

30 July 2014

Senator the Hon Penny Wong
Leader of the Opposition in the Senate
Senator for South Australia
Parliament House
CANBERRA ACT 2600

Dear Senator Wong

Commission of Audit – appointment of Mr Peter Crone as head of Secretariat

I am writing in response to questions you raised at the 26 May 2014 (budget estimates) hearings of the Finance and Public Administration Legislation Committee relating to the basis on which Mr Peter Crone was appointed to head the Secretariat of the National Commission of Audit. I subsequently advised you that the Australian National Audit Office (ANAO) had requested relevant records from the Department of Finance (Finance) and that I would write to you separately, and provide a copy of the correspondence to the Committee Secretariat, after the ANAO had examined the records.

2. The ANAO has sought and obtained relevant documentation from Finance relating to the appointment process. However, the ANAO has not undertaken an audit, given other planned audit commitments; our review has been limited to our analysis of the documents and discussions with Finance.

3. In making this non-statutory appointment, a number of options were available but of particular relevance to the basis on which Mr Crone was appointed are the following two:

- a) An appointment made by a minister using the executive power of the Commonwealth. Under this option, the 2012 Commonwealth Procurement Rules (the CPRs, which were then in force) would not apply, as clause 2.9(h) of the CPRs provided that such appointments were not defined as procurements.
- b) The use of a contract for labour hire, which was defined in the 2012 CPRs as: "a *contract* under which an agency engages an individual to provide labour, where the individual is engaged either directly or through a firm which primarily exists to provide the services of only that individual. This includes the appointment of an eminent individual to a special role by a Chief Executive, or the appointment of a person or persons by a Chief Executive to a governance committee (for example, an audit committee, ethics committee or steering committee), but does not include the engagement of consultants."

i. The 2012 CPRs contained an exemption (known as exemption 15) which had

the effect of exempting such contracts from the limited tender requirements set out in Division 2 of the CPRs, even if the contract value was over the procurement threshold of \$80 000.

- ii. However, the requirements in Division 1 of the CPRs continued to apply notwithstanding exemption 15. Key requirements included the need to apply the core procurement rule of achieving value for money, and to report any contract over \$10 000 on AusTender.

4. The documents examined by the ANAO indicate that there was confusion within Finance as to how the appointment was being treated.

- a) On the one hand, departmental documents suggest that a distinction was intended between the appointment of Mr Crone by the Government, with the formalities of his engagement to be settled by the Department of Finance; an approach broadly consistent with the application of clause 2.9(h) of the 2012 CPRs. This intention was reflected in the following documents:
 - i. A Treasury Executive Minute of 21 October 2013 to the Treasurer and Finance Minister. The Minute noted that the two ministers had recommended to ministerial colleagues that “the details of the appointments of the Commissioners and the Head of the Secretariat will be settled with the Prime Minister” and that “Mr Crone is to be engaged by the Department of Finance. Matters such as Mr Crone’s remuneration, possible conflicts of interest and other matters will be handled as part of that process.”
 - ii. An Executive Minute to the then Finance Secretary of 24 October 2013 which recommended: “That you **sign** the attached letters of appointment to the Chair and Commissioners of the Commission of Audit (Attachment A). ... The Prime Minister appointed Mr Tony Shepherd AO, as the part-time Chair of the Commission from 22 October 2013 until 31 March 2014. He also appointed Dr Peter Boxall AO, Mr Tony Cole AO, Mr Robert Fisher AM, and the Hon Amanda Vanstone, as part-time Commissioners of the Commission of Audit for the same period. Mr Peter Crone was also appointed as the Head of the Secretariat.”
 - iii. This view was also reflected in subsequent documentation discussed at paragraph 6 below, and in the Finance Minister’s comments of 25 February 2014 at hearings of the Finance and Public Administration Legislation Committee, where the Minister observed that: “There are two different aspects. You have the logistics of entering into a contract, which is managed by the department. Separate from that, there is the decision about the establishment of the Commission of Audit. There are two separate processes. The execution of contracts is very much something that is handled by the department under their brief.”
- b) On the other hand, Finance’s advice to the then Finance Secretary also described the appointments as contracts for labour hire subject to exemption 15 of the CPRs. In particular, a Finance Executive Minute of 28 October 2013 to the then Finance Secretary seeking financial approval for the services, under Regulation 9

of the Financial Management and Accountability Regulations 1997, advised that: "The cost of the services is over the relevant procurement threshold of \$80,000. However these 'approved persons' fall under the definition of Contracts for labour hire which includes the appointment of an eminent individual to a special role, therefore exemption 15 from Division 2 of the *Commonwealth Procurement Rules* applies."

- i. Further, the Executive Minute addressed the issue of achieving value for money, as required by the CPRs. It advised that: "The approved persons are all eminently qualified to undertake the appointed tasks" and that "This is a value for money solution that makes proper use of Commonwealth resources."
- ii. Consistent with this general approach and the requirement at clauses 7.16 and 7.17 of the CPRs that all contracts over \$10 000 be publicly reported, the contract was reported on AusTender as a 'Limiter tender' on 15 November 2013 (Contract Notice CN1884191).

5. The confusion within Finance over the two appointment methods, described at paragraph 4 above, influenced the department's general handling of the matter, including the variety of responses to the Senate and inconsistency in the information provided. The confusion surfaced publicly in the following interactions involving the Senate and yourself:

- a) The 11 February 2014 response to your Question on Notice No. 124, which advised that clause 2.9(h) of the 2012 CPRs applied to the arrangement (as discussed, this clause related to ministerial appointments using the executive power), while also referring to an "eminent persons contract of employment" (a reference to exemption 15 of the CPRs relating to contracts for labour hire, discussed above).
- b) The subsequent hearings of the Finance and Public Administration Legislation Committee on 25 February 2014, where Finance referred to both: the Government's role in making the appointment; and its reliance on the eminent persons exemption from the limited tender requirements of the CPRs (exemption 15).
 - i. A further complicating factor at those hearings was the mistaken reference by Finance to exemption 7 of the CPRs (relating to the engagement of an "expert or neutral person, including engaging counsel or barristers") which was not directly relevant.

6. Following receipt of your further Question on Notice No. 246 on 20 February 2014, the confusion over the two appointment methods became evident within Finance, and steps were taken to clarify the public record. Those steps included:

- a) The response to Question on Notice No. 246 of 6 May 2014, which advised that the appointment was a decision made by the Government: "The engagement of the Head of the Secretariat of the National Commission of Audit (NCOA) was by ministerial appointment, which is not subject to the Commonwealth Procurement Rules (CPRs). A letter of engagement was the mechanism used to give effect to the ministerial appointment. As a non-procurement contract, no tendering method

applied and reporting is not mandatory ... Following the Government's decision, the Secretary of the Department of Finance wrote to Mr Peter Crone to confirm his appointment ..."

- b) Correspondence from a Finance Deputy Secretary to the Secretary of the Finance and Public Administration Legislation Committee, dated 23 May 2014, correcting evidence given at the Committee's hearings on 25 February 2014. The correspondence advised that: "In my response I stated that I believed the appointment was made under an eminent persons exemption. I wish to correct the record as follows ... The engagement of the Head of the Secretariat of the National Commission of Audit (NCOA) was by ministerial appointment, which is not subject to the Commonwealth Procurement Rules. A letter of engagement was the mechanism used to give effect to the ministerial appointment. As a non-procurement contract, no tendering method applied ..."

7. A remaining issue relates to the date of appointment. The documents examined by the ANAO included correspondence from the then Finance Secretary to Mr Crone, dated 29 October 2013, in the following terms: "Thank you for accepting the invitation to serve as the Head of the Secretariat of the Commission of Audit ... This letter is the official instrument to appoint you to this role. The role commenced on 22 October 2013 and will cease on 31 March 2014."

8. The language used in the then Finance Secretary's letter, and the reference to 22 October as the commencement date of the appointment (rather than 29 October, the date of the letter), indicates an understanding that the appointment had been made earlier and that the letter was a formal follow-up instrument. Such an understanding, and the reference to 22 October, would be consistent with the Finance Minister's response to your Question on Notice No. 246 of 6 May 2014, which advised that: "On 22 October 2013, the Treasurer and I issued a joint press release announcing that the Government had appointed Mr Peter Crone to the position of Head of the Secretariat of the NCOA."

9. However, it is not made explicit in the documents provided by Finance, by what means the appointment was made by a minister, or the date on which the executive power was used for that purpose. Finance's Executive Minute to the then Finance Secretary of 24 October 2013 (discussed at paragraph 4 above) indicated that the Prime Minister had made the appointment, and Mr Crone's testimony of 15 January 2014 to the Parliamentary Select Committee on the Commission of Audit also suggests the appointment rested with the Prime Minister, in the context of his reported conversation with Mr Crone:

Senator DASTYARI: ... But obviously there were some discussions with you before your name appeared in a press release announcing that you were going to come on board in the secretariat. At what point in the process were you advised or were you offered the position of secretariat?

Mr Crone: I do not recall the precise date, but I received a brief phone call from the Prime Minister. He asked me to be part of this exercise.

Senator DASTYARI: So the Prime Minister himself asked you to be part of this?

Mr Crone: The Prime Minister gave me a call and spoke to me, yes. [...]

Senator DASTYARI: Apart from the Prime Minister, who else spoke to you before your appointment?

Mr Crone: I had some contact with the Prime Minister's office.

Senator DASTYARI: The chief of staff of the Prime Minister?

Mr Crone: Yes, the chief of staff asked me to do this.

Senator DASTYARI: Okay; I assume that is the reasonable thing, because the Prime Minister does not just cold call.

Mr Crone: That is right.

Senator DASTYARI: So, the chief of staff of the Prime Minister - and I am not implying that this is inappropriate - would have sounded you out to see whether or not it was something you would be interested in. When you said yes, the Prime Minister would have made the call. Is that fair?

Mr Crone: Well, I think I had not actually said yes by the time the Prime Minister made the call.

Senator DASTYARI: And did you speak to Mr Hockey or Mr Cormann prior to your public announcement that you had taken this role?

Mr Crone: I do not believe so, no.

10. Whatever the case, the then Finance Secretary's letter of 29 October 2013 gave effect to the appointment. Section 44 of the *Financial Management and Accountability Act 1997* (FMA Act), which was in effect at the time, gave the Chief Executive of an FMA Act agency powers to make, vary and administer arrangements on behalf of the Commonwealth, in relation to the affairs of the agency. Under the Act, an "arrangement" included a contract, agreement or deed.

11. In summary, while the ANAO has not undertaken an audit to respond to your question, we have reviewed relevant documents and held discussions with Finance, and the indications are that Mr Crone was appointed by the Government using the executive power of the Commonwealth, meaning that the CPRs did not apply. It would also have been open to the Government to consider appointing the head of the Secretariat under exemption 15 of the CPRs. During the course of the appointment and engagement process there was confusion in Finance concerning the appointment method and this was apparent in Finance documentation and evidence given to the Finance and Public Administration Legislation Committee (and subsequently clarified). Nevertheless, the then Finance Secretary's letter of 29 October 2013 gave effect to the appointment.

12. I trust that this information is of assistance.

13. As previously foreshadowed, I have provided a copy of this correspondence to the Secretariat of the Finance and Public Administration Legislation Committee.

Yours sincerely



Ian McPhee
Auditor-General