

The Auditor-General  
Audit Report No.33 2001-02  
Assurance and Control Assessment Audit

**Senate Order of 20 June 2001  
(February 2002)**

Australian National Audit Office

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of Australia 2002

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Canberra ACT  
25 February 2002

Dear Madam President  
Dear Mr Speaker

The Australian National Audit Office has undertaken an across agency Assurance and Control Assessment audit in accordance with the authority contained in the *Auditor-General Act 1997*. I present this report of this audit, and the accompanying brochure, to the Parliament. The report is titled *Senate Order of 20 June 2001 (February 2001)*.

Following its tabling in Parliament, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. J. Barrett', is positioned below the text 'Yours sincerely'.

P. J. Barrett  
Auditor-General

The Honourable the President of the Senate  
The Honourable the Speaker of the House of Representatives  
Parliament House  
Canberra ACT

## AUDITING FOR AUSTRALIA

The Auditor-General is head of the Australian National Audit Office. The ANAO assists the Auditor-General to carry out his duties under the *Auditor-General Act 1997* to undertake performance audits and financial statement audits of Commonwealth public sector bodies and to provide independent reports and advice for the Parliament, the Government and the community. The aim is to improve Commonwealth public sector administration and accountability.

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## Abbreviations/Glossary

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ABS	Australian Bureau of Statistics
AFFA	Department of Agriculture, Fisheries and Forestry—Australia
AGS	Australian Government Solicitor
ANAO	Australian National Audit Office
Audit Report No.38	<i>Use of Confidentiality Provisions in Commonwealth Contracts</i> (ANAO Audit Report 2000–01 No.38)
CEIs	Chief Executive’s Instructions
CPGs	Commonwealth Procurement Guidelines
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
DITR	Department of Industry, Tourism and Resources
Finance	Department of Finance and Administration
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FPA	Senate Finance and Public Administration References Committee
GaPS	Gazette Publishing System
JHD	Joint House Department
PM&C	Department of the Prime Minister and Cabinet

# Summary





# Summary

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## Background

1. On 20 June 2001, the Senate made an Order that required Ministers to table, twice yearly, letters of advice that all agencies<sup>1</sup>, which they administered, had placed on the Internet lists of current contracts of \$100 000 or more by the tenth day of the Spring<sup>2</sup> and Autumn sittings of Parliament. The list was to indicate, amongst other things whether the contracts contained any confidentiality provisions. The complete text of the Senate Order is attached at Appendix 1.
2. In addition, the Auditor-General was asked to examine a number of contracts listed and indicate whether there had been any inappropriate use of confidentiality provisions. The Auditor-General agreed to the request.
3. In late August, the Government, in its response to the Senate Order, agreed that agencies would comply with the spirit of the Order because it was committed to transparency of Commonwealth contracts. The Government also indicated that agencies' compliance with the Order would be progressive as agencies refine arrangements and processes to meet the requirements (see Appendix 2).
4. On 26 September 2001, the Senate Finance and Public Administration References (FPA) Committee tabled its final report on an *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*<sup>3</sup>. The report incorporated a draft amendment to the Order (see Appendix 3), which was agreed to by the Senate.
5. The Government had not responded to the Order, as amended, when the Parliament was prorogued on 8 October 2001. The Department of Finance and Administration (Finance) advised agencies on 18 October 2001 that:

*...as the Government did not have an opportunity to respond to the amended Senate Order before the commencement of the caretaker period, I confirm that FMA agencies should continue to comply with the terms of the original order in line with the Government's response of 27 August 2001 until further notice.*

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<sup>1</sup> Agencies within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act).

<sup>2</sup> In the case of the 2001 Spring Sittings, this was 28 August 2001.

<sup>3</sup> Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a New Framework for Accountability (Final Report)* September 2001.

6. At the same time, Finance also advised agencies that:

- there was no need for them to change their preparations if they were already intending to list any of the additional information required by the amended Order; and
- until such time as the Government responds to the amended Order, as a contingency, agencies should prepare for the additional requirements in the amended Order.

### **Other relevant reviews**

7. The FPA Committee commenced an Inquiry in 2000 in response to a draft Senate Motion that sought to provide greater transparency in relation to government contracts. The Committee produced two reports.

8. In its interim report tabled in June 2000, the Committee considered that the level of information to the Parliament and the public about government contracting had not kept pace with the increased rate of contracting out, particularly in the outsourcing of many functions previously performed by government agencies. The general principle, sometimes called the reverse onus principle, was that information in contracts should be made public unless there are good reasons for withholding it. The Committee added that if government sought to keep information confidential, then it must establish that it is in the public interest that the information not be disclosed.

9. During the Committee's Inquiry in May 2000, the Australian National Audit Office (ANAO) advised that it would consider including in its work program for 2000–2001, a performance audit that would look at agencies' use of confidentiality provisions in contracts. An audit was subsequently conducted, and the ANAO tabled its report on the *Use of Confidentiality Provisions in Commonwealth Contracts* (Audit Report No.38) in May 2001. In recognising that there was an absence of comprehensive material to assist agencies in determining whether contractual provisions should be treated as confidential, the ANAO developed criteria to assist in such decisions. The criteria included that:

- the information to be protected must be able to be identified in specific rather than global terms;
- the information must have the necessary quality of confidentiality; and
- detriment to the confider of the information is generally necessary.

10. Building on the discussion of the above criteria, the earlier report also categorised information that the courts have held to be confidential (for example, trade secrets and information having a commercial value that would be diminished or destroyed if disclosed). In addition, the report provided some

guidance on a possible new framework for dealing with the issues of confidentiality in contracts and disclosure to parliamentary committees. It also emphasised that the fact that information is confidential does not, by itself, provide grounds for refusing disclosure to parliamentary committees. The report's recommendations were generally accepted by those agencies that were included in the audit.

11. The FPA Committee in its final report (September 2001) endorsed the application, and immediate use, of the criteria developed by the ANAO for agencies to assess private sector claims and to determine what is genuinely confidential in advance of signing a contract. In its report, the Committee also made the point that public servants must make contractors aware of the different framework that applies when dealing with Parliamentary committees prior to tendering and contracting work with the Government.

12. In early October 2001, the Government released the updated *Commonwealth Procurement Guidelines* (CPGs), which in relation to accountability and transparency, advised agencies that they should:

- include provisions in tender documentation and contracts that alert prospective tenderers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees; and
- consider, on a case-by-case basis, what might be commercial-in-confidence<sup>4</sup> when designing any contract.

## Audit Objectives

13. In accordance with the request in the Senate Order of 20 June 2001, the ANAO conducted an audit in a selection of FMA agencies with the objectives of examining:

- (a) the process by which the agencies' Internet listing was made, and assessing whether the process was likely to lead to the list of contracts placed on the Internet being complete;
- (b) the process by which agencies determined which contracts contained confidential provisions or were considered to be confidential, and assessing whether the process was appropriate;

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<sup>4</sup> 'Typically, things that [the CPGs considered] may be commercial-in-confidence include details of a company's commercial strategies or fee structures, intellectual property, or information that could benefit competitors.' *Commonwealth Procurement Guidelines and Better Practice Guidance, September 2001*, p. 8.

- (c) a selection of contracts listed on the Internet and assessing whether there was any inappropriate use of confidentiality provisions; and
- (d) the processes and guidance in place to determine in the future whether information in a contract should be protected as confidential.

14. In developing the audit objectives, the ANAO had regard for both the original Senate Order and the subsequent amendment. However, the ANAO recognised that those agencies included in the audit placed their lists of contracts on the Internet in accordance with the requirements of the original Senate Order because:

- the Order, as amended, was not in place at the time some of the agencies placed their lists on the Internet, and others were well advanced in preparing their listing at the time the Order, as amended, was tabled; and
- Finance advised agencies, that as the Government had not responded to the Order by the time Parliament was prorogued, they should continue to comply with the terms of the original Order. Finance also indicated that it was seeking clarification on aspects of the Order, as amended, and the intent of the changes.

15. The ANAO also conducted a desktop review of all agencies' Internet sites to determine whether a list of contracts had been placed on the Internet site and whether the list was consistent<sup>5</sup> with the requirements of the original Senate Order. In conducting the review the ANAO noted that, for the reasons outlined above, agencies may not have been in a position to comply with the Order, as amended.

## Audit Scope

16. The original Senate Order requested that the results of the audit be tabled by 28 February 2002. In order to meet the Senate request, the ANAO set cut off dates of 18 October 2001 for the selection of agencies for audit and 30 January 2002 for the desktop review of agency Internet sites.

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<sup>5</sup> Consistent with the Senate Order, includes listing contracts over \$100 000 that have not been fully performed or which have been entered into in the last twelve months, the name of the contractor and subject matter for each contract and whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, a statement of the reasons for the confidentiality; and an estimate of the cost of complying with this order.

17. The Senate Order required that Ministers, in respect of each agency administered by that Minister, table letters of advice that a list of contracts had been placed on the Internet. The five parliamentary departments<sup>6</sup>, although agencies under the FMA Act, are not departments of state administered by Ministers. As a result, they are not included in the Order. However, all parliamentary departments, with the exception of the Department of the House of Representatives<sup>7</sup>, have chosen to put a list of contracts on the Internet. Taking into account the Parliamentary departments, the population of FMA agencies required to comply with the Order, or that have agreed to do so, was 72.

18. The audit identified that, as at 18 October 2001, 23 agencies had listed details of relevant contracts on the Internet. The sample of agencies selected for audit was therefore taken from those 23 agencies and, as a result, was not a representative sample of all FMA agencies.

19. The ANAO selected six of the above mentioned 23 agencies that had placed a listing of contracts on the Internet for audit examination. From those six agencies, a sample of contracts listed as having confidentiality provisions was reviewed.

## Overall conclusion

20. The ANAO concluded that all six audited agencies had placed contract listings on the Internet consistent with the requirements of the original Senate Order, and in line with the Government's response to the Order. In addition, each agency had taken positive and appropriate action to revise their policies and procedures, including their standard Request for Tender and contract documentation, to reflect the new contracting environment. This required agencies, amongst other things, to:

- determine what information is to be protected as confidential at the time the contract is negotiated; and
- include provisions in tender documentation and contracts that provided for information to be made available to Parliament and its Committees, if requested.

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<sup>6</sup> Department of the Senate; Department of the House of Representatives; Department of the Parliamentary Library; Department of the Parliamentary Reporting Staff; and Joint House Department.

<sup>7</sup> The Department of the House of Representatives advised that '*As a matter of principle this Department does not acknowledge nor comply with Senate Orders unless the House of Representatives has passed a similar order.*

21. In relation to the other FMA agencies that were either subject to the Senate Order, or had agreed to comply with the Order anyway, 63 had placed a contract listing on the Internet as at 30 January 2002. Three agencies had no contracts over \$100 000 and, therefore, were not required to provide a listing on the Internet. The other six agencies indicated that they were still working towards placing their list of contracts on the Internet. Overall, this represents a positive response to the Government decision that agencies should comply progressively with the Senate Order.

22. There are also indications that a number of agencies are developing, progressively, more detailed guidance to assist relevant staff on how to determine those aspects of the contract that might be protected as confidential.

## Key findings

23. The ANAO considers that processes followed by the agencies subject to audit, in order to compile their Internet listing of contracts as required by the Senate Order, provided a reasonable level of confidence that the Internet listing was complete.

24. The ANAO concluded that all agencies subject to audit had appropriate processes for determining whether information in the contract was confidential. The ANAO considered that, as contracts are an agreement between the Commonwealth and the supplier, it would be appropriate for the suppliers with existing contracts to be contacted to establish what information in a contract, if any, they regard as confidential in the contracts listed on the Internet.

25. The ANAO concluded that the use of confidentiality provisions in all 64 contracts examined was not unexpected given that, during the period the contracts were entered into, it was not general practice for agencies to discuss with suppliers those aspects of the contract that might be regarded as confidential.

26. However, in applying the criteria developed for determining whether information should be classified as confidential, the ANAO considered that 40 of the 64 contracts had confidentiality provisions that would now be inappropriate. The inappropriate use of confidentiality provisions related mainly to the price of goods and services, or staff hourly and daily rates, all of which would generally not be considered confidential. All agencies agreed in principle with the ANAO assessment.

**27.** Of the remaining 24 contracts considered to have confidentiality provisions that were appropriate<sup>8</sup>, most of the information related to detailed pricing structures that contained sufficient information to reveal a supplier's profit margin. This information would normally be regarded as having a commercial value to the supplier or its competitors, and detriment may be caused to the supplier should the information be disclosed.

**28.** The ANAO considers that the processes and guidance being put in place by the agencies audited will assist in promoting the appropriate use of confidentiality provisions in contracts. In particular, agency procedures provide for:

- tenderers to identify contractual information that they consider confidential in the RFT documentation;
- agency contract management staff to discuss with suppliers those aspects of the contract they consider confidential and assess the appropriateness of such claims; and
- the inclusion of clauses in contracts for access to contract information by Parliamentary Committees and the Auditor-General, if required.

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<sup>8</sup> Where confidentiality of certain information is considered to be appropriate in either, or both, parties' interests the ANAO has indicated in Audit Report No.38 that agencies should as a matter of course seek to include a provision which provides an exception with respect to disclosure to a parliamentary committee, if only on a confidential basis





# **Audit Findings and Conclusions**



# Introduction

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## Background

### The Senate Order

**1.1** On 20 June 2001, the Senate made an Order that required Ministers to table, twice yearly, letters of advice that all agencies<sup>9</sup>, which they administered, had placed on the Internet lists of current contracts of \$100 000 or more by the tenth day of the Spring<sup>10</sup> and Autumn sittings of Parliament. The list was to indicate, amongst other things, whether the contracts contained any confidentiality provisions. The complete text of the Senate Order is attached at Appendix 1.

**1.2** In addition, the Auditor-General was asked to examine a number of contracts listed and indicate whether there had been any inappropriate use of confidentiality provisions. The Auditor-General agreed to the request.

**1.3** In late August, the Government, in its response to the Senate Order, considered that the Order was probably beyond the Senate's power based on legal advice from the Australian Government Solicitor. However, the Government agreed that agencies would comply with the spirit of the Order because it was committed to transparency of Commonwealth contracts. The Government also indicated that agencies' compliance with the Order would be progressive as agencies refine arrangements and processes to meet the requirements (see Appendix 2).

**1.4** On 26 September 2001, the Senate Finance and Public Administration References (FPA) Committee tabled its final report on an *Inquiry into the mechanism for providing accountability to the Senate in relation to government contracts*<sup>11</sup>. The report incorporated a draft amendment to the Order (see Appendix 3), which was agreed to by the Senate. The major changes to the Order were that, where not all contracts were listed on the Internet, the Minister's tabled letter should indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. (See Appendix 4 for a comparison of the two Orders).

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<sup>9</sup> Agencies within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act)

<sup>10</sup> In the case of the 2001 Spring Sittings, this was 28 August 2001.

<sup>11</sup> Senate Finance and Public Administration References Committee, *Commonwealth Contracts: a New Framework for Accountability (Final Report)* September 2001.

1.5 The Government had not responded to the Order, as amended, when the Parliament was prorogued on 8 October 2001. Finance advised agencies on 18 October 2001 that:

*As the Government did not have an opportunity to respond to the amended Senate Order before the commencement of the caretaker period, I confirm that FMA agencies should continue to comply with the terms of the original order in line with the Government's response of 27 August 2001 until further notice.*

1.6 At the same time Finance also advised agencies that:

- there was no need for them to change their preparations if they were already intending to list any of the additional information required by the amended Order; and
- until such time as the Government responds to the amended Order as a contingency agencies should prepare for the additional requirements in the amended Order.

### **Other relevant reviews**

1.7 The FPA Committee commenced an Inquiry in 2000 in response to a draft Senate Motion that sought to provide greater transparency in relation to government contracts. The Committee produced two reports.

1.8 In its interim report tabled in June 2000, the Committee considered that the level of information to the Parliament and the public about government contracting had not kept pace with the increased rate of contracting out, particularly in the outsourcing of many functions previously performed by government agencies. The general principle, sometimes called the reverse onus principle, was that information in contracts should be made public unless there are good reasons for withholding it. The Committee added that if government sought to keep information confidential, then it must establish that it is in the public interest that the information not be disclosed.

1.9 During the Committee's Inquiry in May 2000, the ANAO advised that it would consider including in its work program for 2000–2001, a performance audit that would look at agencies' use of confidentiality provisions in contracts. An audit was subsequently conducted, and the ANAO tabled its report on the *Use of Confidentiality Provisions in Commonwealth Contracts* (Audit Report No.38) in May 2001. The report supported the principle that Government accountability obligations are such that contractual material should only be protected as confidential if there are sound reasons to do so. In recognising that there was an absence of comprehensive material to assist agencies in determining whether

contractual provisions should be treated as confidential, the ANAO developed criteria to assist in such decisions. The criteria included that:

- the information to be protected must be able to be identified in specific rather than global terms;
- the information must have the necessary quality of confidentiality; and
- detriment to the confider of the information is generally necessary.

**1.10** Building on the discussion of the above criteria, the earlier report also categorised information that the courts have held to be confidential (for example, trade secrets and information having a commercial value that would be diminished or destroyed if disclosed). In addition, the report provided some guidance on a possible new framework for dealing with the issues of confidentiality in contracts and disclosure to parliamentary committees. It also emphasised that the fact that information is confidential does not, by itself, provide grounds for refusing disclosure to parliamentary committees. The report's recommendations were generally accepted by those agencies that were included in the audit.

**1.11** In its final report tabled in September 2001, the FPA Committee endorsed the application, and immediate use, of the criteria developed by the ANAO for agencies to assess private sector claims and to determine what is genuinely confidential in advance of signing a contract. The Committee also made the point that public servants must make contractors aware of the different framework that applies when dealing with Parliamentary committees prior to tendering and contracting work with the Government.

**1.12** In early October 2001, the Government released the updated *Commonwealth Procurement Guidelines and Better Practice Guidance* (CPGs), which in relation to accountability and transparency, advised agencies that they should:

- include provisions in tender documentation and contracts that alert prospective tenderers to the public accountability requirements of the Commonwealth, including disclosure to Parliament and its Committees; and
- consider, on a case-by-case basis, what might be commercial-in-confidence<sup>12</sup> when designing any contract.

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<sup>12</sup> 'Typically, things that [the CPGs considered] may be commercial-in-confidence include details of a company's commercial strategies or fee structures, intellectual property, or information that could benefit competitors.' *Commonwealth Procurement Guidelines and Better Practice Guidance*, September 2001, p. 8.

**1.13** In addition, the CPGs reflect the Government's response to the Senate Order of 20 June 2001, which is reproduced below:

*Agencies are also required to publish a list of agency contracts exceeding \$100 000 in value and which have not been fully performed or which have been entered into in the previous 12 months on the agency's website. Compliance with this requirement is to be based on the following terms:*

- *the information to be placed on the agency's website is to include details of:*
  - *the contractor details and the subject matter of each contract;*
  - *whether the contract includes confidentiality provisions;*
  - *the reasons for confidentiality; and*
  - *the cost of complying with the Senate Order.*
- *agencies will use the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity (in Government Guidelines for Official Witnesses before Parliamentary Committees<sup>13</sup>) to determine whether information regarding individual contracts will be provided; and*
- *agencies will not disclose information if disclosure would be contrary to the Privacy Act 1988, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed.<sup>14</sup>*

**1.14** To assist agencies with their understanding of the requirements for complying with the spirit of the Senate Order, Finance, in cooperation with the ANAO, provided written advice and held an information seminar for agencies. The advice provided to agencies included: what is considered to be a contract; identifying information that should be protected as confidential; legal issues associated with placing information in the public domain; and the timing for tabling in the Senate of advice on compliance with the Senate Order.

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<sup>13</sup> Senate Finance and Public Administration References Committee, *Commonwealth Contracts: A New framework for Accountability (Final Report)* makes the point that '*... the guidelines have not been approved (by the Senate or the Parliament) or released at the time of their report.*

<sup>14</sup> *Commonwealth Procurement Guidelines and Better Practice Guidance*, September 2001, p. 9.

## Audit Objectives

**1.15** In accordance with the request in the Senate Order of 20 June 2001, the ANAO conducted an audit in a selection of FMA agencies with the objectives of examining:

- (a) the process by which the agencies' Internet listing was made, and assessing whether the process was likely to lead to the list of contracts placed on the Internet being complete;
- (b) the process by which agencies determined which contracts contained confidential provisions or were considered to be confidential, and assessing whether the process was appropriate;
- (c) a selection of contracts listed on the Internet and assessing whether there was any inappropriate use of confidentiality provisions; and
- (d) the processes and guidance in place to determine in the future whether information in a contract should be protected as confidential.

**1.16** In developing the audit objectives, the ANAO had regard to both the original Senate Order and the subsequent amendment. However, the ANAO recognised that those agencies included in the audit placed their lists of contracts on the Internet in accordance with the requirements of the original Senate Order because:

- the Order, as amended, was not in place at the time some of the agencies placed their lists on the Internet, and others were well advanced in preparing their listing at the time the Order, as amended, was tabled; and
- Finance advised agencies that, as the Government had not responded to the Order by the time Parliament was prorogued, they should continue to comply with the terms of the original Order.

**1.17** The ANAO also conducted a desktop review of all agencies' Internet sites to determine whether a list of contracts had been placed on the Internet site and whether the list was consistent<sup>15</sup> with the requirements of the original Senate Order. In conducting the review the ANAO noted that, for the reasons outlined above, agencies may not have been in a position to comply with the Order, as amended.

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<sup>15</sup> Consistent with the Senate Order, includes listing contracts over \$100 000 that have not been fully performed or which have been entered into in the last 12 months, the name of the contractor and subject matter for each contract and whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, a statement of the reasons for the confidentiality; and an estimate of the cost of complying with this order.

## Assessment against the audit objectives

**1.18** In conducting the audit, the ANAO recognised that agency Chief Executive Officers (CEOs) are responsible and accountable for agency administration under the FMA Act and the *Public Service Act 1999*, including for goods and services provided under contracted outsourced arrangements. CEOs are therefore accountable for their agency's approach to contract management, including determining whether information in a contract should be protected as confidential on a case-by-case basis.

**1.19** In making assessments against audit objectives (a), (b) and (c) outlined in paragraph 1.15, the ANAO recognised that the decisions made by agencies on contracts entered into before 1 July 2001 would generally have been negotiated where:

- the principle that information in contracts should be made public unless there are good reasons for withholding it, was not widely applied;
- decisions about the confidentiality of the contract, or some of its provisions, would have been made without the benefit of general guidance on how to determine whether information in contracts should be protected from disclosure; and
- the parties may have assumed that information was given and received in confidence.

**1.20** While recognising that, in general, the contracts were negotiated prior to the publication of the reports of the FPA Committee and the ANAO, the ANAO made an assessment about the appropriateness of confidential provisions (objective (c)), using the criteria in these two reports. The aim was to provide Parliament and individual agencies with an assessment of whether there was any commercial information in the contracts that could reasonably be considered to be confidential if agencies had used the Senate endorsed criteria at the time the contracts were signed.

**1.21** Audit objective (d), an examination of the processes and guidance in place to determine in the future whether information in a contract should be protected as confidential, was designed to assess agencies' approaches to the new accountability and transparency regime as specified in the FPA Committee report, the revised CPGs and Audit Report No.38.

## Audit Scope

**1.22** The original Senate Order requested that the results of the audit be tabled by 28 February 2002. In order to meet the Senate request, the ANAO set cut off



dates of 18 October 2001 for the selection of agencies for audit and 30 January 2002 for the desktop review of agency Internet sites.

**1.23** The Senate Order required that Ministers, in respect of each agency administered by that Minister, table letters of advice that a list of contracts had been placed on the Internet. The five parliamentary departments<sup>16</sup>, although agencies under the FMA Act, are not departments of state administered by Ministers. As a result they are not included in the Order. However, all parliamentary departments, with the exception of the Department of the House of Representatives<sup>17</sup>, have chosen to put a list of contracts on the Internet. Taking into account the Parliamentary departments the population of FMA agencies required to comply with the order, or that have agreed to do so, was 72.

**1.24** The audit identified that, as at 18 October 2001, 23 agencies had listed details of relevant contracts on the Internet. The sample of agencies selected for audit was therefore taken from those 23 agencies and, as a result, was not a representative sample of all FMA agencies.

**1.25** The ANAO selected six of the above mentioned 23 agencies that had placed a listing of contracts on the Internet for audit examination. From those six agencies, a sample of contracts listed as having confidentiality provisions was reviewed.

**1.26** The audit of the six agencies was undertaken prior to the new administrative arrangements of 23 November 2001. As a result of the new arrangements, some agency names and organisational structures have changed. This report uses the new agency names but the audit findings address the organisational structures within each portfolio that existed at the time of the audit fieldwork.

The six agencies selected for audit were:

- Agriculture, Fisheries and Forestry—Australia (AFFA);
- Australian Bureau of Statistics (ABS);
- Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) formerly Department of Immigration and Multicultural Affairs (DIMA);

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<sup>16</sup> Department of the Senate; Department of the House of Representatives; Department of the Parliamentary Library; Department of the Parliamentary Reporting Staff; and Joint House Department.

<sup>17</sup> The Department of the House of Representatives advised that *'As a matter of principle this Department does not acknowledge nor comply with Senate Orders unless the House of Representatives has passed a similar order.*

- Department of Industry, Tourism and Resources (DITR) formerly Department of Industry, Science and Resources (DISR);
- Department of the Prime Minister and Cabinet (PM&C); and
- Joint House Department (JHD).

**1.28** A consultant, Ms Margaret Goode, was engaged as a member of the ANAO audit team. Her contribution covered all aspects of the audit.

**1.29** The audit was conducted in conformance with ANAO audit standards at a cost of approximately \$185 000.

# Audit Findings

## Review of the contract listing on Agency Internet sites against the requirements of the original Senate Order

### Agencies with Internet listing

2.1 The ANAO found that, as at 30 January 2002, 63 agencies<sup>18</sup> had placed a listing of their contracts over \$100 000 on the Internet. The table below lists these the agencies and indicates whether the specific requirements of the original Senate Order have been met<sup>19</sup>.

**Table 1**  
**Agencies with a contract listing on the Internet**

Department/Agency	Name of contractor	Subject matter	Provisions requiring parties to maintain confidentiality of any provisions or provisions regarded by the parties as confidential.	Statement of reasons for confidentiality	Cost of compliance with the Senate Order
Administrative Appeals Tribunal	✓ <sup>20</sup>	✓	✓	✓	✓
Attorney-General's Department	✓	✓	✓	✓	✓
AusAID	✓	✓	* <sup>21</sup>	*	✓
Australia-Japan Foundation	✓	✓	✓	✓	✓
<b>Australian Bureau of Statistics</b>	✓	✓	✓	✓	✓
Australian Centre for International Agricultural Research	✓	✓	✓	✓	✓
Australian Competition and Consumer Commission	✓	✓	✓	✓	✓
Australian Customs Service	✓	✓	✓	✓	✓
Australian Federal Police	✓	✓	✓	✓	✓
Australian Greenhouse Office	✓	✓	✓	✓	✓
Australian Industrial Registry	✓	✓	✓	✓	✓
Australian National Audit Office	✓	✓	✓	✓	✓
Australian Office of Financial Management	✓	✓	✓	✓	✓

Continued next page

<sup>18</sup> FMA agencies were identified by reference to the Department of Finance and Administration website at [www.finance.gov.au/finframework/list\\_fma\\_agencies.html](http://www.finance.gov.au/finframework/list_fma_agencies.html) on 18 October 2001, and later amended as a result of the new administrative arrangements of 23 November 2001.

<sup>19</sup> In addition, a small number of agencies had taken steps to meet the requirements of the Senate Order, as amended on 26 September 2001 (paragraph 1.6 refers)

<sup>20</sup> ✓ indicates the detail required by the Senate Order has been entered on the Internet site as at 30 January 2002.

<sup>21</sup> \* indicates that the contracts did not have any confidentiality provisions and therefore there was no statement of reason for confidentiality.

Department/Agency	Name of contractor	Subject matter	Provisions requiring parties to maintain confidentiality of any provisions or provisions regarded by the parties as confidential.	Statement of reasons for confidentiality	Cost of compliance with the Senate Order
Australian Radiation Protection and Nuclear Safety Agency	✓	✓	✓	✓	✓
Australian Research Council	✓	✓	✓	✓	✓
Australian Taxation Office	✓	✓	X <sup>22</sup>	X	✓
Australian Transaction Reports and Analysis Centre	✓	✓	✓	✓	✓
Commonwealth Grants Commission	✓	✓	✓	✓	✓
Commonwealth Superannuation Administration (ComSuper)	✓	✓	✓	✓	✓
Dairy Adjustment Authority	✓	✓	✓	✓	✓
<b>Department of Agriculture, Fisheries and Forestry—Australia</b>	✓	✓	✓	✓	✓
Department of Communications, Information Technology and the Arts	✓	✓	✓	✓	✓
Department of Defence	✓	✓	X	X	✓
Department of Education, Science and Training	✓	✓	✓	✓	✓
Department of Finance and Administration	✓	✓	✓	✓	✓
Department of Foreign Affairs and Trade	✓	✓	✓	✓	✓
Department of Health and Ageing	✓	✓	X	X	X
<b>Department of Immigration and Multicultural and Indigenous Affairs</b>	✓	✓	✓	✓	✓
<b>Department of Industry, Tourism and Resources</b>	✓	✓	✓	✓	✓
Department of Parliamentary Reporting Staff	✓	✓	✓	✓	✓
Department of the Environment and Heritage	✓	✓	✓	✓	✓
Department of the Parliamentary Library	✓	✓	✓	✓	✓
<b>Department of the Prime Minister and Cabinet</b>	✓	✓	✓	✓	✓
Department of the Senate	✓	✓	✓	✓	✓
Department of Transport and Regional Services	✓	✓	✓	✓	✓
Department of Treasury	✓	✓	✓	✓	✓
Equal Opportunity for Women in the Workplace Agency	✓	✓	✓	✓	✓
Family Court of Australia	✓	✓	✓	✓	✓
Federal Court of Australia	✓	✓	✓	✓	✓
Federal Magistrates Court	✓	✓	✓	✓	✓
Geoscience Australia	✓	✓	✓	✓	✓
Human Rights and Equal Opportunity Commission	✓	✓	✓	✓	✓

**Continued next page**

<sup>22</sup> X indicates the detail required by the Senate order has not been entered on the Internet site as at 30 January 2002.

Department/Agency	Name of contractor	Subject matter	Provisions requiring parties to maintain confidentiality of any provisions or provisions regarded by the parties as confidential.	Statement of reasons for confidentiality	Cost of compliance with the Senate Order
Insolvency and Trustee Service Australia	✓	✓	✓	✓	✓
IP Australia	✓	✓	✓	✓	✓
<b>Joint House Department</b>	✓	✓	✓	✓	✓
Migration Review Tribunal	✓	✓	✓	✓	✓
National Archives of Australia	✓	✓	✓	✓	✓
National Capital Authority	✓	✓	✓	✓	✓
National Competition Council	✓	✓	✓	✓	✓
National Crime Authority	✓	✓	✓	✓	✓
National Native Title Registry	✓	✓	✓	✓	✓
National Oceans Office	✓	✓	✓	✓	✓
National Office of the Information Economy	✓	✓	X	X	X
Office of Film and Literature Classification	✓	✓	✓	✓	✓
Office of National Assessments	✓	✓	✓	✓	✓
Office of Parliamentary Counsel	✓	✓	✓	✓	✓
Office of the Commonwealth Ombudsman	✓	✓	✓	✓	✓
Office of the Director of Public Prosecutions	✓	✓	✓	✓	✓
Office of the Official Secretary of the Governor-General	✓	✓	✓	✓	✓
Office of the Privacy Commissioner	✓	✓	✓	✓	✓
Productivity Commission	✓	✓	✓	✓	✓
Public Service and Merit Protection Commission	✓	✓	✓	✓	✓
Refugee Review Tribunal	✓	✓	✓	✓	✓

**Note**—Heavy typeface indicates agencies selected for detailed audit.

## Agency comments

**2.2** The following comments have been made by agencies in relation to the ANAO's findings that agency Internet sites did not contain all the information required by the Senate Order as at 30 January 2002.

**2.3** AusAID advised that:

- *...contracts do not contain provisions requiring the parties to maintain confidentiality of any of their provisions nor are any of the provisions of the contracts regarded as confidential; and*
- *this information will be stated more explicitly on the Internet site when publishing future contract information.*

**2.4** The ANAO was advised that the Australian Taxation Office is implementing the requirements of the Senate Order progressively and work is currently underway to ensure full compliance with the Order.

**2.5** The Minister for Defence informed the President of the Senate on 22 August 2001 that the Department of Defence's list of contracts was available on the Defence website, and that the information on the website relates to some 14 000 contracts over the past five years. In addition, the Minister stated:

*...it has been impractical in the time frame to examine each contract individually and identify the precise extent and location of commercial-in-confidence information. Accordingly, the website contains a general statement of Defence's approach to commercial-in-confidence information and the Senate Order.*

**2.6** The Department of Defence advised the ANAO of the scope of the task in that there were approximately 14 000 contracts listed on the website and that an estimated 3 000 contracts valued at over \$100 000 are entered annually. The Department also advised, inter alia, that:

- [it] ...will provide on a case-by-case basis details of any request from the Parliament relating to a particular contract;
- [it] ...is currently putting a significant amount of effort into scoping an upgrade of its information technology systems to assist in capturing the information required for the Order;
- [its] ...staff have participated in numerous working groups with both the AGS and Finance to determine the scope of the Senate Order and its implications for Government and Defence; and
- ...there are some significant practical issues in complying with the Senate Order. Apart from the volume of contracts and the theoretical need to consult other parties to these contracts, identifying commercial-in-confidence material is far from simple.

**2.7** The Department of Health and Ageing advised that its Internet site:

*...is in the early stages of construction, with only a small number of contracts listed at this point in time. The Department is currently developing and validating a more comprehensive listing in line with the requirements of the Senate Order, and this information will be uploaded to the site in the near future. When this process is completed, the information on the site will comply with the requirements of the Senate Order, including information on contract costs.*

**2.8** The National Office of the Information Economy advised that it is:

*... working to improve and update the information provided on the site in accordance with the Senate Order, and establish better working procedures within the [Communications, Information Technology and the Arts]*

*portfolio to ensure accurate and complete information is provided in a timely fashion under this requirement. The detail and the content of the information provided will be updated by March 2002.*

**Agencies advising they have no contracts over \$100000**

**2.9** Table 2 shows those agencies that advised they did not have contracts over \$100 000 and, therefore, were not required to place a list on the Internet.

**Table 2**

**Agencies advising they have no contracts over \$100 000**

Department/Agency
Classification Board
Classification Review Board
Office of the Inspector General of Intelligence and Security

**Agencies yet to place list of contracts on the Internet**

**2.10** Table 3 shows those FMA agencies that had not placed their lists of contracts on the Internet at 30 January 2002.

**Table 3**

**Agencies yet to place a list of contracts on the Internet**

Department/Agency
Australian Electoral Commission <sup>23</sup>
Department of Employment and Workplace Relations
Department of Family and Community Services <sup>24</sup>
Centrelink <sup>24</sup>
Department of Veterans' Affairs <sup>25</sup>
Professional Services Review <sup>26</sup>

**Agency comments**

**2.11** Comments on the ANAO's findings that agency contract listings were not placed on the agency's website at 30 January 2002 are shown below:

- The Minister for Finance and Administration advised in a letter to the President of the Senate on 5 October 2001 that the Australian Electoral Commission is still in the process of seeking responses from some

<sup>23</sup> The ANAO was advised by the Australia Electoral Commission that its contract listing was on the Internet on 8 February 2002.

<sup>24</sup> The Department of Family and Community Services advised the ANAO that the listings for both the Department and Centrelink had been placed on the Internet on 7 February 2002.

<sup>25</sup> The Department of Veterans' Affairs advised that its contract listing was placed on the Internet on 20 February 2002.

<sup>26</sup> The Professional Services Review contract listing was placed on the Internet on 10 February 2002.

contractors, and will place an equivalent list on its Internet website when complete. Subsequently, the Australian Electoral Commission advised the ANAO in late January that it was currently awaiting Ministerial approval to place its contracts list on its Internet site.

- The Department of Employment and Workplace Relations advised that:

*...it is developing its Internet listing progressively and will have a list of contracts placed on the Internet for the Autumn session of Parliament.*

- The Department of Family and Community Services advised that:

*...due to the lack of an automated contract management system within FaCS, a significant amount of manual work has been undertaken to collect the information required by the Senate Order. This, coupled with some uncertainty as to the status of funding agreements, means that FaCS will be complying with the Senate Order on a progressive basis. A submission on compliance with the Senate Order is currently being considered by the Minister for Family and Community Services.*

- Centrelink advised that it:

*...has compiled and provided its input to the Department of Family and Community Services as part of the required consolidated portfolio response which is currently under consideration, and that it ... expects to receive agreement to publish its list of contracts on its home page shortly.*

- The Department of Veterans' Affairs advised that it:

*...expects to have its list on the Internet for the Autumn sitting. The DVA list currently exceeds 600 contracts and DVA has delayed deliberately in posting them in order to ensure completeness, accuracy and consistency of characterisation in the details listed.*

- The Professional Services Review advised that its *listing is expected to appear on the website by the end of February 2002.*

## **An overview of the six agencies subject to audit**

**2.12** The following table details the number of contracts listed on the Internet by each audited agency.



**Table 4****Number of contracts listed by agencies subject to detailed audit**

Agency	Number of contracts listed	Number of contracts listed as having provisions identified or regarded by the parties as confidential	Estimated cost of compliance with the Senate Order	Date of ANAO review of Internet listing
1. DIMIA	198	181	\$54 000	3 Oct 2001
2. AFFA	99	60	\$12 500	18 Oct 2001
3. PM&C	26	11	\$7 400	3 Oct 2001
4. DITR	129	7	\$2 000	19 Sep 2001
5. ABS	84	72	\$27 000	18 Sep 2001
6. JHD	74	17	\$2 300	26 Sep 2001
<b>Total</b>	<b>610</b>	<b>348</b>		

Source: ANAO analysis as at date of ANAO review of Internet listing.

## The processes used to create the Internet list

**2.13** In examining whether the processes used by agencies to list contracts on the Internet would provide a reasonable level of confidence that the Internet listing was complete, the ANAO reviewed the processes the agencies had in place to manage and register their contracts as follows:

- JHD had a single area responsible for procurement, which maintained a contract register from which the listing was made.
- In both DIMIA and the ABS, the procurement policy and coordination units were responsible for maintaining the contract register and generating the Internet listing. Within each agency, contract management was devolved to individual areas that were responsible for keeping the contract register current.
- DITR had two procurement policy and coordination areas responsible for maintaining contract registers and generating the Internet listing. These areas had the responsibility to ensure that the contract register remained current and accurate.
- In PM&C and AFFA, responsibility for procurement and contract management was devolved to divisional or organisational levels. In each agency, one person was given the responsibility for coordinating the Internet listing.

**2.14** Most agencies generated a report detailing the payments made through their FMIS to verify the completeness of their contracts list. As an additional check, three agencies compared their draft Internet listing against the information contained in the Gazette Publishing System (GaPS), a mechanism for publicly reporting details of Commonwealth contracts.

**2.15** The ANAO interviewed contract management staff about the processes used to compile the list, and compared the Internet listing with the agency's data in GaPS and the contracts register. Any differences identified between the Internet list, GaPS and/or the contracts register were discussed with contract management staff and, where appropriate, the Internet list was updated.

### *Conclusion*

**2.16** The ANAO considers that processes followed by the agencies subject to audit, in order to compile their Internet listing of contracts as required by the Senate Order, provided a reasonable level of confidence that the Internet listings were complete.

## **Listing of confidential contracts**

**2.17** The ANAO reviewed the process by which the agencies determined that contracts either contained confidential provisions or were considered by the parties to be confidential. In DIMIA, PM&C, AFFA and DITR the processes for compiling the Internet list were handled by local areas coordinated by a central procurement unit. In JHD and ABS, the processes were handled entirely by a central procurement unit.

**2.18** The ANAO found that in DIMIA, PM&C, AFFA, JHD and ABS contract management staff reviewed the contracts to identify those contracts which had provisions specifying all or parts of the contracts to be confidential. The five agencies used the criteria for commercially sensitive information that might be regarded as confidential presented in the FPA Committee's Final Report and Audit Report No.38 as guidance for their assessment. The other agency, DITR, did not review the contracts for confidentiality because it already had an established practice whereby no contract was regarded as confidential unless agreed, and specific provisions identified, by both parties at the time of contract negotiation.

**2.19** In addition to their own assessment of the contracts, DIMIA, JHD, AFFA and PM&C contacted some or all of their suppliers. In the initial listing process, those agencies that contacted suppliers accepted the claims of the suppliers that they regarded parts of the contracts as confidential. This was based on the understanding that the information regarded as confidential must have been

communicated and received on the basis of a mutual understanding of confidence, and that the issue must be judged according to the understanding of the parties at the time of the communication, not in retrospect.

**2.20** DIMIA has started the process of reviewing the confidentiality provisions in their longer term contracts to make explicit, with supplier agreement, that the contract, or most parts of the contract, are not confidential.

### *Conclusion*

**2.21** The ANAO concluded that all agencies subject to audit had appropriate processes for determining whether information in the contract was confidential.

**2.22** The ANAO considered that, as contracts are an agreement between the Commonwealth and the supplier, it would be appropriate for suppliers with existing contracts to be contacted to establish what information, if any, they regard as confidential in the contracts listed on the Internet.

## **An assessment of the appropriateness of use of confidential provisions**

**2.23** A sample of each agency's list of confidential contracts was selected for review to assess the appropriateness of the use of confidentiality provisions in each contract.

### **Types of confidentiality provisions**

**2.24** In its examination of the contracts, the ANAO found the following broad categories of provisions relating to confidential information:

- provisions making the entire contract confidential;
- provisions specifying a particular clause, clauses or a schedule to the contract as confidential; and
- general provisions on disclosure of confidential information binding on one or both of the parties and where confidential information was defined as either:
  - that information which is confidential in nature, known to be or should have been known to be confidential; or
  - that information defined specifically in the contract as confidential, such as certain schedules or items of information including prices or personnel.

## Assessment of the use of confidentiality provisions

2.25 In assessing whether, in the ANAO's view, there was any inappropriate use of confidentiality provisions in a selection of contracts listed on the Internet, the ANAO recognised that most of the contracts were negotiated at a time when it was not uncommon for agencies to treat commercial information as confidential.

2.26 Audit Report No.38 noted that confidentiality of information in a contract is influenced not only by the nature of the information that is being provided but also the circumstances in which it is provided. The audit report states:

*...If the information is provided or accepted where it is clear that the provider's position is that the information should not be disclosed, this is an important factor to consider when making an assessment about whether to classify the information as confidential.<sup>27</sup>*

2.27 The ANAO examined a number of contracts listed as confidential by each of the audited agencies. The contracts were still current, but had been entered into between 1997 and July 2001. During this period it was not general practice for agencies to discuss with suppliers those aspects of the contract that should be regarded as confidential. The ANAO concludes that the use of confidentiality provisions in the contracts reviewed was not unexpected given the circumstances in which they were negotiated.

2.28 Although the use of confidentiality provisions was not unexpected given the circumstances described above, the ANAO considered that, in responding to the request in the Senate Order, it also would be appropriate for contracts to be assessed as if they had been negotiated in the environment envisaged by the FPA Committee in its final report. In this environment, the onus is on the supplier to make a case for information to be protected as being confidential.

2.29 An assessment was made against the criteria for determining whether information in contracts could properly be protected as confidential, outlined in the FPA Committee's Final Report and the ANAO Audit Report No.38. These criteria<sup>28</sup> are as follows:

- **Specific identification of information in question**

- The information to be protected must be able to be identified in specific rather than global terms.
  - ◆ Particular clauses or parts of clauses within a contract, or particular information, may satisfy this requirement, rather than the contract as a whole, or all of the information.
- A confidentiality claim should not be made or accepted in relation to innocuous material.

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<sup>27</sup> ANAO Audit Report No. 38 2000–2001, p. 57.

<sup>28</sup> *ibid*, pp. 56–57.

- **Information has the necessary quality of confidentiality**

- The information in question must not be something that is trivial or within the public domain (for example, details may already appear in the client charter, published business plan or annual report).
- The information must have continuing sensitivity for the entity whose information has been confided. It is not sufficient that the ‘confider’ merely wishes to protect the communication.
- The information must have a commercial value to the business or its competitors (for example, trade secrets), and it is likely that detriment will be caused to the ‘confider’ should it be disclosed.
- At the time when confidentiality is claimed, the information must be known only by a limited number of parties. The nature of some of the items of information may be such that they enter the public domain over time as circumstances change (for example, where otherwise confidential information has been tendered in court proceedings, or where a contract has been awarded following a tendering process). Much commercial information has quite a short sensitivity period, say two or three months, but some can remain sensitive for many years.

- **Detriment to the ‘confider’ of the information**

- Detriment to a ‘confider’ resulting from the disclosure of information is generally a necessary element to a court making a finding that disclosure would amount to a breach of confidence.
- However, where the information is about spending taxpayers’ money and the government seeks to enforce a confidence, the courts have held that detriment must be established by reference to the relevant public interests that would be damaged upon disclosure. Unlike a private party seeking to enforce a confidence against the Commonwealth, the Commonwealth is obliged to act in the broader public interest. Public discussion and criticism of government actions or embarrassment do not amount to sufficient detriment to warrant a confidentiality claim.
- Commonly, the terms and conditions of a government contract are jointly developed as part of the contracting process. As already noted, as a matter of the ordinary law of contract, it is open to the parties to agree that certain information should be kept confidential. But, this confidentiality option is often not appropriate in the public arena. It is therefore essential for agencies to consider very carefully the particular terms and conditions of a proposed contract.

**2.30** Examples of types of information that generally would, or would not be considered confidential, as outlined in Audit Report No.38, are detailed in Appendix5.

### **ANAO assessment using endorsed criteria**

**2.31** The ANAO assessed whether the use of provisions to make information confidential would have been appropriate, if the criteria endorsed by the Senate and outlined in Audit Report No.38 had been used at the time the contracts were negotiated.

**2.32** The ANAO notes that, since the preparation of Audit Report No.38, significant changes in the way in which agencies are approaching contract negotiation has occurred. This change is evidenced by the:

- review and modification of standard contracts to provide for the release of contract information to Parliament if required;
- number of agencies that have sought more detailed guidance on how to determine those aspects of a contract that might be protected as confidential;
- review and modification of tender documentation to include a requirement for tenderers to specify in their offer what, if any, information they consider to be confidential; and
- revision of the CPGs, and agency Chief Executive's Instructions (CEIs) and supporting procedural documentation to reflect the new accountability and transparency environment.

#### *Assessment against criterion: Specific identification of information*

**2.33** Of the contracts examined, one had global provisions making the entire contract confidential. Seventeen contracts used a commercial-in-confidence marking, in most cases on every page, as the means of protecting the entire contract. In general, these were the older contracts. The use of the confidentiality provisions in these contracts was considered inappropriate because the information to be protected should be expressed in specific rather than in global terms.

**2.34** Four contracts had provisions making specific parts of the contract confidential. As these were specific provisions agreed to by the parties and contained detailed commercial information, the provisions were considered by the ANAO to have been appropriately identified.

*Assessment against criterion: Information has the necessary quality of confidentiality*

**2.35** The ANAO found that information of potential commercial sensitivity related to price in the majority of contracts reviewed.

**2.36** In Audit Report No.38, the ANAO indicated that the price of an individual item, or groups of items, of goods and services would generally not be considered confidential. On the other hand, information on pricing structures (where this information, which may include costs, would reveal whether a supplier was making a profit or loss on supply of a particular good or service) may be protected as confidential.

**2.37** In general, the pricing information in the contracts examined included prices for services and items but rarely included the costs to the contractors of providing the service or item. It would therefore be unlikely to reveal the profit (or loss) margins for the contractor and would not have provided sufficient information for a competitor to ascertain the profit position or viability of the business. In these cases, the ANAO considered it unlikely that the commercial information would have the necessary quality of confidentiality, as described in paragraph 2.29, to warrant being protected as confidential.

**2.38** Daily and hourly rates for contract personnel contained in contracts were commonly regarded by the parties as confidential. Several suppliers nominated those parts of the contracts containing hourly or daily rates as parts they regarded as confidential. The ANAO found that, in general, the rates did not reveal the profit margins of the suppliers and, as such, the commercial information was unlikely to require protection as confidential.

**2.39** However, there were some situations where a case could be made that daily or hourly rates were of commercial value to the supplier and where disclosure might cause detriment to the supplier. For example, labour hire companies that provide sub-contractors may not, as a matter of course, reveal to their subcontractor the difference between what is being paid to them and what the company received. If this situation occurs in a field where the supply of a particular or specialised skill set is limited, the information could have commercial value to the supplier because disclosure of this information to subcontractors may cause detriment to the supplier's business. The commercial value in this information could, however, be expected to have a relatively short lifespan, possibly shorter than the period of the contract.

**2.40** In its review of contracts of the audited agencies, the ANAO identified 17 contracts that contained pricing methodologies or structures that were of sufficient detail that might allow a competitor to estimate the profitability or

viability of the contracted service. In making the assessment of whether the pricing methodology was sufficiently detailed to disclose profitability or profit margins, and thus might be protected as confidential, the ANAO considered whether the methodology disclosed all, or most, of the following information:

- unit prices of items supplied, source and cost of supply, and likely volume;
- unit prices combined with details of how the good or service is likely to be produced or delivered;
- discounts combined with volume and source of supply/cost of delivery factors; and
- performance indicators linked to bonus payments where contractor's distribution of these payments to staff or sub-contractors, may indicate profit margins.

**2.41** The ANAO identified the following examples of information relevant to the assessment of pricing methodology, which illustrated the presence of multiple elements of pricing structure, and thus provided sufficient information to warrant the methodology being regarded as confidential (see paragraph 2.36) in the contracts reviewed:

- Prices for standard lines, known in the relevant industry, combined with the source of supply for those items, and the discount applying to those items from that source. Competitors may know the approximate costs to the contractor of such goods and thus would be able to estimate, with reasonable accuracy, the profit margin being made by the contractor on those goods. In this context, sources of supply and volume of items likely to be supplied might also be information which, together with standard lines pricing, could be of commercial value to the business and therefore could cause detriment to the supplier if disclosed.
- A panel of preferred suppliers for a particular type of service (for example, project management) established by one agency with a head agreement to cover the bulk of the terms of the contract. For specific projects, each panel member prepared a detailed and specific offer. The offers contained details of materials to be used with volume and source of supply, subcontractors and their rates, and the expected number of days required to deliver the specified service. The information contained in each of these offers is sufficiently detailed to be of commercial value to the other contractors who are, by virtue of the panel arrangement, operating in and competing for, identical business.

**2.42** Two contracts contained financial viability statements or profit and loss information for the contractor. The ANAO assessed this information as having the necessary quality of confidentiality (see paragraph 2.29) and thus concluded its protection was appropriate.



**2.43** Five contracts reviewed contained information about research methods that could be classified as intellectual property or proprietary information. The ANAO assessed this information as having the necessary quality of confidentiality (see paragraph 2.29) and its protection to be appropriate.

### Summary of detailed findings

**2.44** In coming to a conclusion on the appropriateness<sup>29</sup> of the agencies' use of provisions requiring parties to maintain confidentiality on aspects of the contract, the ANAO discussed the commercial issues surrounding each of the contracts examined. Table 5 provides a summary of this assessment.

**2.45** All agencies indicated their 'in principle' agreement with the ANAO's assessment of the appropriateness of the confidential provisions. 'In principle' agreement was provided by most agencies as discussions generally had not been held with suppliers and because agencies had not yet, in many cases, had to negotiate contracts under the new arrangements.

**Table 5**

#### Summary of ANAO assessment of future appropriateness of audited agencies use of confidentiality provisions

Agency	Were the use of provisions requiring parties to maintain confidentiality on aspects of the contract appropriate, if the Senate endorsed criteria had been used at the time the contracts were negotiated?		Did the agency agree 'in principle' with the ANAO assessment?
	Yes	No	
1. DIMIA	3	13	Yes
2. AFFA	3	7	Yes
3. PM&C	1	9	Yes
4. DITR	4	0	Yes
5. ABS	6	8	Yes
6. JHD	7	3	Yes
<b>Total</b>	<b>24</b>	<b>40</b>	

**2.46** A more detailed assessment of the appropriateness of the use of confidentiality provisions in each agency's contracts is described below.

<sup>29</sup> Where confidentiality of certain information is considered to be appropriate in either, or both, parties interests the ANAO has indicated in Audit Report No. 38 that agencies should as a matter of course seek to include a provision which provides an exception with respect to disclosure to a parliamentary committee, if only on a confidential basis.

## *DIMIA*

**2.47** In three contracts, where confidentiality provisions were considered appropriate, commercial information, including pricing methodologies, was sufficiently detailed to enable a competitor to estimate profit margins associated with the contract.

**2.48** Of the 13 DIMIA contracts where confidentiality claims would now be considered inappropriate, 10 had commercial-in-confidence markings protecting the whole contract as confidential. The Department has now discontinued the practice of marking contracts as commercial-in-confidence. For those contracts due to expire after 30 June 2002, DIMIA has started to discuss with suppliers whether any contractual information should continue to be kept confidential.

**2.49** In the remaining three contracts, the ANAO considered confidentiality provisions would now be assessed as being inappropriate because the commercial information contained in the contract related to price. In addition, this was not sufficiently detailed to be likely to be of commercial value to the supplier or its competitors and, if disclosed, likely to cause detriment to the supplier.

## *DIMIA's response*

**2.50** In response to the ANAO's findings, DIMIA advised, inter alia, that it:

- *...accepts that the ANAO is proposing a 'best practice' approach to the confidentiality of pricing information with a view to attempting to achieve a cultural change on pricing confidentiality;*
- *...supports the idea of culture change, will therefore provide departmental staff with information regarding the ANAO position and recommend that this be used as a starting point in negotiations; and*
- *...will advise staff that in all cases they should expect the contractor to justify requests that particular information be treated as confidential.*

**2.51** The Department also advised that:

*Given some staff are experiencing supplier opposition to pricing being treated as non-confidential [the Department] anticipates practical difficulties in achieving the 'best practice' position advocated by the ANAO in all cases. DIMIA expects this to be an issue for contract renegotiation more than for negotiations on new contracts.*

*AFFA*

**2.52** The ANAO considered two contracts were appropriately classified as confidential because they contained research methodologies that could be considered to be intellectual property or proprietary information, known only to a limited number of parties. Such information may be of commercial value to competitors and, if disclosed, possibly could cause detriment to the supplier. A further contract was considered to be appropriately classified as confidential because it included a pricing methodology that was sufficiently detailed to allow competitors to estimate the profitability of the contract with reasonable accuracy. The information, therefore, could have commercial value to the business or its competitors and, if disclosed, may cause detriment to the supplier.

**2.53** Of the other seven contracts assessed against the criteria for commercial confidentiality, most of the commercial information in the contracts related to prices for services and was not sufficiently detailed to reveal the profit margins or profit position of the supplier.

*AFFA's response*

**2.54** In response to the ANAO findings, AFFA advised that it:

- *...has revised its standard contract to specifically identify within a contract confidential information agreed or accepted by the parties, and has also made available to employees advice on the requirements of the Senate Order and the 'Confidential Information Guidelines' developed by the ANAO;*
- *...agreed 'in principle' with the ANAO assessment regarding the use of confidentiality provisions in current contracts if the Senate endorsed criteria had been used;*
- *... recognised that suppliers may continue to seek to protect pricing schedules and other aspects of their bids that they believed have commercial value which would be diminished or destroyed if made public; and*
- *... considered it appropriate that it assess on a case-by-case basis, in accordance with the Commonwealth Procurement Guidelines and Best Practice Guidance of September 2001, and taking into account the Confidential Information Guidelines, whether contract material should be considered confidential.*

### *PM&C*

**2.55** The ANAO considered that one contract made appropriate use of confidentiality provisions because the information included detailed pricing methodologies combined with detailed service delivery methodologies that may allow competitors to estimate the profit margins of the contractor.

**2.56** The ANAO assessed that the confidentiality provisions of the remaining nine contracts' would now be considered as being inappropriate as they contained price only information that was unlikely to be of commercial value to other suppliers.

### *PM&C's response*

**2.57** PM&C noted ANAO's conclusions but indicated that it:

- *...would be concerned if, in future, strict application of the criteria for assessing confidentiality were to result in the preferred contractor rejecting the contract.*

**2.58 ANAO Comment.** The ANAO recognises that the criteria for assessing the confidentiality should be judged on a case-by-case basis. However, the ANAO suggests that every effort should be made by the agency to ensure that the preferred contractor understands the Parliamentary concerns for transparency and also that the agency decision-maker should understand the basis of the commercial sensitivity that the preferred contractor is seeking to protect.

### *DITR*

**2.59** The ANAO considers that the listing of four contracts as confidential was appropriate as the information, including performance incentive arrangements and price structures, was likely to be commercially valuable to the contractor in commercial arrangements with other parties.

**2.60** A major contributing factor to the contracts being listed appropriately as confidential related to DITR's long standing policy that the contract is regarded as not confidential unless advised otherwise by the supplier during contract negotiations.

### *DITR's response*

**2.61** DITR agreed with the audit findings.

## **ABS**

**2.62** The ANAO noted that the confidentiality clauses contained in ABS contracts were designed to protect ABS material and did not make the contract confidential.

**2.63** The ANAO considered that six contracts were likely to be regarded as confidential as they contained information, including detailed service specifications and pricing structures, from which a competitor may be able to estimate the margins of the supplier. Two contracts contained information that could be considered to be intellectual property or proprietary information. The ANAO considered that this information may be of commercial value to the business and, if disclosed, could cause detriment to the supplier if disclosed to a competitor.

**2.64** The ANAO assessed that eight of ABS's contracts listed as being confidential would now be considered as inappropriately classified because they did not contain commercial information that was likely to be of value to a competitor.

## **ABS's response**

**2.65** The ABS agreed with the ANAO assessment and noted that future contracts will be specific in identifying what is actually confidential in contracts in line with the CPGs.

## **JHD**

**2.66** Five of the seven contracts were considered by the ANAO to have appropriate confidentiality provisions as they contained detailed pricing methodologies from which competitors may have been able to establish the profitability of the service. As a result, the information, if disclosed, was likely to be of value to the supplier or its competitors, and could cause detriment to the supplier. This was considered particularly likely to apply to the project management panel contracts used by JHD.

**2.67** The two other contracts, assessed as making an appropriate use of confidentiality provisions, contained financial reports, viability statements and business plans that were of commercial value to the business and not publicly available.

**2.68** The three contracts assessed by the ANAO as now making an inappropriate use of confidentiality provisions, contained pricing details that were not sufficiently detailed so as to allow a competitor to estimate the profitability of the contracted services. The discount information regarded by

one supplier as confidential was considered by the ANAO to be the price for a service and thus not likely to be considered to have the necessary quality of confidentiality (see paragraph 2.29).

**2.69** At the time of the audit, JHD had begun the practice of advising suppliers that price and pricing methodologies are not necessarily regarded, in the Commonwealth environment, as confidential information. As a result, the onus is on suppliers to make the case that the information has commercial value to the supplier or its competitors.

### *JHD's response*

**2.70** JHD generally agreed with the ANAO's findings in terms of the specific contracts selected for analysis. However, JHD pointed out that each situation involving pricing methodology or discount rate structures is assessed on its merits, taking into consideration the nature of the industry concerned and the prevailing market conditions.

### *Conclusion on appropriateness of use of confidential provisions*

**2.71** The ANAO concluded that the use of confidentiality provisions in all 64 contracts examined was not unexpected given that, during the period the contracts were entered into, it was not general practice for agencies to discuss with suppliers those aspects of the contract that might be regarded as confidential.

**2.72** However, in applying the criteria developed for determining whether information should be classified as confidential, the ANAO considered that 40 of the 64 contracts had confidentiality provisions that would now be inappropriate. The inappropriate use of confidentiality provisions related mainly to the prices for goods and services, or for staff hourly and daily rates, all of which would generally not be considered confidential. All agencies agreed in principle with the ANAO assessment.

**2.73** Of the remaining 24 contracts considered to have confidentiality provisions that were appropriate<sup>30</sup>, most of the information related to detailed pricing structures that contained sufficient information to reveal a supplier's profit margin. This information would normally be regarded as having a commercial value to the supplier or its competitors, and detriment may be caused to the supplier should the information be disclosed.

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<sup>30</sup> Where confidentiality of certain information is considered to be appropriate in either, or both, parties' interests the ANAO has indicated in Audit Report No. 38 that agencies should as a matter of course seek to include a provision which provides an exception with respect to disclosure to a parliamentary committee, if only on a confidential basis.

## Processes and guidance in place for the future

**2.74** One of the audit objectives was to examine how agencies were dealing with the issue of confidentiality provisions in contracts in light of the FPA Committee report and the new CPGs.

**2.75** All agencies audited have completed, or are in the process of making amendments to, their standard form contract to eliminate clauses that make the whole contract confidential and to limit the use of clauses that make parts or some information in the contract confidential.

**2.76** All audited agencies have reviewed their tender processes and have included in the standard RFT documentation a requirement for tenderers to identify contractual information they consider to be confidential if their tender was successful.

**2.77** One agency, DITR, already has a standard practice of not making any part of contracts confidential and negotiates with suppliers accordingly. All other audited agencies have amended their CEIs and procedural guidance on procurement and contract management in light of the Senate Order, the Audit Report No.38 and the CPGs. Most agencies make this procedural guidance available on their Intranet.

**2.78** All agencies subject to the audit identified that detailed guidance on assessing those aspects of a contract that might be regarded as confidential would be useful. The ANAO noted that a group of several FMA agencies, including some from the audit sample, have participated in a working group with the AGS to revise their standard form contracts and to develop more detailed guidance to supplement that provided in the FPA Committee and ANAO reports. Finance has advised the ANAO that it is currently preparing best practice guidance on dealing with commercial-in-confidence in contracts, which will assist agencies with this task. This advice will draw on existing advice, including that provided in ANAO Report No.38.

**2.79** One agency commissioned AGS to prepare and deliver training to their staff on commercially sensitive information. This training has been used by the agency as the basis for some of their Intranet guidance to staff.

**2.80** All audited agencies are including clauses in their contracts to provide for the release of information to the Parliament and Parliamentary committees, and the Auditor-General, should it be required.

## Conclusion

**2.81** The ANAO considers that the processes and guidance being put in place by the agencies audited will assist in promoting the appropriate use of confidentiality provisions in contracts. In particular, agency procedures provide for:

- tenderers to identify contractual information that they consider confidential in the RFT documentation;
  - agency contract management staff to discuss with suppliers those aspects of the contract they consider confidential and assess the appropriateness of such claims; and
  - the inclusion of clauses in contracts for access to contract information by Parliamentary Committees and the Auditor-General, if required.
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Canberra ACT  
25 February 2001



P. J. Barrett  
Auditor-General



# **Appendices**



## Appendix 1

### Senate Order of 20 June 2001

(1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.

(2) The list of contracts referred to in paragraph (1) indicate:

- (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
- (b) the contractor and the subject matter of each such contract;
- (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether any provisions of the contract are regarded by the parties as confidential, and a statement of the reasons for confidentiality; and
- (d) an estimate of the cost of complying with this order.

(3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within 6 months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.

(4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.

(5) This order has effect on and after 1 July 2001.

(6) In this order:

“**agency**” means an agency within the meaning of the *Financial Management and Accountability Act 1997*;

“**autumn sittings**” means the period of sittings of the Senate first commencing on a day after 1 January in any year; and

“**spring sittings**” means the period of sittings of the Senate first commencing on a day after 31 July in any year.

## Appendix 2

### Senate Order on Government Contracts—Government Response

On 20 June 2001, the Senate made an order requiring Ministers to table, twice yearly, a letter of advice stating that all FMA agencies for which they have responsibility place on the Internet a list of contracts of \$100 000 or more which had not been fully performed or which had been entered into in the previous 12 months. The list is to indicate:

- the contractor details and the subject matter of each contract;
- whether the contract includes confidentiality provisions; and
- the reasons for confidentiality.

Finally an estimate of the cost of complying with the order is to be provided. The Government has been advised by the Australian Government Solicitor that the order is probably beyond the Senate's power because it requires information to be provided to the public and not the Senate or a Senate Committee. However, as the Government is committed to transparency of Commonwealth contracts, it will, in principle, comply with the spirit of the order on the basis that:

- agencies will use the Department of Prime Minister and Cabinet guidelines on the scope of public interest immunity (in Government Guidelines for Official Witnesses before Parliamentary Committees) to determine whether information regarding individual contracts will be provided;
- agencies will not disclose information if disclosure would be contrary to the *Privacy Act 1988*, or to other statutory secrecy provisions, or if the Commonwealth has given an undertaking to another party that the information will not be disclosed; and
- compliance with the Senate order will be progressive as agencies covered by the *Financial Management and Accountability Act 1997* refine arrangements and processes to meet the requirements.

These terms take account of advice to Government that it is likely that the *Parliamentary Privileges Act 1987* would not provide absolute privilege in respect of the publication of information on the Internet and the legal implications of complying with the order. The Government notes that the Auditor-General has agreed to evaluate a sample of the contracts listed for the appropriate use of confidentiality provisions in line with the request in the Senate order. The Australian National Audit Office has advised that it will commence the first of the audits in late August 2001, with a report to be tabled in Parliament in February 2002.

## Appendix 3

### Senate Order of 20 June 2001, as amended, on 27 September 2001

On 27 September 2001, the Senate amended its Order of 20 June 2001 as follows:

- (1) There be laid on the table, by each minister in the Senate, in respect of each agency administered by that minister, or by a minister in the House of Representatives represented by that minister, by not later than the tenth day of the spring and autumn sittings, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.
- (2) The list of contracts referred to in paragraph (1) indicate:
  - (a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;
  - (b) the contractor, the amount of the consideration and the subject matter of each such contract;
  - (c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality, and a statement of the reasons for the confidentiality; and
  - (d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.
- (2A) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:
  - (a) the list is not up to date
  - (b) not all relevant agencies are included
  - (c) contracts all of which are confidential are not included.
- (2B) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

- (3) In respect of contracts identified as containing provisions of the kind referred to in paragraph (2)(c), the Auditor-General be requested to provide to the Senate, within six months after each day mentioned in paragraph (1), a report indicating that the Auditor-General has examined a number of such contracts selected by the Auditor-General, and indicating whether any inappropriate use of such provisions was detected in that examination.
- (3A) In respect of letters including matter under paragraph (2A), the Auditor-General be requested to indicate in a report under paragraph (3) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
- (4) The Finance and Public Administration References Committee consider and report on the first year of operation of this order.
- (5) This order has effect on and after 1 July 2001.
- (6) In this order:
- “agency” means an agency within the meaning of the *Financial Management and Accountability Act 1997*;
- “autumn sittings” means the period of sittings of the Senate first commencing on a day after 1 January in any year;
- “previous 12 months” means the period of 12 months ending on the day before the first day of sitting of the autumn or spring sittings, as the case may be;
- “spring sittings” means the period of sittings of the Senate first commencing on a day after 31 July in any year.

## Appendix 4

### Comparison of Senate Orders of 20 June and 27 September 2001

20 June Order	27 September Order, as amended.
2b) the contractor and the subject matter of each such contract;	2b) the contractor, <b>the amount of the consideration</b> and the subject matter of each such contract;
2c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or <b>whether any provisions of the contract are regarded by the parties as confidential...</b>	2c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, <b>or whether there are any other requirements of confidentiality...</b>
	<p>New clauses</p> <p>(2A) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:(a) the list is not up to date(b) not all relevant agencies are included(c) contracts all of which are confidential are not included.</p>
	<p>Adds to the requirements of the Auditor-General</p> <p>(3A) In respect of letters including matter under paragraph (2A), the Auditor-General be requested to indicate in a report under paragraph (3) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.</p>

## Appendix 5

### Examples of confidential information from ANAO Audit Report No.38 2000–2001 (pp. 64–65)

#### Examples of information that could be considered confidential

The following types of information may meet the criteria of being protected as confidential information:

- trade secrets;
- proprietary information of contractors (this could be information about how a particular technical or business solution is to be provided);
- a contractor's internal costing information or information about its profit margins;
- pricing structures (where this information would reveal whether a contractor was making a profit or loss on the supply of a particular good or service); and
- intellectual property matters where these relate to a contractor's competitive position.

#### Examples of information that would generally not be considered confidential

The following types of information in, or in relation to, contracts would generally not be considered to be confidential:

- performance and financial guarantees;
- indemnities;
- the price of an individual item, or groups of items of goods or services;<sup>31</sup>
- rebate, liquidated damages and service credit clauses;
- performance measures that are to apply to the contract;
- clauses which describe how intellectual property rights are to be dealt with; and
- payment arrangements.

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<sup>31</sup> Looking at examples in daily life is a good way to consider this category. For example, if you go to a car repairer you are able to obtain details of what you are to pay for labour and parts and the quantities of each. In addition, at the dentist you obtain a bill for each individual treatment that you receive, even though you pay the total amount. This level of detail can also be found out by getting a quote to provide the service. This information does not indicate what the cost of a service is, or whether a profit or loss is being made on the provision of the service.



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