



COMMONWEALTH OF AUSTRALIA

# Official Committee Hansard

## SENATE

FINANCE AND PUBLIC ADMINISTRATION REFERENCES  
COMMITTEE

**Reference: The government's information technology outsourcing initiative**

TUESDAY, 19 JUNE 2001

CANBERRA

BY AUTHORITY OF THE SENATE

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**SENATE**  
**FINANCE AND PUBLIC ADMINISTRATION REFERENCES COMMITTEE**

**Tuesday, 19 June 2001**

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

**Senators in attendance:** Senators Buckland, George Campbell, Eggleston and McLucas

Substitute members: Senator Greig for Senator Ridgeway; Senator Eggleston for Senator 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**

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**Committee met at 12.07 p.m.**

**MORAN, Mr Peter, Assistant Secretary, Information Technology Group, Department of Health and Aged Care**

**PODGER, Mr Andrew Stuart, Secretary, Department of Health and Aged Care**

**HARMER, Dr Jeffrey Allan, Managing Director, Health Insurance Commission**

**THOMAS, Mr Robert Septimus, General Manager, Information Technology Services, Health Insurance Commission**

**BRIDGE, Mr John, Senior Director, Office of Asset Sales and Information Technology Outsourcing**

**SMITH, Mr Ross, Chief Executive, Office of Asset Sales and Information Technology Outsourcing**

**WHITHEAR, Mr Rod, Senior Director, Office of Asset Sales and Information Technology Outsourcing**

**WILLIAMS, Mr Neil, Director, Office of Asset Sales and Information Technology Outsourcing**

**YARRA, Mr David, Executive Director, Office of Asset Sales and Information Technology Outsourcing**

**CHAIR**—I declare open the seventh public hearing of the Finance and Public Administration References Committee inquiry into the government's information technology outsourcing initiative. I welcome my Senate colleagues and the witnesses.

Before we commence, for the record I wish to advise that all witnesses appearing before the committee are protected by parliamentary privilege with respect to evidence provided. 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 point out, however, that evidence taken in camera may subsequently be made public by order of the Senate. I also remind witnesses that the giving of false or misleading evidence may constitute a contempt of the parliament. Does anyone wish to make an opening statement?

**Mr Smith**—No thanks, Mr Chairman.

**Senator BUCKLAND**—We have received a letter from you now explaining that your secretary provided a disc, that you have taken the actions described to recover that disc from the tenderer, and that you do not therefore think that it was a leak in those terms. Is that what you are telling us?

**Mr Whithear**—I think the term ‘leak’ is often used to describe a situation where material, documentation, might be provided intentionally to another party. I just wanted to clarify that there was no intent on the part of OASITO in particular—that it was an accidental disclosure of information.

**Senator BUCKLAND**—Were there no markings on the disk at all to say what it was or do you just leave blank disks lying around?

**Mr Whithear**—I cannot confirm whether there were markings on the disk or not. My assistant provided the disk to the company concerned so I did not actually ever see the disk to see whether the actual material was identified on the outside of the diskette.

**Senator BUCKLAND**—Am I right in believing that the disk came back?

**Mr Whithear**—Yes.

**Senator BUCKLAND**—And you have not seen it?

**Mr Whithear**—It is sealed. It is two years ago. I cannot recall whether I saw it before it was sealed in an envelope or not at this point.

**Senator BUCKLAND**—Given that it is the subject of an inquiry and we are here again today about that, have you made no efforts at all to check that information, knowing you were coming here again today?

**Mr Whithear**—Not to check what was on the outside of the disk, no, Senator.

**Senator BUCKLAND**—Have you checked the contents of the disk since it has come back?

**Mr Whithear**—We are aware of the contents of the disk and the nature of the information on it, yes.

**Senator BUCKLAND**—And you have made no personal effort yourself to confirm what you have been told; is that what you are telling me?

**Mr Whithear**—Not quite. The diskette has been sealed in an envelope. Given that we were aware of the content of the disk at the time and the nature of that material and it was held on a secure evaluation LAN—a copy of that; it was only a copy of a document held on the LAN—I saw so real need to break the seal on that envelope and reconfirm the content of that disk.

**Senator BUCKLAND**—So in fact that disk could now contain copies of Bugs Bunny or anything else, rather than the information that was sent through to the third party?

**Mr Whithear**—One of the reasons it was sealed in an envelope at the time was just to maintain it in the state in which we received it back. I did see the envelope, reading through files over the last few days, and the seals remain unbroken.

**Mr Smith**—What is important is that we are aware, and we have given testimony to the Senate on past occasions that we were aware, that the information contained on that disk contained pricing for all bidders in relation to this health process. We have given testimony to that effect in the past. That disk was sealed and remains sealed.

**CHAIR**—Just on that issue, Mr Smith: at the time the disk was passed from the Health Group Financial Evaluation Team member to the member of OASITO, was there any correspondence that accompanied the disk?

**Mr Smith**—The answer to that is no. The sequence of events, on which I think we have given testimony in the past but I will briefly run through them again, was that one of the bidders called us to say that their facsimile copy of information was illegible and could they have a soft copy of the data. One of OASITO's staff members requested Mr Whithear's executive assistant to go to the evaluation centre and request the pricing information that was contained in that facsimile on disk. The executive assistant, having received that, went and passed it to the bidder who was waiting for it on the upper floor of our building. There was no exchange of correspondence, as I understand it, other than the transfer of the disk.

**CHAIR**—There was no checking of the disk to see what detailed information it contained?

**Mr Smith**—As we have previously testified, that is correct. Immediately following that event, we realised that there should be processes put in place to ensure that that would not happen. I 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. That process was put in place immediately after the event.

**CHAIR**—That is essentially recognition that there was a fault in the system?

**Mr Smith**—It was an inadvertent error which we have said in the past that we deeply regret. It is one of those things that do occur in a major, complex project like this. We did move very swiftly to put in revised processes to make sure it did not happen again.

**Senator BUCKLAND**—We have been provided with a 3 September sign-off letter by OASITO on the health group tender process. What other probity advice was given by Mr Marks specifically after the unauthorised disclosure?

**Mr Whithear**—Mr Marks was involved in the action that took place subsequent to that disclosure including the meetings with the other tenderers and several other discussions with us. I do not recall whether there is any additional advice.

**Mr Smith**—Could you refer me to this 3 September letter that you are referring to? It is not one that I am familiar with.

**Senator BUCKLAND**—It is a September sign-off. It is a letter from the probity auditor, Stephen Marks, dated 3 September.

**Mr Smith**—We were asked last time to provide other sign-offs or advices that may have been provided by Mr Marks as probity auditor. We took that question on notice. That response is due shortly with you. It is still being considered as to whether it can be made available or not. I am aware of at least one other written advice that Mr Marks gave us as to how we should proceed in handling the matter. That particular correspondence is subject to a question on notice from the last Senate estimates or the last references committee hearing.

**Senator BUCKLAND**—Why would it not be available to us?

**Mr Smith**—It is not a question of whether it will or will not be available. It is going through a process of consideration as always occurs with questions on notice. We have already given you the 3 September one. In my view, there will be inherently nothing in it to be a reason why it would not be provided but it is going through a process of consideration. We would hope to have a decision on that with you shortly.

**CHAIR**—We did ask that any documentation relevant to this matter be brought along to the hearing today. I presume you have a copy of that advice here. Setting aside the argument of whether or not the committee should have access to the contents of that advice, the other part of the question, which I think is relevant from our point of view and which I do not see any reason why you cannot answer, is: how many advices were provided by the probity auditor in respect of this matter, including the advice of 3 September which was the sign-off?

**Mr Smith**—I am aware that there are only two pieces of written advice. In answering your question on notice, I am not up to date on whether that is entirely accurate. I am aware of two, the one on 3 September and one on about 29 July. Whether there are others, I would have to check. I can check with my people sitting behind me and give that to you if that is appropriate.

**CHAIR**—When you are checking, could you ask if, during the period 29 July to 3 September, there was oral advice given by the probity auditor. Was that recorded in the department? Were file notes kept of that oral or verbal advice? How many advices were provided by the probity auditor over that period?

**Mr Smith**—I can be reasonably confident that a number of conversations took place with the probity auditor. I could also be reasonably confident that they were not documented conversations. They were in the nature of what Mr Whithear just referred to. Mr Marks attended with us, as we previously testified, in our discussions with the bidders concerned. He was in those meetings. There are file notes of those discussions, which were signed, as I recall, by the probity auditor as a correct account of the discussions we had with the bidders. But there would have been a number of discussions going on between us which would not have been recorded. Whether they were in the form of formal advice, I do not recall, other than we were strictly following the probity and legal advice in the way in which we handled the matter.

**Mr Yarra**—It is also likely that Mr Marks was involved in the health project from 29 July forwards to its completion in the normal way—that is, he would have attended steering committee meetings, he would have been consulted on issues as they arose as we brought the project to completion, and he would have given his advice on those often small issues orally or in committee. The comments he made may or may not have been recorded in minutes of that committee.



**CHAIR**—Would the probity auditor, Mr Marks, have had access to all of the relevant material or information that was available to both OASITO and the health department related to this leak? For example, would he have had access to the legal advice from Blake Dawson Waldron?

**Mr Whithear**—He did.

**CHAIR**—And did he have access to any other documentation or information related to this?

**Mr Whithear**—As a general matter of Mr Marks's 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.

**CHAIR**—Did Mr Marks ask to see all the relevant information relating to the leak, for want of a better term?

**Mr Whithear**—I cannot recall whether he said, 'Can I see all things that might be pertinent to this,' but we certainly did share the information that we had.

**Mr Yarra**—I think we could safely say that his access to documents was unconstrained.

**CHAIR**—Yes I understand that, Mr Yarra.

**Mr Yarra**—Anything that he requested—and we cannot remember what he requested—he had access to in order to form his views.

**Mr Smith**—I could give you my assurance that I was the one who first spoke to Mr Marks about the incident. I was the one who walked him through all the details of all the knowledge that I had at the time. He had full access to the sequence of events—who had said what and who had got what. He subsequently sat with us—he went with us to visit the bidders and sat in on those discussions. He was deeply involved. On the question of, 'Did he get everything that he ever asked for?' I can say to you one hundred per cent that I hope that he did. That is our normal practice. He certainly was aware of all the facts. There was nothing that I held back from him in relation to the incident.

**CHAIR**—I suppose you have in part answered my question, Mr Smith, which essentially was not so much what Mr Marks sought but whether Mr Marks was offered everything that was available from OASITO. You are saying to me that as far as you are concerned the answer to that is yes.

**Mr Smith**—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 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.

**CHAIR**—Was that also the case with respect to the health department?

**Mr Moran**—We were unaware of the inadvertent breach at the time, Senator, so we had no idea of what was happening at the time. What Mr Smith has said is broadly consistent with, if you like, my inquiries at the time that I became aware of the issue.

**CHAIR**—When did you become aware of the breach?

**Mr Podger**—I became aware of it at a meeting on 5 August with Mr Smith. Mr Smith indicated to me the process he had been through with the probity auditor at that time. What he said to me is, in my view, consistent with what he said just a few moments ago.

**Senator BUCKLAND**—At the time that the leak—or whatever you want to call that—occurred, when the third tenderer got copies of the first and second tenderers' bids, my recollection of the evidence is that they were spoken to and they were happy with the process to continue. Was that advice from the offended bidders given to you in writing or was it just a verbal, 'Yes, don't worry about it'? Was that in written form?

**Mr Smith**—No. I think we may have testified in the past that it was not in written form. It was in the presence of the probity auditor. The probity auditor, I and Mr Whithear were involved in those discussions. We made a file note. Just to give you a general sense, I want to make the comment that no-one in this process was happy with the event.

**Senator BUCKLAND**—I do not think that we are questioning that.

**Mr Smith**—It was a very serious issue. 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. But, to answer your question, they were not available in writing.

**Senator BUCKLAND**—Could you please make copies of those file notes available?

**Mr Smith**—We will take that on notice, Senator, yes.

**Senator BUCKLAND**—You may have to refresh my memory, and forgive me for that as I have had a cold and I think some of this went out with the cold, but in respect of the period of time between knowing that you had inadvertently, as you say, provided information to the third party, how much time elapsed between that and the first and second parties being notified of the breach?

**Mr Smith**—There is testimony of a sequence of events and we could just run them by you again to make sure that you are clear.

**Senator BUCKLAND**—If you would.

**Mr Whithear**—On 27 July 1999, tenderer information, that is relating to each tenderer, was faxed to each tenderer for checking, to check whether our assessment of that material was accurate. On 28 July, one tenderer requested a soft copy of that material by telephone. On the same day, a diskette was obtained from the evaluation team, and again on the same day, that diskette was provided to a tenderer. Later that afternoon, that tenderer called OASITO to advise that they had been provided with a diskette which appeared to contain information relating to other tenderers, and 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.

We, OASITO, retrieved that information also on 28 July. The minister's office was advised on that day by telephone of the inadvertent disclosure. The probity auditor was also contacted and advised of that event on that day, as were the legal advisers. On 29 July, OASITO officials briefed the probity auditor in person and the probity auditor wrote to OASITO proposing a course of action to address the situation. On 29 July, the first statutory declaration was provided by the tenderer from the individual that opened the diskette and on 30 July further statutory declarations were received from the other parties that could have had access to the information. On 30 July, Blake Dawson Waldron, as legal advisers, wrote to OASITO advising of legal risks and proposing a course of action to address the situation.

On 30 July, OASITO and the probity auditor met with the chief executives of the other two bidders and advised them of the situation. As we have testified, both chief executives concurred that the process should continue unchanged. On that day, a formal brief was provided to the Minister for Finance and Administration. On 2 August, the chief executive of OASITO wrote to the heads of organisations involved in the health group, and subsequent briefings were provided over the next few days. On 2 August, revised pricing was submitted.

**Senator BUCKLAND**—Were any commitments given by you to the offended parties as to what you would do to try and rectify the error?

**Mr Whithear**—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.

**Senator BUCKLAND**—Did any of the three tenderers see the advice that you have just referred to from Blake Dawson Waldron?

**Mr Smith**—I do not recall, Senator, but I would think it was unlikely. When we went to them, we explained to them what we proposed to do, how the matter would be handled and how

it had been handled, step by step. Nothing was retained from them, but I would think it was most unlikely that we would have given them the Blake Dawson advice.

**Senator BUCKLAND**—Did you advise them to seek their own legal advice, or did they advise that they were going to do that?

**Mr Smith**—No, we certainly would not have presumed to advise them on how they should handle the matter, Senator, and my strong recollection is that no-one made any reference to seeking legal advice.

**Senator BUCKLAND**—Did any of the parties see the probity auditor's advice?

**Mr Smith**—We would have to check that, Senator, but I do not think so, either. I do not think we took with us copies of the advices, but we would have walked through the key elements of how we were going to handle the process. I just do not think that we would have divulged that information to them specifically, other than to reinforce to them the steps that we were taking as suggested by both advisers.

**Senator BUCKLAND**—Are you aware whether any of them may have spoken with the probity auditor or Blake Dawson?

**Mr Smith**—They certainly would have spoken to the probity auditor, because he was present at the meetings. Whether they independently spoke to Blake Dawson, I am not aware of that. That is a question you would have to address to them.

**Senator BUCKLAND**—Will you check that and let us know what the outcome is?

**Mr Smith**—Yes.

**Senator BUCKLAND**—The committee has been advised of the different dates for closing of the repricing bids. What time was notified in writing in advance?

**Mr Smith**—Two letters went to bidders: one referred to repricing, or some words to that effect, and to 2 August; and one referred to requiring information to be with us by 9 a.m. on 2 August.

**Senator BUCKLAND**—There is a bit of confusion about the actual closing time. I can recall seeing '9 a.m.' and 'midday on 2 August'.

**Mr Smith**—On a previous occasion, I was asked what the time was. I said that our normal practice was to close things at four or five in the afternoon, but that we would check the matter. The letter specifically referred to 9 a.m. on Monday, 2 August. A previous letter that was referring to this matter had said, 'You will be required to put information in on Monday,' without a reference to 9 a.m. A subsequent letter then said, 'We are writing to advise you that it should be 9 a.m.' There was an element of, perhaps, uncertainty about that time.

**Mr Whithear**—This is one of several repricings that occurred during that tender process, as do occur through these major transactions. There is clarification of agency requirements. The agencies, as they went through these tender processes, tended to learn more about their IT requirements. Their estimates of the volumes of various IT components would vary and sometimes we had to allow tenderers the opportunity to vary their prices in accordance with those varied volumes.

**Senator BUCKLAND**—Who was present when the tender box was opened on that day?

**Mr Whithear**—The probity auditor representative of Mr Marks'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.

**CHAIR**—Mr Whithear, why would you use the term that you were present for 'parts of the day'? The closure was 9 o'clock. There were only three bidders, as I understand. It would not take that long to take them out of the—

**Mr Whithear**—Sometimes the volume of these tender documents is such that the process which might ordinarily sound like one of cutting some string and brown paper is actually a bit more involved than that. We had franking machines, if you like, that would run through and perforate the originals of the pages provided. That might take several hours and I would not attend for all of that time. I might not check on the progress of the tender opening and franking. We often ask people to sign the financial pages just to make sure that those were the financial pages and they could not be substituted by any means during the process. That is the reason for my reference.

**CHAIR**—Now I understand it. That is the process once you open up the tender box.

**Mr Whithear**—Yes.

**CHAIR**—But at the point of opening up the tender box at 9 o'clock, how many tenders were in the box?

**Mr Smith**—That is part of the difficulty Mr Whithear is having with trying to explain to you what happened on that day. As I said to you, 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.

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 pric-

ing. 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.

The legal advice that we obtained at the time said that under the tender rules we had no obligation to report this matter to the other two parties. However, on 4 August we sent a letter to both other parties indicating that we had received some pricing late on that day and that the chief executive had exercised his delegation to accept that late pricing and that in the interests of transparency we were advising them that this had occurred and that we intended to evaluate the third set of pricing.

**CHAIR**—Mr Smith, who provided the legal advice on that day—Blake Dawson Waldron?

**Mr Smith**—Blake Dawson Waldron.

**CHAIR**—Is that written advice?

**Mr Smith**—That is written advice.

**CHAIR**—Can a copy of that advice be made available to the committee?

**Mr Smith**—We would have to take that on notice.

**CHAIR**—Could I just go back, because there is a bit of confusion here in my mind about some of these dates. I think earlier on it was said that the probity auditor provided advice on 29 July in respect of the process that should be followed, given the leak that had occurred, or the problem that had occurred, and I think it was said that the probity auditor had had access to the legal advice. Did he have access to that legal advice in writing?

**Mr Smith**—Are you saying: when he gave us the advice on 29 July did he have access—

**CHAIR**—Yes.

**Mr Smith**—to the physical copy of the Blake Dawson advice? I suspect he did have a physical copy, but could we check that for you? We sought the advices in parallel. I telephoned them both. I think that is a question on notice as well, but we will check that fact. We sought them in parallel from them both. I suspect he would have seen a physical copy of the Blake Dawson advice before he settled his, but we can confirm that for you.

**CHAIR**—You discussed with the probity auditor Mr Marks the process to be followed in finalising this tender process, given the problem that had occurred.

**Mr Smith**—Yes.

**CHAIR**—Mr Marks presumably set out in writing the process that should be followed, and you accepted that process. Did you seek a variation to the processes he advised on, or not?

**Mr Smith**—We have testified in the past that we followed the advice strictly, as best my recollection is, on both the legal advice and the probity advice.

**CHAIR**—Did Mr Marks provide any advice in respect of the closing of the tenders?

**Mr Smith**—My recollection is that he advised us that we should not extend the closing date, but we will check that for you as well.

**CHAIR**—If he provided that advice, did you discuss with Mr Marks your ultimate decision to extend on the day?

**Mr Smith**—Well, we did not extend the closing date; we accepted a late tender.

**CHAIR**—Sorry, Mr Smith: if it was a ballot the closing date would be 9 a.m. on the morning of whatever date was specified.

**Mr Smith**—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.

**CHAIR**—I understand the distinction you are trying to draw. It is obviously a distinction that you would want to draw, given the events that have occurred. But that is not the question that I am asking. I am asking: did you discuss the process with the probity auditor? Surely you would have drawn his attention to all of these provisions including the provision for the receipt of late tenders or late pricing in respect of this matter.

**Mr Smith**—Sure.

**CHAIR**—And you have said he provided you with advice that you should not under any circumstances extend beyond that date at that time.

**Mr Smith**—Correct, and we did not. I would argue that we did not extend the closing date, but—

**CHAIR**—Did his advice go to date or the time and the date?

**Mr Smith**—No; he said, ‘You should not extend the closing date,’ as I recall it. But, as we have testified, the probity auditor’s representative was with us from the start of the morning of 2 August and held the tender documentation under her control until all bids were in, so the probity auditor’s representative was with us the whole of that morning and was fully aware of the process that was unfolding on that day.

**CHAIR**—I accept that. What I am trying to establish is this: you said you consulted the legal people about providing for the late tender; did you consult with the probity auditor? Did you discuss the matter with his representative? Did his representative discuss the matter with him,

given that he had given you specific advice in respect of the closing of the tenders—whether it went to the time and date or just the date?

**Mr Whithear**—We certainly discussed the receipt and opening of the tenders with Mr Marks's representative. I believe that she was in contact with him personally, because we were relying on the probity auditor's advice there. 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 to ensure equity as best as possible. 'Leave expectations as they are,' I think was his advice.

**Mr Smith**—My full expectation would be that the probity auditor's representative on site would have discussed the matter with Mr Marks. I can check that, though. We can seek that advice if that is what you would like. I just could not contemplate a situation where his representative was on site and this event was happening and she would not talk with him, but we could confirm that for you.

**CHAIR**—Stranger things have happened. Lots of strange things have happened in this process, I understand.

**Mr Smith**—It has been a very difficult process, I agree. But it is a matter of fact; we could check that for you.

**Mr Yarra**—Can I add that the probity auditor sat there all day with these documents—

**CHAIR**—The probity auditor's representative sat there all day.

**Mr Yarra**—Correct. Participating fully in this tender receipt and tender opening process. With that full involvement minute by minute and hour by hour plus the support of our legal advice, we were very comfortable in how we handled it on that day.

**CHAIR**—But are you aware, Mr Yarra, whether or not the probity auditor's representative was aware of the advice the probity auditor had given to you in respect of the conduct of this process?

**Mr Yarra**—The question you are asking us is whether the representative was aware that Stephen Marks had given us some advice separately?

**CHAIR**—Yes.

**Mr Yarra**—You would have to ask them. I assume that they were aware, of course.

**CHAIR**—But it is an assumption; you have no basis in fact to say that they did?

**Mr Smith**—We can certainly check that. We can ask the individuals involved. I again make the point that Mr Marks's advice, in my recollection, was quite specific: that we should not extend the closing date. In our view we did not. I just make that point.



**CHAIR**—Did you or did anyone from OASITO contact the late tenderer to establish why the tender was not in, and if they were putting the tender in, and what timeframe they had to put the tender in?

**Mr Smith**—Certainly I was involved in one discussion. I suspect there might have been another one or two. Part of my earlier testimony referred to the fact that there were two letters. One that was dated 14 July, which flagged the possibility that pricing would be required to be submitted to OASITO by 2 August, had no reference to time. A subsequent letter that went out dated 28 July, some 14 days later, referred to the fact that the adjustments or any refinements to their pricing structure should be in by 9 a.m. In my discussions with the company concerned, they said two things to me. One, they said, ‘Your normal practice is to have this information in at the end of the day,’ and I have to confirm to you that our normal practice—although there is no specific policy that it must be—was that we tended to close these things at 4 or 5 o’clock in the afternoon. They said, ‘Look, it was not clear. We were acting on a letter which said it had to be in by 2 August.’ In their minds, they said, they were confused about what time the document should be in.

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.’

In the discussion I had with someone—I cannot recall the individual’s name in the company, but it does not matter—I said that they had to have this in as quickly as possible. They undertook to get elements of the thing in early. One element of the pricing came in about 12 o’clock, as I recall, and the rest of the document came in at 2.30. 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.

I might say, Senator, that I have been in government procurement for nearly 25 years. The late tender process goes back to the late eighties. The flexibility that was enshrined in the late tender policy was designed specifically to allow delegates to exercise discretion. That process has held us in good stead over the last decade or two, and, in my view, the process that we followed was entirely appropriate. The delegate in this case, the previous chief executive, accepted our advice and we accepted the late tender.

**CHAIR**—Are you suggesting, Mr Smith, that the procedures that were followed in respect of this tender were consistent with the tendering provisions that existed in the Public Service in the late eighties?

**Mr Smith**—It is my understanding that the late tender policy goes back a long time. I would have to check exact periods, but certainly I can remember accepting late tenders in the late seventies, when I worked in the department of administrative services contracting function. The framework, I recall, was put in place in about the late eighties, when a purchasing reform process was conducted, and I suspect that the policy came out of that, but I could be wrong on that. It has certainly been in place for a long time.

Part of the inflexibility when I first started in contracting in the early seventies was that no late tender was able to be received, and that was certainly not in the interests of taxpayers. Therefore, flexibility was built into the process. We had instances in which better offers were late because someone's car had broken down 100 metres from the tender box. You had a couple of choices: ignore that bid or retender. The costs of retendering are significant. As a result of all that experience, the processes were changed. I am not entirely sure when the policy changed, but certainly there has been flexibility in the late tender policy for quite some time, as I recall. Certainly, there are provisions in our RFT—our tender document—which allowed us to accept late tenders. We followed that and we sought legal advice. They said, 'Yes, you are entitled to accept this bid,' and the probity adviser was with us all the way. It was very important for us to treat this as a late tender. We considered it on its merits, made the judgments we would normally make about late tenders, and it was accepted.

**CHAIR**—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.

**Mr Yarra**—That is the wrong conclusion absolutely in our view. I will now try and address that concern that you have.

**CHAIR**—Are you going to give us some documentary evidence to prove that conclusion wrong? There is nothing on the table yet that we have seen that proves it wrong.

**Mr Yarra**—I will explain to you the process that we go through. At the end of the explanation I think it will be very clear to you that what we have done is entirely conventional, within our rights and appropriate. Mr Smith made reference to tender rules. We write our tender rules each time we issue a tender. Under common law the rules that we write we are bound by. 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. When

we received that late tender, the process was not changed. We applied the rules we set up for that process prior to the process commencing.

**CHAIR**—Mr Yarra, are you saying that the process that occurred between 29 July and 2 or 3 August was predetermined in your tender?

**Mr Yarra**—For the receipt of late tenders?

**CHAIR**—No. The whole process that occurred?

**Mr Yarra**—We are now talking about the inadvertent disclosure?

**CHAIR**—Yes.

**Mr Yarra**—The inadvertent disclosure was an event that occurred that we had to then quickly take on board what effect it would have on the process.

**CHAIR**—What did your tender rules provide for in respect of that?

**Mr Yarra**—Our tender rules provide for fairness and equity in treatment to all of our tenderers every step of the way, every minute of the process.

**CHAIR**—It did not provide for recalling of tenders?

**Mr Yarra**—They provide for fairness and equity.

**CHAIR**—Did it provide for recalling of tenders?

**Mr Yarra**—The termination provided all the flexibility we needed in making the decisions we needed to make in order to run a clean process. These things happen from time to time. We had an inadvertence occur on that day. We had the decision to take to manage the outcome of that. That decision was managed in accordance with our tender rules and within the bounds of common law, which are to treat our tenderers fairly and equitably. We did that. We went through processes which ensured that that happened. They were satisfied that we did that. We were satisfied we did that. Our experts were satisfied we did that.

**CHAIR**—Were the agencies concerned in this tender happy with this process?

**Mr Yarra**—As far as I am aware, the agencies concerned agreed that we continue the process.

**CHAIR**—Were they happy with it? Did you discuss it directly with them?

**Mr Yarra**—You must ask them.

**CHAIR**—Did you discuss it directly with them?

**Mr Yarra**—I did not.

**Mr Smith**—I did. I had discussions certainly with Mr Podger but also with Dr Harmer. I make the comment that none of us were happy with this process. As I have testified in the past, not one of us was happy with what had eventuated in this. It was a very difficult circumstance. It was regrettable and we have said that on more than one occasion. But faced with a difficult situation, we handled it in a way which we believe was entirely appropriate. 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.

**CHAIR**—Did they have a choice?

**Mr Smith**—They absolutely had a choice.

**CHAIR**—What choices were available to them?

**Mr Smith**—They could have certainly disagreed and said, ‘We disagree. We do not want the process to go on.’ We would have had regard to that. The bidders and the key agencies involved all agreed. None of us were entirely happy with what happened because, as we have said in the past, it was a deeply regrettable situation. 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.’

**CHAIR**—May I ask Mr Podger or Dr Harmer whether they felt they had an alternative other than to proceed along the route that had been determined?

**Mr Podger**—I think Mr Smith is right. He spoke to me on 5 August about this matter and relayed to me what had happened about the unauthorised disclosure and relayed to me the steps that had been taken by the office and the advice that the office had received from the probity auditor, including that the other two companies had accepted that the process should proceed.

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. I think Mr Whithear was at that meeting as well.

**CHAIR**—As I understand it, what you are saying, Mr Podger, is that on 5 August, given all the events that had occurred from when the unauthorised disclosure first occurred—which you were not aware of until 5 August, I understand, and so all of these events had been put in train—it would have been very difficult for you to turn round at that time, surely, and say, ‘No, I don’t want to proceed on this basis. I want to take a different route.’

**Mr Podger**—That is a fair comment. It would have been difficult for me to do it but Mr Smith is right: I could have and I did not.

**CHAIR**—Sure, I accept that.

**Mr Podger**—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.

**CHAIR**—Did the events of 2 August concern you?

**Mr Podger**—They did concern me. I did not have detailed information on that but I did have a discussion, as I recall—I think it was at the same meeting on 5 August—about the issue of the late tender and Mr Smith assured me again 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.

**Dr Harmer**—In the HIC, I agreed to the process for exactly the same reasons as Mr Podger. I have nothing to add other than to make the point that for the Health Insurance Commission the process was quite a debilitating one. I was afraid of losing staff. It had gone on for a long time. It would not have been in the interests of the HIC, in my view, that we went out to tender again or that we extended the process any longer than necessary. I was losing key staff, we had a very important social program to run in Medicare and I was anxious to get the situation resolved so that I could continue to run an efficient operation. So, we were really concerned about the time it had already taken. The same reasons stated by Mr Podger—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.’

**CHAIR**—Thank you for that. Mr Yarra, you referred to your tender rules and that the processes were consistent with your tender rules, which you determined prior to the tender. Can we get a copy of those tender rules?

**Mr Yarra**—You have them several times over. They are in the RFT. There is a full section in our RFTs that set out the tender rules in great detail. They are the rules that we give to the tenderers when we issue it and they are the rules that we stick by throughout the process.

**CHAIR**—Can we just check that they have not been blanked out?

**Mr Yarra**—The tender rules—

**CHAIR**—We have got a lot of documents; we have got a lot of blank pages, too. Where are they?

**Mr Yarra**—It will be a chapter in our RFT document. I forget the chapter. Look in the contents.

**CHAIR**—Is it chapter 10, ‘General conditions of tender’?

**Mr Yarra**—That is correct. You will find in that chapter a reference to the Commonwealth reserving its right to receive late tenders.

**Senator BUCKLAND**—I have a question to direct to Mr Moran and Mr Thomas but, before I do that, I will go back to the timing of this. Mr Smith, you were asked a question earlier by Senator Campbell. In your response, you talked about the date of the cut-off and whether you had spoken to IBM, as I recall. On 2 August, when it was known that there were only two tenders in there, did you contact that third party by phone? Or did one of your people contact that party and say, ‘Look, you haven’t got your tender in yet’?

**Mr Smith**—I will have to rely on others who are more directly involved, but I joined a conversation—whether it was the first or the second conversation, I do not know; I suspect it was the second—later that morning to stress the importance to the company involved of them getting their pricing information in as urgently as possible.

**Senator BUCKLAND**—And that would have been after 9.00 a.m.?

**Mr Smith**—Absolutely.

**Senator BUCKLAND**—So the answer to my question is: yes, you did speak to them.

**Mr Smith**—I thought the question was whether we called them or whether they called us.

**Senator BUCKLAND**—Yes.

**Mr Smith**—I joined an existing telephone conversation that morning. Others will have to testify as to whether we made the call or they made the call, or whether there were calls earlier than the one I was involved in.

**Mr Whithear**—My recollection is that our office did call and say, effectively: ‘Where is it? It’s due. Where is your material?’

**Senator BUCKLAND**—Would you have made a call to EDS or CSC?

**Mr Whithear**—We do not tend to discuss the identity of the various tenderers in the process, but we do—and we have, in this circumstance—proactively managed these situations. If somebody were late in submitting an offer for office stationery or something, they would most likely be called and asked, ‘Where is it?’

**Senator BUCKLAND**—Just refresh my memory: how long had this tender been lying out there for people to prepare their bids?

**Mr Whithear**—The request for tender was initially—

**Mr Yarra**—The date of the request for repricing was 14 July.

**Senator BUCKLAND**—That was 14 July, so it had been out there a long time before that.

**Mr Smith**—This process has been going on for months. The first pricing came in in February.

**Mr Whithear**—On 15 February. The initial request for tender was 30 November of the previous year.

**Mr Smith**—To answer your question, Senator, I would say that that is absolutely the case. There is no distinction between the identities of the parties in handling these processes, and any implication to the contrary is unfortunate. The tender process allows for late tenders. I would have made the same phone call or we would have approached it in the same way, irrespective of the identity of the parties. It is standard practice in Commonwealth procurement for that to occur. There was nothing unusual.

**Senator BUCKLAND**—If that is the answer you are giving, Mr Smith, why do you keep telling us that it is regrettable that it occurred?

**Mr Smith**—It is regrettable that the information was disclosed inadvertently. I absolutely have testified that on more than one occasion. I am not pleased that that happened. It was an unfortunate disclosure of information that we all would have preferred not to have happened. It was difficult, and we handled it in the most appropriate way possible.

**Senator BUCKLAND**—Mr Moran, as I recall, you were a party to the evaluation committee or a member of that committee. This committee knows that that evaluation committee did not know about the disclosure when you weighed up the comparative claims for the tender. Would you have looked at the information differently had you known that?

**Mr Moran**—That is a very difficult question. The task of the evaluation teams was to have an objective discussion and, in terms of the hypothesis you are putting, it is actually quite difficult to say whether I would have, or whether the teams would have, done that. My experience of the extent of granularity that the three relative valuation teams went through is that it was pretty exhaustive. My suspicion—and I can only give you my best estimate—is that they would not have had reason to deal differently with the detailed issues they were dealing with. As an evaluation committee, it is probably the case that we would not have made a different recommendation, based on the information provided in the bids.

**Senator BUCKLAND**—Mr Thomas, how would you respond to that?

**Mr Thomas**—I was not with the Health Insurance Commission at that time, so what I know of this is what I have learnt since.

**Senator BUCKLAND**—I see.

**Mr Thomas**—I am unable to respond to that.

**Senator BUCKLAND**—Thank you for that. Mr Moran, do you think that it was an advantage to have a clean process as opposed to the compromise or what does not now appear to have been a clean process that you went through?

**Mr Moran**—As Mr Smith said, it would certainly have been in all of our interests had the inadvertent disclosure not happened, and had IBM got its prices in on time. That clearly would have been everybody's preference. If you are asking me if I would have preferred that to have happened, the answer is yes.

**Senator BUCKLAND**—Mr Podger and Dr Harmer, would you in future follow the same process that you took in relation to this matter? If you were starting again, would you go through the process as you did, or would you be a bit more diligent about dates, cut-off times and things like that?

**Mr Podger**—I hasten to say that these issues were not in our court—either the department's court or the Health Insurance Commission's court. I think Mr Smith made it clear that OASITO put in place arrangements which very sharply reduced the risk of an inadvertent disclosure in the future. I would hope that no future arrangements that the department may be involved in would have any unauthorised disclosure. If your question is that, having had the unauthorised disclosure, would I now, with hindsight, suggest a different process be undertaken, the answer is no. I think it is very regrettable, but I cannot see that there was an alternative, having weighed up all the factors concerned, that would have been a better alternative under the circumstances.

**Senator BUCKLAND**—Thank you. Dr Harmer?

**Dr Harmer**—I have nothing to add to Mr Podger's answer other than to say that it was made clear throughout. I would have preferred to have been in control of the process myself, but we were not. It was a whole of government process and we were part of it. As Mr Podger said, these issues were entrusted to OASITO and, at the end of the day, in this issue we believe that they did everything they could. Our biggest concern was to ensure that we did not delay the decision any further.

**Senator McLUCAS**—Mr Smith, you said earlier that normal practice for closing tenders was four or five in the afternoon. Why did it change on this occasion?

**Mr Smith**—I am not aware of why that occurred. It was a decision not taken by me. Mr Whithear would be better placed to answer this. I just make the high level point that there is no specified practice for the Commonwealth as to when these may or may not happen. It has been always our practice in the main to have them later in the afternoon because that gives bidders an opportunity to take the benefit of that day to finalise their bids and do photocopying, because these are huge documents and, invariably, things go wrong with production and delivery. You can almost bet that, the morning you want to put something in, the photocopier breaks down. Normally, based on those practical things, it is later in the day.

Part of our consideration, I recall—and Mr Whithear may correct me—was that we were giving them the weekend to put in their pricing and therefore they should be in a position to put it in first thing on Monday morning. I can recall some discussion about that. It was important that we got the prices in as early as possible to move on with the process because of the



pressures that Dr Harmer and others were quite rightly making known to us. This had been a very long, drawn out process. The judgment call was something like, 'Would you close it Friday night or would you close it first thing Monday morning?' It was that sort of logic, but Mr Whithear may have a different view.

**Mr Whithear**—No, I would only reinforce that. In managing these processes you have to have regard for the abilities of the various evaluation teams to evaluate the submitted material. We were hoping to make sure that we made full use of that week, so we were seeking to get the information earlier on Monday.

**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 auditor's representative at 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 focused a document.

**Senator McLUCAS**—But not of the personnel present though?

**Mr Whithear**—There could be.

**Mr Smith**—We could check that.

**Senator McLUCAS**—It seems usual practice from my understanding of other tender processes.

**Mr Whithear**—There were definitely representatives from OASITO and from the probity auditor in attendance. I do not recall whether there were any others. That is the second time I have been asked that question.

**Mr Smith**—We will check that for you.

**Senator McLUCAS**—Were the tenderers invited to be present at the opening?

**Mr Whithear**—Tenderers?

**Senator McLUCAS**—Yes.

**Mr Whithear**—That is not our practice at all. It never has been.

**Senator McLUCAS**—When you wrote to the tenderers—the unsuccessful tenderers, as it pans out—to tell them that there was a late tender, did you receive a response to those letters?

**Mr Smith**—There was no letter response, if that is the question.

**Senator McLUCAS**—There wasn't a written response?

**Mr Smith**—Sorry, no written response.

**Senator McLUCAS**—Was there another response?

**Mr Smith**—No, not that I recall. Certainly not to me, other than the parties continued in the process. Certainly none of the parties raised any objection to me personally.

**Senator McLUCAS**—So they were still happy to go along?

**Mr Smith**—Absolutely, because they continued to participate in the evaluation and negotiation that went on for some weeks after that event. I would have thought if they were not happy they would have certainly raised that with me and never did. Whether they raised it with anyone else in the process—

**Mr Whithear**—I certainly received no objections from the other tenderers.

**Mr Smith**—There was quite a deal of interaction with all the bidders from that day on through the month of August. They invested their resources, as they did in the normal way. I can only conclude, when I reflect back, that they were happy to continue with the process. Certainly, no-one formally wrote to me and no-one approached me to say that they were unhappy about that process. I think in the normal course, whilst unfortunate again, it was a late tender process that happens fairly frequently.

**Senator BUCKLAND**—Is there an appeal mechanism in the process?

**Mr Smith**—I do not think there is one specified in the tender documents, but that does not remove the prospect that they can always talk to me, to the minister, to the probity auditor or to whomever they want to. Certainly no-one raised it with me, and 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—they would approach ministers to say, 'We're unhappy with this particular element of the process.' I am not aware that they did that on this occasion.

**Senator McLUCAS**—You said that you wrote a subsequent letter on 28 July to all prospective tenderers to tell them the time of the closure; that was the same day of the disclosure.

**Mr Smith**—I am sorry, Senator, I may have said the wrong date. I will just check that for you. Yes, it was 28 July.

**Senator McLUCAS**—Which is the same day as the unauthorised disclosure.

**Mr Whithear**—Senator, I think that is most likely a mere coincidence. As I recall this sequence of events, we established that we had not given a clear time so we needed to write to the bidders to give them a clear time to respond. With respect to the fact that it was the same day that a diskette was provided to one of the bidders, it should be remembered that the purpose of that information being provided was only to ensure that we had made an accurate assessment of the information provided to us by the bidders.

**Senator McLUCAS**—It was a busy day.

**Mr Smith**—I can also point out that that letter was not just a letter about the closing date. It was quite a comprehensive letter that talked about clarification and the scope of the requirement. It was several pages long. I would just like to check to make sure I have this right: yes, there was a clarification in the letter of 28 July that provided bidders with additional information in forming their prices. It was part of our normal process to write. So it was not just a dedicated letter about the time of 9 a.m. on Monday. It had additional information to all bidders to help them form their prices, as well.

**Senator McLUCAS**—One-week out from the date of closure?

**Mr Smith**—Absolutely.

**Senator McLUCAS**—Can I have a copy of the letter, please?

**Mr Smith**—We took that on notice earlier. That process is not unusual. These processes were major, complex processes.

**Senator McLUCAS**—That is where I agree.

**Mr Smith**—As we went through each of those processes, it was quite normal for us to adjust, based on additional information and based on questions from bidders such as, ‘What do you mean by that? What do you mean by this?’ to be able to clarify as we went forward. I can give an example of a process, which always sticks in my mind: the bidders were told in the scope that the help desk was going to be manned 24 hours. It was manned 24 hours a day, seven days a week and they committed something like 15 resources full time for that. In clarification it was discovered that, at 6 o’clock, someone had taken a mobile phone home and did not connect back into the full resource until 8 a.m. the next day. That particular clarification, which occurred in the interaction, meant millions of dollars of change in price, because of the interpretation. The agency saying, ‘Yes, we have access 24 hours, seven days a week,’ was interpreted as full-time resourced. That went on through all of the processes that we conducted. As people went into the complexity of the way in which this service was going to be delivered, the clarification occurred right up to the last minute on all of our transactions. That is not unusual.

**CHAIR**—Mr Smith, how was that letter you referred to distributed? Was it by email or by fax?

**Mr Whithear**—It would have been by facsimile, I would assume.

**CHAIR**—On 28 July at what time?

**Mr Smith**—I do not have a fax confirmation sheet, but it is dated 28 July.

**Mr Whithear**—Senator, we will check that for you, but I suspect I would not have sent that letter if it was due to be sent after I was aware of that disclosure. I suspect that I sent this earlier in the day, and then the diskette was provided. But we will confirm that.

**Mr Smith**—That is something that we could take on notice fairly quickly.

**CHAIR**—Mr Smith, I understand that the probity auditor signed off on 3 September.

**Mr Smith**—I think we have provided a copy of that to you.

**CHAIR**—We have been provided with a copy of the probity auditor's sign-off on 3 September?

**Mr Smith**—Yes, you have.

**Mr Yarra**—It was in about April last year.

**Mr Smith**—I think it was over a year ago that we provided that to you.

**CHAIR**—The difficulty with this thing is that we keep asking questions and we get answers and we get no answers, and it is very difficult to keep track of what we have been given and what we have not been given in this whole process.

**Mr Smith**—We always give you an answer. It is a question of what we can and cannot—

**CHAIR**—If it is a non-answer, that is right.

**Mr Smith**—Correct.

**CHAIR**—It is not only us, Mr Smith. I am sure that there are other senators at estimates and in other committees who will also have a bag of questions that they will continue to ask on these issues. The question I was coming to, and maybe you can answer it and save us looking through the letter, is whether that sign-off—

**Mr Yarra**—It has just been drawn to my attention that we provided the probity adviser's sign-off to the estimates committee in April last year.

**CHAIR**—Yes, you did. I am just looking at it. It does not deal with the issues that I am raising. My question was: in respect of the probity auditor's sign-off, were there discussions held with OASITO or is there any other material in writing where the probity auditor deals with the process that was established from 29 July through to and including 2 August on the process of the tender and the late tender receipt, and does he make reference to any of those events in specific terms?

**Mr Smith**—It was my understanding that you asked that question earlier. I said that my understanding is that there is only one other piece of written advice and that we would check that for you. There would have been dialogue going on. I certainly recall one written advice on the way to handle the inadvertent release of information, which we have taken on notice today to get to you quickly if we can. My understanding is that that was the only other formal piece of information that we got from the probity auditor other than on 3 September, but we will check that for you.

**CHAIR**—What I am really interested in is whether or not there is any written advice to the department from the probity auditor relating to the events of the day of the receipt of the last tender.

**Mr Smith**—The late tender?

**CHAIR**—Yes.

**Mr Smith**—I am just trying to work out which issue we are talking about. As I said to you earlier, I suspect not, but the probity auditor's representative was with us. What we have undertaken to take on notice is to check with the representative to see whether she was in dialogue with the probity auditor during that day. My best recollection is that we did not have anything in writing on that issue from the probity auditor, but we will have to check the files.

**CHAIR**—Mr Smith, in the revised schedule to Mr Marks's contract of 6 May all specific reference to an audit role has been removed. Why was that done?

**Mr Smith**—Can I just see if I can get hold of the copies? I am told that I have a copy here. Senator, could you refer me again to the relevant part?

**CHAIR**—It is the revised schedule of Mr Marks's contract dated 6 May 1998 in which any specific reference to an audit role has been removed. Why did you consider him to be both an auditor and an adviser?

**Mr Smith**—I think we went through this testimony last time. My best understanding—and I think I testified about this last time—is that we reviewed the role of the probity adviser as it had occurred in practice. I recall that the original scope did not contemplate, for example, that the probity adviser would be present at steering committee meetings—formal structural meetings. As time evolved, his role evolved. My best recollection is that, in about May, there was a discussion about what his role was in the process, which was based on experience and practice. This was an attempt to more accurately reflect his involvement at the time.

**CHAIR**—Over the period from July to September, when he signed off on these matters, was he acting as a probity auditor or a probity adviser?

**Mr Yarra**—On 18 May we went through similar sets of questions to these before this committee, and the answers were along the lines that we had a contract in place and we amended the schedule over time. The schedule for us is the important part of the contract, since it sets out the obligations of the probity auditor or probity adviser. There was no great clarity in terms of whether the probity adviser was a probity auditor or adviser. That was the name of the

contract. What we did was attend to the schedule at the back, which accurately defined the tasks of the probity auditor as they changed over time. So, in our view, the tasks that the auditor was providing over time were reflected in the schedules that you have received. They were the important things for us. The contract remained the probity auditor contract.

**Mr Smith**—In relation to the July to August period, it is not clear to me why the distinction in your mind is important. I am not saying that it is not, but it is not clear to me. It seems to me that we were faced with a circumstance, and we consulted with our probity adviser/auditor and said, ‘Here are the circumstances we find ourselves in; what is the appropriate course of action?’ and we got independent probity advice. Is that an auditor or an adviser? I am not sure. What we acted upon was the advice of an independent probity person who was saying, ‘Here is, in my view, the best way forward.’ I am not sure what the distinction is in that particular circumstance.

**CHAIR**—There are a couple of issues. We received the contract that we talked about on notice, and we are after some clarification as to why those changes were made—why it was felt necessary to make those changes. That is the reason for the question, Mr Yarra. The second concern that I have is that in evidence to this committee, Mr Marks said that in the process he had in fact been proactive in his advice. In other words, he had been involved in the process all along advising you, as you reinforced this morning, as to what steps to take, when to take them and presumably how to take them in order to protect, I presume, the interests of the Commonwealth. Does that fall into the role of a probity adviser vis-a-vis a probity auditor? Did anyone then go back independently and assess the processes that were put in place or actually audit the process to ensure that probity had been achieved as a result of what had been advised? There seems to be a fair degree of uncertainty—not only in our minds but also in the minds of other people who have been asked the question—as to when a person is a probity auditor and when a person is a probity adviser.

**Mr Smith**—I see the distinction you are drawing in relation to the particular incident: we had advice, and you are wondering whether that process was audited to ensure that the advice was put in place. I think that is the nature of your question.

**CHAIR**—Yes. Mr Marks would have provided you with advice—and he says he had been proactive; so, presumably, on a daily basis over that period—as to what steps to take to minimise the impact of the leak or the event on the process. Having done that, it would be difficult to go back and audit his own advice.

**Mr Smith**—That is true, except he did participate directly with us in the process in that earlier he attended their meetings with the bidders, he signed off a file note as an accurate reflection of the discussions from our point of view and he was aware that we had obtained statutory declarations because of his involvement in those meetings. He would have witnessed first-hand that we had put in all the sorts of things he recommended we do. Did we have an independent party come through and tick all the boxes as to whether that was fully complied with? The answer would be no—other than that I would have an obligation, in my view, to report at the end of the process if something like that had not been complied with in briefing ministers and other delegates. There was nothing that I can see from the process that we did not do in terms of what it was suggested we do.

**CHAIR**—I am trying to establish also why, in its audit of the cluster 3 tender of September 2000, the ANAO found that the probity auditor provided no formal sign-off on the probity aspects of final negotiations with the preferred tenderer. That is tagged in recommendation 6(c). They said that the scope of the probity auditor services includes provision of a formal sign-off to the decision maker prior to the execution of the final contract. That was their recommendation.

**Mr Smith**—Which was the 3 September sign-off.

**CHAIR**—Is that it? I think you have to draw the conclusion from what they have said that they did not regard that as being a formal sign-off.

**Mr Smith**—In relation to group 3, cluster 3, I am talking about the health project. I think you are referring to the sign-off of 3 September for the health group.

**CHAIR**—Yes, but I am saying that it appears from what the Audit Office is saying, and based on their recommendation, that sign-off of 3 September by Mr Marks would not meet that recommendation from the ANAO.

**Mr Smith**—I would have to check that, because I do not have the information. My recollection on group 3 was that the Audit Office was concerned about the fact that there were some minor discussions that occurred at the last minute in relation to clarification on the contract, which was not signed off by the probity auditor. In our view, it was consistent with the approvals that we had already sought and got. It was a long time ago, and I would have to go back and check that. We can certainly take that question on notice and have a look at it, because I would have thought, without having direct information, that that 3 September letter was appropriate in terms of that recommendation. But I would have to check that for you.

**Senator BUCKLAND**—You would be familiar with the recommendations coming out of the Humphry report, no doubt.

**Mr Smith**—Indeed.

**Senator BUCKLAND**—Recommendation 6 says:

There is a need for agencies to receive support from a separate organisation in managing transition and implementation of IT outsourcing. It is essential that such a supporting body adopts the nature of a service organisation, acting as a central repository of skill and knowledge ...

It goes on to say that this group could draw on OASITO's experience. Has OASITO been involved in discussions to implement this particular recommendation?

**Mr Smith**—That recommendation refers to the fact that Mr Humphry identified a gap in terms of advice on transition. There has been a longstanding discussion going on between ourselves and agencies and probably the estimates committee about where OASITO's role started and finished. I think Mr Humphry concluded that there was a gap in terms of transitioning the new provider into the organisation once the contract was agreed. Agencies did not have enough assistance or advice from either an organisation like OASITO or another

organisation. I recall that he identified transition risk as one of the key factors that he was concerned about.

OASITO has for a long time held the view that we could put in place certain things that would help handle transitioning; for example, transition plans were part of the evaluation process and we had a manual on post-contract administration that was available to agencies. We filled the gap to a certain extent. Mr Humphry said that there needed to be a specialist organisation or a particular group of people who could, on an ongoing basis, advise agencies. With our role being wound down, because as of 30 June we no longer have a role in IT outsourcing, it was recommended that—I think it was specifically recommended, but it was certainly accepted by government—any ongoing transitional function would rest in the Department of Finance and Administration.

I am aware that they have taken some steps to form an organisation in that department to provide advice as required by agencies at their discretion. Have we been involved? As we now move towards the end of June, we will be talking more closely with Finance to ensure that they have at their disposal any relevant material we have that may assist them that we can transition across. Material for which we have no further use we will archive in the normal way under the Archives Act. There is some dialogue, I suspect, going on at other levels in my organisation about what information should go across, but that has been the limit of it.

**Senator BUCKLAND**—Mr Podger, you received on 2 August a letter from a Mr Hutchinson, which stated, *inter alia*:

... we can and will improve the information management processes for these outsourcing projects.

I believe he also indicated in that correspondence that he had initiated a review to be conducted by the probity auditor. When was that review received, or has it been received?

**Mr Smith**—I do not think Mr Podger would be aware of it, if I could be so bold as to suggest that.

**Senator BUCKLAND**—The letter, I understand, was sent to him.

**Mr Smith**—The letter was sent to Mr Podger. Mr Hutchinson was referring to the fact that he had asked the probity auditor to conduct a review of our internal procedures in OASITO, not in the department of health, in terms of information handling. That review was undertaken, that report was tabled and recommendations were made and implemented.

**Senator BUCKLAND**—Where was it tabled? Was it tabled to this committee?

**Mr Smith**—No. It was tabled to Mr Hutchinson by the probity audit internal working document.

**Senator BUCKLAND**—Could that be made available to the committee?

**Mr Smith**—I will certainly take that on notice.



**Senator BUCKLAND**—Mr Podger, knowing that you went through a difficult time with this and knowing some of the difficulties that confronted your department and others because of what has occurred, would you have felt more comfortable if you had had an outside advising body on IT outsourcing?

**Mr Podger**—I am not quite sure of the particular focus of your question. Your earlier question to Mr Smith was about the issue of the Humphry report recommendations on transition. Our view of that particular issue was that we felt that we did not need external help on the transition process. We had done that ourselves and we did not seek advice on the transition aspects from the office, as I recall. We thought that we were able to handle that internally. Certainly, this process was a very centralised process, which was the core issue of the Humphry review—whether it should have been as centralised as it was. The government has responded to those recommendations. If we had been managing the process ourselves, we would have sought a considerable amount of external assistance, just as OASITO had to seek external assistance. If we had done it ourselves, we would certainly have had external support.

**Senator BUCKLAND**—Were you offered external support or advised to seek it?

**Mr Moran**—Just to clarify this: during the process of transition?

**Senator BUCKLAND**—Yes.

**Mr Moran**—We were not offered it, and we sought our own advice. I hired a particular consultant and a couple of other contracted people who had been through similar processes in the private sector—put it that way—who provided advice to us in terms of managing the transition with IBM GSA. I did not seek it from OASITO.

**Senator BUCKLAND**—Dr Harmer, did you use outside consultants? If not, would you have preferred to do that?

**Dr Harmer**—Like Mr Podger, we made the decision that, having gone through the process, we were comfortable that we could manage it ourselves. It was at that time that I engaged Mr Thomas, who is sitting on my left here. In fact, before the final contract was signed, I engaged Mr Thomas, who had specialist expertise in managing contracts, including managing transition periods, et cetera. So, with him and the other resources available to me in the Health Insurance Commission, I was confident that I could manage it. As you are already aware from answers to previous questions, we did engage consultants to help us during the process and to help advise the board about the nature of our outsourcing, et cetera. Mr Podger on the board, as he has said before too, benefited from that advice to the Health Insurance Commission during the process.

**Senator BUCKLAND**—Mr Smith, the committee's request for a copy of the evaluation manual, as I understand it, was refused because it was considered commercially sensitive. Is that still the position you hold—that the committee cannot get access to that? For what reason?

**Mr Smith**—The committee has for some time requested copies of the full evaluation reports in relation to the health project. My minister has responded to this committee on that matter. I understand that there is further correspondence between the chairman of this committee and my minister, and that is a matter of record.

**CHAIR**—I think we are getting confused between ‘evaluation reports’ and ‘evaluation manual’.

**Senator BUCKLAND**—The manual, yes.

**Mr Smith**—My apologies. I assume that there was an evaluation document. I was not aware that that had been asked for in the past.

**Senator BUCKLAND**—Does anyone know if there was?

**Mr Yarra**—There was an evaluation guide, which is the guide that is drafted prior to the commencement of the evaluation to regulate the evaluation process. We will check whether we have been asked for that guide.

**Senator BUCKLAND**—Let me tell you: we are now asking for that ‘guide’, as opposed to ‘manual’, because you have changed the name from what I have referred to it as.

**Mr Yarra**—The name is the evaluation guide.

**Senator BUCKLAND**—I would be asking that you do release that to us.

**Mr Smith**—We will take that on notice.

**CHAIR**—I think you will find that we have asked you for it. There are not too many documents that we have not asked you for in this process and there are not too many that have been provided. We did ask you for it, Mr Yarra, and it was refused. We will send you a copy of your answer.

**Mr Smith**—We can only check. I do not recall that, but I am not saying that we have not. We will certainly take that on notice and see what we can do.

**CHAIR**—Was OASITO aware of the ongoing studies undertaken by Professor Willcocks in the UK and Professor Mary Lacity in the USA, in which they had analysed IT outsourcing experiences in US and UK organisations since the early 1990s?

**Mr Smith**—I was not aware of that, but Mr Whithear might comment.

**Mr Whithear**—We were aware of those reports; we read several of them and had regard to them. I noticed that one of the views expressed by Professor Willcocks and his co-authors was that a whole of shop outsourcing method should not be pursued. That was something that a number of people seemed to latch on to in relation to the whole of government outsourcing initiative—and that was an incorrect assumption. The government’s outsourcing initiative was infrastructure only; at least that was all that was mandated. In the larger agencies that might be 30 per cent of the IT shop. So certainly that was one area where people seemed to be latching on to Professor Willcocks’s writings and incorrectly applying it to the IT outsourcing initiative.

**CHAIR**—It is not a matter of latching on to anything, Mr Whithear; it is a matter of whether or not OASITO was aware of these studies prior to commencing the process.

**Mr Smith**—Just to clarify that: I would make the point that OASITO, as an implementation agency—about which we have made the point in other committees on several occasions—implemented the government’s policy as it was.

**CHAIR**—I understand that, Mr Smith. I am just trying to establish whether or not you were aware of these studies that did exist internationally in respect of IT outsourcing.

**Mr Smith**—I do not recall that I have read them; Mr Whithear seems to have read them. I think that in other places Senator Lundy has asked me the same sorts of questions, such as: did we keep abreast of international thinking on IT outsourcing? My answer has been consistent in that we had a policy framework that had to be implemented by government, and we implemented it, as we were required to.

**CHAIR**—And certainly you would have been required to. Did Shaw Pittman advise OASITO of any long-term studies of IT outsourcing that may have alerted to potential problems that were encountered?

**Mr Whithear**—To answer that question properly, I would probably need to know the nature of those problems. A range of risks is associated with any contracting process and with IT provision generally, whether it is in house or external. We endeavoured to manage those risks as best we could through these processes. So Shaw Pittman did assist us in working out methodologies or processes to manage certain risks associated with contracting.

**CHAIR**—But did they draw your attention to any long-term studies that had been done?

**Mr Yarra**—Shaw Pittman constantly monitored internationally and constantly brought continuous improvement to the model that we were using in the IT outsourcing. All the way through the methodologies and the tender documents we had were Shaw Pittman’s latest advice. They were drawing on their officers around the world and on their knowledge around the world. So, yes, they were bringing to bear their best strategic advice.

**CHAIR**—Did they draw to your attention any contradictions between the approach being taken by OASITO and experiences globally?

**Mr Smith**—I had lots of discussions with Shaw Pittman about the strategy. There are several ways of doing outsourcing; we will all have a different view about what is appropriate and what is not. I can recall having many a late night discussion with Shaw Pittman about the appropriateness of whole outsourcing, infrastructure outsourcing and facilities management— all sorts of models. But we had a model, which was infrastructure services, and a mandate from government. We then were required to do that as efficiently as we possibly could. I would have to say that the biggest learning experience for us was the fact that we were doing transaction upon transaction. We took lessons from one into the next and into the next and into the next, in terms of the framework that we were implementing.

**CHAIR**—Were you aware that 20 per cent of Shaw Pittman's work was in renegotiation of IT outsourcing deals?

**Mr Smith**—I am not sure of what the base reference point is. Twenty per cent of what work?

**CHAIR**—Shaw Pittman's work.

**Mr Smith**—In relation to our—

**CHAIR**—No; in general it was related to the renegotiation of IT outsourcing deals.

**Mr Smith**—I was not aware of that, no.

**Mr Whithear**—They are an outsourcing adviser, and so you would expect them to be involved in those processes as they occur.

**Mr Smith**—It may very well have been that the organisations had implemented the wrong model and Shaw Pittman was helping to implement a better model. I do not know; I could not answer that theoretically.

**CHAIR**—Mr Smith, given that you are about to go out of existence—so the department will have a lot of work to do to get the answers to those questions back before the end of next week—what is the process from hereon in? There has been a unit established in DOFA?

**Mr Smith**—A unit has been established to deal with transition advice at the discretion of the agencies. That is correct. As of 30 September we have had, as we explained in the past, from January through to 30 June, an advisory role. Agencies have been calling us and asking us for copies of our tenders, for copies of our contracts and for guides and documents, which we have provided to them. As of 30 June, we will no longer have that role. Whatever is relevant for us to pass on to Finance we shall. As I said to Senator Buckland—I think while you were out of the room—to the extent to which files would be relevant to their ongoing role, we will transfer them formally to Finance. Other files and documents that we have that are no longer in a sense directly relevant to their role we will archive under the Archives Act but, as I think I said on a previous occasion, I think it would be prudent for us to hold that information for a period of, say, six months in our own premises to make sure we had easy access to respond to committees and agencies as we have to.

**CHAIR**—If we as a committee want to pursue issues, who do we pursue them with?

**Mr Smith**—It depends on the nature of the issue. If it would help, if it is in relation to OASITO, you have asked the question. The committee secretary has written to us asking how we would handle this going beyond 1 July in relation to OASITO. We will send shortly a name of someone in OASITO and a contact number for you to contact us. My view is that we still have an obligation to this committee in particular to respond to any queries that you have post 1 July, and we shall do that. If you have a different view, I would be happy to take that on board.

**CHAIR**—We do not have a different view. Finally, Mr Podger and Dr Harmer, what structures have been set up in your department to monitor and benchmark the ongoing savings as a result of the IT outsourcing initiative?

**Mr Podger**—We have a team that works with Mr Moran in overseeing the contract with IBM GSA. We have instituted a reasonably centralised process within the department, including changing our financial arrangements internally to be able to track more closely our costs for IT services. Our capacity to track it back to the actual savings is difficult. You will recall the savings benchmark was based on some assumptions around the likely levels of work, and so on. Right now our new ways of handling the financing is helping us to hold back the demand for IT services, below where it had been. So the tracking is a bit difficult to be sure about what has come out of the contract and what has come out of our internal processes. Mr Moran might like to say a little more about the tracking arrangements.

**Mr Moran**—I cannot actually add anything to that. I agree with Mr Podger in terms of savings against what may have been the theoretical cost baseline for savings some years ago now, but certainly the mechanisms we have in place in the last 12 months since handover to IBM GSA are showing encouraging trends in terms of holding back demand and therefore the costs against what we had previously projected as being the likely consumption and costs. They were based on a set of assumptions to do with historical consumption.

**Dr Harmer**—From the HIC's perspective, I set up a special unit, called a vendor management team, which until very recently Mr Bob Thomas has headed. He, within that unit, has set up a range of structures to monitor the performance of the IBM GSA group in providing services to the Health Insurance Commission, including the financial service levels and a whole range of other activity. One can always improve. However, I believe that we have a very good grasp of the contract, IBM GSA's obligations under that and managing the financial aspects.

**Mr Thomas**—We track finances, in particular regarding your question, on a monthly basis against a budget that was set using schedule 4 from the contract, which was the expected cost as seen some 18 months back. Our costs to date have tracked within that budget, even though we know that with the changing nature of the HIC we have taken on more work.

**Mr Podger**—If I can make one further comment: as I said, it is difficult to do a direct track against the benchmarked prices which were done nearly two years ago now. I would suggest that we have been able to control the demand within our organisation for IT services better than we had been doing previously. On the other hand, our management of the contract has proved to be more expensive than we had hoped up to this point because we have had to put more resources in that. I am hopeful that we can reduce that over time, but it is true that our management of the contract is still running at a pretty high price.

**CHAIR**—Unfortunately, we have to conclude proceedings. However, 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.

There is a series of questions that we received from Senator Eggleston and from other senators which we have not got to today and which we will put on notice to you. Hopefully, Mr Smith, we will get a response before you go out of business. 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. This meeting is now adjourned.

**Committee adjourned at 2.01 p.m.**