Institute of Public Administration
Australia

The Role of Watchdogs in this
New Era of Partnerships

30 November 2001

Pat Barrett
Auditor-General for Australia
1. INTRODUCTION

It has to be said that this has been a significant year for ‘watchdogs’, a popular term that I do not particularly like. A number of issues come to mind, such as the collapse of HIH which drew attention to the activities of the Australian Prudential Regulation Authority (APRA) and of the Australian Securities and Investment Commission (ASIC). The Civil Aviation Safety Authority (CASA) was at the centre of Ansett’s issues with maintenance standards last Christmas. The Australian Competition and Consumer Commission (ACCC) was involved in a range of issues relating to pricing and the impact of the Goods and Services Tax (GST). The ANAO had more than its share of media attention particularly in relation to roads funding, the sale of Government property and the management of information technology (IT) contracts.

Increasingly, we see involvement of watchdogs in the governance of the nation, both in the commercial sector and in the government sector. Over the last half of the twentieth century we witnessed a significant growth in the number of watchdog organisations and their involvement in many areas of our professional and private lives. Their existence leads inevitably to discussions about what is the proper role and balance of regulation in the affairs of the nation, for example big versus small government and/or greater integration between the public and private sectors. To a degree, this involves attitudes and perceptions reflecting ideological viewpoints. While interesting in itself, this is not the issue I will be discussing. Watchdogs should understand what governments and Parliaments decide and the administrative and other implications of their decisions.

The public perception of the impact of watchdogs varies to some extent according to whether they are focussed on community activities (e.g. ACCC, CASA or ASIC) or on the activities of the public service (as, for example, the Ombudsman or the Auditor-General). Some do both, of course, such as my colleague Malcolm Crompton, the Privacy Commissioner.

Those organisations concerned with the activities of the broader community are more likely to have authority to regulate directly the activities they are responsible for. Some of them are empowered to institute legal proceedings to enforce compliance or themselves impose sanctions. They can both bark and bite. The bite may be a refusal to grant permission, or approve, as well as to impose penalties. It is quite difficult to maintain credibility with your constituency with such dual roles. One can effectively undermine the other.

Others, and this includes myself, rely most significantly on the power of public disclosure to perform our function. We operate mainly in the context of public opinion of which Parliament is arguably the most influential and the most vocal, particularly about transparency. It is our ability to publish, to make people aware of what is happening that is central to our function. Like the watchdog, it is our bark that alerts others to the existence of something wrong in public administration. That seems to be the public perception. Of course, it is an oversimplification. The reality is somewhat more complicated than that,
particularly when we consider both conformance and performance. Such an observation can be somewhat disappointing to those who see us mainly in a policing role. That is an unfortunate perception which can lead to unrealistic expectations and/or difficulties in securing, for example, cooperation and access to required information.

I will focus on what I consider to be issues central to the role of the watchdogs and how we endeavour to carry out our responsibilities in today’s world. I hope you understand, and accept, that I will draw mostly from my own experience as the Auditor-General for the Commonwealth, hopefully in a way that points to issues that are common to all of us. I am certainly not intending to speak on their behalf, something they are well equipped to do. I thought it might be useful to first directly address the question as to ‘why have watchdogs’, with a brief discussion of public perceptions and, most importantly, accountability issues in a changing era of public administration.

I will then go on to examine the environment in which we are working and address the apparent implications for us of partnerships in the wider context of networking and collaboration, as the title of the address given to me suggests. The discussion will broadly outline some of the emerging features of a changing public service environment, in particular the growing interface between the public and private sectors and perhaps even convergence, and the associated consequences they may have for the approach and operations of watchdogs. I will then endeavour to identify and discuss particular challenges that such an environment poses.

More ambitiously, I will go on to suggest where watchdogs might add more value, particularly with increasing convergence of the public and private sectors, which is a focus I would like to see given more weight when assessing our role. My concluding remarks aim to add a little direction to the demands that are being placed on us and canvass what we might do to meet those demands. My basic position is that watchdogs not only have to bark but also have to contribute to the environment in which we operate. As with other features of our changing public sector, such as risk management, we should be accentuating the positive rather than simply the negative. That is essentially why I am not overly comfortable with the notion of watchdogs.

2. WHY HAVE WATCHDOGS?

Essentially, we have watchdogs because the general public want to be assured that whatever is done in its name is done properly. That is, it is done according to the law and with reference to the community standards of economy and probity at the time. In our democratic society, they are at least entitled to that assurance. There are at least two elements to this question:

- what does the public expect; and
- how does it satisfy itself that its expectations are met? We often refer to this latter process as accountability.
While it can be said that Parliament itself has a watchdog role, I have chosen only to canvass that role to the extent of the work of a number of its key Committees. For the purposes of this presentation, I have taken the position that the Parliament reflects the views of the general public and is treated as a major stakeholder of the watchdog organisations.

Public expectations

How long is a piece of string? One has only to read the newspapers and the letters to the editor after any disaster - natural, financial or military - to know that there is a strong view from people wanting to know why whatever has happened was not foreseen, or at least avoided. In many instances, they expect their watchdogs to perform that function. Whether it is the collapse of HIH or the Sydney to Hobart race in which so many lost their lives, the collapse of coal mines or banks or the administration of Bruce stadium, the question arises: wasn’t someone looking after things to make sure that those responsible were doing what they should have been? Where were the auditors? Where were the regulators? Why didn’t they prevent it?

One journalist has commented:

_Australia’s chief corporate regulator is using publicity as a weapon against business misconduct. The head of the Australian Securities and Investments Commission (ASIC), David Knott, said on 22 June 2001 that in order to satisfy community expectations, its watchdog role must be visible to the public. Corporate misconduct also affected the reputation of Australian business, he said. If the system was perceived not to respond, then Australia’s marketplace would suffer._

There is not a lot I can add to the issue of public perceptions other than to make some simple related observations. First, public disquiet is most often expressed at times when emotions are running high. That is, we often hear about a concern only after something has gone seriously wrong. In these circumstances, watchdogs are often perceived as instruments of retribution. Not surprisingly, those at the centre of the problem can be highly defensive and generally not likely to be very cooperative. This is not the ideal situation for gleaning the facts as a means of redressing a problem, if that is possible, or of ensuring that it does not happen again.

The second point is that there is a deal of public confusion about the role and powers of the watchdog, which I hinted at earlier. It needs to be said that the role of the watchdog is not that of a substitute manager, or even a backstop manager, or ‘policeman’ in most cases. Nor are its powers or abilities to foresee events necessarily any greater than those responsible for managing the function. To the contrary, it would normally be expected that those actually operating in the area would have greatest knowledge and understanding of it. For the most part, the tendency at the Federal level of government is to separate policy, administration, and prosecuting functions.
Watchdogs are required to maintain the principles which guide their actions and decisions. The reality is that the environment in which they operate is constantly changing, which means they need to adjust to those changes and even be part of them. Indeed, the watchdogs may have been instrumental to such developments. Nevertheless, there is a balance to be struck such as between a broad-based accountability requirement and the demand for increased efficiency in the use of resources. Achieving such a balance over time means that watchdogs have to understand the changing nature of the public sector environment and its demands to be effective. Better still, they need to contribute to the required outcomes where they can.

While there is a clear distinction between the role of government and the role of the watchdog, this is not generally understood or, perhaps, even accepted. The ANAO, or any other watchdog for that matter, is not there to keep some level of control over the government of the day. The government is subject to scrutiny by the Parliament and ultimately by the electorate. It is the public service and the way that it implements the government’s agenda that is mainly subject to examination in this respect. The roles of the public service include the giving of advice to government in a professional manner (without fear or favour) and, after government has decided on its course of action, to implement what has been decided efficiently, effectively and ethically, as required in the *Financial Management and Accountability Act 1997*.

In reviewing the performance of Commonwealth agencies, it is relevant for the ANAO to examine the implementation of any decision as well as the advice provided to Ministers by the relevant agencies in the course of government consideration of policy decisions. For instance, is the advice in accord with relevant policies and does it represent value for money? The real issue for watchdogs is accountability where I am more equipped to make some useful observations.

**The accountability imperatives**

The simplest explanation of accountability is the requirement to answer to somebody for something. And therein lie the seeds of possible confusion, conflict and often public recrimination. As the then Management Advisory Board to the Australian Government and its Management Improvement Advisory Committee (MAB-MIAC) observed in 1993:

> In describing the accountability mechanisms within the public service, care has been taken to clarify the basic relationship between the complementary concepts of authority, responsibility and accountability. A mismatch between the first two elements can weaken the accountability relationship.\(^2\)

It is this relationship that I want to address today. It is useful to see:

> accountability as existing where there is a direct authority relationship within which one party accounts to a person or body for the performance of tasks or functions conferred, or able to be conferred, by that person or body.\(^3\)
Put simply, the challenge becomes to identify who is accountable for what. I accept that there is a continuum of accountability relationships between the electorate, the Parliament, the Government and the public service. However, the ongoing difficulty is to define such relationships in a credible manner that is acceptable to all those parties. This difficulty continues to be exacerbated by successive governments in Australia not having control of the Senate, which puts greater pressure particularly on the accountability relationship between the Parliament and the Government. This may not simply reflect political differences but could also indicate a broader concern with lack of transparency and even complacency of an incumbent government which fails to provide public explanation. That, in turn, raises issues for the accountability relationships of the public service with each of those groups, particularly where differences, often criticisms, reflect political considerations, including the need to influence public opinion, perhaps in an ideological way. This can create difficulties for a public service that is expected to act in a non-partisan fashion.

The clearest accountability imperative is adherence to the rule of law. Conversely, the greatest uncertainties and conflicts are created by the administrative, particularly political, environment and its demands that are not clearly related to the legal framework applying to the public service, including any guidelines derived from particular statutes. Sometimes this is simply described as an area of discretion or judgement. Public servants have always had to deal extensively in such an area, not least of all because of differing political philosophies and expectations, as well as the demands of value systems and codes of conduct. But the accountability equation has been made more complex with recent public service reforms involving greater private sector involvement and related issues of public and private interests. The latter issues are as much about establishing possible commonality as they are about dealing positively with inherent differences.

At the federal level of Government, there is a clear legal requirement for Chief Executive Officers (CEOs) to be accountable for the efficient, effective and ethical use of their resources. However, all the major legislation dealing with the public sector is now principles based. This means that, in large part, the required Chief Executive’s Instructions (CEIs) have to determine the detail of accountability requirements and/or the extent of discretion available. The lack of attention, including ongoing oversight and review, of CEIs by a number of agencies is therefore somewhat perplexing given their fundamental importance in providing guidance to staff.

That said, Secretaries and Heads of Agencies have been faced with a conundrum, given their legal accountabilities, in a reform environment of devolved authority, and the demands made by whole-of-government (centralised) approaches and initiatives. CEOs have long had the challenge to achieve an appropriate balance between implementing government policy, serving a range of different objectives, and accountability for securing value for money outcomes. The unequivocal legal imperative has now changed that balance. In my view, this requires the need for clear recognition of the legal accountability imperative in any policy statement that has a significant impact on public administration. This should remove any uncertainty, or equivocation,
about the resulting accountability obligations. An example is the government’s outsourcing policies in relation to information technology (IT) and corporate services. In a number of IT outsourcing situations, there was concern about the impact of government decisions on CEOs’ accountability obligations under the Financial Management and Accountability (FMA) Act 1997 and, in particular, on the responsibilities of Boards covered by the Commonwealth Authorities and Companies (CAC) Act 1997.

This conundrum was specifically addressed in the review of the “Whole of Government Information Technology Outsourcing Initiative” conducted by Richard Humphry AO. Mr Humphry noted that:

> While it is the prerogative of the Government to set overall direction, the introduction of the FMA and CAC Acts places responsibility for implementation of policies with Chief Executives and Boards.

He went on to recommend:

> Accordingly, future responsibility for implementing the Initiative should be fully devolved to agency Chief Executives or Boards.

Other recommendations also focussed on the latter’s ongoing responsibilities and discretion. The Government accepted all the Review’s recommendations, at least in principle.

The foregoing comments are basically about who is accountable for what, particularly in an era where CEO accountability is very much tied to the primacy of the rule of law. There are other situations where a more collaborative, as opposed to decentralised, public service is emerging internally and externally. The challenge for CEOs, and other levels of the public service, will be to ensure they have the appropriate information and robust risk assessments on which to base their decisions in such an environment. These decisions must encompass the appropriate balance to be struck in relation to performance, and accountability for that performance, including the processes and methods used in achieving the results required, both for the individual and collaborating agencies, for example as a one-stop shop arrangement, in partnerships with private sector firms, or in association with State and/or Local Government bodies.

The notion of shared responsibility is hardly novel. However, the concept of shared accountability is a different matter, particularly where the private sector is concerned, and taking into account Parliament’s ongoing view that ‘accountability cannot be outsourced’. It is possible to conceive, in particular public service situations, at least some degree of accountability being taken by a private sector provider either within, or outside, the contractual framework. The issues are whether the Government and the Parliament are prepared to redefine accountability that will allow such adoption to occur or, indeed, whether the private sector is prepared to accept it. If real progress is to be made on this vexed issue, it would seem that both sides have to address both
public expectations and commercial pressures to come to a sustainable position.

**Accountability to Parliament**

Public sector managers have a particular responsibility to the Government and to the Parliament to help ensure that accepted notions of responsibility, accountability and performance, including required results, are being properly implemented by the public sector. This is a recognition of the supremacy of the Government and the Parliament in the governance framework (see Figure 1).

**Figure 1**

However, in a period of significant public service reform, questions are being raised about apparent changing accountability relationships between public servants and Ministers on the one hand and Parliament on the other. There has been a change in the Westminster notion of the overall responsibility of Ministers for both policy and administration in their portfolios over the years, at least in Ministerial practice, and supported by Prime Ministers. Guidance indicates that where Ministers neither knew, nor should have known, about matters of departmental administration which come under scrutiny, it is not unreasonable to expect that the Secretary or some other senior Officer will take the responsibility. However, Ministerial responsibility is not an issue I will be covering directly here. Nevertheless, I noted with some interest the suggestions made by the ACT Auditor General in his recent report on *Enhancing Professionalism and Accountability* that:

> the Legislative Assembly should consider and determine the extent to which Ministers are to be held accountable for the operation of public sector administrative units. As well, if the Legislative Assembly decides that Ministers should not be held fully accountable for the operation of public sector administrative units, then the Legislative Assembly should consider other means by which clear and full accountability to the public for the use of the public’s resources is to be achieved.

Tensions have arisen, particularly in the context of Australian Parliamentary Committees, about the unfulfilled expectations arising from the trade-offs between providing greater management flexibility and the accountability for
improved performance. In part, this perceived ‘failure’ can be explained by an inevitable time gap between the two events. There would also seem to be scope for agencies not only to take more initiatives to better inform the Parliament and its Committees about what they are doing, particularly in promoting greater accountability and performance management, but also to ensure that they are more attuned to the views and concerns being expressed by those stakeholders. As a result, public sector agencies and bodies should be better equipped to know just how Parliamentary expectations can be met, thus building up a more productive relationship, and, hopefully, greater confidence, respect and trust. Again, the problem is not one-sided.

In a recent interim report by the Senate Finance and Public Administration References Committee the majority opinion expressed concern about the right of the Committee to access documents and information necessary for it to effectively conduct an inquiry into a matter of public concern. The Committee considered that it was one aspect of accountability that had been undermined in its inquiry. The purpose of the interim report was:

_to highlight the apparent lack of understanding in the Australian Public Service about parliamentary accountability, as illustrated by the arguments put forward during this inquiry, and to draw attention to what is clearly a wider problem._

The Committee also sought to facilitate an improved awareness of parliamentary accountability in the private sector in order for it to understand the rules of accountability. In its further, but not final, report the Committee reiterated its concerns, as well as those of a number of other Parliamentary Committees, about the ‘lack of accountability’ and noted that ‘Parliamentary accountability is the corner stone of modern democracy.’

In relation to one IT outsourcing case, the Health Group tendering process, the Committee’s (majority opinion’s) concern at not being able to obtain unfettered access to all the documents necessary to reach an informed conclusion has led it to request me to undertake an examination of the case. I have agreed to a limited scope audit relating to the particular issue of concern to the Committee and, as noted, to other Parliamentary Committees, such as the Joint Committee of Public Accounts and Audit (JCPAA) and Senate Finance and Public Administration Legislation Committee. As a consequence, the Committee subsequently agreed not to persist with its Order of 22 May for the evaluation reports relating to the Health Group.

The Committee produced its final, comprehensive report on 28 August, including 22 recommendations. Of interest for this particular area of discussion is the recommendation that the Government gives serious consideration to introducing legislation that will provide a greater degree of transparency in Commonwealth Contracts by making them publicly available. As well, requests for tender and contracts should include provisions that require contractors to keep and provide sufficient information to allow for proper parliamentary scrutiny, including before Parliamentary Committees.
Parliamentary access issues are not new; however, the current concerns are reflective of the increasing involvement of the private sector. This has raised questions about ‘new frameworks of accountability’.17 Quoting Dr John Uhr:

The test case is the accountability challenge posed by alternative service providers and their claims that their contracts with government lessen their liabilities of public accountability because of the ‘commercial in confidence’ nature of their performance information.18

The latter is of particular interest, which is worthy of separate comment.

Such observations are a particular illustration of the need to meet Parliamentary expectations in the area of contract management. Another related issue that has arisen is that of access to contractor records and other information relevant to public accountability. Such access allows the performance of responsibilities set out in legislation, for example in relation to records and information, where access is a necessary pre-condition for the effectiveness of watchdogs.

My Office has experienced some problems in accessing contractor information both through audited agencies and in direct approaches to private sector providers. This matter should be of concern to public agencies in their role as contract managers, to executive government as decision-makers, and to the Parliament when scrutinising public sector activities. In particular, public service managers need to have a level of access sufficient to ensure they can meet their own accountability obligations. In general, the ANAO would not have any different requirements.

In this context, I noted with some interest in a recent United Kingdom (UK) National Audit Office Report19 that a public authority had faced great difficulty in getting timely information on the true extent of the private sector provider’s financial difficulties. This was because, under the contract, it had no access to the contractor’s underlying financial records.20 However, the Report also noted that, with appropriate subsequent action, ‘greater rights of access to the private sector party’s financial records are now standard in that country’.21

As part of performing a statutory duty to the Parliament, the Auditor-General may require access to records and information relating to contractor performance. My statutory information-gathering powers22 are broad but they do not include a right of access to contractors’ premises to obtain information. As early as September 1997, my Office circulated draft model access clauses to agencies and recommended their insertion in appropriate contracts. These clauses give the agency and the ANAO access to contractors’ premises and the right to inspect and copy documentation and records associated with the contract.

The primary responsibility for ensuring there is sufficient access to relevant records and information pertaining to a contract lies with agency heads. A Chief Executive must manage the affairs of the Agency in a way that promotes proper use (meaning efficient, effective and ethical use) of the taxpayers’
resources, as noted earlier. Such an arrangement reflects the principles of good governance accepted internationally. It would be expected that those obligations would generally override any concerns about private sector participation because of such access. At the very least, the perception should be given a reality test. Interestingly, Parliamentary Committees have noted that often the problem is with the public servants, not with the private sector providers.

For accountability measures to be effective, it is critical that agencies closely examine the nature and level of information to be supplied under the contract and the authority to access contractors’ records and premises as necessary to monitor adequately the performance of the contract. I stress ‘as necessary’ because I am not advocating carte blanche access. I consider that access to contract related records and information should generally be equivalent to that which should reasonably be specified by the contracting agency in order to fulfil its responsibilities for competent performance management and administration of the contract. Access to premises would not normally be necessary for ‘products’ or ‘commodity type’ services, such as cleaning and maintenance, which are provided in the normal course of business. It would be a different matter where government information or other significant assets were located on private sector premises.

The inclusion of access provisions within the contract for performance and financial auditing is particularly important in maintaining the thread of accountability with government agencies’ growing reliance on partnering with the private sector and on contractors’ quality assurance systems. I stress that this is important both for agency management and audit assurance to other stakeholders, including the Government and the Parliament. I was interested to see recently that the Australian Prudential Regulation Authority (APRA) wants the banks to change their outsourcing contracts to allow for greater supervision by the regulator. This would involve APRA obtaining information it requires in the course of its duty from third-party outsourcing companies under legislation rather than depending on voluntary cooperation from the computer industry.

The JCPAA has recommended that the Minister for Finance and Administration make legislative provision for audit access. The Government response to that report stated that:

its preferred approach is not to mandate obligations, through legislative or other means, to provide the Auditor-General and automatic right of access to contractors’ premises.

and that

the Government supports Commonwealth bodies including appropriate clauses in contracts as the best and most cost effective mechanism to facilitate access by the ANAO to a contractor’s premises in appropriate circumstances.

The response also stated that:
the Commonwealth Procurement Guidelines would be amended to emphasise the importance of agencies ensuring they are able to satisfy all relevant accountability obligations, including ANAO access to records and premises.26

While noting the Government’s response, the ANAO continues to encourage the use of contractual provisions as the key mechanism for ensuring agency and ANAO access to contractor’s records for accountability purposes. Following discussions between the ANAO and the Department of Finance and Administration to review the content of the standard access clauses, the Minister for Finance and Administration approved standard clauses for inclusion in relevant government contracts.27 These are included in the just released updated ‘Procurement Guidelines’.28

This issue also has implications for agencies’ security responsibilities, particularly where direct control over Commonwealth assets and/or information resides with a private sector provider. Specific responsibility is set out in the Commonwealth Protective Security Manual 2000 (PSM 2000) as follows:

*The agency must be able to carry out an examination of the contractor’s security procedures when undertaking its regular audit or review of the contractor’s methods and procedures. Access must be permitted for a security risk review to evaluate the contractor’s security procedures.*29

Interestingly, PSM 2000 indicates that a contract must include a general clause providing the agency with rights of access to the contractor’s premises and, where necessary, a clause specifying the contractor’s right of access to agency premises.

**Commercial-in-confidence information**

Situations have arisen where performance data relevant to managing a contract is held exclusively by the private sector. Also, private sector providers have made, in a number of instances, claims of commercial confidentiality that seek to limit or exclude data in agency hands from wider parliamentary scrutiny. Such claims have sometimes been reinforced by public servants but, ill-advisedly in Parliament’s view, have also been asserted where the private sector has made no such claim. Accountability can be markedly impaired where outsourcing reduces openness and transparency in public administration for whatever reason. It has been said that ‘information is the lifeblood of accountability’.30

The Australasian Council of Auditors-General has released a statement of Principles for Commercial Confidentiality and the Public Interest31. Of particular concern to Council members has been the insertion of confidentiality clauses in agreements/contracts that can impact adversely on Parliament’s ‘right to know’ even if they do not limit a legislatively protected capacity of an Auditor-General to report to Parliament. For example, the then Auditor-General of Victoria commented that:
... the issue of commercial confidentiality and sensitivity should not override the fundamental obligation of government to be fully accountable at all times for all financial arrangements involving public moneys.\textsuperscript{32}

This view has been echoed in almost every audit jurisdiction. For example, the Chairman of the Tasmanian Public Accounts Committee stated:

\textit{Maintaining secrecy by confidentiality clauses in contracts is adverse to the Parliament's right to know. Confidentiality clauses should not, therefore, be used in contracts unless there are specific approvals for them by the Parliament itself.}\textsuperscript{33}

I am sensitive to the need to respect the confidentiality of genuine 'commercial-in-confidence' information. In my own experience, I have found that, almost without exception, the relevant issues of principle can be explored in an audit report without the need to disclose the precise information that could be regarded as commercial-in-confidence. In this way, the Parliament can be confident it is informed of the substance of the issues that impact on public administration. It is then up to the Parliament to decide the extent to which it requires additional information for its own purposes. This view is supported by the Victorian Public Accounts and Estimates Committee in a landmark report last year, as follows:

\textit{‘Commercial-in-Confidence should not prevent the Auditor-General and Ombudsman from disclosing information where they assess its disclosure to be in the public interest’}\textsuperscript{34}

The Chairman of that Committee recently reiterated that a variety of options exist for dealing with commercially sensitive material and that, where genuine reasons exist, it is possible to take a middle ground between unrestricted access or total confidentiality.\textsuperscript{35} The Chairman went on to note that the only Committee recommendations rejected outright related to the disclosure of information contained in tenders (as opposed to contracts) and the conferral on the Ombudsman of an extended oversight role in relation to commercial-in-confidence claims\textsuperscript{36}.

Commercial confidentiality concerns have also been addressed by a number of Commonwealth Parliamentary inquiries.\textsuperscript{37} Recently, the Senate Finance and Public Administration References Committee, in its \textit{Inquiry into the Mechanism for Providing Accountability to the Senate in Relation to Government Contracts},\textsuperscript{38} addressed a motion that had been put before the Senate by Senator Andrew Murray (see note 37). Senator Murray’s motion sought to achieve greater transparency of government contracting through passage of a Senate Order that would require:

- the posting on agency web sites of lists of contracts entered into, indicating whether they contain confidentiality clauses and, if so, the reason for them;
the independent verification by the Auditor-General of those confidentiality claims; and

the requirement for Ministers to table letters in the Senate chamber on a six-monthly basis indicating compliance with the Order\textsuperscript{39}.

The Committee’s report noted that, at almost every estimates hearing, information is denied Senators on the grounds that it is commercially confidential.

The Committee tabled an initial report in June 2000. At the hearing of 12 May 2000 the ANAO had advised that it would consider conducting a performance audit on the issue of confidentiality provisions in Commonwealth contracts. In its report the Senate Committee undertook to report once more on the motion after the results of the audit were known. The ANAO report, to which I shall refer below, was tabled on 24 May 2001 after which the Committee prepared a second and final report on the mechanism proposed in the general notice of motion no. 489. The motion is now a Senate order. The changed wording of the order, passed on 20 June 2001 after the tabling of the ANAO report, reflects some of the committee’s concerns described in its June 2000 report. The Committee noted in its second report:

\textit{the order [of June 2001] works as a safeguard against the overuse of confidentiality claims in Commonwealth contracts. Agencies now need to think carefully about whether there is a genuine reason for keeping material confidential and restricting access to details of public expenditure}\textsuperscript{40}.

Senator Murray’s motion can be taken as a further indication of Parliament’s frustration with insufficient accountability reporting associated with government contracting and a belief that commercial-in-confidence provisions are used excessively and unnecessarily in contracts. Most recently, the Senate Finance and Public Administration References Committee commented that:

\textit{The need for confidentiality should be interpreted as narrowly as possible to ensure that the maximum amount of information is in the public domain}\textsuperscript{41}.

My Office recently completed a performance audit of the use of confidentiality provisions, in the context of commercial contracts, in response to a commitment taken at the inquiry addressing Senator Murray’s motion. The audit sought to:

\begin{itemize}
  \item assess the extent of guidance on the use of confidentiality clauses in the context of contracts at a government wide level or within selected agencies;
  \item develop criteria that could be used to determine whether information in (or in relation to) a contract is confidential, and what limits should apply;
  \item assess the appropriateness of agencies’ use of confidentiality clauses in the context
\end{itemize}
of contracts to cover information relating to contracted provisions of goods and services, and the implications of existing practices of applying the criteria that have been developed; and

- assess the effectiveness of the existing accountability and disclosure arrangements for the transparency of contracts entered into by the Commonwealth, and whether agencies are complying with the arrangements.\(^{42}\)

The audit approach was to work cooperatively with several agencies to distil their experience and so provide a sound framework for wider applicability across the Australian public/private sector interface. The report noted several weaknesses in how agencies generally deal with the inclusion of confidentiality provisions in contracts as follows:

- consideration of what information should be confidential is generally not addressed in a rigorous manner in the development of contracts;

- where there are confidentiality provisions in contracts, there is usually no indication of what specific contractual information in the contract is confidential; and

- there is uncertainty among officers working with contracts over what information should properly be classified as confidential.\(^{43}\)

The audit report made three recommendations that were generally agreed by the agencies concerned. As well, the ANAO developed some criteria for agencies in determining whether contractual provisions should be treated as confidential.\(^{44}\) These criteria are designed to assist agencies to make a decision on the inherent quality of the information before the information is accepted or handed over – rather than focusing on the circumstances surrounding the provision of the information. The report also gave examples of what would not be considered confidential\(^{45}\) and examples of what would be considered confidential.\(^{46}\) The Senate agreed a resolution reflecting Senator Murray’s motion on 20 June last.\(^{47}\) On the tabling of Ministers’ returns, the ANAO intends to evaluate a sample of the contracts listed for the appropriate use of confidentiality provisions. A report on the finding of such evaluation will then be tabled in Parliament.

The Senate Finance and Public Administration References Committee in a recent report on Commonwealth contracts\(^{48}\) supported the set of criteria developed by the ANAO for determining whether a sound basis exists for deeming information in contracts confidential. As well, the Committee recommended changes to the Senate Order of June 2001 which increased the
openness and accountability of all Commonwealth contracts with a value of $100,000 or more aimed at strengthening and clarifying the order.49

Information and records are a major element of the authority, responsibility and accountability continuum, if only because they can provide a clear evidential trail for managers and other stakeholders. Being pro-active in this respect reduces the risk of unnecessary speculation, confrontation and conflict, particularly where the parties concerned are asserting quite contrary views and/or perceptions. Unfortunately, the adequacy of information and records is often not seriously addressed until an issue is contested.

**Triple bottom line reporting – redefining accountability?**

One question I have been raising in the last couple of years is whether we can expect to see an emergence and consolidation of new modalities of accountability in the evolving public/private interface. One example is the so-called **Triple Bottom Line**. A recent article suggested that the current socio-legal construction of accountability in the business world – and I would include government operations in this category – is on the threshold of a major paradigm shift.50 Public and other stakeholder expectations in an increasingly globalised business and communications environment will, according to the article’s author and other proponents of the Triple Bottom Line (TBL), provide the drivers for a shift away from traditional input-output based model of accountability towards a focus on **economic prosperity, environmental quality and social justice**.51 However, no-one pretends this will be easy and will certainly be debatable. Nevertheless, I was interested to see a comment in the recent Annual Report of the Department of Family and Community Services that funding is available under the Community Business Partnerships to ‘take forward a national framework of triple bottom line reporting’.52

TBL goes beyond the current orthodox focus on financial performance (in the narrow sense of profit and loss), the utilisation of inputs and the disposition of outputs, and probity (expressed as conformance with applicable law and the minimisation of liability) to also take into account the environmental and social consequences of business activity. In part, this view is supported by the passage of ‘right-to-know’ legislation. As well, new corporate governance rules are challenging the traditional non-disclosure or low-disclosure policies of companies and are, consequently, giving rise to new expectations and standards of transparency. One could speculate about the effects of the greater spread of shareholding generally and the impact of, say, large size Investment Management and Superannuation Funds, particularly when their holdings are sufficient to gain a seat or seats on Corporate Boards.

TBL reporting could lead to changes to the manner in which public and private sector organisations report performance and discharge their accountability to their stakeholders, such as the Parliament. The concept of sustainability requires new definitions of performance and the re-articulation of organisational goals. In the private sector, this would involve some balancing of environmental and social considerations against profitability. The bottom line for the public sector is often diffuse with a range of sometimes apparently
conflicting objectives and, consequently, different balances have to be struck at points in time and over time to secure required results. An important aspect for both sectors is management of reputation, which is an all-pervasive issue for performance assessment. A degree of ‘trust and confidence’ is essential for a sustainable future, particularly where the general community is placing some value on corporations meeting broader ‘environmental’ and ‘social’ goals, both in terms of ownership and share prices. No less is expected of governments. The situation is reinforced where there are increasing partnerships between the public and private sectors.

There is a risk, however, that TBL can become simply a public relations exercise to promote the image of companies trying to project themselves as good corporate citizens. There is still a long way to go before TBL reporting has the rigour that characterises the financial bottom line reporting. In these circumstances there is also a particular challenge for those responsible for auditing this form of reporting, particularly where the evidential links are limited. This is an additional challenge for performance measurement and qualitative assessment. There are available techniques in the evaluation literature with the increasing cross-links between different social and economic disciplines and particular segments of community activity. This is another challenge for watchdogs. However, I note that the International Standard Organisation’s (ISO’s) Consumer Policy Committee has agreed to explore the feasibility and desirability of developing ISO standards to benchmark corporate social responsibility and report its recommendations by June 2002.

3. UNDERSTANDING THE CHANGING ENVIRONMENT

The changing face of public administration

All public sector organisations (whether statutory authorities, government agencies, corporations or local authorities) are required to be transparent, responsive and accountable for their activities. Citizens are entitled to know whether public resources are being properly used and what is being achieved with them. Consistent, clear reports of performance and publication of results, are important to record progress and exert pressure for improvement. Such transparency is essential to help ensure that public bodies are fully accountable and is therefore central to good governance overall.

I have pointed to the implications of the changing nature of that accountability with the greater involvement of the private sector in the provision of services to, and in particular for, the public sector. This phenomenon has been variously described, under many headings, for example new public management, the purchaser-provider model and entrepreneurial governance. The latest emphasis has been on so-called Public-Private Partnerships (PPP) for service delivery. But the changing environment goes further with the greater emphasis on partnering and networking, between and across organisations, involving all levels of government and sectors of the economy. I stress that there are areas of public sector activity where such approaches are not applicable, or may not be considered appropriate. Watchdogs have to deal with all means of
delivering public services and associated accountability for both the ‘how’ and ‘what’ is being achieved.

In a more privatised public sector, the question often becomes what is a reasonable trade-off when, inevitably in a public sector environment, the perceived needs for accountability can impact adversely on economy and efficiency. A similar observation extends to the notion of effectiveness, particularly where that concept does not embrace accountability concerns such as transparency, equity of treatment and probity in the use of public resources, including the application of public service values and codes of conduct.

The apparent trade-off has been extensively commented on by, for example, Professor Richard Mulgan of the Australian National University, in many articles and presentations in recent years. The following is indicative:

Contracting out inevitably involves some reduction in accountability through the removal of direct departmental and Ministerial control over the day-to-day actions of contractors and their staff. Indeed, the removal of such control is essential to the rationale for contracting out because the main increases in efficiency come from the greater freedom allowed to contracting providers.55

A practical comment on the perceived trade-off has been provided by the former Canadian Auditor General, as follows:

The emphasis should not be solely on greater efficiency or on meeting accountability requirements.56

In other words, an appropriate balance has to be struck, which may involve reconsideration by the Government and the Parliament as to the appropriate nature and level of accountability of both public and private organisations where there is shared responsibility, and even accountability for the delivery of public services to the citizen. However, I am personally inclined to support the observation of Professor John Uhr, also of the Australian National University, that:

Accountability and responsibility are two parts of a larger whole: whoever is ‘responsible for’ a policy or program is also ‘accountable to’ some authority for their performance within their sphere of responsibility.57

When commenting on the need to maintain scrutiny of government operations, Senator Hogg (a Member of the Australian Parliament’s Joint Committee of Public Accounts and Audit (JCPAA)), for instance, has noted that:

Public funds are not for the private purse of the government nor the bureaucrats to do what they like with. They are public funds for public purposes and should stand the test of public scrutiny by the Parliament.58
This is as it should be. I take the view that accountability of public sector operations depends to a great extent on providing the representatives of the Australian people —that is, Parliament — with full information on the operations of agencies and other bodies and on the functions performed therein. In some situations, because of the nature and complexity of public sector administration in an environment of ongoing reform:

Additional transparency provisions may be a cost that we have to meet to ensure an acceptable level of accountability.\(^{59}\)

There is no suggestion on the part of the Government or Parliament that accountability expectations will be downgraded; if anything, the reforms suggest that additional authority and flexibility require enhanced accountabilities even where there may be an additional cost involved. Parliament’s confidence in the accountability of public sector organisations is an on-going challenge to our corporate governance frameworks.

It has been generally recognised that networked arrangements for service delivery, which envisage more sophisticated and cooperative approaches to cross-cutting issues, are likely to focus on the importance of partnerships, collaboration and joint working agreements. This is increasingly occurring at the inter-agency level. As well, networking can be expected to evolve to include strategic arrangements and structures between public organisations, private operators and voluntary associations as well as individual clients and the community generally. Such interaction should in turn generate new forms of service delivery and probably redefine the various relationships between government and the community over time. As well, they erode differences between the public and private sectors which, in turn, often tends to result in focussing greater attention on the remaining differences, particularly when considering issues such as serving particular public and private interests, however they might be defined or described. Most are likely to agree with the following observation in the recent Annual Report of the Department of Family and Community Services (FaCS):

Real gains in social capital require genuine collaboration and partnership between all tiers of government, community leaders, individual members of the community, and the business community.\(^{60}\)

These moves have important ramifications for both responsibility and accountability and raise the question, again, as to ‘who is accountable for what?’ Are we looking at a more integrated model of public administration? Is it feasible to apply such a model to a more networked environment involving ‘real’ partnerships as well as direct competition on the basis of genuine competitive neutrality? And what are the implications for the various watchdogs? Figure 2 below reflects a fully collaborative environment under the legislative umbrella, coupled with a sharing of values. It also reflects an overarching corporate governance framework, including a sharing of risks, aimed at meeting both performance and conformance requirements.

Figure 2
This more integrated arrangement directly begs the question as to what trade-offs in approaches are possible and in what situations, not least in the nature and level of accountability and results that can be agreed. Probity, trust and confidence would seem immutable. Some see the creation of a 'level playing field' as levelling down rather than up. Others talk about the necessity of clearly identifying the 'basic differences' between the public and private sectors. Some of these differences are becoming more apparent than real, but this simply demands their better articulation.

My particular focus here is on the possible greater integration of both sectors generally, or for selected functions, and not on the creation of two public services reflecting, for example, core government on the one hand, and quasi government operations on the other. Distinctions of the latter kind are often spoken about by Prime Ministers, Ministers and Members of Parliament but, in reality, largely occur incrementally through a series of policy decisions that transfer particular activities and organisations from the public to the private sector over time. The Minister Assisting the Prime Minister for the Public Service has stated that the Government’s objective:

...has been to focus the APS (Australian Public Service) on its core activities of policy development, legislative implementation and the contracting and oversight of service delivery.

The Prime Minister has indicated the following list of functions and/or activities that he considers could, and should, be performed and delivered by government:

...defence, justice, a social security net, the monitoring of, and alternatives to, existing policies – all these will require public
A major aim of modern public administration has been expressed as creating the ability to deliver services that appear seamless to the recipient. In such arrangements, where there is joint responsibility for overseeing and implementing programs across a number of bodies, involving public and/or private sector organisations, a robust governance framework and accountability and reporting arrangements, which clearly define roles and responsibilities of the various participants, would seem to be required. Perhaps a more controversial aspect is the notion of sharing values, at least to some degree, with the private sector. This may be less of a problem with the not-for-profit segment. Increasingly, relevant governance arrangements will need to cross organisational boundaries to better align activities and reduce barriers to effective cooperation and coordination. Of note, in this respect, is the fact that globalisation has resulted in an increasing number of business networks operating across national borders. Networks do not necessarily require formal organisational structures to be effective but any arrangements for networking, or coordination, of activities, have to be at least transparent in the public sector.

More networked or partnering arrangements can also help overcome any apparent inflexibilities of a narrowly based contractual relationship. Such arrangements are seen to enable a greater exchange of ideas and information and to allow partners to gain access to knowledge and resources of the other parties which contribute to their joint performance and results. They may also facilitate contract re-negotiations and variations which are often more likely to involve WIN-LOSE than WIN-WIN perceptions, including a greater propensity to resort to contract clauses to resolve any problems in working arrangements. An important issue for agencies is whether their staff have the necessary experience and training to enter into a partnership relationship.

A focus on cooperation to overcome any identified problems and/or to deal positively with any issue of collaboration, coupled with a genuine commitment to mutual understanding, can lead to a more productive relationship and better results for all parties. Without such cooperation, it would seem difficult for public sector managers to exert a great deal of influence, or accountability, on private sector providers as opposed to relying on contractual clauses and legal confrontation, even Court action.

Realising the benefits of networking in a cross-cutting mode requires further cultural transformation in government agencies. For example, hierarchical management approaches may need to yield to more ‘partnering-type’ approaches. Process oriented ways of doing business will need to be at least complemented, if not largely replaced, by results-oriented ones. Organisations operating as virtual ‘silos’ or ‘islands’ of activity under devolved authority arrangements will not only need to become more integrated with their partners, but will also have to become more externally focussed if they are to meet the needs of their ultimate clients cost-effectively. What is needed is a positive and encouraging framework for building relationships, dialogue and cooperation that can lead to:
• clearer and more realistic performance measurements;
• more buy-in on both sides to achieve the results;
• a basis for ongoing dialogue throughout the year to improve the likelihood of achieving results; and
• capacity for learning and improvement.67

Within such a framework, accountability issues need to be openly discussed and action agreed both for individual and joint responsibilities. Emphasis is placed on the requirement for trust. It has been observed that ‘contracts and trust are not direct opposites of each other’.68 This has important implications for the level of transactions costs involved.

Another important aspect of developing networked solutions is the need to ensure greater availability of information and access to citizens as clients or customers. Information technology is providing significant opportunities for government to put in place facilities for existing and potential clients to have access to the information they require. It has been suggested that one effect upon businesses in the electronic era, with its emphasis on e-commerce and related technology based service delivery, is that they will need to work more closely together. To fully exploit opportunities created by the Internet will require organisations to develop closer working relationships with their stakeholders.69 Indeed, rapid advances in information and communication technologies are likely to demand the establishment of effective partnering and networking to ensure a responsive, efficient and cost-effective public sector providing seamless availability of information and other services to all stakeholders.

It therefore seems likely that partnership arrangements will be encouraged through the increased adoption and impact of electronic government with its focus on coordination and collaboration in the business environment and with shared databases as well as greater electronic integration in a virtual ‘one-stop’ service delivery environment. Between agencies, such arrangements tend to be quasi-contractual, based on ‘relational’, rather than ‘legal’, agreements, for example Memoranda of Understanding. An example is the Strategic Partnership Agreement between the Department of Health and Aged Care and the Health Insurance Commission in relation to Medicare and the Pharmaceutical Benefits Scheme. A Senior Management Committee considers strategic issues and provides a forum for consultation and co-ordination and a joint report on performance. The Agreement provides an extensive set of principles, protocols, mechanisms and procedures specifically designed to articulate and govern the relationship between the two agencies with respect to the delivery of the health programs and services involved.

Another example is the Business Partnership Agreement (signed on 31 July 2001) between FaCS and Centrelink which:
recognises the blend of partnership and purchaser-provider models inherent in the relationship;

addresses the major concerns, expressed by FaCS and Centrelink, in the day-to-day operations of the relationship;

restructures the committees to improve their effectiveness;

incorporates principles underlying the *Australians Working Together* package;

develops a business assurance protocol;

trials the tying of payments to successful service delivery; and

develops the organisational level key performance indicators.70

FaCS is developing a Partnership Framework within which its relationships with the non-government sector will operate. It will include the importance of partnerships in achieving outcomes, accountability and co-operation, and different approaches FaCS may take to different relationships.71

There are apparently compelling reasons in a number of areas for considering the extension of the relational/partnering approach involving the private sector in a more networked environment. As usual, a balance has to be struck in particular cases between the various demands on managers, which can change depending on circumstances and the environment. The following is a related observation from a private sector perspective:

…*the move to collaborative outsourcing agreements is an admission that the most successful outsourcing organisations are the ones that have a clear idea what they want the outcomes to be, rather than trying to manage (my underlining) the outsourcer.*72

A further indication of a greater move towards network bureaucracies is the renewed focus on the needs of citizens as clients or customers. This is, at least partly, a consequence of a government decision in March 1997 to introduce Service Charters in order to promote a more open and customer-focused Commonwealth Public Service. All Commonwealth Departments, agencies and Government Business Enterprises that have an impact on the public must develop a Service Charter. These Charters are to represent a public commitment by each agency to deliver high quality services to their customers. Two whole-of-government reports have been presented to Parliament reporting, among other things, performance against the ‘principles for developing a Service Charter’ launched in 1997. The second report concluded that:

*Service Charters are proving to be key instruments for innovation and for driving effective service delivery in the 21st Century.*73
Where service delivery has been outsourced, Service Charters will clearly have a direct impact on the private sector contractor. In particular, it is to be expected that outsourcing contracts will need to reflect the Service Charter commitments if the Charters are to have any real meaning. It will also be important to require, as part of the contractual arrangement, the provider to supply outcome, output and input information against which the provider's performance can be assessed, including whether processes are efficient and the service quality is satisfactory. In this way, even if the client is one or more steps removed from the responsible department, it should still be possible to ensure clients are receiving the appropriate level and quality of service, consistent with the Service Charter. Such an approach may also be expected to reinforce the notion of both the private sector provider and the contracting agency being dependent on one-another for delivering a satisfactory level of performance and accounting for their performance – in effect trading-off some degree of their individual control for agreement about their joint performance and results to be achieved.

Private financing of government activities

A related topic is that of the use of private finance in areas of the public sector such as infrastructure, property, defence and information technology (IT) and the way in which this can lead to risk transfer, or allocation, between the two sectors. Again, the use of such a facility is a test of corporate governance arrangements, literally with shared responsibility, if not accountability. The key message in this context is the need for public sector managers to fully appreciate the nature of the commercial arrangements and attendant risks involved in private financing initiatives.

In the current budgetary environment, public sector entities in many countries have often found it difficult to provide dedicated funding for large projects out of annual budgets. The encouragement of private sector investment in public infrastructure by governments is one response to fiscal pressures. This gives rise to additional challenges and demands for public accountability and transparency because the parameters of risk are far different to those involved in traditional approaches to funding public infrastructure. Indeed, the potential liabilities accruing to governments may be significant.

Extensive use has been made of private financing in the United Kingdom (UK). The Private Finance Initiative (PFI) was introduced in 1992 to harness private sector management and expertise in the delivery of public services. By December 1999, agreements for more than 250 PFI projects had been signed by central and local government for procurement of services across a wide range of sectors, including roads, rail, hospitals, prisons, office accommodation and IT systems. The aggregate capital value of these projects was estimated to be some £Stg 16 billion.

The UK National Audit Office (NAO) has noted that the private finance approach is both new and more complicated than traditional methods of funding public infrastructure. It brings new risks to value for money and requires new skills on the part of the public sector. Since 1997, the NAO has published eight reports on such projects. These reports collectively suggest
that for privately financed projects to represent value for money, the price must be in line with the market, the contract must provide a suitable framework for delivering the service or goods specified, and the cost of the privately financed option (taking into account risk) should be no more than that of a publicly funded alternative.77

It is not easy to evaluate the overall benefits that accrue from PFIs. In financial terms, it has been recognised that it is difficult for the private sector to borrow as cheaply as governments can. This is because government borrowings are considered by markets to be risk-free. This relates to governments’ capacity to raise taxes and because of the absence of default by most sovereign borrowers. Accordingly, delivering financial benefits from private financing requires cost savings in other aspects of the project and/or the effective transfer of risk.

It is apparent that the PFI in the UK is being driven heavily by the objective to transfer risk.78 For example, in contracting the funding, design and management of IT and infrastructure projects to the private sector, the associated transfer of risk to private sector managers is being justified on the basis that they are better able to manage the risks involved. However, a report commissioned by the UK Treasury indicated that some invitations by public sector bodies to negotiate contract provisions included risks that could not realistically be best managed by the contractor.79 The report went on to advocate an approach involving the ‘optimum’ transfer of risk, which simply means allocating individual risks to those best placed to manage them. As usual, the devil is in the detail but experience is indicating some useful means of deciding on an appropriate allocation of such risks. There would be general agreement that the issue is more about risk allocation than risk transfer. Nevertheless, there is always concern that the ultimate risk often rests with the public sector.

In Australia, most of the activity in private financing initiatives has occurred at the State Government level, particularly in relation to infrastructure projects such as roads. Prominent examples include the Sydney Harbour Tunnel and the M2 Motorway in Sydney80 and the City Link project in Melbourne. Of note is that these high profile projects have been the subject of external scrutiny that has raised concerns about the exact distribution of risk and financial benefits between the public and private sectors, for example as indicated by the following audit observations:

• The previous New South Wales Auditor-General consistently commented that, although private sector owners have been given long-term rights over important road networks, there has not been a proper comparison of the cost-effectiveness of private sector involvement and the traditional public sector approach. Accordingly, the Auditor-General was unable to conclude that the projects that have been undertaken were in the State’s best interests from a financial viewpoint.81 In particular, the opportunistic and ad hoc use of private
finance was criticised as it was considered unlikely to improve the overall efficient use of the road network and reduce the total costs of road maintenance and management.\(^{82}\)

- The Melbourne City Link project is one of the largest infrastructure projects ever undertaken in Australia with an estimated total cost of around $2 billion. It involves around 22 kilometres of road, tunnel and bridge works linking three of Melbourne’s most important freeways. A report by the State Auditor-General found that, while the users of the City Link via toll payments will, in substance, be the financiers of the project, the private sector has accepted substantial obligations associated with the delivery and operation of the City Link, including traffic and revenue risks. However, the auditors also found that the decision to establish the City Link as a toll road was not supported by a financial model that compared project costings on the basis of private sector financing versus government borrowings.\(^{83}\)

Significantly, there have also been concerns raised about public accountability for privately financed projects. These have stemmed from difficulties Parliaments have experienced in gaining access to contract documents, as I also noted earlier. For example, in relation to the aforementioned M2 Motorway in New South Wales, the NSW Parliament was denied access to the contract deed between the public sector roads authority and the private sector counterpart.\(^{84}\) These experiences reinforce the need to have such contractual arrangements clearly specified and agreed at the outset rather than when difficulties arise and funding commitments have clearly been made. Both New South Wales\(^{85}\) and Victorian Governments\(^{86}\) have now issued extensive guidance on the use of private finance, which address many of the foregoing and other relevant issues.

At the national level, there has been increasing interest in private financing initiatives, although to date there has been limited actual adoption, notably in the property and defence projects areas. The Department of Defence has recently committed itself to examining the merits of using private financing in the delivery of Defence services, with the aim of realising financial savings or improving effectiveness. Defence services included in this examination are to cover capital equipment as well as Defence facilities, logistical support and IT programs. The clear intention on the part of Defence in widening the use of private financing, reportedly for as much as 25 to 35 per cent of all future acquisition projects,\(^{87}\) is to achieve the best affordable operational capability.
As an aside, I note that, in rebutting some criticism that PFI in the Defence context has been seen as 'simply putting Defence capital expenditure on the plastic', the Under Secretary of the Defence Materiel Organisation has made the point that PFI will link the provision of the capital item or capacity with its life-cycle cost, and hence provide Defence with one payment for availability.\(^{88}\)

An associated move that Defence is making in the area of private financing is to encourage increased participation in such financing methods by small to medium enterprises (SMEs). There are strong indications that SMEs presently feel that the opportunities presented by such initiatives are only within the scope of larger, national and international defence industry players.\(^{89}\) Interestingly, the Leader of the Opposition in the Federal Parliament recently indicated that a Labor Government would:

- increase the target value of government purchases from SMEs from 10 to 20 percent;
- move to reduce the size of individual government contracts where appropriate in order to ensure that SMEs have more opportunities to tender; and
- develop and include in the tender evaluation process a points system for agencies that rewards the inclusion of local SMEs in preferred tenders.\(^{90}\)

Of course, any substantial move towards private financing of Defence activities would need to consider what core business the Department needs to maintain in order to manage effectively the longer-term risks that are involved in any outsourcing. With this in mind, the Department has indicated in a Discussion Paper that private financing is to be considered for all capability proposals and tested as an acquisition method unless the capability:

- involves the direct delivery of lethal force (core Defence business); or
- is demonstrably inappropriate and uneconomic (that is, does not reflect best value for money).\(^{91}\)

In view of the growing interest in, and use of, private financing initiatives and the important financial, risk transfer and accountability issues raised, it can be expected that agencies, as well as the ANAO, will increasingly focus their attention on examining such activities. It is hoped that such scrutiny can assist in optimising outcomes and providing assurance to the public and Parliaments about the processes adopted and outcomes achieved. The particular challenge for agency management will be to determine just what is meant by ‘value for money’ in terms of the government purchasing policy of the day. The private sector has a similar problem, as many have indicated over the years.

In testing value for money, specific attention, including considerations of accountability, will need to be given by agencies to ensuring that an adequate assessment (pricing) of risk to be transferred between the public and private
sectors occurs before such transfer takes place. Recent Commonwealth Policy Principles for the Use of Private Financing indicate that value for money is to be tested by comparing the outputs and costs of private financing proposals against a neutral benchmark, called the Public Sector Comparator, developed by the agency (and its advisers) in consultation with the Private Financing Unit (PFU) established in the Department of Finance and Administration (Finance)\(^92\). In particular, value for money should be assessed on a whole-of-life and whole-of-government basis.

The PFU is to provide a concentrated level of expertise and apply a whole-of-government perspective to potential proposals. The Unit’s role will be to advise on the relative value of private financing as an alternative to traditional procurement, in order to choose between private financing and the latter prior to any decision committing the government to a procurement method.\(^93\) The Government has indicated that, the greater degree of harmonisation of assessment methodologies around Australia, the cheaper it will be to assess the benefits of private financing. Any savings determined are sensitive to the underlying assumptions used for any comparator as well as consistency of treatment between both the public and private sectors. A perceived lack of consistency has been an issue raised by the private sector in the context of the Government’s policy to market test corporate services in all public sector agencies. Reflecting the growing international importance of PFI, a working group of Heads of Audit Offices from a range of countries, under the Chairmanship of the Comptroller and Auditor General of the United Kingdom, recently published Guidelines on Best Practice for the Audit of Public/Private Finance and Concessions.\(^94\)

The initial benchmark for comparison purposes is often the incumbent public service provision of similar goods or services. However, it is not uncommon for such benchmarks to be adjusted to improve comparability. For example, we have a requirement to ensure ‘competitive neutrality’ with potential private sector providers. This introduces further assumptions and subjectivity to the evaluation process which has been viewed with some concern by the Senate Finance and Public Administration References Committee in a recent hearing on IT Outsourcing\(^95\). Unless risk is substantially transferred to the private sector, private financing may achieve little other than to provide the private sector with the benefit of a very secure income stream, similar to a government debt security, but with the private sector able to earn returns above those available from investing in government debt securities. However, the transfer of risk to the private sector is only really cost-effective where the private sector is better able to manage and price these risks. Nevertheless, as observed earlier, the Commonwealth’s Policy Principles state that:

> Agencies are responsible for the delivery of their outputs even through the use of private financing. Agencies are not able to transfer accountability to a private sector entity, irrespective of the procurement method.\(^96\)

Even where a risk has been transferred, as part of the allocation process, there can remain a residual risk that the public sector may have to step-in where the private sector contractor experiences difficulties in meeting its obligations. This
is because, where the provision of public services or goods is involved, private financing does not equate to contracting out ultimate responsibility and accountability for the outputs and/or outcomes concerned. A good example was the United Kingdom Royal Armouries deal, where the armouries had to take back certain risks previously allocated to the private sector supplier in a revised deal in July 1999. This arrangement also illustrated that it is not always desirable to transfer demand risk since the level of usage required of an asset or service under PFI deals is usually not within the private sector’s control.

In this context, I commend the work done by the UK NAO in examining privately financed projects and in providing sound guidance to auditors on how to examine value for money of privately financed deals as well as identifying better practice in a ‘partnership-type’ relationship. I also welcome the following requirement of the Commonwealth’s Policy Principles:

In all private financing arrangements should be standard best practice clauses on audit access, security, privacy and parliamentary access.

Governments as minority shareholders

In various countries, governments have taken out minority shareholdings in private companies for the purpose of delivering public services. This may be as a result of a deliberate decision that this is a desirable policy response to a particular situation, or as a step on the way to a more privately centred delivery pattern. It seems, from studies by an international Working Group of Supreme Auditing Institutions (or Auditors-General) on the Audit of Privatisation that, in developed economies, this arrangement is likely to represent a small proportion of economic activity. The working group commented:

There is widespread recognition of the exposure of the state to risk as a result of these holdings (eg of exposure to demand for financial support if the business gets into difficulty, or of criticism from wholly owned or non-subsidised private sector competitors about unfair competition). It is also clear that the state does not have any more legal rights and protection than those offered to other minority shareholders, even though it may in practice if not in law be more exposed to demands for support from the private business than private shareholders (eg indemnities, explicit or implicit).

Accordingly, the Working Group pointed to the need for more guidance on issues such as:

- what are the risks to which the state is exposed where it is a minority shareholder and how these can best be managed;

- what steps the state needs to take to ensure that its interests are protected (eg by stating its objectives for its investment, ascertaining and securing its legal
rights, valuing its contribution, securing a reasonable return, minimising moral hazard);

- the skills needed by public bodies required to monitor minority shareholdings or seeking to acquire such holdings;

- incentives for public bodies and their staff to protect the state’s interests; and

- how to carry out constructive examinations where they have access rights to the public body responsible for the state’s minority shareholding but not to the private business itself.¹⁰¹

Governing the public-private sectors’ interrelationships

Convergence between the public and private sectors has drawn attention to sharing approaches and experiences in relation to corporate governance, particularly in managing the interrelationships. The main focus, however, has been on managing contracts and outsourcing arrangements.

Managing the risks associated with the increased involvement of the private sector in the delivery of government services, particularly through contract arrangements, has required the development and/or enhancement of a range of commercial, negotiating, project and contract management skills across the public sector. We have learnt quickly that outsourcing places considerable focus and emphasis on project and contract management, including management of the underlying risks involved, both within and outside the public sector. The problem has been to achieve both management understanding of, and action on, these imperatives in a reasonable time period.

Over recent years, there has been considerable attention through the audits of the ANAO on the necessity of having in place the ‘right’ contract, as well as appropriate contract management arrangements, to assist in meeting organisational objectives and strategies. This reflects the greater involvement of the private sector in providing a wide range of public services. One important lesson we have learnt, and that is being reinforced constantly, is that:

… clear identification and articulation of contract requirements at the outset can save considerable time, cost and effort later in contract management.¹⁰²

A common theme of these audit reports has been the deficiencies in the project management skills of agency decision-makers. This is of concern given that some of these projects involve substantial resources and complexity. As well, reports have flagged a need for care in assessing value for money and negotiating, preparing, administering and amending major contracts.
Our Parliament and media have also paid particular attention to these issues during recent years with several agencies receiving significant adverse comments and publicity. I am not alone, therefore, in stating that this situation has to be addressed as a matter of urgency. The various elements of the public sector that are involved in contract administration have to reverse such concerns to win back the confidence of all stakeholders. Future audit reports will closely examine relevant contracting issues to assist in making this a reality.

4. THE CHALLENGES FOR WATCHDOGS

I have canvassed a range of issues associated with the greater involvement of the private sector in public sector activities, including notions of partnership, collaboration and networking. I have also made the point that these notions are also of growing importance to agencies within the public sector, particularly at different levels of government. The issues raised are simply illustrative. Watchdogs need to understand not only the issues but also the pressures on those immediately concerned. As well, they have to form opinions, and often advise, on those issues.

Contract management

It would be no exaggeration to say that most public sector managers today have to grapple with how to establish a sound contract and contracting environment. For example, outcomes can often be difficult to specify in many contractual arrangements and, indeed, may even be the combined product of more than one agency, as I noted earlier. Given these complex linkages, it can therefore be difficult to specify, in order to press for successful contractor performance, the circumstances in which ‘non-performance’ has occurred or what constitute enforceable responses.

Legal advice should be framed with reference not only to the contract but should also give consideration to the relationship between the contractor and government organisation and the risks the government is exposed to by contracting-out that particular service. The legal advisers of the then Office of Asset Sales and Information Technology Outsourcing (OASITO) conducted a high level assessment of the legal risks associated with the provision by an external contractor of IT infrastructure services to agencies within a cluster. A considerable number of such risks were identified. Inevitably, so-called transactions costs associated with outsourcing arrangements seem to be largely overlooked and/or under-stated.

Equally, unfortunately, is that experience to date has generally shown a risk averse approach to contracting and contract management which has led, in some cases, to an ineffective and inefficient provision of the services under contract. The issue is not simply about a process or rules-based culture of public service as opposed to being more responsive and results oriented. The concern is about achieving the ‘right’ balance of complementary behaviour and approaches to meet both accountability and performance imperatives in
sometimes widely varying situations. A robust corporate governance framework can help achieve such a balance.

Effective contract administration in the public sector goes beyond simply trying to hold contractors to account for each minute detail of the contract. To get the most from a contract, the contract manager and contractor alike need to nurture a relationship supporting not only the objectives of both parties but also one that recognises their functional and business imperatives. It is a question of achieving a suitable balance between ensuring strict contract compliance and working with providers in a partnership context to achieve the required result. According to the OECD:

A good contract is one that strikes, at a level which will be robust over time, a balance between specification and trust which is appropriate to the risks of non-performance but does not impose unnecessary transaction costs or inhibit the capacity or motivation of the agency to contribute anonymously and creatively to the enterprise in question.\textsuperscript{104}

A recent innovation, at least in the Australian context of public sector contracting, has been the use of project alliancing, for the construction of the National Museum of Australia (NMA) and the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).\textsuperscript{105} A relatively new method of contracting, a project alliance is an agreement between two or more parties, the project owner and the contractor/s, who undertake work cooperatively, on the basis of sharing the risks and rewards of the project. Although project alliancing is a business relationship, the aim is to achieve agreed commercial outcomes based on the principles of good faith and trust. As such, it offers potential benefits over traditional contracting but also raises new and different risks that have to be managed. Again it is important that staff required to manage the project have the appropriate skills and knowledge in order to ensure that the project results are effectively achieved. In a recent presentation to ANAO staff, Professor John Langford of the University of Victoria in Canada observed that the general consensus about managing alliances was that it was as difficult as ‘stirring concrete with eyelashes’, a mind-boggling thought.

The recently issued ANAO Better Practice Guide on Contract Management emphasises the importance of not only dealing effectively with risk in contracts but also in developing and maintaining a relationship with the contractor that supports the objectives of both parties and focuses on the agreed results to be achieved. However, as recently observed by the Senate Finance and Public Administration References Committee, there are also concerns that both parties do not understand, or are insufficiently aware of, the requirements for parliamentary accountability.\textsuperscript{106}

**Record-keeping in a more networked environment**

While the National Archives of Australia would not agree, and rightly so, record-keeping is not seen by many public servants as a ‘glamorous’ or ‘exciting’ activity. Nevertheless, it is basic to good management and can be
quite complex. Effective systems and operational practices are often subject to review by Watchdogs.

Records are an indispensable element of transparency, and thus of accountability, both within the organisation and externally. As the Public Record Office in the United Kingdom observes:

\[
\text{All organisations need to keep records of business decisions and transactions to meet the demands of corporate accountability.} \quad \text{107}
\]

Records are consulted as proof of activity by senior managers, auditors, members of the public or by anyone inquiring into a decision, a process or the performance of an organisation or an individual. As such, they are an appropriate example of not only the importance of good process but also how it often contributes importantly to the myriad of public sector outcomes or results. With the move to greater outsourcing to the private sector, there is increasing concern about organisations' ability to preserve those records that are needed to support the delivery of programs and services, and to meet their accountability, as well as archival, obligations.

As you know, higher standards of accountability are expected in the public sector than is usual in the private sector. Recognising this, Parliament has passed legislation relevant to record-keeping that applies to all Commonwealth agencies, such as the Archives Act 1983, the Freedom of Information (FOI) Act 1982 and the Privacy Act 1988. These Acts deal with the overarching issues of maintenance, archiving and destruction of records, access to records by the public, and confidentiality of records. Also of relevance, particularly from a management viewpoint, are the Public Service Act 1999, the Financial Management and Accountability (FMA) Act 1997 and the Commonwealth Authorities and Companies (CAC) Act 1997.

The FMA Act requires that Chief Executive Officers (CEOs) manage the affairs of their agencies in a way that promotes proper use (that is, efficient, effective and ethical use) of the Commonwealth resources for which the Chief Executive or Board is responsible. A CEO must ensure that the accounts and records of the agency are kept as required by the Finance Minister's Orders. Record-keeping is also covered by the CAC Act, which requires a Commonwealth authority to keep accounting records that properly record and explain its transactions and financial position. These records have to be kept in a way that enables the preparation of financial statements and that allows those statements to be audited appropriately and effectively.

In addition to legislative requirements, there are several other significant reasons for emphasising the importance of record-keeping in the public sector. Up-to-date, accessible, relevant and accurate records can ensure that decisions made by an agency are consistent, based on accurate information; are cost-effective; engender a sense of ownership of decisions throughout the agency; and place the agency in a considerably better position to justify to Parliament and the public any decisions made. I stress that it is often not just outputs and outcomes that are of concern to Parliament and the public, but also the processes of decision-making and the reasons for decisions made.
Such transparency is achieved by ensuring that the decision-making process, and the reasons for decisions made, are adequately documented by the agency.

Transparency, through record-keeping, is an agency's first line of defence against accusations of bias, unfair treatment and other negative public perceptions. It also promotes confidence in the integrity of the Australian Public Service (APS) and provides assurance to stakeholders that the APS is making decisions in the 'public interest', particularly where procurement is concerned, as well as meeting any requirements for fairness, equity, privacy and freedom of information. Transparency also provides some guarantee of integrity of information, which improves the scope for governments to make constructive use of the internet in dealing with their citizens.

Countering the loss of corporate knowledge is another area that can be greatly assisted by a sound record-keeping culture. Corporate knowledge is largely the wealth of information and experience that is stored on paper, electronically or mentally. Of course, we are well aware that such knowledge is only useful when something is actually done with it. Loss of corporate knowledge has been a significant issue for the public sector in recent years where, due to the trend towards high turnover and increasing mobility of staff, in part the result of outsourcing activity and privatisation of public sector organisations and activities, we have seen an enormous drain on the retained knowledge of the APS through the departure of many experienced individuals. The creation and maintenance of suitable records can alleviate this problem to some extent, particularly in relation to decision-making.

We also recognise that formal systems cannot easily store or transfer 'tacit' knowledge. Nevertheless, a relatively inexperienced manager, unable to gain a more experienced colleague's advice on a decision-making matter, would be greatly assisted by access to records of a similar decision someone else in the agency may have made in the past, particularly where other related information is also readily available. Information Technology (IT)-based expert systems may also address this problem to some extent. Although this technology is still very much in its infancy, expert systems use artificial intelligence technology and are encoded with human knowledge and experience to achieve expert levels of problem solving, greatly reducing the reliance on retained staff knowledge. Such systems have been extensively used in agencies such as Centrelink and the Department of Veterans' Affairs. However, the emphasis in recent years has been increasingly on developing knowledge management systems with their emphasis on people.

Apart from mitigating the loss of corporate knowledge, record-keeping can assist the internal functioning of agencies by improving performance. Records of performance information are important in allowing an agency to monitor its performance and benchmark itself against other organisations, to ensure that performance is at optimum level. As well, fraud is less likely in a sound record-keeping environment that supports timely and accurate recording of data, with sufficient separation of duties. We are all aware that there is a cost associated with good record-keeping. In the main, it is a risk management judgement that should be made on the basis of a systematic risk assessment with sound
identification and prioritisation of both internal and external risks. This involves careful examination of what outcomes are really being required and, therefore, what record-keeping practices are necessary to achieve those outcomes. Any approach should also meet legislative requirements for record-keeping. In short, records should be fit for their purpose. This is particularly important in any outsourcing situation where such records are being wholly or partially maintained by the private sector.

It is apparent that there is an increasing tendency for policy and administrative decisions to be communicated and confirmed through e-mail communications. E-mail, electronic files and e-commerce are replacing traditional paper based records and transactions. This is a function of our changing expectations about the speed of communications, a growing emphasis on timely management of the ‘political’ dimensions of policy, and the appropriation by the public sector of a ‘commercial paradigm’ in which ‘deals are done’ (which is given added impetus by the involvement of private sector ‘partners’ in various aspects of government operations). Nevertheless, as better practice private sector firms demonstrate, good record-keeping is an integral part of a sound control environment and subject to a regularly reviewed risk management strategy which is integral to their required outcomes and accountability requirements.

As a particular instance of the task facing those of us who are required to oversee public sector operations and to provide important public accountability assurance, I note that the increasing use of e-mail poses significant challenges in terms of our traditional evidentiary standards (which customarily hinge on paper-based records) and the skills base of our auditors. As auditors, we are already confronting situations in which traditional forms of documentary evidence are not available. In such situations we are having to make links in the chain of decision-making in organisations which no longer keep paper records, or having to discover audit trails in electronic records, desktop office systems or archival data tapes. As communications between government agencies and outsourced service providers become increasingly electronic, it gives added urgency to making sure that the standards of accountability expected for the performance of government functions are understood and complied with by the relevant private sector partners. Particularly where there are still the hurdles of access and confidentiality to be overcome, the outcome is problematic.

Privacy and security versus openness and transparency in both the public and private sectors

The question of access to private contractor’s premises and records is important to both public service managers and watchdogs, as I have previously discussed. What I wish to treat here is how the privacy concerns of citizens are protected in an environment where responsibility for the delivery of services and the collection of information is performed by the private sector on behalf of the government. The recent State of the Service Report indicates that:
The Privacy Commissioner remains apprehensive about the handling of personal information by outsourced providers and stresses that, with an increase in outsourcing across a range of services, APS employees must be confident that service providers are complying with the Information Privacy Principles (IPPs) and the Privacy Act 2000.\textsuperscript{109}

For the public sector, with the increased involvement of the private sector in the provision of public services, the security of agency data, and particularly electronic data, is another critical issue that needs to be effectively managed. Contracts negotiated between Australian federal public service agencies and their private sector providers must include provisions which acknowledge Australian Federal Government IT security requirements. In addition to the technical issues associated with the protection of the data held by government agencies from unauthorised access or improper use, there are also issues associated with the security of, for example, personal information held by government. Contracts for outsourcing service delivery need to ensure that prospective service providers are aware of the standard of protection that comes from dealing with people on behalf of the government and that the mechanisms in place do provide effective privacy protection. A watchful citizenry will want to be certain that agencies and their contractors cannot evade their obligations.

To fully address such concerns, a Better Practice Guide, recently prepared by the ANAO,\textsuperscript{110} suggests that agency Internet websites should incorporate a prominently displayed Privacy Statement that states what information is collected, for what purpose, and how this information is used, if it is disclosed and to whom. It should also address any other privacy issues.\textsuperscript{111} According to Privacy Compliance Audits conducted by the Privacy Commissioner, of Commonwealth Government web sites in 2000 and 2001, about 20 per cent of larger agencies, and 38 per cent of smaller agencies, still need to include a privacy statement on their web sites.\textsuperscript{112}

The risks involved in broadening networks and Internet use also raise issues associated with who has access to the records. This has consequences for the privacy and confidentiality of records, which are of considerable concern to Parliament. This is particularly the case during outsourcing, where private sector service providers have access to collections of personal records that could be used for inappropriate purposes, such as sales to other private sector organisations of mailing lists.

The Federal Privacy Commissioner has noted: \textsuperscript{113}

Like poor privacy practice by Commonwealth Agencies, poor practice by contractors may have a number of undesirable effects:

- Individuals may be more reluctant to provide information, or to provide accurate information, if they suspect that it will be accessible to private firms as well as the agency with which they
are primarily dealing.

- Individuals may be directly disadvantaged by having their information improperly used, stored or disclosed.
- Under the existing legal situation (prior to 21 December 2001), those who have suffered such disadvantage may not have access to means of redress as effective as those available if the information had been handled directly by a Commonwealth agency.

Most non-commercial Commonwealth agencies are required by the Privacy Act 1998, to comply with eleven IPPs that provide for the security and storage of personal information. The Privacy Act defines personal information as:

> information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion.\(^{114}\)

The IPPs state that, if a record is to be given to a service provider, the recordkeeper (ie the agency) must do everything reasonably within its power to prevent unauthorised use or disclosure of information contained in the record. They cover four areas of personal information handling: openness, collection, security, and publication.

The increased involvement of the private sector in the provision of public services raises issues about the security of agency data and records, particularly in electronic form. In the past, the obligations that apply to Commonwealth agencies under the Privacy Act have not applied to private sector organisations. However, the Privacy Amendment (Private Sector) Act 2000 passed in December last aims to provide privacy protection for personal records across the private sector, including those organisations providing outsourced services to the public sector. The Act enables a contract between a Commonwealth agency and the private sector supplier to be the primary source of the contractors’ privacy obligations regarding personal records. The contractual clauses must be consistent with the IPPs that apply to the agency itself, and details of these privacy clauses must be released on request. The Act:

> aims to control the way information is used and stored, and bring to justice those who abuse private information for their own ends. Placed in the insecure context of e-commerce and e-mail transmission of personal details, issues of privacy have become more significant.\(^{115}\)

For many organisations, including health services, the new private sector provisions will commence on 21 December 2001. For small businesses to which the provisions will apply (except health services), the new provisions will
commence one year later. The Act will apply to ‘organisations’ in the private sector. An organisation can be an individual, a body corporate, a partnership, an unincorporated association or a trust. It will cover:

- businesses, including not-for-profit organisations such as charitable organisations, sports clubs and unions, with a turnover of more than $3 million;
- federal government contractors;
- health service providers that hold health information (even if their turnover is less than $3 million);
- organisations that carry on a business that collects or discloses personal information for a benefit, service or advantage (even if their turnover is less than $3 million);
- small businesses with a turnover of less than $3 million that choose to opt-in;
- incorporated State Government business enterprises; and
- any organisation that regulations say are covered\textsuperscript{116}.

A key provision of the Act is the inclusion of ten ‘National Privacy Principles for the Fair Handling of Personal Information’. These Principles set standards about how business should collect, secure, store, use and disclose personal information. The Act makes a distinction between ‘personal’ and ‘sensitive’ information\textsuperscript{117}. The latter includes information on a person’s religious and political beliefs and health, where the private sector is more strictly limited in its collection and handling. This legislation is likely to have a marked impact on that sector’s involvement in the delivery of public services.\textsuperscript{118}

For those organisations and industry sectors seeking to develop their own privacy codes, the Privacy Commissioner has prepared a set of Code Development Guidelines which are available on the Commissioner’s web-site (www.privacy.gov.au). The final National Privacy Principle Guidelines, and a series of information sheets, were released in mid-September last on the same web site. A comment has been made that the approach is ‘user friendly, less onerous and more pragmatic’\textsuperscript{119} compared to the draft guidelines issued on 10 April.

Section 95B of the \textit{Privacy Amendment (Private Sector) Act 2000} requires agencies to consider their own obligations under the Act when entering into Commonwealth contracts and obliges them to take contractual measures to ensure that a contracted service provider does not do an act, or engage in a practice, that would breach an Information Privacy Principle if done by the
agency. The obligation on the agency extends to ensuring that such an act or practice is not authorised by a subcontract.

To ensure that individuals can find out about the content of privacy clauses agreed between agencies and organisations and included in Commonwealth contracts, section 95C enables a person to ask a party to the contract for information about any provisions of the contract that are inconsistent with an approved privacy code binding the party or the National Privacy Principles. The party requested must inform the person in writing of any such provisions. This ensures that parties to a Commonwealth contract cannot claim that provisions are confidential in respect of privacy standards in Commonwealth contracts, thereby preserving accountability and openness in respect of these standards.

Under the Privacy Act as currently constituted, privacy monitoring of outsourcing arrangements falls into two stages:

- assessing the privacy control environment, particularly by ensuring that outsourcing arrangements are governed by contracts that contain appropriate privacy clauses; and

- monitoring the actual implementation of the controls, particularly by monitoring compliance with the contractual clauses.\(^{120}\)

In practice, to date, feedback from outsourcing agencies and contractors suggests that few, if any, complaints have arisen in relation to privacy breaches associated with outsourcing contracts.\(^{121}\)

Agencies must also consider the privacy of personal records that are provided to other public sector entities for purposes such as data-matching. There are quite valid privacy protection reservations about the use of data matching, but there is no doubt that it has facilitated better decision-making as well as saving the taxpayer many hundreds of millions of dollars.

Although they probably do not come within a strict Privacy Act definition, the use of clickstream data (collecting information on access to the site, such as server address, top level domain name, pages accessed and so on) and cookies (that can be used to track individual’s activities on a web site) are important sources of data on performance that have privacy implications. Many users consider cookies, in particular, intrusive. For practical purposes they should be treated in the same way as other privacy related material. In the interests of transparency their use should be declared. However, legal opinion suggests that the ‘click and accept’ method by which web page hosts solicit visitors’ consent, might need to involve an upfront explanation and then a requirement to check consent at the end of each section and at the bottom of each page.\(^{122}\)

The current and emerging issues that I have mentioned will continue to become significant as agencies grapple with the challenges presented by the present APS environment, such as increased outsourcing and IT usage. As new high risk areas emerge, public sector agencies need to adopt modern
practices to correct underlying management problems that impede effective system development and operations, even where these are outsourced. Robust corporate governance processes that are pervasive throughout an organisation will both help to identify and deal with such problems. Record-keeping is basic to such processes. That is also a focus of audit activity and which is also central to its effectiveness.

Audit reports have also examined the usefulness of adequate and accessible register systems, and appropriate physical security measures for important and confidential documents, such as Commonwealth guarantees, indemnities and letters of comfort. The ANAO’s audit of the Operation of the Classification System for Protecting Sensitive Information found that all organisations covered by the audit were not adequately protecting the confidentiality of sensitive information in accordance with the Commonwealth’s security classification system, policy and standards, and recognised best practice. As a result, there was a high risk of unauthorised access to sensitive information within most of the organisations examined, particularly in relation to staff and other people dealing with the organisations, such as contractors and clients.

An audit survey found that security was an important issue for agencies intending to use the Internet. Fifty-three of all agencies covered rated data security as a high, or very high, impediment to the introduction of electronic service delivery (ESD). Indeed, this reflects the increasingly confidential, sensitive and, indeed valuable, information that is being shared over both internal and external networks. Such concerns are being exacerbated by the use of developing wireless technologies which have still to pass any stringent security testing. Access is both a technical and a security issue. The current trend towards increased contracting with the private sector for the provision of government services provides a challenge, not only for agencies' accountability, but also for the ANAO's actual ability to access the relevant records. The following observation in the recent State of the Service Report has relevance in this respect as well as for the protection of intellectual capital in outsourcing arrangements:

*The Department of Veterans’ Affairs advised that its agreement requires the contractor to acknowledge the Department’s absolute ownership of the data and of the intellectual property rights in Departmental software. Such ownership and intellectual property rights will not pass or be assigned to the contractor at any time.*

A particular issue bearing on the outsourcing question became apparent in an audit we conducted on internal fraud control arrangements in the Australian Taxation Office (ATO). The ANAO noted the significant risks associated with ensuring the security of the ATO IT systems. These risks related primarily to the storage of taxpayer data on the ATO Wide Area Network and the granting and monitoring of staff access to the ATO IT systems.

The audit also found that these risks factors increased due to the outsourcing of many IT systems functions. This was the result of the IT contractor’s staff having limited exposure to ATO fraud prevention, education and awareness.
material and programs in comparison to that of ATO employees. As well, the ATO could provide no evidence that the IT security section had monitored contractors’ activity to ensure compliance with taxpayer data security provisions of its outsourcing contracts.

Administrative law considerations in a contractual framework

Inevitably, contracting-out blurs the boundary between public and private law. In particular, the way in which citizens may seek remedy under administrative law for decisions taken by a body that is not itself a statutory body or a government agency. As one commentator has noted:

The administrative law system is the principal means by which government is accountable to individuals. It also reinforces and complements the mechanisms for financial and political accountability.

Unless great care is taken, contracts can have the effect of removing an individual’s access to:

- Freedom of Information rights;
- the jurisdiction of the Ombudsman or similar review mechanisms; or
- the rights of litigation under administrative law.

In a recent Annual Report, the Administrative Review Council expressed its concern to ensure that the value of its report on ‘The Contracting Out of Government Services’ (Report No. 42 of 25 August 1998) was not lost and that:

the increasing use of contracted services by government agencies is managed in a way that provides adequate safeguards to the public, as well as appropriate accountability.

The Council went on to say that it remains of the view that such safeguards would not only benefit citizens, but should be:

an integral part of any contract management regime which will be necessary to ensure agencies actually realise the benefits and efficiencies that contracting services can offer.

Governments are responsible for a wide range of outcomes that affect the well-being of its citizens. That well-being can be understood differently in the context of a variety of social, economic, and political considerations. Governments are obliged to pursue that responsibility by selecting the most appropriate means available to them at the time. Contracts are one such instrument. The move to greater contracting by governments has been largely prompted by considerations of efficiency. But the efficient use of the public resources is not all there is to public governance. It is important that contracts entered into on behalf of the government do not have the effect of unnecessarily restricting the freedom of policy action by successive
governments, while recognising the advantages in certain areas of longer term contracts for all parties concerned.

Contracts for the supply of goods and services often extend for periods in excess of the particular life of the Parliament or the government of the day. Some have consequences that can last for generations, for example, water or waste management. What is important in these circumstances is that administrators do not enter into contracts that have the effect of unnecessarily limiting the ability of governments to use their executive power flexibly for the public good. While there are clearly policy issues involved in this connexion, which are generally outside the audit mandate, there are also resourcing and other issues which would be integral to any contract on which audit assurance would be sought.

The Administrative Law principles require the ANAO’s reports to refer to evidence in support of each conclusion reached. As well, each conclusion should be clear and substantiated. A conclusion that there is no evidence about a matter should not be made without having conducted reasonable inquiries to check for the existence of such evidence. In particular, we need to be clear as to the extent of a conclusion. Any conclusion expressly, or impliedly, critical of a person or body should not be made unless that person/body has been informed of the adverse material relevant to that conclusion. In addition, the person/body has to be given a reasonable opportunity to comment or respond to any adverse material. This is a matter of natural justice, with its origins in natural law, which I will shortly discuss further. However, Audit Offices are well aware of the foregoing requirements from professional auditing disciplines.

**Equity Law and natural justice**

In any consideration of Government contractual arrangements there are also considerations of the law of equity. A former Chief Justice of the High Court of Australia, Sir Anthony Mason, has remarked:

*One aspect of the latest developments in equity is the increasing penetration of equitable doctrine into contract and commercial law…*

and

*It seems inevitable that equity’s penetration of commercial transactions, which depends so much on the way in which parties formulate their contracts and shape their arrangements will increase.131*

In Australia, the High Court has made it clear that equitable doctrines can apply to the Government as well as to individuals.132

My colleague, the Auditor-General of South Australia makes the following comment:
Where Government transactions are complex and the details of contractual arrangements are confidential the likelihood that outsiders will misunderstand the relationship between the Government agency and private parties increases substantially. The result is a potential future liability of Government for the reasonable reliance by those outsiders due to representations made either by the Government or the private parties involved in the transaction. It has been suggested that the protection of reasonable expectations is more important when government is involved because ‘government should act and be obliged to act as a “moral exemplar” in its relationships and dealings with members of the community.’

Consistent with the Attorney-General’s responsibility for the maintenance of proper standards in litigation, the Commonwealth Government and its agencies must behave as a model litigant in the conduct of litigation. Being a model litigant requires us to act with complete propriety, fairly and in accordance with the highest professional standards. This expectation has been recognised by the Courts.

In practical terms, the foregoing discussion suggests that there is a higher standard of integrity demanded of governments and administrators when dealing with the private sector. It is also important to see that where external service providers operate on the government’s behalf, they understand and abide by that higher level of expectation. Ultimately it is the government administrator who is responsible for ensuring that higher expectations of service are met, but, as noted earlier, there may be scope in collaborative arrangements for shared responsibilities in this respect.

A particular issue has arisen in relation to our performance audits about the coverage of private sector individuals and firms. In common with the practice in other jurisdictions, we provide a copy of our draft reports, in part or whole, to those affected for their comment. Our legislation provides for a period of 28 days for submission of comments on draft reports, which I must consider before preparing a final report (Section 19 of the Auditor-General Act 1997). As noted earlier, we have to provide ‘natural justice’, or procedural fairness as some term it, to those identified in our reports. Natural justice has been described as the minimum standard of fairness that has to be applied in the adjudication of a dispute. It consists basically of two elements, one to ensure a fair hearing, and the other to act without bias. Because of some uncertainty as to the extension of Parliamentary Privilege to such reports, questions of defamation action have arisen. The standard of proof applicable to findings in an audit report is the ‘civil standard’, that is, it is more probable than not that the matter found to have occurred in fact occurred. This has resulted in the ANAO having to seek legal opinions on some of its reports dealing with private sector participation in government activities.

However, there has also been a problem of the private sector seeing the draft report commentary process as being one for ‘negotiation’ as to what is to be included in the final report, rather than ensuring that the ANAO has an accurate understanding of the ‘facts’ of the situation and that those ‘facts’ are
correct as would normally occur with public sector agencies and bodies. I made the point in my annual report last year that:

…full cooperation in responding on this basis will save all parties considerable time and cost and engender confidence in the process.136

I went on to observe that conflicts of public and private interests are not new, but their resolution in performance audit reports is a challenge to all parties without a genuine shared understanding of what constitutes public accountability and, indeed, performance and results.

Values and Ethics

It hardly needs to be emphasised that the ethical administration of government contracts is a key consideration of Audit Offices, as it is for all watchdogs perhaps in different ways in particular circumstances. In practical terms, however, particularly where fraud and/or corruption is involved, there is a requirement for the application of a range of forensic auditing skills that are not often within the skillset of our public auditors. Conflicts of interest, whether real or apparent, can become increasingly difficult to define, let alone identify, as agencies become further removed from the locus of decision making. At least contracts should be examined to make sure that they establish suitable procedures to expose potential real or apparent conflicts of interest.

The Financial Management and Accountability Act 1997 requires Chief Executives to promote the efficient, effective and ethical use of Commonwealth resources for which the Chief Executives are responsible (part 7, section 44). The Public Service Act sets out the Australian Public Service (APS) Values (part 3, section 10), and the APS Code of Conduct (part 3, section 13). In addition, an agency head must uphold and promote the APS Values (part 3, section 12), as well as being bound by the Code of Conduct (part 3, section 14). The latter section also binds Statutory office holders. These Values and the Code of Conduct form the framework for the ANAO’s Code of Conduct which also includes our professional responsibilities.

At the very least, private sector providers need to have these Values and Codes of Conduct brought to their attention. It is highly desirable that they not only be informed of, but also make some effort to understand the requirements and implications for identified performance and results to be achieved. There are community concerns that private sector service providers are not subject to the same legal requirements as public servants are in these respects, nor to the same potential consequences if those requirements can be made to apply. Moreover, it is clearly difficult to impose contractual conditions involving values and ethics that are practically enforceable. Nevertheless, the recent State of the Service Report indicated that:

The Department of Foreign Affairs and Trade includes the following standard clause in all of its contracts that ‘the Contractor must ensure that the Specified Personnel conduct themselves in accordance with the Values and the Code of
Conduct of the Australian Public Service. Many agencies reported ongoing monitoring of compliance with values as an aspect of their contract management.¹³⁷

The above conundrum points to the need to agree on a shared culture, including values and ethics as part of any partnership or collaborative agreement between public sector agencies and private sector providers. At a minimum, there needs to be a shared understanding of what is required. I am reminded, in these respects, of a comment by Sir Christopher Foster in relation to the United Kingdom administration in the 1990s that:

Reaffirmation of rules could not compensate for the decline of shared values.¹³⁸

Governance issues

e-Government

Information (including communications) technology is revolutionising the way the public sector actually operates. It has improved the ability of public organisations to communicate, to share critical information and to organise political and bureaucratic processes in a more efficient way. Effective management of our information assets is becoming a significant element of the growing proportion of our Intellectual Property which has to be protected and preserved. In that respect, you may be interested in the Better Practice Guide recently produced by the New South Wales Audit Office.¹³⁹

Information technology has also enhanced productivity by providing new, more responsive and efficient ways of delivering public services and providing information to citizens. It potentially provides the vehicle to deliver better quality products to the public more quickly, cost effectively and conveniently. The result could be programs designed primarily around the needs of citizens, rather than just largely reflecting the organisational structure of the public sector. This will require the redesign of current governance systems.

Public policy has only begun to come to grips with the changing context. The time that policy makers need to process, structure and use knowledge so as to make informed decisions has become a scarce commodity, particularly as 24 hour media coverage of events around the world exerts unrelenting pressure to act, or perhaps react, quickly. Already we are witnessing what has been termed ‘instant politics, where far-reaching decisions are often made on the first available information.’¹⁴⁰ Taking a longer-term perspective, there is little doubt that technological change will radically transform the framework conditions within which policy is made. Nevertheless, as the OECD Public Management Service has observed, rapid policy change, higher standards of accountability and short deadlines are unavoidable governance facts. As well, it might be possible to raise awareness of the independency of policy and implementation issues when it comes to e-government¹⁴¹.

As organisations embrace modern networked communications, such as the World Wide Web, they are creating a need for different styles of governance in
the information age. Consequently, in many areas, consideration has to be given to the extent that information technology is core business. This is evident where it is difficult to actually separate the technology from the service being delivered. Nevertheless, there are complexities in the migration process itself in the public sector environment as the following observation notes:

Calls for government service delivery to migrate from in-line to online sooner rather than later often overlook the complex social, regulatory and legal issues governments face in changing their service delivery models\textsuperscript{142}.

The connectivity and interdependence made possible through information technology also creates vulnerabilities. The proliferation of computer viruses and hackers seeking to manipulate critical computer systems poses serious risks to government agencies, and in private domain, and the threat will only grow in the future. Such issues also raise questions about adequate business continuity arrangements. The risks involved also raise issues associated with the privacy and confidentiality of records which are of considerable concern to the Parliament. Unless appropriately controlled, computerised operations can offer numerous opportunities for committing fraud, unauthorised tampering with data or disrupting vital operations. As with many other aspects of the move to e-government, it is often a lack of awareness from the top down that is a major barrier to implementing appropriate security measures as part of sound risk management.

As dependence on information technology grows and new high risk areas emerge, public sector agencies need to adopt modern practices to correct underlying management problems that impede effective system development and operations even where these are outsourced. Effectively managing these risks will, in many cases, have a major impact on achieving business objectives. Robust corporate governance processes that are pervasive throughout an organisation will both help to identify and deal with such problems. As a practical example of this, the Victorian Department of Natural Resources and Environment decided that one of its first tasks in reforming its procurement processes to introduce a fully electronic procurement system was to:

rewrite its purchasing policies to more closely link purchasing with business plans and outputs and to de-emphasise price as the overriding consideration and emphasise value for money and accountability\textsuperscript{143}.

Another key element of the Department’s reform process was to re-align the delegation authorities of staff with their level of responsibility.

The delivery of services via the Internet introduces new risks and exposures that can result in a legal liability for government. Well-designed security and privacy policies can minimise risks and liabilities, while informing agencies’ clients of important aspects of the services they can expect to receive. Nevertheless, such policies need to be kept under close scrutiny particularly
with the development of single portals\textsuperscript{144} which integrate the complete range of government services and provides a link to them that is based on function, or simply citizen demands, and not on an individual organisation. As such, a portal does offer the potential for complete coordination but, as Dr Jenny Stewart has observed:

\textit{The challenge for policy and administration is to recap the potential efficiency and compliance advantages while, at the same time, safeguarding security and privacy.\textsuperscript{145}}

Criminal codes can also be directed at protecting the security, integrity and reliability of computer data and electronic communications. By addressing such threats as hacking, denial of service attacks and virus propagation, the definition of offences offers a suggested means for helping to ensure that the benefits of new technologies are not compromised by crime\textsuperscript{146}. However, the task of the public auditor is not directed per se at the detection of such offences. It is important that systems are examined to ascertain how contractors are suitably protected against such offences. The challenge for all of us lies in the application of forensic skills, wherever they are available, to determine whether there is adequate protection in our systems to protect our operations and to ensure that we continue to be capable of delivering our outputs and outcomes efficiently and effectively.

\textit{Implications for Watchdogs}

There are many implications and consequences for auditors in the current changing governance environment. While there are variations in the mandate, focus and operating arrangements across constituencies, the fundamental role of auditors-general remains substantially the same. That role is to provide the elected representatives of the community (the Parliament in our case) with an independent, apolitical and objective assessment of the way the government of the day is administering their electoral mandate and using resources approved by democratic processes, albeit in differing governance frameworks.

In my view, auditors-general in particular and the wider community of watchdogs are an essential element in the accountability process by providing that unique blend of independence, objectivity and professionalism to the work they do. Indeed, the four national audit agencies making up the Public Audit Forum in the United Kingdom believe that:

... \textit{there are three fundamental principles which underpin public audit:}

- the independence of public sector auditors from the organisations being audited;

- the wide scope of public audit that is covering the audit of financial statements, legislatively (or legality), propriety (or probity) and value for money; and
• the ability of public auditors to make the results of these audits available to the public, and to democratically elected representatives.147

Corresponding with the public sector changes over time, our role and the place of auditing in democratic government has also changed. In today’s environment, my role includes providing independent assurance on the overall performance and accountability of the public sector in delivering the Government’s programs and services and in implementing effectively a wide range of public sector reforms. And I cannot overstate the importance of the independence of Auditors-General in those respects. As the public and private sectors converge; as the management environment becomes inherently riskier; and as concerns for public accountability heighten; it is vital that SAIs have the professional and functional freedom required to fulfil, fearlessly and independently, the role demanded of them.

I would argue, therefore, that the role of Auditors-General is more important to effective, accountable and democratic governance today than at any time in the past. As the Public Audit Forum in the United Kingdom has also observed:

Public audit plays an essential role in maintaining confidence in the stewardship of public funds and in those to whom the responsibility of stewardship is entrusted. Public auditors are, of course, themselves accountable for their performance and are duty bound to undertake their work in a professional, objective and cost-effective manner and with due regard to the needs of the organisations they audit.148

I would also suggest that, as we move into the future, and as the pace of change remains unabated, this trend will not decline, rather it is likely to increase. The roles and responsibilities of the public and private sectors will converge and, perhaps, the differences between the two will become more apparent than real in many aspects of the management task. However, the political environment and the notion of public interest will continue to create fundamental differences between the two sectors.

In Australia, the interests of the ANAO now go well beyond the efficient and effective stewardship of public finances which is said to be fundamental to good national governance.149 While I recognise the importance of legislation as a central element of public sector management, I also stress the Parliament’s concerns with the ‘rule of law’ as a fundamental element of governance. The ANAO is increasing its expenditure on legal advisings each year as a consequence of the extension of such concerns to the greater involvement of the private sector in government activities and service delivery, including considerations of ‘natural justice’.

From my Office’s perspective, reduced central oversight has meant a broadening of our approach to auditing, which once focussed largely on compliance and conformance, to a more pro-active involvement with agencies and entities with the goal of making more real-time contributions to enhancing public administration. For example, our better practice guides are designed to
assist organisations test their own systems and where applicable, improve their practice and performance in line with recognised principles of better practice. Such practice is being derived from both public and private experience but, increasingly, is having to be developed by both parties in the new environment being created with apparently changing notions of accountability and performance assessment. On the other hand, there might be some kind of mixture of traditional public service ‘assurance’ accountability, aimed at protecting public moneys and other assets, and an accountability for results which reflects both sophisticated risk management approaches and commercial considerations as part of generating required outputs and outcomes.

That said, we are nevertheless conscious of our audit responsibility, particularly to the Parliament as our major stakeholder, to report, for example, significant and/or material breaches of approved guidelines, standards and/or legislation. From my experience, agencies generally understand this obligation even where such breaches are inadvertent. My preferred position would be to work with agencies to implement effective processes which are preventative and not just detective, so avoiding such situations. In this context, I see the relationship between internal and external audit and that with agency audit committees as being in the nature of an open partnership sharing common goals thus generating total confidence in the relationship. For most organisations, it is a maturing relationship that is still being tested as a major contributor to good corporate governance.

In an ever-changing environment, the demands upon the skill of those charged with protecting the public are changing also. As technology, managerial philosophy, financial sophistication and legal frameworks change, the challenge is how to maintain a core of people who are technically competent to assess what is happening in their area of responsibility. For those dealing with a constrained segment of activity, the problem is daunting enough. For those of us who are required to look across the whole range of government activities it poses a particular problem in risk management.

In all this we have to consider the changing skills base for auditors. Fortunately, many of us have had experience in dealing with the private sector and in commercial operations, including financial decision-making and accounting. On the other hand, it also makes our staff that much more in demand in both the public and private sectors. Consequently, we not only have a skills enhancement challenge for our offices in a more contractual oriented environment, but we also have a problem of retention of our valuable skills base. How we address any skill deficiencies and staff retention issues will be dependent on the particular environment in which we work. What seems obvious at this stage is that a solution will come from an suitable mixture of internal training, the use of universities and other educational institutions, interchanges between the private and public sectors, the judicious use of ‘bought-in’ resources, and suitable rewards and recognition, including the opportunity to work in other Audit Offices.
A recent letter to the editor of the Australian Financial Review complained about an apparent lack of accountability of the Australian Competition and Consumer Commission (ACCC) as follows:

As is unfortunately becoming increasingly common among federal regulatory agencies (the Australian Taxation Office, the Australian Securities and Investments Commission and the ACCC), control is exerted through the press rather than through the courts.

Why resort to the cost and delay of due process when you can instead rule by headline? Business reacts to headlines: "Fels threatens Video Ezy with $10m fine", "Carmody attacks agribusiness tax deductions". Most of it is self-congratulatory and not open to scrutiny. It is difficult to argue with populist headlines but what does it mean in terms of business efficiency, growth and employment? …

If my Latin is not too rusty: Quis custodet ipsos custodes (simply, who oversees the sentinels)?

Although we must be careful of paying too much attention to apparently self-interested complaints of this nature, there is a point here. The power that we exercise through the publication of our reports must be exercised responsibly. In this respect, the risks inherent in carrying out our designated tasks must be recognised and managed with an eye to justice, efficiency, administrative effectiveness and proper accountability.

We are subject to the full range of review processes that the rest of the public service is subject to. In my case, there is an external auditor appointed who reports in both financial and performance terms to the Parliament on the operations of the ANAO. The Parliament reviews all reports issued by the ANAO.

Nor are we exempt from the stress of addressing a huge remit with limited resources. Inevitably this leads to our having to make decisions about where to direct our efforts. Comprehensive risk management systems are the key to handling this kind of situation. What it means, though, is that no one can give a cast-iron guarantee that we will provide infallible protection. What the community is entitled to expect is that we know our operating environment well enough that we can identify risks as they emerge; assess their likely consequences; and devote adequate resources to address them effectively.

5. CAN WATCHDOGS CONTRIBUTE MORE – ADDING VALUE TO PUBLIC ADMINISTRATION

The oft repeated message of this presentation is that the various watchdogs, in helping to meet the challenges of rapid change and developing managerial styles, have to be seen to be a real contributor to the process of finding solutions for the increasingly complex problems faced by policy-makers and
program managers, including issues of accountability. I am confident this more positive role is accepted by all watchdogs.

I would also suggest that, as the pace of change remains unabated, this trend will not decline. Rather, it is likely to increase. The roles and responsibilities of the public and private sectors will be more integrated and, perhaps, the differences between the two will become more apparent than real in many aspects of the management task. However, the political environment and the notion of public interest will continue to create fundamental differences between the two sectors.

The United Kingdom Government expressed concern that an over-emphasis on accountability would stand in the way of an appropriate risk management environment in which innovation could flourish. The Public Audit Forum responded by stating that:

*Public sector managers are of course responsible, as stewards of public resources, for assessing and managing the risks associated with innovation and increased flexibility, and for ensuring the proper conduct of public business and the honest handling of public money while pursuing innovative ways of securing improvements in public services. It remains important to ensure proper accountability but this must not be approached in a rigid way which might mean missing opportunities to deliver better value for money. And auditors will respond to this new environment positively and constructively by:

- adopting an open minded and supportive approach to innovation (including the use of techniques tried elsewhere) examining how the innovation has worked in practice and the extent to which value for money has been achieved;

- in the process, supporting well thought through risk-taking and experimentation;

- consistent with their independent role, providing advice and encouragement to managers implementing Modernising Government initiatives by drawing on their audit work in this area, seeking to identify and promote good practice so that experience can be shared and risks minimised.

In these ways, we believe that auditors can support and encourage worthwhile change, while providing independent scrutiny and assurance, and fulfilling effectively their statutory and professional responsibilities.151

This issue is not restricted to the public sector. There are many institutions in the private sector that have a significant impact on the level of public accountability and where under-performance has the potential to restrict public policy making. The banking sector in Japan has been a cause for some concern in recent times. The collapse of our second largest insurer HIH has
had disastrous effects on many sectors of our economy, resulting in pressure on governments to mount expensive rescue operations. Suggestions that the firm had been trading as insolvent for an extended period have raised public uncertainty about the effectiveness of public regulatory ‘watch-dogs’ in carrying out their functions. In particular, the way in which the company’s auditors have performed their role is being questioned. But the performance of prudential regulators for the industry is also subject to investigation. Many of the same comments have arisen in relation to the collapse of Ansett. Unfortunately, this is an area of the public/private performance that receives little attention, particularly in an environment where governments are expected to intervene in the affairs of private companies as little as possible.

The assessment of the performance of regulatory bodies poses particular problems for the public auditor. As a general rule, their activities are usually highly technical in nature, and the organisations themselves are sometimes the only source of credible expertise.

In the HIH case, the company had adopted an aggressive pricing regime for its policies. The question has to be asked whether the risks of this decision, particularly for revenue, were either properly understood and/or kept properly under review. Within an audit framework, the suitability of the risk management and overall governance framework to provide accurate and timely information on key risks is a central issue of control. As such, it is of considerable strategic and operational interest for any Audit Committee and external audit.

The debate about the responsibilities of external auditors and audit committees has raised the audit profile in both the private and public sectors. The ANAO sees its relationship with an audit committee and internal audit as one of partnership. One important difference is that the Office is employed by the Parliament, not by the corporation or agency. As such, the scope and cost of an audit are decisions by the Auditor-General for which he or she is accountable to the Parliament. In the private sector, such decisions are the prerogative of the Board or Chief Executive but are often determined by an audit committee. It is within the authority of boards and their audit committees to direct auditors as to the scope and quality of the audit, subject to professional, including both accounting and auditing standards, requirements of those auditors.

Promoting independence for greater assurance

While the Auditor-General has the statutory independence provided by Parliament, the issue of independence is important, as it is for the private sector, in the provision of non-audit services. There are basic ‘conflict of interest’ issues arising for both sectors, although clearly of greater concern for private sector auditors. Last year, the United States Securities and Exchange Commission (SEC), particularly its Chairman in widely published addresses, drew attention to the need for more stringent restrictions on the scope of non-audit relationships accounting firms have with their clients. In some instances, non-audit income may be greater than the audit fees for specific clients. The perception is that this may impact adversely on the integrity of the audit. The
fundamental principle supported by public sector auditors in Australia is that auditors must be, and should be seen to be, free of any interest or relationship which might be regarded, whatever its actual effect, as being incompatible with integrity and objectivity.

It has been suggested that the responsibility for appointments of auditors to companies should be given to the Australian Securities and Investments Commission (ASIC). This idea has had limited support, if only because it would raise real questions about the extent to which ASIC would have to share responsibility for the effectiveness of audits. It is another illustration of the need to be clear as to who is accountable for what. The SEC last November required companies to disclose, in proxies, a breakdown of fees they paid to accounting firms. Disclosure of the non-audit income paid to auditors in Australia is already part of our requirements, although some would argue there is scope for a greater disaggregation of non-audit services. That said, the level of such income is a secondary consideration. As well, modern auditing practice does involve a more strategic advisory role as expert consultant. The primary issue is about apparent conflict of interest in relation to significant business processes, or processes underlying the financial statements or data to be audited.

The level of non-audit fees was not explicitly addressed in the Exposure Draft ‘Independence’ put out by the International Federation of Accountants (IFAC) earlier this year. Nor indeed did the Draft explicitly recognise relevant issues for the public sector. We have asked IFAC to address public sector matters perhaps by way of a ‘Public Sector Perspective’ at the end of the document. The Australian Government asked Professor Ian Ramsey of the University of Melbourne to head an inquiry into the state of audit independence in Australia. As well, the Institute of Chartered Accountants and CPA Australia have established a continuing joint working party to develop a revised ethical statement on Independence for the Australian profession. Professor Ramsay recently reported to the then Minister for Financial Services and Regulation. The Minister observed that:

\[
\text{We must ensure the independence of auditors is preserved and that stakeholders are secure with the knowledge that the auditor is objective and independent.} \]

Professor Ramsay indicates a range of relationships with the client which would result in an auditor not being independent. These cover employment, financial and business relationships. Interestingly, he recommended that the regulation of non-audit services provided by audit firms to their clients be dealt with in professional ethical rules, suitably updated to reflect proposals being made by the International Federation of Accountants (IFAC). Perhaps more controversially, he also recommended the establishment of an Auditor Independence Supervisory Board to be funded by the professional Accounting bodies. The other recommendations that I want to refer to here are those relating to amendments to the Corporations Act indicating a general statement of principle requiring an auditor to be independent and for the auditor to make an annual declaration, addressed to the board of directors, that the auditor has
maintained his/her independence in accordance with the Corporations Law and the rules of the professional Accounting bodies.

The Australian Securities and Investment Commission is also examining the issue of auditor independence. In June, the Chairman of the ASIC announced that the ASIC would conduct a survey of Australia’s top 100 listed companies on audit independence. The survey will question companies about relationships with their external audit firm, including any business or professional relationships that exist outside their role as external auditors. Mr Knott stated that “the survey is designed to improve the level and quality of factual information available to the industry, Government and regulators who are considering these issues.”

The results of the inquiry and survey are sure to generate further debate on this very important issue. The current legal and professional requirements provide some assurance over independence. However, in the absence of more detailed and specific legislation, some audit practices will continue to skirt the edges. It is inevitable that some form of change is coming, whether or not we follow the path of the US on the issue remains a question. What is clear is that the public’s perception of auditor independence is critical and, in the words of the Chief Accountant of the SEC, “Enduring public confidence begins with the auditor.”

While clearly having a responsibility to provide assurance about the observance of proper accountability by agencies for the protection and use of public sector resources, there is a parallel audit responsibility for reporting on agency performance. Such reporting can, and should, assist the political stakeholders to determine the nature and practice of accountability in the changing environment. The reality is, that without such determination, the everyday operational imperatives may mean that the nature and practice of accountability may be changing, virtually by default, in ways that may not be subsequently endorsed at the political level. This would be an untenable situation if public confidence is to be maintained in the governance framework.

One aspect of agency governance and audit responsibility, that has arisen with purchaser-provider relationships between public sector agencies, relates to access to audit documents and Chief Executive Officer (CEO) accountability. The CEO of the Department of Family and Community Services has a partnership agreement with Centrelink for the delivery of welfare services. Given his accountability for such services, the CEO has contended he should be informed in a timely manner if significant matters relevant to Centrelink arise in any audit of that agency. Our response has been that we provide our audit reports to the CEO of the Agency concerned in accordance with legislative (and professional) requirements. It is up to the two parties to decide how they share such information, whether in a contractual arrangement or by a Memorandum of Understanding. In relation to Performance Audits, I can give a copy of a report to any person who I consider has a special interest in the report. I would have regard to any contractual or equivalent arrangements in place in deciding who has a special interest in such circumstances.
In reality, satisfactory arrangements are in place, admittedly mainly because of the Centrelink Board’s cooperation. However, the CEO of the Department of Family and Community Services recommended to a Joint Committee of Public Accounts and Audit (JCPAA) inquiry into the adequacy of the Auditor-General Act 1997 that the legislation should recognise the accountability of the CEO of a purchaser agency and require the Auditor-General to report significant and relevant matters arising during an audit of a service provider to the Chief Executive of a purchaser agency in a timely manner. The legislation should also include a broad definition of audit reports covering those more detailed reports provided to management. In the ANAO’s view, the legislation does not need to be amended to cater specifically for purchaser/provider arrangements and is flexible enough to cope with any reasonable requirements for CEO accountability.

It is relevant to note in this context that the JCPAA inquiry, which reported in September, concluded that overall the Act provided an effective framework for the ANAO to carry out its functions\(^{158}\). The Committee has identified five legislative amendments, which it considers would further enhance the Act. They are listed below:

- subsection 19 (3) should be amended to provide the Auditor-General with the power to circulate extracts of draft reports where necessary;
- amendments to subsection 37(4) to ensure that it reflects the original intentions set out in the Explanatory Memorandum. This amendment would remove ambiguity in the event that the Attorney-General issues a certificate requiring certain information to be omitted from a public report;
- amendments to subsection 15(2) to provide the Auditor-General with the power to provide a completed copy of a completed report to a Minister who has a special interest in the report;
- amendment to subsection 19(4) to provide for the Auditor-general to include agency comments, in full, in a final report; and
- the Committee has resolved that, as part of its power to review and change the Annual Report Guidelines, it will require government agencies to include in their Annual reports a list showing all contracts by name, value and the reason why the standard access clause, which provides the Auditor-General with access to the premises of Commonwealth contractors, was not included in the contract.

The Committee acknowledged the significance of the issues raised by the Chief Executive of FaCS and agreed with them. Nevertheless, under current arrangements, ‘the provision of audit information should be straightforward’\(^{159}\). From a broader viewpoint, it has to be said that the issue is not fully resolved.

**Improving our capabilities and products**

The earlier discussion suggests to me that Auditors-General, at least, need to be more positive in their involvement in reviewing decisions and action being
taken in the strategic management phases of an outsourcing situation, including in the latter’s implementation and not just after the event. No doubt such an approach would be greatly facilitated by the electronic capability to conduct audits in real time with direct access to agency systems and data banks. Admittedly, such auditing is still in its infancy in many constituencies but, as with the growth of the use of the Internet, Intranets and e-mail, we need to anticipate the demands of our various stakeholders, particularly those whose functions and business are substantially dependent on information technology and electronic communications. This need could also be met in part by a more pro-active approach either by an Audit Office itself, or in cooperation with other interested organisations, to produce suitable Better Practice Guides as an aid to agencies in developing areas of public administration, including for use in future audit examinations, for example as a basis for audit criteria.

The ANAO has for several years now had a program of producing Better Practice Guides. These are generally well received by the agencies concerned and have provided the basis of subsequent audits. They are seen by most as a positive contribution to the overall administration of government services. In developing them we regularly draw on the experience of other jurisdictions so that the work of others finds some fruit in our publications. We would hope that what we are able to achieve also finds its way around the world where others can leverage off what we have done.

As well as Better Practice Guides, the ANAO has embarked on a program of benchmarking common activities in public administration. To date, benchmarking studies have been completed in relation to the Internal Audit and the Finance functions. My Office has now embarked on a study of the Human Resource Management function. In these projects a number of public agencies are benchmarked against each other and an extensive range (several hundred) of private and public entities. We see them as relatively high-risk projects for the office but as having substantial benefits for the management of public activity regardless of whether it is performed by the public or private sector. In particular, risk management must address:

- the need to buy in expertise. This relates as much to the range of skills within the Office as to the need for an extended knowledge of the corporate world;
- the quality of the data that is gathered – given the size of the project, it is not audited data, but relies on the data supplied by agencies;
- the range of diagnostic tools available and their relative strengths and weaknesses;
- an understanding of the differences between the environments in which the individual agencies must operate;
- the size and complexity of the project management task; and
- the need to achieve and maintain cooperation with the agencies concerned.
The benefits that can flow from such an exercise are significant. For example, the ANAO report on the Benchmarking of the Finance Function comments:

An estimate of potential expenditure reductions is made in these chapters on the basis that those organisations in the Commonwealth group with costs above the group median are moved to the median level. The potential reductions total some...20.7 per cent of current expenditure on the benchmarked finance activities.160

Other benefits flow through to policy decision-makers, public sector managers and audit authorities. They can include:

- clear specific criteria for future audit activity and other avenues of assessment;
- where functions are to be contracted out, clear and credible performance criteria to be included in tender and contract documentation;
- credible information on which to base decisions on whether to perform functions in-house or to contract out;
- performance evaluation standards for management to help identify under-performance and reward excellence;
- the benchmarks developed through this method are already being used in other jurisdictions, leading to greater uniformity of performance expectations; and
- in the context of service charters mentioned elsewhere they can help provide for more credible communication with clients or citizens.

We can leverage off the experience and approaches taken by the private sector in many areas of benchmarking and performance management. However, there are requirements in the public sector environment which are different and need to be treated as such. Partnership arrangements have to recognise this reality and adjust to it. It is not a one-way street. As I have said many times now, watchdogs can facilitate both the understanding and resolution of management, accountability and performance issues within their particular areas of expertise. We can do so both by the nature of the approach we take to public/private partnerships and by tailoring our products to assist all stakeholders.

6. CONCLUDING REMARKS

Sound corporate governance frameworks will enhance the development of suitable networks and partnerships and facilitate risk management so that
opportunities can be taken to be more responsive and improve performance while minimising risk. Fundamentally, good governance arrangements increase participation; strengthen accountability mechanisms; and open channels of communication within, and across, organisations. In this way, the public sector can be more confident about delivering defined outcomes and being accountable for the way in which our results are achieved. These requirements are integral to the more market-oriented approach being taken to public administration in recent years. The disciplines involved have focussed greater attention on performance management and accountability for that performance whether the activity is performed by public or private sector organisations.

Public sector organisations have to recognise performance obligations to stakeholders and the negative aspects of being risk averse. We also have to be aware of the need for leadership and control and the confidence and assurance that the latter engenders for all stakeholders and the reputation of the organisation involved, particularly in any partnership arrangement with the private sector.

New technology should facilitate the sharing of information within whatever constraints of privacy and security and/or need to know that might apply. As well, technology can assist in the delivery systems reflecting ‘seamless’ government and greater responsiveness to citizens. Some writers have radically extended the possibilities of information technologies toward a vision of the automated state in which government would establish and manage contracts for project or service delivery largely through information technology. The suggestion is that the imperatives of technology are creating the conditions for the state to become ‘virtual government’.

It is unlikely that such ‘sharing’ could be definitively covered in present day ‘legally based’ contracts. Other forms of agreement and disciplines are emerging to ensure that both the parts and the whole are held responsible for their overall performance; and that accountability for the results is absolutely clear both to the immediate parties and to other stakeholders. It seems like a tall order. It has been said that:

"Studies of accountability also tend to neglect the requirements of managing an interdependent program with independent organizational units".

This is a particular challenge for government auditors if they are to maintain the appropriate balance that allows, perhaps assists, organisations to meet their objectives and satisfy the requirements of accountability.

But the pressures are only likely to increase, even in so-called ‘core’ areas of government, for more ‘cross-cutting’ approaches to better deliver program outcomes, with commensurate accountability for achievement of required results.

Managers are showing interest in exploring the notion of ‘relational contracts’ in particular environments to test their effectiveness both in terms of performance
and accountability. These so-called ‘soft’ contracts focus on cooperation as the guiding principle of contracts. It is, perhaps, another example of the exercise of management flexibility to achieve required outcomes where real partnerships and full cooperation of a range of service suppliers are required to be citizen ‘centric’. On the other hand, is an inability to define adequately performance and accountability requirements or, indeed, lack of private sector acceptance particularly of the latter, sufficient reasons to reject contracting-out? Watchdogs need to keep abreast of these developments and contribute to their resolution.

We should be able to explore different partnership arrangements within the public sector to ascertain what will work in a cohesive and sensible fashion in particular situations. Moreover, it may also be possible to test arrangements within the private sector, where it is involved in the provision of public services, in a way that can accommodate both private and public interests. The future challenge to partnering in the public sector may be to go beyond strategic partnerships with particular contractors and to develop in association with other agencies, community and private sector organisations, public sector ecosystems as described in the private sector. If that is so, watchdogs need to be able to move at the same time. We cannot afford to be left behind.

Strategic combinations of public interest and private profit could generate new forms of service delivery and redefine the relationship between governments and the community. Whatever is attempted needs the support and endorsement of the Government and Parliament if it is to succeed. These are likely to be considerable challenges, not least in the notion of public accountability with its attendant implications for the various watchdogs.

In short, the on-going challenge for the public sector auditor will continue to be meeting performance and accountability expectations, whatever the approach taken to our changing environment. This will increasingly involve establishing agreed modes of network governance to ensure proper integration and coordination of networking activities essential to the effective operation of strategic alliances. Such governance arrangements have to be well understood and accepted by all concerned. In my view, any arrangements have to be dynamic and flexible to meet the needs of all participants including, importantly, those of citizens. And is that not what governance, and corporate governance in the public sector, are basically all about when all is said and done?

Moreover, with the greater involvement of the private sector, particularly in service delivery as part of an outsourcing situation, there is the added complication of generating common understandings, cultures, values and notions of accountability and responsibility. In my view, this will mean that at least Auditors-General have to be more pro-active in helping to develop such a framework, without undermining the independence of the Office. There will no doubt be a greater focus on the evaluation of policy outcomes as government comes under greater scrutiny from a more informed citizenry. However, it will be:
As part of this broader responsibility, we will also need to be prepared, and equipped, to engage in real time auditing as electronic technology, particularly in communication, comes into more widespread use across the public sector. In this way, there will be more scope for preventative action and a learning process for all stakeholders in order to ensure that proper accountability and required performance and results are achieved by both individual agencies and private sector firms, particularly in any ‘shared’ arrangement or partnership.

Another positive development worthy of mention is the upgraded role of audit committees in the public sector and the contribution that auditors can make in this context. The value-added comes from two main areas: first, their ‘independent’ perspective of the control environment and performance of the organisation and its programs; and second, their knowledge of better practice gained from the oversight of a wide range and variety of public sector bodies. These perspectives can provide a positive stimulus to audit committee deliberations and organisational performance.

From a Parliamentary perspective, greater flexibility in decision-making needs to be matched by at least a commensurate focus on strengthening the associated accountability arrangements to ensure that decisions are appropriately made and that those public servants making decisions can be properly called to account should the question arise. As agencies grapple with the requirements of this complex and changing environment, the ANAO is working with agency people at all levels to be seen not so much as audit ‘police’ but more positively as professionals who can assist agencies to meet their accountability requirements and in doing so embrace innovative practices and focus more on results. We also have to give more attention to our own performance both internally and externally. It is in the nature of our function and responsibilities that we have to lead by example. That is our particular challenge and, I am sure, that it would be a similar view of other watchdogs.
NOTES AND REFERENCES

1  Hewett Jennifer, 2001, Australasian Business Intelligence: Sydney Morning Herald  
06/23/2001, p.45

2  Management Advisory Board and its Management Improvement Advisory Committee  
AGPS Canberra. June. p.1

3  Ibid., p.13

4  Ibid., p.4


6  Ibid. p.13

7  Ibid. p.13

Canberra. December. p.13

Publishing Services, Department of Urban Services, Canberra. 20 June.

10  Ibid. pp.11 and 30-45

Accountability in a Commercial Environment – Emerging Issues. Interim report on an  
inquiry into the Government’s Information Technology Outsourcing Initiative. Canberra.  
April.

12  The Government Guidelines for Official Witnesses before Parliamentary Committees and  
Related Matters (November 1989) indicate that the Guidelines are aimed at encouraging the  
freest possible flow of information between the public service, the Parliament and the public  
(para 1.1). The scope of public interest immunity is set out in para 2.31.


Information Technology Outsourcing Initiative. Parliament of the Commonwealth of  
Australia, Canberra. June. p.31

15  SFPARC 2001. Re-booting the IT Agenda in the Australian Public Service. Final Report on the  
Government’s Information Technology Outsourcing Initiative. Senate Printing Unit,  
Parliament House, Canberra, 28 August.

16  Ibid., p.xx.

Journal of Public Administration, Vol 58 No 1, March. p.100

18  Ibid. p.100

19  UK National Audit Office (NAO) 2001. The Re-negotiation of the PFI-type deal for the  

20  Ibid., p. 5.

21  Ibid., p. 7.

22  Set out in Part 5 of the Auditor-General Act 1997

The risks that concern APRA include:

- **Systemic risk**: a threat to the entire banking system when a number of banking institutions rely on one, or a handful of, computer companies for information technology services;
- **Outsourcing risk**: poor monitoring of outsourced operations can increase the risk of failure of service by a bank;
- **Legal risk**: the obligations of banks and computer companies in outsourcing arrangements can be unclear and open to legal challenge; and
- **Strategic risk**: the pace of technological development opens new areas of risk for banks that can be increased with long-term outsourcing contracts.


'Recommendation 5: The Committee recommends that the Minister for Finance make legislative provision, either through amendment of the Auditor-General Act or the Finance Minister’s Orders, to enable the Auditor-General to access the premises of a contractor for the purpose of inspecting and copying documentation and records directly related to a Commonwealth contract, and to inspect any Commonwealth assets held on the premises of the contractor, where such access is, in the opinion of the Auditor-General, required to assist in the performance of an Auditor-General function. (paragraph 6.20).'


Ibid.

The clauses are available on the ANAO’s website, [http://www.anao.gov.au](http://www.anao.gov.au)


Ibid., p. 7.

into the mechanism for providing accountability to the Senate in relation to Government contracts, Canberra. [Online] Available: 


39 SFPARC 2000. Accountability to the Senate in relation to government contracts (Murray motion) 12 April.


43 Ibid. p.15

44 Ibid. pp. 55-60

45 Ibid. p.64. 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;
- rebate, liquidated damages and service credit clauses;
- clauses which describe how intellectual property rights are to be dealt with; and
- payment arrangements.

46 Ibid. p.65. 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.

47 Senate resolution, agreed 20 June 2001, that:

(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.


49 Ibid. (see Appendix C)


51 Ibid pp. 75-77.


53 The Australian, 14 August 2001, Alan Kohler reviewed Bjorn Lomborg’s book, The Skeptical Environmentalist. He pointed to the dangers of an uncritical acceptance of much of the environmentalist claim and reflected that it can result in burdening the world with unnecessary costs.


63 Kemp, Dr David The Hon. MP 1998. Building the Momentum of APS Reform. Address to the PSMPC Lunchtime Seminar, Canberra. 3 August. p.3


“…given their different arenas and callings, the transposition of public sector ethics and values into the private sector or the introduction of private sector ethics and values into the public sector will create difficulties and tensions”


69 Braganza, Dr Ashley and Lambert, Rob, 2000, Dynamic partnerships, in Knowledge and Process Management: The Journal of Corporate Transformation – Special Issue into the ‘E’ era, Braganza, Dr Ashley and Lambert, Rob (eds), Vol. 7 No. 3, July-September, p.131.


71 Ibid., p.235.


77 UK NAO 1999, op. cit., p. 52.


79 Ibid.

80 These were the subjects of two Reports by the Audit Office of New South Wales: *Private Participation in the Provision of Public Infrastructure*–The Roads and Traffic Authority, 1994, and *Roads and Traffic Authority: the M2 Motorway*, 1995.


82 Ibid., p. 25.


89 La Franchi, P. 2000, op. cit.


93 Ibid., p.22.


The legal risk assessment identifies the following areas of risk as possible events or incidents during the life of service agreements:

- service disruption during transition to the contractor;
- failure by contractor to meet service levels’
- failure of contract management process by contractor or agency;
- financial viability;
- termination of the Service Level Agreement (SLA);
- breaches of privacy or confidentiality obligations by contractor; and
- failure to meet Industry Development (ID) objectives.

The legal risk assessment also identifies a number of areas of potential loss or damage that might result from the identified risk events including:

- loss of productivity;
- loss or reputation and public confidence;
- loss of responsiveness;
- difficulties in servicing remote or regional offices;
- damage to commercial, community and stakeholder relations;
- breach of privacy, security and confidentiality undertakings;
- loss of flexibility and responsiveness; and
- legal liability for breach of contract for failing to provide services to community or third party partners.

The legal risk assessment places primary focus on provisions in IT outsourcing contracts and Service Level Agreements (SLAs) to minimise the chance of a risk event occurring, as well as minimising the loss or damage to any of the agencies within the Group and to preserve remedies available.


Ibid, p.61


SFPARC, 2001, Inquiry into the Government’s Information Technology Outsourcing Initiative, Submission from the Federal Privacy Commissioner, February, p.4

Privacy Act 1988 (Commonwealth), Section 6.


Ibid. Personal information is information or an opinion that can identify a person. Sensitive information is information about an individual’s racial or ethnic origin, political opinions, membership of a political association, religious beliefs or affiliations, philosophical beliefs, membership of a professional or trade association, membership of a trade union, sexual preferences or practices, criminal record, or health information.


Ibid., p.8


Ibid. p.20

Ibid. p.92


130 November. p.29.

130 Ibid. p.29


132 Commonwealth v Verwayen, 1990, ALJR 540


134 See Attorney-General’s Legal Services Direction Appendix B. pp 15-16


143 Young, Alan, 2001. *Case Study : E-Commerce,* CPA Australia, National Public Sector Convention 2001, Gold Coast. 27-30 March, p.4

144 A Portal is generally an interface to another system or mainframe; the term is also used to describe links between intranet and internet sources. Importantly it described one of the customer focussed interfaces forming part of the Commonwealth Government’s initiative to improve accessibility to on-line resources.

145 Stewart, Jenny. 2001, *Horizontal Coordination – how far have we gone and how far can we go? The Australian View.* Paper presented to a National Institute for Governance Canadian/Australian Symposium, ANU. Canberra 5 April. P.5.


An example of Mr Levitt’s comments is as follows:
‘And too many auditors are being judged not just by how well they manage an audit, but by how well they cross market their firm’s non-audit services.’ p.2.

An example of Mr Levitt’s comments is as follows:
‘And too many auditors are being judged not just by how well they manage an audit, but by how well they cross market their firm’s non-audit services.’ p.2.


Ibid., para 5.25, p.51

