we have found some of the Audit Office work to be very helpful in that regard. We do try to work with them rather than trample on each other's patch.

Senator LUNDY—When you said 'kicked off the audit process', I thought that meant you had made the decision to do those audits.

Mr Crompton—What I am saying is that it is an annual process. Each year we set ourselves an audit program.

Senator LUNDY—Have you decided to audit the group 8 and health group contracts in relation to privacy?

Mr Crompton—I am about to ask Mr Pridmore to see if he can answer that question.

Mr Pridmore—The answer is yes, we have scheduled that in our program. Indeed, the first stages of that program are under way.

Senator LUNDY—When you set your annual programs, is that the 'post budget pre the start of the next fiscal year' kind of time frame?

Mr Pridmore—Generally we do it on a financial year basis. So this process I am talking about would be essentially the first cab off the rank in the coming financial year.

Senator LUNDY—When would you expect to report back on those privacy audits and to whom?

Mr Pridmore—It is hard to be certain about timing. It does depend on what we find and what sort of follow-ups we would need to do. It is difficult to specify probably even a month at this early stage.

Senator LUNDY—Would it be this year?

Mr Pridmore—This calendar year?

Senator LUNDY—Yes.

Mr Pridmore—I would expect so. I would be surprised if it were not.

Senator LUNDY—Sorry, you were going to say—

Mr Pridmore—Our reports customarily go to the agencies involved and, of course, to the commissioner. A summary of them is also included in the commissioner's annual report.

Senator LUNDY—What capacity is there for those reports to be made available either publicly or to the parliament?

Mr Crompton—I must admit I would have to go back and think about that, because it is not something we have ever done up to now except in the summary terms that Brant is talking about. It has ended up being closer to an internal audit process in the way we work with the agency rather than being a very public external process. I think that has reflected the cooperation we have received from the agencies as we have audited them.

Senator LUNDY—Could you perhaps take on notice what opportunity there is for broader scrutiny of those audits when they are completed. Could you advise the committee if it is an internal audit to be delivered to the agency and it then crops up in your annual report as 'we did a privacy audit for this agency' and not much more detail—what path or scope there is for that

agency to then release that document publicly and whether or not there is any reason why they could not subsequently release that audit publicly.

Mr Crompton—Our annual report is more than just a table of whom we audited this year. The major findings do get summarised.

Senator LUNDY—I understand that. Can you take that other point on notice?

Mr Crompton—Yes.

Senator LUNDY—In terms of that assessment that you were looking forward, are those proposed privacy audits going to be addressed in the context of the forthcoming Privacy Act provisions or will they assess the privacy activities in relation to those IT outsourcing contracts to date, perhaps with some commentary on the changing provisions, given you are likely to have completed and delivered those reports to agencies prior to the new act coming into effect?

Mr Crompton—Many of the changes to the Privacy Act are about process rather than what needs to be in the contract in a sense of putting a clearer obligation on the contracting agency—in other words, putting an obligation in the act on the contracting agency to get it right rather than it simply being the Privacy Commissioner saying it ought to be done and it getting the support of government. Most of the other provisions are about giving the Privacy Commissioner the clear right to handle complaints and powers of investigation—basically, it does not matter too much whether what is going on is in the outsourcing entity or with the contractor. Much of what we would find would probably carry through with the changing of the act. Whether there need to be changes to the contractual provisions themselves in terms of future contracts being written, I cannot say off the top of my head. Maybe Brant can give some answers to that. I think we are probably thinking that through and writing it down. That is probably where we are at, at the moment. There will be considerable relevance, even though we will look at what is happening now rather than what is happening in the future, for future activity. The aim of any audit is how to make sure that the future runs properly.

Senator LUNDY—You made an observation that we would kind of know by now if something had gone dreadfully wrong. On what basis do you make the assessment that nothing has, given that you have not even looked at a couple of the other larger contracts?

Mr Crompton—Our intelligence system has got three streams. There are the auditing processes that we do—and, as I said, we are trying to run a risk management assessment on where we should audit. We are not trying to look at the boring bits; we are trying to look at areas with a high likelihood of it happening. The second area is complaints: what has happened by way of complaints coming in. The third area is general intelligence, the newspaper reports or some other way in which we see something happening which sometimes causes us to initiate investigations, which we have had to do periodically from time to time. No auditor, no matter how comprehensive, can be totally either prescient or omniscient. But we are not seeing anything that makes outsourcing activity look different from the rest of what we are looking at. That is the point I was making.

Senator LUNDY—You also mentioned that, with the introduction of the new act, it will change things quite significantly. I know this is an area that you have covered in various sub-

missions, but can you just summarise the basis of those changes that will occur with the new act in relation to the roles and responsibilities of both agencies and external service providers or the outsourcing companies?

Mr Crompton—Certainly. We have tried to summarise that in part 3.1 of our submission, page 4. I mentioned the first dot point a moment ago:

'...any Commonwealth agency contracting out services must include in the contract clauses that prohibit the contractor from breaching the IPPs.'

IPPs are information privacy principles That is an important component because the default set of privacy principles that apply in the private sector are the national privacy principles. The privacy principles that apply for Commonwealth agencies are the information privacy principles. That is making sure that it does not matter whether the activity is being undertaken by the originating agency or by one of its contracted service providers—the same privacy principles apply. There is a corresponding bit of the act that makes sure that the national privacy principles do not overlay the information privacy principles. So there is basically one set of rules that the contractor has to follow in terms of getting privacy right. The second dot point states:

'... if the contractor breaches such a clause, it is deemed to have committed an 'interference with privacy ...'

Again, that is about making sure that the legal structures that are in place with regard to the outsourced activity are the same as if it was being conducted within the agency. The third dot point is probably the most important change:

'... affected individuals can complain about the contractor direct to the Privacy Commissioner ...'

Until that change comes into effect, while I believe we could investigate a complaint that relates to a contractor getting it wrong, it would have to be via investigating the contracting federal agency. This makes the path simpler and more direct. I think that is probably the most important part of the changes to the legislation. The fourth dot point is the corollary of that:

'... the Privacy Commissioner has the same powers to investigate complaints against Commonwealth contractors as against Commonwealth agencies ...'

That is power to enter premises, power to obtain documents, power to take evidence and so forth. The last dot point on page 4 states:

'... even if no complaint has been received, the Commissioner has the power to investigate potential breaches ...'

Besides audit, one of our other streams is own-motion investigations. Again, we could probably do it obliquely already by investigating the contracting federal agency, but this allows us to look more directly.

The next point, which is on page 5, addresses a very specific concern that has been mentioned in times previously; namely, that the contracting entity might start using that personal information essentially for its own purposes rather than for the contracted purposes with the Commonwealth. That applies in particular to database formation for any purpose, but it has been specifi-

cally mentioned in terms of direct marketing. It is making sure that, whether it is within the agency or it is with the contracting entity, the same obligations with regard to direct marketing are in place— namely, 'don't'. Then in 3.2 on page 5 there are are a couple of the other elements that need to be place just to make sure the act works properly.

Senator LUNDY—I wanted to get further clarification on the information privacy principles and the national privacy principles. If you were to find a breach under the information privacy principles—applying to the external service provider or the contractor—would that automatically constitute a finding of breach under the national privacy principles for the agency, given their contractual relationship and the fact that you cannot sort of offload Commonwealth liabilities for those matters?

Mr Crompton—I may not have understood your question correctly, but let me try the answer. It could be that, depending on what a private sector entity is doing, part of its activities might be covered by the IPPs because that is a service that it is providing for a Commonwealth agency. Another part of its activities might be covered by the national privacy principles simply because it is in the private sector and it is not an exempt agency. But, theoretically at least, only one of those two sets of rules applies in any one circumstance.

Senator LUNDY—Sorry, I did ask it the wrong way round. The national privacy principles are the ones that are applying under the new act—

Mr Crompton—To private sector activity.

Senator LUNDY—I asked the question the wrong way round. If a private sector company that is contracted to the Commonwealth is found to have breached the national privacy principles, and you investigate them and it is in conjunction with their work for the Commonwealth, does that Commonwealth agency automatically become subject to a breach action, whatever that is, under the information privacy principles, given the contractual relationship between the two entities? It is a question about ultimate Commonwealth liability in the event of a privacy breach by a contracted party. Do you see what I mean?

Mr Crompton—I do but I think we probably still might be debating whether it is national privacy principles or information privacy principles applying—

Senator LUNDY—I am assuming it would be an issue of some ubiquity between both sets of principles.

Mr Crompton—Okay, let us get this clear. If it is the private sector entity—such as IBM, EDS or something else—and it is doing work for a bank, then the national privacy principles apply; but if it is doing work for the Commonwealth in one of the outsourcing contracts, the IPPs will apply. It does not matter whether the Commonwealth entity or the contracting entity is doing the work; the same set of principles apply. That is intended to make it simple, clean and fair, if you like. Then we come down to where there has been a breach of privacy or interference of privacy found—what are the liabilities? I am going to make sure that Brant answers this question, or we will take it on notice, but I think you would find that, if it was the contracting entity rather than the Commonwealth agency that had made the boo-boo, it would be that entity that suffered the liability for getting it right.

We need to remember that the scale of the liabilities has not been great by any measure, because up to now interference with privacy has rarely constituted something of great financial magnitude. It has been another form of hurt that has needed to be cleaned up or fixed up by the Privacy Act, but it has not often involved large financial hurt. But that is an observation on the side, because I think the most important point is that there will be the contracting entity, that private sector entity, that would be liable for its own mistake. Of course, when you get to any piece of work like this, there is the possibility of duck shoving. If it happened while a piece of information was moving between the Commonwealth agency and the contractor, was it the process of disclosure by that Commonwealth agency that was the cause of the problem or was it the process of collection by the contractor that caused the problem? Essentially, that is what we would have to investigate.

Senator LUNDY—Or any range of scenarios in between where there is effectively a complainant who, because it was a privacy breach that occurred in association with the receipt of a Commonwealth service, would in normal circumstances pursue their remedy through the Commonwealth. That would be expected to be the appropriate course, because the other scenario would be that the complainant would be forced, and this is what I am concerned about, to pursue their remedy through the external service provider—in other words, a multinational IT company—rendering the scope for them attaining a remedy pretty limited.

Mr Crompton—The point is that, once it is a complaint and we are investigating it, essentially we are doing the work.

Senator LUNDY—Sure, I appreciate that. But you will be faced with the same issues in taking on defendants who are well resourced and have international reputations to protect. I guess that is where this issue of liability really needs to be clarified sooner rather than later, particularly because I remember that a large part of the first Senate inquiry into contracting out was initiated on the basis of a Commonwealth Ombudsman's report which gave some very scary case studies of how the buck had been passed between agencies and contractors.

Mr Crompton—You are beginning to move beyond what the Privacy Act is about, and you probably need to talk to those people.

Senator LUNDY—I appreciate that, but the principle is about people who are seeking a remedy as a result of a contractual breach of some sort—in this case a privacy breach which would be a contractual breach if all of the boxes had been ticked off in terms of process. But the act does define a greater degree of specificity of what the rules are and what the law is in relation to handling privacy. Can I leave that with you?

Mr Crompton—I must admit that I do not know what the question is.

Senator LUNDY—The question is: if there were to be a breach of privacy, and the complainant, the person who felt their privacy had been breached, wanted to pursue a remedy—perhaps an apology or perhaps there was something more to it—would the Commonwealth or the outsourcing company be liable and whom would they take their complaint to?

Mr Crompton—Brant might be able to clarify that now. As I understand it, it would be the Office of the Federal Privacy Commissioner making a determination against the offending

respondent, who would be the contractor. If the respondent did not respond to the determination, then we would be proceeding to the Federal Court to seek the remedy through there.

Senator LUNDY—So your determination would be part or all responsibility, some part to the agency, some part to the contractor and so forth?

Mr Crompton—Yes, but we would have to leave it to the contracts and the courts to find out how far and down how many avenues we would have to pursue the issue. But, as I understand it, we would be pursuing the responsible entity or responsible responding entity, whichever it was.

Mr Pridmore—If I can just add something, I think it would be possible to have a scenario where both the agency and the contractor had breached their responsibilities. You could imagine a situation where an agency had not taken reasonable steps to ensure that the contractor was doing the right thing and there might be, as the commissioner said, some sharing of responsibility. You might have two separate breaches of the information privacy principles arising out of the one set of facts.

CHAIR—I think Senator Watson has some questions.

Senator WATSON—I have two things. You talk about contractors being explicitly prohibited from disclosing personal information collected under a Commonwealth contract for direct marketing purposes. That word 'direct' worries me a bit. Why was that put in? Why not just for 'marketing purposes'? It leaves the door open for people to say, 'This is not a direct marketing purpose.' There often could be indirect purposes, and I imagine that is how it could be used. That is an escape clause which worries me.

Mr Crompton—Senator Watson, there are quite a number of terms in the Privacy Act that are not given formal definitions in the definitions part of the act, and the term 'direct marketing' is one of many.

Senator WATSON—It is one that worries me though.

Mr Crompton—Yes, I was going to come to that. In the recently published draft guidelines on the interpretation of the national privacy principles in the private sector, the word 'direct marketing' is one of the many terms that we have tried to give meaning to. We are beginning to try to elucidate meaning for that term and many other terms in the draft principles.

Senator WATSON—Can you share that term with the committee on notice? Can you give that explanation to the committee?

Mr Crompton—I wish I had brought my copy of the draft guidelines with me so I could read it to you, but I am afraid I have not. It is on our web site; it is very easily found and we will do that for you. As I recall it, though, 'direct marketing' meant as opposed to a letter box drop up and down the suburb was something that appeared in your letter box which had your name and address on it or you had been chosen in some other more specific way to be targeted and in that sense it was direct. I have used the letterbox example, but whether it is the telemarketing—the phone marketing that happens late at night—or whether it is something that happens on email, it

is where, in some more directed way than free-to-air television advertising or letterbox drop, stuff has been done such that it becomes direct marketing. In that sense, 'marketing' without the 'direct' may not actually be using much, if any, personal information. I would also say that, arguably, that particular clause is redundant. It is a nice confirmation that direct marketing cannot be done, but without that clause being there, there would probably have been a breach of the information privacy principles anyway if it was used for any form of marketing other than that which the Commonwealth agency required of the contractor. So it is an extra clause, a sort of belt and braces job rather than anything else, I think.

Senator WATSON—I might take this up further, depending on how you have explained it in your guidelines. Obviously, there are some Commonwealth contracts which do permit marketing of personal information. Can you give us a list of all these? You will have to take that one on notice.

Mr Crompton—I very much doubt if we could. I think that would have to be asked of each of the agencies directly.

Senator WATSON—That is a bit of a worry as far as I am concerned. I for one might not want to be on some of those lists, because it might suit my private purpose or my business purpose not to be known and not to be on a certain list.

Mr Crompton—That is precisely what my predecessor had to investigate immediately before the—

Senator WATSON—You could almost have guilt by association for being on lists, for example.

Senator LUNDY—The ABN example was probably the sort of thing Senator Watson is alluding to, without qualifying the question he just asked.

Mr Crompton—Yes, it would be. But I think that the social security example before the 1998 election is probably a closer analogy to what Senator Watson is asking.

Senator LUNDY—Sure.

Senator WATSON—Both of them are really.

Senator LUNDY—But the question was asked: what examples exist in the Commonwealth agencies where information collected by the Commonwealth is used for marketing? The ABN example that was dealt with last year is a classic case of the Commonwealth knowingly selling and releasing information collected through a requirement of the law—that is, furnishing the government with details about the ABN, GST, et cetera—and then getting caught out by not having any strings or guidelines about how that information was subsequently used by those people.

Senator WATSON—To take it a bit further, people have had the opportunity of withdrawing from the ABN, saying, 'We prefer to be assessed.' The guidelines now permit people to opt out. If you are, for example, regarded as a hobbyist under the $50,000 rule or whatever it is, you can

say, 'I will pay full tax and I will not have to put in any returns because the cost of compliance is too high. I will scale my business back to be under the limits.' But then to suddenly find that you are on a list might be somewhat embarrassing when you have customers to whom you have said, 'No, I have not got an ABN,' and they say, 'Well, you are on this list.' Do you see the sort of situation where you could be faced with having to explain your position to suppliers?

Mr Crompton—I understand that, but, if you want me to provide you with a list of all marketing activities by Commonwealth agencies, I could not possibly do that.

Senator WATSON—Please would you answer it according to the best information you have; obviously you must have some.

Mr Crompton—We might have half-a-dozen examples.

Senator WATSON—Even that would be helpful. We will put a rider that we will have to contact other agencies and we might have to write to all the other Commonwealth agencies to find out by way of questionnaire. My next question is this: in this new legislation, are there any 'safe harbours', as we call them, as there are under corporate law?

Mr Crompton—Could you expand on that for me, please?

Senator WATSON—In talking about the new or extended legislation, are there any of what I call 'safe harbours' in relation to what is about to come in and in relation to what is already there?

Mr Crompton—Do you mean that some organisations are exempt from the coverage of the law?

Senator WATSON—No. There is a specific provision in company law, as you know, which means that, if the directors can offer a fair and reasonable approach that what they did should not have produced the outcomes that were produced, they can escape the full force of the law or escape the law altogether. That is what is called a 'safe harbour' provision.

Mr Crompton—In the privacy world, 'safe harbour' has come to mean something quite different, so I was being thrown.

Senator WATSON—Do you see what I am getting at?

Mr Crompton—I do. I do not know that there is.

Senator WATSON—In effect, it has made the implementation of corporate law very difficult as far as the regulator is concerned. We have had a lot of criticism of regulators, but they are faced with this problem all the time—the safe harbour provisions—in trying to get a conviction.

Mr Crompton—Yes. As far as I know, the Privacy Act is built the other way round. There are certain organisations that are exempt, or the act might exempt particular activities. For example, the use of the employment record as part of the employment relationship is exempt

under the act. Quite what that means we may well have defined in the courts at some stage. But I do not think there is an analogy in the safe harbour sense that you are talking about anywhere in the Privacy Act, because I think the Privacy Act has been built the other way round. We have an obligation on us when we investigate—

Senator WATSON—Can you take it on notice. I think it is an important point that we want to be absolutely watertight on. My other question is of a more general nature, in terms of assistance by politicians. Even if people give their permission, a lot of agencies just will not give information to politicians. This is very difficult, because a lot of people just cannot handle a face-to-face interview with a bureaucrat. They come in wanting a politician to help them, and they say, 'No, sorry, you have to excuse yourself. We will deal with that exclusively with the client.' That in itself is a real embarrassment. What about privacy provisions in terms of assistance by people such as politicians who are trying desperately to help people with a problem and are told, 'Nick out of it; we will deal exclusively with the client.' The client is in a position where they can be distressed, they can be completely ignorant, they might not have the financial resources. There are a whole lot of reasons why they come to a politician wanting their assistance. The door just gets closed in your face straight away. They come up saying, 'It is privacy.'

Mr Crompton—Generally speaking, and again Brant Pridmore may be able to give a clearer answer than me, if the particular individual which you are talking about had given a consent that the agency could release the information to you as the caring politician or whoever, that would be possible. There is a minor procedural issue there about gaining proper consent beforehand. But, in terms of the agency doing the right thing as far as it is concerned with the individual, I think that is a very good thing that the agency is not unwittingly given—

Senator WATSON—But some agencies under pressure will actually give it to you, while others will stand firm. It depends how sensitive the issue is sometimes, or how much information the agency really wants you to know.

Mr Crompton—I must admit I would have thought that if the elector and the parliamentarian had between them a written form of consent about the data being released to the parliamentarian, that probably ends the matter as far as the Privacy Act is concerned, and then it becomes a matter for other pieces of legislation.

Senator WATSON—What I am suggesting is that perhaps your agency should put on its web site how agencies should handle assistance measures in relation to privacy between the agency and, say, a politician. There is no set format. It can be very difficult and very time consuming. We then have to write down the answers and give them to the client. The client then goes away, and you are never quite sure if they have faithfully reproduced your questions. I think there should be a standard format to make sure there is consistency amongst Commonwealth agencies about the process or procedure that they go through in handling assistance in terms of privacy issues, whether it be through politicians or even through lawyers who are getting paid for it.

Mr Crompton—It does arise repeatedly in a number of sectors of the economy. It is not just lawyers, but banks, insurance companies—

Senator WATSON—That is right. That is why I think you need to issue some of your guidelines that you say you are posting on your web site to ensure there is a uniform process. You can name them if you like—that these are the steps that will be required in relation to politicians, for example—if you think that demarcation is necessary, and the nature of the request. You should have a standard form, for example, that you fill in.

Mr Crompton—One of the things that you need to be aware of is that we can certainly do that, but it would be an area where it would be guidance rather than a piece of subordinate legislation. We would be saying it just facilitates the matter.

Senator WATSON—Yes, facilitates. Obviously, you do not want it in the form of legislation; otherwise our statute books will be filled with information that we do not really need. But I think it would be good if you had some guidelines to make sure that each agency has a consistent policy in terms of assistance where there are privacy issues, that is all.

Mr Pridmore—If I could add something to that, the Privacy Commissioner has issued a short guideline about the provision of information from agencies to members of parliament in relation to constituents in response to queries made over the phone. It really talks about what sort of assurance the agency needs that you are talking to whom you think you are talking to.

Senator WATSON—That is fair enough. I do not object to that. You can ring back; you can do all sorts of things to prove—

Mr Pridmore—Yes, so we did put out some advice on that matter, although I cannot remember exactly which year—

Senator WATSON—Perhaps you could give that to us. But there is a need for some sort of standard, whether it is by letter, by personal contact, by phone.

CHAIR—Have you finished, Senator Watson?

Senator WATSON—Yes, I think so.

CHAIR—I would like to ask a couple of brief, probably obvious, questions. Is the role of the Privacy Commissioner a proactive or a reactive one? In other words, are you looking essentially for breaches of the acts or is it also part of your role to look at weaknesses in the contractual arrangements that may actually lead to breaches of the Privacy Act?

Mr Crompton—I think the answer to that is: both. Certainly, we are intended to be the complaints handler. But through the audit process that we have in terms of the Commonwealth's contracts with service providers, we would also be looking for systemic issues by active search rather than simply waiting for a complaint to come in.

CHAIR—When you do that, do you also examine the security of data that is held or potentially held by contractors—in other words, what provisions they make for the security of that data?

Mr Crompton—Brant would have a lot more to say about this than I have, but security is one of the issues that is a regular part of our audits, yes.

CHAIR—Have you come across experiences of data being held offshore by contractors when the contractor is a multinational corporation? How would the act operate, for example, if you had a multinational corporation as a contractor, or a company based overseas who was holding data offshore, and there was a breach of the security on that data?

Mr Crompton—As I recall, the Privacy Act seeks to reach overseas under such circumstances—essentially, as strongly as is possible against the Constitution and against the legal limits of the Commonwealth. It would certainly have at least some reach overseas, but I doubt that anybody could guarantee that you could make that stick under all circumstances.

Senator LUNDY—So you could not necessarily mount a prosecution if there was a breach of privacy with the data held overseas and that was an agreed provision of the contract?

Mr Crompton—What would happen is that at least the start of the process would be with the Australian entity or component of that.

CHAIR—The point I was coming to is that, if there is that degree of uncertainty about your capacity to administer or exercise the objectives of the act over the security of the data, is that good reason to be suggesting to Commonwealth agencies that part of their contractual arrangements should be to the extent that data is not held overseas?

Mr Crompton—I would be putting it the other way around: that the obligation is on the contracting agency, the Commonwealth agency, to ensure that whatever arrangement it comes up with, whether it moves data overseas or leaves it within Australia, does not compromise security. I think it is much better to think of it from the other way round—namely, that the agency has an obligation to make sure that security is not compromised.

CHAIR—I accept that, but, at the end of the day, if it is compromised, there ought to be a capacity for that to be redressed.

Mr Crompton—Yes. If that cannot be done, then the Commonwealth agency should not be entering into the contract in the first place.

Senator LUNDY—I have a further point on that. I guess what I am looking for is some direction from the Privacy Commissioner's office as to what is the best course of action for the contracting agencies that will remove as much ambiguity from their ability to manage privacy and security. In fact, from what you have described, it seems that the best way to remove that ambiguity is to recommend that they do not allow the management or holding of that data outside the Australian jurisdiction, for all of those reasons. But you have not done that, and I guess the question is: why are you choosing not to make that part of your recommendations?

Mr Crompton—Which recommendations?

Senator LUNDY—In what you are advising the government agencies to do with respect to handling and managing the security and privacy of data under the outsourcing contracts—the way that you responded to the outsourcing audit report, for example.

Mr Crompton—I will give you an analogous example as to why you have to be so careful about being overprescriptive. In times past, it has been believed that the only way of making sure that information does not leak from one computer installation to the other is physical separation. That is, in the data warehouses dealing with Commonwealth functions and dealing with bank functions and so forth, you have separate computers—

Senator LUNDY—With all due respect, I am not talking about technology and the protection of technology, but about a jurisdictional issue—

CHAIR—Senator Lundy, just let Mr Crompton make his point and then, if you are not satisfied with the answer, you can come back to it.

Mr Crompton—The point I was making was that these days it is considered that you can build technological security to the point where that is no longer necessary to achieve the guaranteed separation. So, if we had come out with a statement at some stage which said that you should only ever have outsourced Commonwealth data operating in a separate computer, we could unwittingly be requiring the Commonwealth to pay a higher price than it needs to get the results that it wants. I accept your point that the security risks need to be identified and exposed, but you do have to be very careful, in writing the kind of guideline that you are talking about, that you are not unwittingly crossing off an option that makes a lot of sense. Certainly we ought to take on board the question that you have asked in terms of whether sending it overseas inherently compromises the data or its integrity in some way—

Senator LUNDY—Or Australian law.

Mr Crompton—But we need to be extremely careful that we are not also unwittingly crossing off efficiencies that will be properly contained in terms of the risks that they create.

Senator WATSON—We find that now, because any form of security comes at a cost. You have to weigh up just how much security you really want.

Mr Crompton—Yes.

Senator WATSON—I would not like to see that stated as a general principle, because otherwise you are just lowering the common denominator unnecessarily. The security has to be the highest that is commercially achievable relative to all the risks involved.

Mr Crompton—Exactly, relative to all the risks involved, including the risks of damage.

Senator WATSON—Yes.

Senator LUNDY—Where does it state in your charter that you have to take into account cost efficiencies to government in the advice that you provide and the recommendations you give?

Mr Crompton—That is section 29 of the act.

Senator LUNDY—So it explicitly puts costs out there—

Mr Crompton—I am sorry, I have not memorised the section, but its effect is that we have to balance the ability of government to govern and the ability of business to do business with the public interest in privacy.

Senator LUNDY—Sure, but this is a question specifically in relation to cost. You have drawn out cost efficiencies as a motivation for why it would be held offshore, and I accept that. That is absolutely true. There are all sorts of global databases out there. What I want to know is: where does it enter your scope to make determinations in your recommendations on what the cost efficiency trade-off is, specifically costs?

Mr Crompton—It is no more specific than section 29, and I believe the point that you are raising is covered by section 29.

Senator LUNDY—Have you had any submissions or perspectives put to you that you can offer up as a test case or something like that in that regard?

Mr Crompton—No.

Senator LUNDY—So that is something you have drawn out on your own initiative?

Mr Crompton—I would have to say mainly in the last half hour in the sense of the questions that you are putting to me.

Senator LUNDY—No worries. I have a couple of other specific questions. Going back to the issue about the complainant and the Federal Court, if you pursue a remedy in the Federal Court—that is, you have a finding against a contractor or private entity in association with a government contract—is it the Privacy Commissioner that takes that contractor to the Federal Court?

Mr Crompton—Brant can probably answer this one better than me. As I understand it though, the act is quite flexible in that area, so I think any of the parties could. The individual complainant could initiate it.

Senator LUNDY—So the complainant could be the one who could take it, okay.

Mr Crompton—I would expect we would be a fairly active party in seeking enforcement, because that is part of our role. But I would also have to say that, seeing we have not had to do that in the whole of the life of the office, it is one of those unknown areas in terms of actual practice, because the decisions of the office have been respected. We have not even often had to go to the point of making a determination to get a result. As I recall it, we have had to do two determinations in 10 years, even at that level. I do not think we have ever had to go to the courts to have the determination enforced.

Senator LUNDY—I will flag my concern, which is that, in a case of ambiguity arising between liabilities of the Commonwealth and the outsourcing contractor, that could give rise to your decision making on whether or not you pursue a Federal Court remedy if, for example, the best counterargument put to you by the contractor was, 'This is a bit of a test case as to whether it is us or them.' Do you see what I mean? If that is the case, what scope does the complainant have to pursue the court action? You have said that is there anyway. I guess I raise that as a concern.

Mr Crompton—Sorry, are you asking me to answer a question?

Senator LUNDY—No, I do not think so. I think I am raising it as a concern. My final question is: did you have discussions with Blake Dawson Waldron, who were retained by OASITO to advise them on privacy related matters in the outsourcing contracts, and, if so, what was the nature of those discussions and contact?

Mr Crompton—We may have to take that one on notice unless Brant can recall it immediately.

Mr Pridmore—I am not aware of any direct contact, from my memory of the file. I would need to revisit that.

Senator LUNDY—If you do not mind, we would be interested. I should ask too whether you have made a response in writing to the Humphry report and what comments or views you have on the Humphry recommendations, given the strong weighting he gave to security and privacy matters in respect of his findings—findings that, as we all know, were accepted by the government?

Mr Crompton—We have not provided any response to the Humphry report, nor were we asked.

Senator LUNDY—Is it your intention to make some formal observations about the findings of that report, given the weighting on security and privacy matters?

Mr Crompton—It was not.

Senator LUNDY—Okay.

CHAIR—I think that brings us to the conclusion of the hearing. Are there any concluding comments you wish to make?

Mr Crompton—No, thank you very much indeed.

CHAIR—Thank you for your time. That concludes today's public hearing. Those interested in following the inquiry should refer to the committee's Internet page, which will provide information about the progress of the inquiry on an ongoing basis.

Committee adjourned at 1.58 p.m.