

1999 ACPAC Biennial Conference,
Commercial Confidentiality – Striking
the Balance

**Commercial Confidentiality – A
matter of Public Interest**

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COMMERCIAL CONFIDENTIALITY - A MATTER OF PUBLIC INTEREST

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I. INTRODUCTION

I welcome the opportunity to speak today at this conference on the topic entitled '*Commercial in Confidence - Striking the Balance*', as it reflects a number of current issues, imperatives and interrelated challenges for Auditors-General in carrying out their functions in a changing public service environment.

As with many other Western democracies, Australian governments have been under increasing pressure over the last decade or so to achieve a better performing public service and less costly, better quality services to taxpayers - aims which Auditors-General relate to from their statutory responsibilities. The Australian Public Service (APS) has been steadily evolving towards a more private sector orientation, influenced by the momentum of the National Competition Policy reforms¹ and the Industry Commission inquiry into competitive tendering and contracting². More recently, the Government's acceptance of the basic principles set down by the National Commission of Audit for determining what activities should be undertaken within the public sector has led to an increased focus on privatisation and outsourcing of government services and activities³. The Government has made it clear that the challenge of public sector reform, including contestability with the private sector, remains both substantial and urgent.

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There is a new emphasis on the contestability of services, the outsourcing of functions which the private sector can undertake more efficiently and on ensuring a greater APS orientation towards outcomes rather than just on processes and an accent on continuous improvement to achieve better performance. In effect, we are witnessing a convergence between the public and private sectors. However, it is doubtful that anyone could say with confidence at this stage where that might lead in terms of the framework of governance. We are witnessing both competition and partnership in the delivery of public services and differences in assigned and shared responsibilities, including accountability for results and/or outsourcing. Much of politics and administration is about achieving the 'right balance', whatever might determine that at any point in time. Another common determinant is that 'circumstances alter cases'. There is frequently a tension between principle and pragmatism. Resolution of issues in such an environment is seldom simple.

Convergence offers opportunities for greater partnership and shared concepts but also gives focus to the distinctions between the two sectors. In my view the latter are mainly about accountability and the public interest and have come into prominence at the same time as the volume of information held and the technological means of its access (and of unlawful access) and use are expanding rapidly. Convergence also raises issues about whether there should be a change in the nature of accountability. Private sector providers clearly feel under pressure from the openness and transparency required by the public sector accountability relationship with the Parliament and the community. Public sector purchasers are under pressure to recognise the commercial 'realities' of operating in the marketplace. There needs to be some movement towards 'striking the balance' on the appropriate nature and level of accountability. Some would argue that it is simply a case of applying the existing requirement for transparency to private sector providers. Others might think that might be possible over time or under some different kind of accountability that reflected particular commercial pressures.

At the Federal level, the Government announced on 3 February 1998 its decision to apply the Freedom of Information Act 1982 (the FOI Act) to contractors providing services to government. As well, in March 1998 the Government introduced the Privacy Amendment Bill 1998 to apply the Privacy Act 1988 to personal information held by contractors in relation to services provided to the Commonwealth. On 15 December 1998 the Government announced that it will legislate to support and strengthen self-regulatory privacy protection in the private sector. At this stage it is unclear what the implications, if any, are for the Privacy Amendment Bill.

Against this background, I consider that the provision of government services by contractors is one of the most significant issues in contemporary public sector administration. It represents a major challenge for public service managers and Auditors-General to establish an

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appropriate balance between achieving cost effective outcomes and accountability for the manner in which public sector resources are used. This is the case regardless of whether service delivery is performed on behalf of the Commonwealth by service providers outside of the Commonwealth (contracted out) or whether outside services are used within Commonwealth entities to supplement their service delivery (contracted in).

II. THE EVOLVING DEBATE

We are all well aware that, as this steady evolution in arrangements for private sector delivery of government services has occurred, there has been much discussion over the various elements of change associated with this process and their impact on accountability requirements. For example, Linda Hancock from the Centre for Public Policy, Melbourne University, has referred to the “muddying dilution of accountability” which results from shifts from process to performance and from public administration to contract arrangements as a means of ordering public resources and delivering government services⁴. In a recent paper dealing with accountability issues, Richard Mulgan from the Australian National University commented that:

“Contracting out inevitably involves some reduction in accountability through the removal of direct departmental and Ministerial control over the day-to-day actions of contractors and their staff. Indeed, the removal of such control is essential to the rationale for contracting out because the main increases in efficiency come from the greater freedom allowed to contracting providers. Accountability is also likely to be reduced through the reduced availability of citizen redress under such instruments as the Ombudsman and FOI. At the same time, accountability may on occasion be increased through improved departmental and Ministerial control following from greater clarification of objectives and specification of standards. Providers may also become more responsive to public needs through the forces of market competition. Potential losses (and gains) in accountability need to be balanced against potential efficiency gains in each case.”⁵

As the reform of government service delivery continues to evolve, so has the focus of the debate on these accountability issues, with commercial confidentiality and public interest issues becoming of increasing concern. The debate has not been limited to Parliamentarians and Parliamentary Committees, Auditors-General, and academics. For example, an editorial in the Australian newspaper last November commenting on the High Court

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judgement in relation to the tabling of documents before the NSW Legislative Council stated that:

“This defence (that papers were commercially sensitive and should not be released) is over-used by governments trying to avoid scrutiny and embarrassment and often represents arrogance of the first order; a democracy elects its representatives to act on behalf of the electorate as a whole, not of vested interests. The system requires the utmost transparency and direct accountability from its Parliamentary representatives. Lack of transparency and limiting the capacity of Parliament to review government decisions weakens our democracy”⁶

The Australasian Council of Auditors-General has put out a statement of Principles for Commercial Confidentiality and the Public Interest. As an example, one of the Principles concludes that:

“Some private and public sector bodies are instinctively apprehensive and protective about the disclosure of any commercial information. But such views often overstate the implied risks to an entity that might be occasioned by the release of commercial data. After-the-event commercial information has significantly less value than commercial information concerning events that have yet to occur. But even where commercial information might have commercial value to others, there are often overriding obligations that require it to be released. This is so for commercial information held in the private sector and, a fortiori, it applies to the public sector.”⁷

The issues indicated in the above conclusion reflect a number of considerations which have exercised fellow Auditors-General in addressing commercial in confidence material. A particular concern has been the insertion of confidentiality clauses in agreements/contracts which can impact adversely on Parliament’s ‘right to know’ even if they do not limit a legislatively protected capacity of an Auditor-General to report to Parliament.

The trade-offs referred to by Richard Mulgan that have to be considered are not likely to be simply resolved but are profound and complex, involving consideration of many facets of, inter alia, cost effective service delivery, administrative law and accountability requirements of the Parliament.

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For example, as another indicator of media interest in this subject, in an ABC Background Briefing recently addressing the “Shrinking Democracy” Tony Harris, Auditor-General of New South Wales, stated that:

“...it appears to me that governments just don’t want to be accountable and are using private sector participation and so are reducing the amount of information that’s available.”⁸

Ches Baragwanath, Auditor-General of Victoria, has had to consider whether it is in the public interest to disclose the value of a commercial in confidence contract to outsource the State Revenue Office’s information technology services. Under the terms of the commercial in confidence contract, the service provider had not consented to such disclosure as this information was regarded as proprietary and its public release could place the contractor at a competitive advantage. After analysing the various arguments he concluded that:

“While I am aware of the importance of promoting practices that enable the benefits of competition to flow from the operation of a fully competitive market, it is my view that the introduction of contestability and the involvement of contractors in the provision of government services should not provide public sector agencies with an avenue for not disclosing the cost of publicly-funded services. The Parliament has the power to make these decisions and where it has seen a need to protect commercial confidentiality, as in the case of the Grand Prix, it has passed legislation to this effect.

Accordingly, I have elected to disclose the value of the contract to outsource the Office’s information technology services in order to enhance accountability and preserve the public’s interest in the right to know how their taxes have been spent. It is my view that the same level of disclosure in annual reports of agencies as applies to consultancies should also apply to outsourcing contracts”.⁹

In South Australia, the Auditor-General, Ken McPherson, has produced a substantial report analysing the issues of claims of commercial confidentiality with respect to government contracts and the role of the Auditor General. It provides some analysis which may be of value to this conference. In the report Ken states that:

“the issue of confidentiality is of central importance in matters associated with government contracting.”¹⁰

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Des Pearson, the Western Australian Auditor-General, is reported as backing calls for contracts to be made available for Parliamentary and public scrutiny after they are signed as happens in Britain, New Zealand and the United States.¹¹

On the other hand, the views of some engaged in private sector delivery of government services are reflected, for example, in the comments reportedly attributed to Mark Paterson of the Australian Chamber of Commerce and Industry on the ABC 7.30 Report as follows:

*"I think that the sanctity of contract and the certainty of contract are fundamental pillars of our legal system, and if private businesses enter into contracts with government that specify confidentiality, then that ought to be respected."*¹²

Against such comments and the growing concern about use of commercial in confidence claims to prevent or limit any disclosure, it is interesting to note the recent paper by Tom Brennan, of Corrs, Chambers Westgarth. Building his argument on a series of High Court decisions including Lange's Case, he concludes, inter alia, that:

"The Commonwealth's capacity to enter into binding obligations of confidence most likely is limited.

and

*Parties dealing with the Federal Government or agencies cannot rely on maintenance of confidentiality of information provided to government instrumentalities except to the extent that it can be demonstrated that it would be contrary to the public interest for that confidentiality to be breached."*¹³

In a more recent radio interview with Tom Brennan and Alan Rose (President of the Australian Law Reform Commission and previously Secretary of the Federal Attorney-General's Department) both parties made a distinction between Parliamentary requests for information and formal resolutions seeking its presentation. Reference was made to past stand-offs between the Executive and the Senate on the latter and the issue of the right of Parliaments to require access under the Constitution. Resolution of any differences would be a matter for the High Court.

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As a statement of general principle, Alan Rose said:

“... There are quite obviously important reasons for both Members of the Parliament and the public community at large to know the basis on which certain government decisions were taken and certain government contracts were entered into”.¹⁴

It seems from all of these comments that we can expect some interesting debates today. The remainder of this paper sets out the legislative framework relevant to accountability from the Commonwealth; canvasses some of the issues that are considered to be important; and indicates how they are being dealt with. Nevertheless, a fundamental issue remains that the on-going problem is one of defining clearly the ‘public interest’.

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III. THE ACCOUNTABILITY FRAMEWORK FOR THE COMMONWEALTH

The Commonwealth now has an enhanced framework for the assurance of public sector accountability with three Acts which came into effect on 1 January 1998 replacing the *Audit Act 1901*. The three Acts comprise the:

- *Auditor-General Act 1997* which provides for the appointment, independence, status, powers and responsibilities of the Auditor-General; the establishment of the ANAO, and for the audit of the ANAO by the Independent Auditor. Together with the other two Acts, it will provide the mandate for the Auditor-General to be the external Auditor of all Commonwealth-controlled bodies;
- *Financial Management and Accountability Act 1997* (FMA) which sets down the financial regulatory/accountability/accounting (accrual based) framework for Commonwealth bodies that have no separate legal existence of their own; they are, financially, simply agents of the legal entity, that is the Commonwealth; and
- *Commonwealth Authorities and Companies Act 1997* (CAC) which provides standardised accountability, ethical and reporting provisions for Commonwealth bodies that have a separate legal existence of their own (even though they may derive some or all of their finances from the Commonwealth Budget). Such bodies comprise Commonwealth controlled companies and their subsidiaries and those statutory authorities whose enabling legislation gives them legal power to own money and assets.

These acts form the basic financial legislative framework within which the ANAO conducts its audits and provide for strengthened accountability in a time of continuing change to public administration. This is particularly important given the greater private sector orientation that has a significant impact on methods of service delivery and attribution of responsibility, particularly for performance.

This legislation also makes explicit provisions for accountability of Chief Executive Officers of agencies and statutory bodies. The FMA Act requires Chief Executive Officers to promote efficient, effective and ethical use of Commonwealth resources. The CAC Act specifies standards for boards including acting honestly, exercising a degree of care and diligence,

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disclosing pecuniary interests, the use of insider information and other relevant matters.

The Auditor-General Act clearly provides a range of powers for access by the Auditor-General to records (including contracts) which are relevant to an audit, including records and information held by third parties so long as any access is for the purposes of undertaking an Auditor-General function. Importantly, however, access by the ANAO's statutory access powers do not extend to unfettered access to the premises of third party service providers. Commercial in confidence claims do not limit my right of access to relevant records. However Section 37 of the Act provides the Auditor-General with the power to decide not to include sensitive information public reports nor to disclose it to Parliament if it is considered to be in the public interest. In effect, such a decision would involve weighing up the following:

- effects contrary to the public interest from disclosure; and
- effects contrary to the public interest from non-disclosure (which include a reduction in the information available to Parliament on the matter being reported and thus a reduction in Parliamentary scrutiny).

The Parliament's ongoing interest in commercial in confidence matters was evident during the passage of the new financial legislation to replace the Audit Act. This was reflected by the request of the Senate, as part of the motion to adopt the report of the committee with respect to the package of legislation as follows:

“... that the Auditor-General include in the annual report on the operations of the Australian National Audit Office for the financial year 1997-98 a report on the appropriateness of commercial-in-confidence practices with recommendations on legislative regulation of such practices.”¹⁵

My response to this request is referred to later in this paper.

The Senate Finance and Public Administration References Committee Inquiry into Contracting out of Government Services¹⁶ which reported last year, gave careful consideration to matters of commercial confidentiality and disclosure. In its recommendations the ANAO suggested, as did the Commonwealth Ombudsman, a reverse onus of proof test, that is:

“In our view, the question of whether or not commercial-in-confidence information should be disclosed to the Parliament

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should start from the general principle that the information should be made public unless there is a good reason for it not to be. In other words, what we are saying is there should be a reversal of the principle of onus of proof which would require that the party arguing for non-disclosure should substantiate that disclosure would be harmful to its commercial interests and to the public interest".¹⁷

The Committee agreed and in addressing matters of commercial confidentiality the Committee concluded that:

"The committee is firmly of the view that only relatively small parts of contractual arrangements will be genuinely commercially confidential and the onus should be on the person claiming confidentiality to argue the case for it. A great deal of heat could be taken out of the issue if agencies entering into contracts adopted the practice of making contracts available with any genuinely sensitive parts blacked out. The committee accepts that some matters are legitimately commercially confidential. If Parliament insists on a 'right to know' such legitimately commercially confidential matters, the most appropriate course to achieve this would be the appointment of an independent arbiter such as the Auditor-General to look on its behalf and, as a corollary, to ensure that he has the staff and resources to do it properly".¹⁸

It is clear that the committee's proposals were not confined to contracting-out of government services but should apply to at least any major government contracts.

IV. ISSUES FOR DISCUSSION RELATING TO COMMERCIAL IN CONFIDENCE CONCERNS

Access provisions within contracts

In respect to the implementation of an adequate level of control and performance monitoring of a contract, the primary responsibility for ensuring sufficient access to relevant records and information pertaining to a contract lies with agency heads in accordance with Section 44 of the *Financial Management and Accountability Act 1997*. A Chief Executive must manage the affairs of the Agency in a way that promotes proper use (meaning efficient, effective and ethical use) of the Commonwealth resources for which the Chief Executive is responsible.

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From an accountability viewpoint, the ANAO considers it is critical that agencies closely examine the nature and level of information to be supplied under the contract and access to contractors' records and premises as necessary to monitor adequately the performance of the contract.

As part of its statutory duty to the Parliament, the ANAO may require access to records and information relating to contractor performance. The provisions of Part 5 - Information-gathering powers and secrecy - of the *Auditor-General Act 1997* are set out in Attachment A. The ANAO considers its own access to contract related records and information would generally be equivalent to that which should reasonably be specified by the contracting agency in order to fulfil its responsibility for competent performance management and administration of the contract. The inclusion of access provisions within the contract for performance and financial auditing is also very important in maintaining the thread of accountability. From this perspective, the ANAO considers it is imperative for contracting agencies to ensure the contract indicates the ANAO's powers in this respect and makes suitable arrangements for:

- _ sufficient access to records, information and premises of the contracting parties to allow them to ensure their own, and ultimately their Ministers', accountability expectations are met; and
- _ the Auditor-General to have sufficient access to ensure the accountability requirements of the Parliament are met.

In my view access to relevant records and information is best met by standard or model contract clauses supplemented as necessary by particular clauses that reflect individual circumstances of each agency. The use of mainly standard contract clauses would enable all parties contracting to the Commonwealth to be aware of the Commonwealth's expectations and their obligations in this regard for all contracts with third party service providers. This should include matters which could be classified as *commercial-in-confidence*. While clauses restricting confidentiality in contractor agreements are important for transparency, shared understanding and the purchaser/contractor relationship, legal advice from the Attorney-General's Department confirms that such clauses in no way restrict the ANAO pursuant to its statutory powers - including the furnishing of any associated report to the Parliament.

One solution I considered possible for achieving a degree of standardisation in contract clauses was by using the Finance Ministers Orders under the FMA and CAC to ensure access to information and/or records is available under the contract. This suggestion was based on the United States' Code of Federal Regulations. The Acquisition Regulations (issued under the Office of Federal Procurement Policy Act 1974 [US])

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contain a requirement for contracts entered into above a specified figure to include a clause allowing access to the specified information by the US Comptroller-General and authorised staff to records specified under the contract. This contract clause includes sub-contractors and excludes routine procurement less than a specified amount.

In the event this approach was not favoured by the Executive. I therefore developed in later discussion with the Minister for Finance and his department model clauses covering access to relevant information and records by both agencies and the ANAO for inclusion in Commonwealth contracts. Importantly, the clauses address access by the ANAO to the premises of the contractor for the purpose of accessing documentation and records. These model clauses have been circulated to Agency Heads and CEOs of CAC bodies, and have been applied in a number of contracts. The provisions of the model clauses are set out in Attachment B.

The Administrative Review Council, in its report to the Attorney-General on The Contracting Out of Government Services, has also supported the inclusion of provisions in contracts in support of the role of the Auditor-General, and has made a specific recommendation to this effect¹⁹.

The Commonwealth Procurement Guidelines now indicate that 'Buyers should ensure that where appropriate adequate provision is made in contracts for access to records by the ANAO'.²⁰

The nature of commercial confidentiality

One of the apparent difficulties in addressing commercial confidentiality issues is that of precise definition as to what is covered. Section 43(1) of *The Freedom of Information Act 1982* (FOI Act) describes it, in general terms, with respect to exemption from disclosure as follows:

"A document is an exempt document if its disclosure under this Act would disclose:

(a) trade secrets;

(b) any other information having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed;

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(c) *information ... concerning the business, commercial or financial affairs of an organisation or undertaking, being information -*

(i) *the disclosure of which would, or could reasonably be expected to, unreasonably affect ... that organisation or undertaking in respect of its lawful business, commercial or financial affairs;*

(ii) *the disclosure of which ... could reasonably be expected to prejudice the future supply of information to the Commonwealth...*"

Interestingly, as indicated by Tom Brennan, the Victorian FOI Act differs from all other similar Australian Acts in providing the Administrative Appeals Tribunal (AAT) with the power to order disclosure even though a document falls within an exemption provision²¹. This power can be exercised where, in the opinion of the AAT, the public interest requires disclosure. In a series of decisions relating to outsourcing and government competitive tendering processes, the Victorian AAT has ordered disclosure of tender documentation, due diligence documentation, full outsourcing contracts and information relating to monitoring of contractual performance.

The matter of public interest immunity and its scope is also addressed in guidelines for official witnesses before federal Parliamentary Committees. The guidelines echo in part the exempt provisions of the FOI Act, and state that public servants might be justified in seeking to give evidence to a committee in camera in the case of evidence 'the public disclosure of which would reveal business affairs, including trade secrets or other commercially sensitive information'²². I note that in 1992:

*"The (Senate) Procedure Committee reported that exemption provisions of the FOI Act did not automatically constitute grounds for refusal to produce documents on the grounds of public interest immunity, and that such a correlation 'would considerably expand the grounds of executive privilege (that is, public interest immunity) hitherto claimed by Ministers'."*²³

The above explanations (definitions) leave considerable scope for varying interpretation and application. It is therefore not surprising commercial confidentiality has always been an issue of some contention between parliaments and governments. With the growing convergence between the private and public sectors referred to earlier, and the considerable increase in contracting, the issue has become a matter of practical importance and

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some urgency. Essentially the concern is that agencies may too readily agree to treat contractors' documents as confidential. As the Senate Committee reported in its inquiry into contracting out:

"The harsh reality surrounding executive claims of commercial confidentiality is that they are unlikely to be believed, even when justified, because of their suspected use in the past to hide sloppiness, extravagance, incompetence - or worse - in the expenditure of public money".²⁴

The Committee recommended that, if Parliament insisted on a right to know legitimately commercially confidential information, the most appropriate course to achieve this would be the appointment of an independent arbiter, such as the Auditor-General, to look on its behalf²⁵. This means that, where the government has indicated material is commercial-in-confidence the independent arbiter would at least have access in cases where Ministers were able to prove that it was legitimate for them to withhold the material from the Senate. There may be issues about when an independent arbiter should be involved in the project concerned, any liability or accountability of the arbiter and the costs and processes involved.

Some have suggested codification as a way forward. The Australian Law Reform Commission, in a submission to the Senate Inquiry suggested a broad outline of information which could be protected on the grounds of its commercial character in the contracting out of government services²⁶. The broad outline is included as Attachment C. In April 1998 the ACT Government released draft principles and guidelines for the treatment of commercial information held by ACT government agencies. The guidelines start with the proposition that:

"Of primary importance is the principle of open access of information to the public. The Territory will generally make available to the public information concerning its commercial dealing with private citizens or corporations."²⁷

The Administrative Review Council in its report to the Attorney-General on contracting out has also favoured development of guidelines for Commonwealth agencies recommending:

"Guidelines should be developed and tabled by the Attorney-General setting out the circumstances in which Commonwealth agencies will treat information provided by contractors as confidential."²⁸

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The provisions of the FOI legislation quoted above suggest that codifying what constitutes commercial-in-confidence information would have merit. There is broad understanding of the kinds of information which contractors might regard as commercially confidential which have the potential, if disclosed to their competitors, to disadvantage the contracted organisation. The question is how to ensure adequate accountability for the use of public funds while ameliorating any justifiable private sector concerns.

Assessing claims of confidentiality

The overall conclusion of the above Senate Committee inquiry (that only relatively small parts of contractual arrangements will be genuinely commercially confidential and the onus should be on the person claiming confidentiality to argue the case for it) provides a useful framework in which to undertake my functions under the legislation and, in particular, to address the question of the publication of 'sensitive' commercial information. At the time the Committee reported, the new audit legislation had only recently come into operation. However, the Committee made clear that:

*"The committee expects that the Auditor-General, as an independent officer of the Parliament, will be robust in his assessment of where the balance lies between the public interest and commercial interests."*²⁹

Auditing under the new legislation is still in its infancy. Nevertheless, I am cautiously optimistic since I have not had a great need to exercise such judgement. Perhaps this is because our experience in dealing with matters of national security in some audits has been a useful guide. In practice we have found we can generally work through the issues to provide sufficient information for Parliament without unnecessary disclosure of security matters. Notwithstanding our experience so far, I recognise that this is a matter that we need to monitor carefully as our audits are increasingly addressing contracted services.

ANAO findings regarding Commercial-in-Confidence practices

In addressing the request by the Senate to report on the appropriateness of commercial-in-confidence practices referred to earlier, I had one such matter to report to Parliament in 1997-98. An audit of Contracting Arrangements for Agencies' Air Travel identified some of the risks to the Commonwealth from use of commercial-in-confidence clauses³⁰. The

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ANAO observed that there was significant uncertainty about the extent to which agencies can legally share information within the Commonwealth and found that agencies should not enter into air travel arrangements or confidentiality agreements that place the Commonwealth as a whole at a commercial disadvantage. The ANAO recommended that, to facilitate the exchange of information within the Commonwealth, the Department of Finance and Administration amend the standard confidentiality clause that it promulgates in the standing offer for air travel. The Department agreed with the recommendation. However, it has now withdrawn from managing a whole-of-government travel contract. Guidelines now include contract standard clauses, developed by Attorney-General's Legal Practice, that deal with accessing Commonwealth records.

Striking the Balance

In working through some of these issues it is important to continue to weigh in the balance of the equation that the fundamental driver behind much of the reforms is to improve the delivery of government services through reducing the costs of service delivery and increasing quality of output. In discussing the expectations that the Government has of public sector managers in relation to competitive tendering and contracting (CTC), the Secretary of the Department of Finance and Administration, has stressed that:

“CTC is not business as usual. It means new challenges for public sector managers - and in many instances a whole new culture, including a new array of skills”.³¹

In considering matters of accountability the Secretary supports the need for agencies to have contractual agreements that put in place mechanisms to enable them to meet their obligations under *Administrative Law*, including the *Ombudsman Act*, *Freedom of Information Act*, the *Audit Act* and the *Privacy Act*. He goes on to stress that:

“Our concern is to have a regime that protects the integrity of outsourced services, but does not make doing business with government so tied up with red tape and regulation as to lock businesses, including small businesses, out of the government marketplace”.³²

These comments go to the heart of 'striking the balance'. Notwithstanding the comments of Mark Paterson quoted earlier, it is clear that the private sector needs to involve itself with understanding and committing to the issue of accountability - it goes with the territory when undertaking government business, and at least needs to be spelt out in contract clauses

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for the purposes of transparency and good contract management. Equally, in fulfilling our obligations as instruments of accountability we need to have regard to the realities and pressures of the market environment confronting private sector firms if they are to do business successfully with government. Many will be operating in highly competitive environments in existing or developing markets and will need to protect their competitive position as far as possible, if doing business with governments is to be worthwhile to them. Adopting a 'take it or leave it' approach might simply mean that we might be left with less competition and worse outcomes.

In reality there is likely to be a very wide range of commercial confidentiality considerations - ranging from relatively minor matters which business would prefer not to be freely broadcast, to trade secrets which may go to the heart of a business's competitive and market position. To my mind it is quite understandable that businesses will be protective of such latter commercial information in meeting, for example, their fiduciary obligations to shareholders. It seems to me we have to accept these realities if CTC is to meet the aims referred to earlier by the Finance Secretary. The challenge is how to apply realistic models of accountability in our evolving environment without adversely reporting on public sector performance.

In my view the immediate test is the contractual relationships - that is negotiating an agreement to ensure an agency can appropriately review and monitor and meet its accountability obligations. It is partly a matter of educating both parties to the relationship or contract. Vague relationships do not assist either party nor lend confidence to the partnership/contractual arrangements. It is for this reason that I have promoted the use of model clauses to help agencies to give these matters sufficient thought, including the provision of access to premises of contractors (which, as I have noted, is not provided for in the *Auditor-General Act 1997*).

I suggest it is also important for Auditors-General to be able to demonstrate, through ways in which we meet our obligations, that overriding accountability considerations, while real, are examined appropriately. Part of this is ensuring that the way the ANAO undertakes its audit examinations is clearly relevant to the changing environment. I place great emphasis on the need for my auditors to gain a sound understanding and knowledge of agency operations being audited, and the nature and needs of contractual arrangements; and, at a higher strategic level, we focus on producing audit products and services which are relevant to improving public administration in a more commercialised/privatised public sector environment.

Australia is a very small market in international terms, with less than perfect competition in some sectors. Relevant risks in this environment were demonstrated in the aborted so-called 'cluster 4' outsourcing of some Commonwealth government IT services, where only one bid from a multi-

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national firm was received. In such situations it cannot be assumed that the best cost/quality outcome will necessarily be achieved. The Minister for Finance and Administration decided not to proceed with the tender on that basis.

Transparency is clearly fundamental not only to accountability of suppliers but also to managing the risk of poor management decisions in purchasing service delivery.

This brings me to the issue of what Parliament has a right to see, especially after completion of the tendering process and signing of the contract. I agree with Ches Baragwanath's conclusion that the value of a contract (which is effectively the cost of publicly-funded services) should be disclosed to the Parliament. This should be, at one end of the spectrum, unexceptionable. However, other issues tend to be less clear which we still need to work through as part of an appropriate accountability model in a more market oriented environment. Such issues include privacy, freedom of information, administrative review, citizen redress, ministerial briefing, Parliamentary inquiries and questions and performance assessment.

Finally, while I have generally been referring to Agencies, we need to recognise the special circumstances of Government Business Enterprises (GBEs) which are operating in a more commercial environment. Accountability for GBEs has recently been enhanced by the introduction of the June 1997 Governance Arrangements for Commonwealth Government Business Enterprises, which require GBEs, in consultation with Shareholder Ministers, to prepare an annual Statement of Corporate Intent (SCI) for tabling in the Parliament. The SCI is a brief (no more than five pages), high level, plain English document expressed in terms of outputs or outcomes. It is an integral part of the Corporate Plan, but does not include commercial-in-confidence information. An SCI would normally contain a business description and mission statement, corporate vision, objectives, code of ethics, statement of accountability (including reporting obligations) and broad expectations on financial and non-financial performance.. In addition, during the financial year, the Minister for Finance may require a GBE to prepare an interim report for tabling in the Parliament by the relevant portfolio Minister.

In this context I note that a recent audit of statutory bodies in the former Primary Industries and Energy portfolio found that most statutory marketing authorities had principal plans which were not publicly available because they contained commercial-in-confidence information³³. We considered that it would enhance accountability for these bodies to have an additional brief public plan detailing a Statement of Corporate Intent, as is the case for Government Business Enterprises.

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V. CONCLUDING REMARKS

In conclusion, the title of this conference '*Striking the Balance*', is very appropriate to the changing public administration environment occurring at all levels of government in Australia. In particular it reflects the challenges facing us all, with the greater convergence of the public and private sectors and its attendant implications for proper accountability both for the way in which public funds are spent and the program outcomes being achieved. In the Commonwealth we have sought to address this situation in the large part through an enhanced legislative framework relevant to the rapidly changing environment, focusing on promoting appropriate contractual arrangements. The latter are considered to be at the heart of this debate and focus on the need to gain understanding and acceptance of contracting parties. At the bureaucratic level, we have to ensure that our competencies, products and the way we undertake our work meet the expectations and commitments of accountability for the use of public funds in the evolving environment in which we are operating.

Any debate about public versus private interest can depend very much on the prevailing philosophy and environment in which it is being conducted. Seemingly, such debate often ends up in compromise of some kind. Arguments inevitably revolve around principle and pragmatism. The outcome will largely reflect the price one places on accountability as an important element of democratic governance or on perceptions of individual freedoms. While it is important to have a strong statement of principle on an important issue such as the one we are debating today, it is equally important that any statement recognises the need for consistent, workable and unequivocal implementation of that principle if it is to achieve the outcome required.

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ATTACHMENT A

AUDITOR-GENERAL ACT 1997

No.151, 1997

An Act to provide for the appointment of an Auditor-General, to set out the functions of the Auditor-General, and for related purposes.

Part 5 - Information-gathering powers and secrecy

Division 1- Information-gathering powers

30 Relationship of information-gathering powers with other laws

The operation of sections 32 and 33:

- (a) is limited by laws of the Commonwealth (whether made before or after the commencement of this Act) relating to the powers, privileges and immunities of:
 - (i) each House of the Parliament; and
 - (ii) the members of each House of the Parliament; and
 - (iii) the committees of each House of the Parliament and joint committees of both Houses of the Parliament; but
- (b) is not limited by any other law (whether made before or after the commencement of this Act), except to the extent that the other law expressly excludes the operation of section 32 or 33.

31 Purpose for which information-gathering powers may be used

The powers under sections 32 and 33 may be used for the purpose of, or in connection with, any Auditor-General function, except:

- (a) an audit or other function under section 20;
- or

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- (b) providing advice or information under section 23; or
- (c) preparing a report under section 25 or 26.

32 Power of Auditor-General to obtain information

- (1) The Auditor-General may, by written notice, direct a person to do all or any of the following:
 - (a) to provide the Auditor-General with any information that the Auditor-General requires;
 - (b) to attend and give evidence before the Auditor-General or an authorised official;
 - (c) to produce to the Auditor-General any documents in the custody or under the control of the person.

Note: A proceeding under paragraph (1)(b) is a "judicial proceeding" for the purposes of Part III of the *Crimes Act 1914*. The *Crimes Act* prohibits certain conduct in relation to judicial proceedings.

- (2) The Auditor-General may direct that:
 - (a) the information or answers to questions be given either orally or in writing (as the Auditor-General requires);
 - (b) the information or answers to questions be verified or given on oath or affirmation.

The oath or affirmation is an oath or affirmation that the information or evidence the person will give will be true, and may be administered by the Auditor-General or by an authorised official.

- (3) A person must comply with a direction under this section.

Maximum penalty: 30 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Section 4AA of the *Crimes Act 1914* sets the current value of a penalty unit.

- (4) The regulations may prescribe scales of expenses to be allowed to persons who are required to attend under this section.
- (5) In this section:

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authorised official means an FMA official who is authorised by the Auditor-General, in writing, to exercise powers or perform functions under this section.

33 Access to premises etc.

- (1) The Auditor-General or an authorised official:
 - (a) may, at all reasonable times, enter and remain on any premises occupied by the Commonwealth, a Commonwealth authority or a Commonwealth company; and
 - (b) is entitled to full and free access at all reasonable times to any documents or other property; and
 - (c) may examine, make copies of or take extracts from any document.
- (2) An authorised official is not entitled to enter or remain on premises if he or she fails to produce a written authority on being asked by the occupier to produce proof of his or her authority. For this purpose, **written authority** means an authority signed by the Auditor-General that states that the official is authorised to exercise powers under this Division.
- (3) If an authorised official enters, or proposes to enter, premises under this section, the occupier must provide the official with all reasonable facilities for the effective exercise of powers under this section.

Maximum penalty: 10 penalty units.

Note 1: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Note 2: Section 4AA of the *Crimes Act 1914* sets the current value of a penalty unit.

- (4) In this section:

authorised official means an FMA official who is authorised by the Auditor-General, in writing, to exercise powers or perform functions under this section.

premises includes any land or place.

34 False statements etc.

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(1) A person must not make a statement to an audit official that the person knows is false or misleading in a material particular.

Maximum penalty: Imprisonment for 12 months.

Note: [Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.](#)

(2) If a person gives an audit official a document that the person knows is false or misleading in a material particular, the person must identify the particular.

Maximum penalty: Imprisonment for 12 months.

Note: [Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.](#)

(3) In this section:

audit official means a person performing, or assisting in the performance of, an Auditor-General function.

35 Self-incrimination no excuse

A person is not excused from producing a document or answering a question under section 32 on the ground that the answer, or the production of the document, might tend to incriminate the person or make the person liable to a penalty. However, neither:

- (a) the answer to the question or the production of the document; nor
- (b) anything obtained as a direct or indirect result of the answer or the production of the document;

is admissible in evidence against the person in any criminal proceedings (other than proceedings for an offence against, or arising out of, section 32 or 34).

Division 2 - Confidentiality of information

36 Confidentiality of information

(1) If a person has obtained information in the course of performing an Auditor-General function, the person must not disclose the information except in the course of performing an Auditor-General function or for the purpose of any Act that gives functions to the Auditor-General.

Maximum penalty: Imprisonment for 2 years.

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Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) Subsection (1) does not prevent the Auditor-General from disclosing particular information to the Commissioner of the Australian Federal Police if the Auditor-General is of the opinion that the disclosure is in the public interest.

(3) A person who receives a proposed report under section 19 must not disclose any of the information in the report except with the consent of the Auditor-General.

Maximum penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

37 Sensitive information not to be included in public reports

(1) The Auditor-General must not include particular information in a public report if:

- (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or
- (b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).

(2) The reasons are:

- (a) it would prejudice the security, defence or international relations of the Commonwealth;
- (b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
- (c) it would prejudice relations between the Commonwealth and a State;
- (d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the Commonwealth;
- (e) it would unfairly prejudice the commercial interests of any body or person;

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- (f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.
- (3) The Auditor-General cannot be required, and is not permitted, to disclose to:
- (a) a House of the Parliament; or
 - (b) a member of a House of the Parliament; or
 - (c) a committee of a House of the Parliament or a joint committee of both Houses of the Parliament;

information that subsection (1) prohibits being included in a public report.

- (4) If the Auditor-General decides to omit particular information from a public report because the Attorney-General has issued a certificate under paragraph (1)(b) in relation to the information, the Auditor-General must state in the report:
- (a) that information (which does not have to be identified) has been omitted from the report; and
 - (b) the reason or reasons (in terms of subsection (2)) why the Attorney-General issued the certificate.
- (5) If, because of subsection (1), the Auditor-General decides:
- (a) not to prepare a public report; or
 - (b) to omit particular information from a public report;

the Auditor-General may prepare a report under this subsection that includes the information concerned. The Auditor-General must give a copy of each report under this subsection to the Prime Minister, the Finance Minister and the responsible Minister or Ministers (if any).

- (6) In this section:

public report means a report that is to be tabled in either House of the Parliament.

State includes a self-governing Territory.

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ATTACHMENT B

Model Access Clauses - Agency

1. The Customer, and other persons authorised by the Customer, have the right of access to the premises of the Contractor at all reasonable times and the right to inspect and copy documentation and records, however stored, in the Contractor's possession or control, for purposes associated with the Contract or any review of performance under the Contract. The Customer will also have access to any Commonwealth assets located on the premises of the Contractor which come into existence as a result of the Contract.
2. The rights referred to in clause 1 are subject to:
 - (a) the provision of reasonable prior notice by the Customer;
 - (b) the Contractor's reasonable security procedures; and
 - (c) if appropriate, execution of a deed of confidentiality relating to non-disclosure of the Contractor's confidential information.
3. The requirement for access as specified in clause 1 does not in any way reduce the Contractor's responsibility to perform its obligations in accordance with the Contract.
4. In exercising the rights granted by these clauses, the Customer shall not interfere with the Contractor's performance under the Contract in any material respect. If, in the Contractor's reasonable opinion there is likely to be a significant delay in the Contractor discharging an obligation under the Contract because of a cause beyond the reasonable control of the Contractor and as a direct result of the Customer's action under this clause, the Contractor may request a reasonable extension of time.
5. The Customer shall not refuse a request for extension of time under clause 4 without reasonable grounds for doing so.

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6. The Contractor must ensure that any subcontract entered into for the purpose of this Contract contains an equivalent clause permitting the Customer, and other persons authorised by the Customer, to have access as specified in these clauses.

7. These clauses applies for the term of the Contract and for a period of five years from the date of expiration or termination.

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ATTACHMENT B (Cont.)

Model Access Clauses - ANAO

1. The Auditor-General or a delegate of the Auditor-General, for the purpose of performing the Auditor-General's statutory functions, may, at reasonable times and on giving reasonable notice to the Contractor:

- (a) require the provision by the Contractor, its employees, agents or subcontractors, of records and information which are directly related to the contract;
- (b) have access to the premises of the contractor for the purposes of inspecting and copying documentation and records, however stored, in the custody or under the control of the Contractor, its employees, agents or subcontractors which are directly related to the contract; and, where relevant
- (c) inspect any Commonwealth assets held on the premises of the Contractor.

2. The Contractor shall ensure that any subcontract entered into for the purpose of this Contract contains an equivalent clause granting the rights specified in these clauses.

3. These clauses apply for the term of the Contract and for a period of five years from the date of expiration or termination.

Model Access Clauses for Tender Conditions

1. The Auditor-General has statutory powers to obtain information. The *Audit Act 1901* and the Auditor-General Bill 1996 provides the Auditor-General or an authorised person with a right to have, at all reasonable times, access to information, documents and records (see Ss 14B and 48E of the Audit Act and Ss 32 and 33 of the Auditor-General Bill).

2. In addition to the Auditor-General's statutory powers, and in recognition of the need for the Auditor-General's functions to be conducted in an efficient and cooperative manner, if a tenderer is chosen to enter into

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a contract, that tenderer will be required to provide to the Auditor-General, or a delegate of the Auditor-General, access to information, documents, records and Commonwealth assets, including those on tenderer's premises. This access will be required at reasonable times on giving reasonable notice, for the purpose of carrying out the Auditor-General's functions and will be restricted to information and assets which are in the custody or control of the tenderer, its employees, agents or subcontractors, and which is directly related to the Contract. Such access will apply for the term of any Contract entered into and for a period of five years from the date of expiration or termination.

ATTACHMENT C

Codification of what constitutes 'commercially confidential' information

In a supplementary submission to the Senate Finance and Public Administration References Committee, the Australian Law Reform Commission produced a broad outline of information which could be protected on the grounds of its commercial character in the contracting out of government services:

- _33 information that has an intellectual property value, or amounts to a trade secret (noting that this may change over time);

- _33 information that relates directly to the actual conduct and operations of the contractor (noting also that this may change over time) – in the case of the Victorian Metropolitan Ambulance Service, this included prospective tenderers' financial position, operating hours, activity profile, vehicle insurance, communications equipment, employee shift configurations, cost structures, staff training programs and customer service initiatives; and the tender evaluation methodology;

- _33 details concerning the contractor's successful tender, where evidence of the market in that particular industry demonstrates that disclosure of specified information will adversely impact the business affairs of the contracting firm;

- _33 information obtained in confidence that satisfies the common law test for breach of confidence; and

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33 circumstances where there is no overriding public interest in disclosure of the information or where the public interest is not so great as to result in the person or business being unreasonably affected by disclosure of the information. [\[48\]](#)