

The Auditor-General
Audit Report No.5 2008–09
Performance Audit

**The Senate Order for Departmental and Agency
Contracts (Calendar Year 2007 Compliance)**

Australian National Audit Office

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of Australia 2008

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Canberra ACT
25 September 2008

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. I present the report of this audit and the accompanying brochure to the Parliament. The report is titled *The Senate Order for Departmental and Agency Contracts (Calendar Year 2007 Compliance)*.

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

Yours sincerely

Ian McPhee
Auditor-General

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

AUDITING FOR AUSTRALIA

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

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Abbreviations and Glossary

ANAO	Australian National Audit Office
AusTender	A service that provides the public with information about the Australian Government's procurement and contracting activities.
ARC	Australian Research Council
ASIC	Australian Securities and Investments Commission
CEIs	Chief Executive Instructions
confidential information	Information that is subject to an obligation of confidence—either under the contract or under general law principles.
confidentiality provisions	The clauses of a contract that operate to create the confidentiality obligations on the parties to the contract in respect of information that is specified.
DIAC	Department of Immigration and Citizenship
Finance	Department of Finance and Deregulation
FMG 3	Financial Management Guidance No. 3 – <i>Guidance on Confidentiality in Procurement</i> , July 2007
FMG 8	Financial Management Guidance No. 8 - <i>Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)</i> , January 2004
FMG 15	Financial Management Guidance No. 15 - <i>Guidance on Procurement Publishing Obligations</i> , July 2007
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FMIS	Financial Management Information System
NAA	National Archives of Australia

Senate FPA Committee	Senate Standing Committee on Finance and Public Administration
Senate FPA Committee report	Senate Standing Committee on Finance and Public Administration's report - <i>Departmental and agency contracts: Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003-06)</i> , February 2007.
Senate Order	The Senate Order for Departmental and Agency Contracts requires Ministers to table letters of advice that all agencies that they administer have placed on the Internet lists of contracts of \$100 000 or more. These lists are required to disclose certain information about the contracts, including the use of confidentiality provisions. The letters of advice are to be tabled by no later than two calendar months after the last day of each financial and calendar year.

Summary and Recommendations

Summary

Introduction

1. Against a background of increased use of contracted service providers by Australian Government agencies, the Parliament introduced a range of measures designed to improve the openness and public knowledge of information on procurement and expenditure of public moneys. One of these measures, the Senate Order for Departmental and Agency Contracts (the Senate Order) was introduced in June 2001. The Senate Order has been amended several times since, most recently in December 2003.

2. The requirements of the Senate Order underline the principle that the Parliament's and the public's access to information on government programs and services should not be prevented, or otherwise restricted, through the use of commercial contractual arrangements, unless there is a sound reason to do so.

3. Specifically, the Senate Order requires agencies to place lists of contracts valued at \$100 000 or more on the Internet. Among other things, these lists must indicate whether each contract requires the parties to maintain the confidentiality of any of the contract's provisions, and whether there are any other requirements of confidentiality. The 85 agencies which published 2007 calendar year listings reported 35 800 contracts, valued at approximately \$80 billion.¹

4. The Senate Order requires Ministers to table in the Senate, letters of advice that the agencies they administer have listed their contracts on their Internet sites. The Senate Order also requests the Auditor-General annually review contract lists and to report any inappropriate use of confidentiality provisions.

5. In light of the Government's positive response to the Senate Order, the Department of Finance and Deregulation (Finance) has produced a range of Financial Management Guidance (FMG) that provides information to agencies about the listing of contract details on the Internet, including on the use (and reporting) of confidentiality provisions. Specifically, the following three publications are relevant:

¹ The value reported for each contract should be an estimate of the full amount to be paid or received over the life of the contract.

- FMG 8: *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004;
 - FMG 3: *Guidance on Confidentiality in Procurement*, July 2007; and
 - FMG 15: *Guidance on Procurement Publishing Obligations*, July 2007.
6. This guidance also outlines the categories of information that generally would be considered legitimate claims to confidentiality, including: internal costing information or information about profit margins; propriety information, such as technical or business solutions; and specific personal information.
7. Against this background, it is expected that agencies will appropriately manage confidential information when purchasing goods and services under contractual arrangements. This includes protecting the Government's interests and carefully assessing, on a case by case basis, all claims by potential suppliers for the protection of information. Equally, agencies must maintain accurate records of the use of confidentiality provisions in contracts and ensure these details are reported correctly.
8. Claims for confidentiality should be fully assessed, reflected appropriately in contracts and related-documentation, and accurately reported. In assessing claims for confidentiality, agencies must be cognisant of the rights and obligations arising from the Government's various reporting and disclosure mechanisms, including: the interests of Parliamentary committees; the protection and disclosure of information principles enshrined in the *Freedom of Information Act 1982* and the *Public Service Act 1999*; and the access rights of the Auditor-General.
9. This report outlines the results of the Australian National Audit Office's (ANAO's) tenth audit of agencies' compliance with the reporting requirements of the Senate Order.

Audit objective and scope

10. The audit objective was to assess whether all agencies compiled Internet listings as required by the Senate Order, and to examine the appropriateness of the use, by selected agencies, of confidentiality provisions.
11. Specifically, this audit examined information reported in agencies' 2007 calendar year listings. The 2007 listings were required to contain information on contracts entered into during the twelve months ending 31 December 2007;

or contracts entered into before 2007, that were not fully performed at 31 December 2007.

12. The audit involved a desktop review of the Internet sites of each of the 96 agencies covered by the Senate Order to assess the extent and timing of contract reporting. In addition, a detailed examination was undertaken in six agencies of the use of confidentiality provisions in contracts, and also of the processes used to compile Internet listings.

13. The six agencies selected for detailed examination were:

- Australian Research Council (ARC);
- Australian Securities and Investments Commission (ASIC);
- Centrelink;
- Department of Immigration and Citizenship (DIAC);
- Federal Court of Australia; and
- National Archives of Australia (NAA).

Audit conclusion

14. The proportion of contracts reported as containing confidentiality provisions protecting information in the contract by the audited agencies has decreased significantly over the period that the Senate Order has been in operation. In particular, it has declined steadily from 19 per cent reported in the calendar year 2003 listing to some 10 per cent reported in the 2007 listings. This trend reflects the impact of the Senate Order in reducing the use of confidentiality provisions in contracts. Despite this positive trend, there remains some significant issues that are affecting the accuracy of agencies' reporting of information relating to their contracts on the Internet.

15. In particular, the audit found in the six audited agencies that there continues to be inappropriate use of confidentiality provisions protecting information in contracts. Only 28 of the 101 contracts containing confidentiality provisions protecting information in the contracts that were examined were considered to correctly include these provisions. This result is broadly consistent with the ANAO's most recent Senate Order audit (2006 Internet listings), which found that the proportion of such contracts that correctly included confidentiality provisions was 26 per cent. It is, however, an improvement on the results of the audit of 2005 Internet listings, which found

that the proportion of such contracts correctly including confidentiality provisions was only 8 per cent.

16. Contract listings for 2007 were published on the Internet by the due date of 29 February 2008 by 75 of the 96 agencies (78 per cent) covered by the Senate Order. A further ten agencies published a 2007 listing after the due date. Eleven agencies did not publish lists for the 2007 calendar year. Of these agencies: two did not publish lists for reasons of national security²; four published financial year listings; and five did not publish lists.

17. Given the substantial value of contracts reported by agencies in the 2007 calendar year listings (\$80 billion), it is important that agencies provide accurate and complete Internet listings. This enables the Parliament and others to be informed about the use of contracts, and in particular, about the use of confidentiality provisions in contracts. The incorrect inclusion of confidentiality provisions in contracts can potentially undermine the purpose of the Senate Order by preventing or reducing access to such information. Accordingly, the ANAO has made one recommendation designed to improve agencies' decision-making on the use of confidentiality provisions in contracts and achieve greater consistency in the application of Finance's guidance.

Key findings

Confidential provisions in contracts listed by the audited agencies (Chapter 2)

18. Together, the six audited agencies reported 3 008 contracts (valued at \$9.4 billion) in their 2007 Internet listings. Some 310 or 10 per cent of these contracts were listed as containing confidentiality provisions protecting information in the contract. This result continues the downward trend identified in the three previous calendar year listings, where 13, 17 and 18 per cent of contracts (respectively) were listed by the audited agencies as having such provisions.

19. The ANAO examined 190 of these 310 contracts. We found that only 101 of the 190 contracts (53 per cent) reported as containing confidentiality provisions protecting information in the contract actually contained such provisions. The remaining 89 contracts did not contain any confidentiality provisions protecting information in the contract and were therefore

² Contracts can be excluded from Internet listings where disclosure of the existence of the contract could damage the Australian Government, or in order to safeguard national security.

misreported. These differences arose due to errors in the decision-making to include confidentiality provisions in contracts, and also from a misunderstanding of the differences between confidentiality provisions that: protect information specifically identified in the contract; protect information generated during the performance of the contract; and general confidentiality clauses.

Table 1

Correctness of use of confidentiality provisions by the six audited agencies in contracts examined by the ANAO

Agency	Contracts reported as containing confidentiality provisions examined	Contracts actually containing confidentiality provisions	Contracts correctly containing confidentiality provisions	Contracts incorrectly containing confidentiality provisions
	No.	No. (%) ^a	No. (%) ^b	No. (%) ^b
ARC	0	n/a	n/a	n/a
ASIC	39	1 (3)	0 (0)	1 (100)
Centrelink	66	51 (78)	14 (27)	37 (73)
DIAC	70	35 (50)	11 (31)	24 (69)
Federal Court	10	9 (90)	2 (22)	7 (78)
NAA	5	5 (100)	1 (20)	4 (80)
Total	190	101 (53)	28 (28)	73 (72)

Notes: (a) Percentage shown is the number of contracts actually containing confidential provisions as a proportion of the number of contracts listed as containing such provisions.

(b) Percentage shown is the number of contracts either correctly or incorrectly containing confidentiality provisions as a proportion of the number of contracts actually containing confidentiality provisions.

Source: ANAO, based on testing results.

20. As shown in Table 1, only 28 per cent of the contracts with confidentiality provisions that were examined correctly included these provisions. The types of contractual information that was considered to be appropriately included as confidential related to contractors' financial capability, original business methodology and trade secrets, and specific personal information. This indicates that agencies had incorrectly applied the confidentiality criteria from the guidelines when assessing claims for confidentiality, in 72 per cent of those contracts with confidentiality provisions.

21. Most of the 73 contracts (70 contracts valued at \$590 million) assessed as incorrectly including confidentiality provisions related to the protection of contractors' hourly rates or fees and pricing information. Finance's guidance indicates that a claim for confidentiality of pricing information will only be appropriate where that information reveals details of a supplier's internal costing or profit margins.

22. Around 55 per cent of the 73 contracts (40 contracts valued at \$127 million) that were considered to incorrectly include confidentiality provisions related to the acquisition of Information and Communications Technology products or services.

23. There is a degree of subjectivity involved in agencies assessing claims to protect information as confidential, particularly claims that information is commercially sensitive and likely to cause unreasonable detriment if disclosed to another party. Typically this judgement is formed through discussion and negotiation with prospective suppliers, in the broader context of determining if the supplier is fully capable of undertaking the contract at the best value for money.

24. The need to reconsider the appropriateness of decisions on the use of confidentiality provisions is likely to be greater in older contracts. In this regard, 54 of the 73 contracts (74 per cent) that were found to incorrectly include confidentiality provisions were entered into before 31 December 2005, and 12 (22 per cent) of these were entered into before 31 December 2003.

25. Incorrectly including confidentiality provisions in contracts can potentially undermine the purpose of the Senate Order by preventing or reducing access to such information. The ANAO considers that agencies can improve their decision-making by having measures in place to examine proposals to include confidentiality provisions in contracts when preparing, varying or extending contracts. Such arrangements can ensure appropriate levels of review and achieve greater consistency in the application of Finance's guidance on confidentiality provisions in contracts. Any review measures should be cost effective and appropriate to the size and nature of each agency's procurement activity.

26. The other 89 contracts listed as containing confidentiality provisions that were examined during the audit did not contain any confidentiality provisions protecting information in the contract and as such, were misreported. Misreporting the use of confidentiality provisions, on its own, does not reduce the rights of the Parliament or the public to access agencies'

contractual information, or undermine the purpose of the Senate Order. However, it can mislead interested parties as to their ability to access contractual information.

27. The high level of misreporting suggests, however, that agencies continue to find it difficult to differentiate between confidentiality provisions designed to protect information identified in the contract, and confidentiality provisions designed to protect information generated during the performance of the contract (such as reports). It also suggests a misunderstanding between specific clauses that protect the confidentiality of part of the contract itself and general confidentiality clauses. For example, general confidentiality clauses can restate legislative obligations for confidentiality (such as the under the *Privacy Act 1998*) or set out in general terms how they will impose a duty of confidentiality (such as describing how Intellectual Property rights will be dealt with).

28. Overall, most of the contracts examined in the audited agencies contained clauses providing for disclosure of contract related information to the Parliament, or its Committees, and the ANAO. The inclusion of these clauses is significant as it means that both parties are aware, regardless of the use of confidentiality provisions in a contract, that there is no absolute guarantee of confidentiality of any information.

Compliance with Senate Order requirements (Chapter 3)

29. For the 2007 reporting period, 96 *Financial Management and Accountability Act 1997* (FMA Act) agencies were covered by the Senate Order. The ANAO found that 75 of these agencies posted a listing of contracts on the Internet by the due date of 29 February 2008. A further ten agencies published a 2007 listing after the due date. Of the remaining eleven agencies: two did not publish lists for reasons of national security³; four published financial year listings; and five did not publish lists. Of these five agencies, four were prescribed as FMA Act agencies during the reporting period.

30. As was the case in previous years, the Ministers' letters of advice were typically not tabled in the Senate by the due date of 29 February 2008. Only one letter of advice (relating to one agency covered by the Senate Order) was tabled by the due date, although a further 10 letters (relating to 57 agencies covered by the Order) were tabled the following business day. Where the due

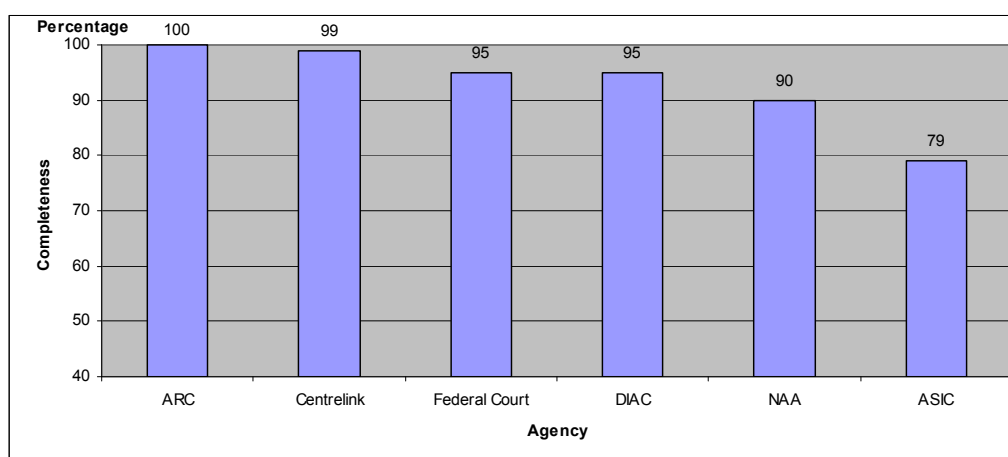
³ Contracts can be excluded from Internet listings where disclosure of the existence of the contract could damage the Australian Government, or in order to safeguard national security.

date for tabling the Ministers' letters falls outside of scheduled Parliamentary sitting days, agencies should make arrangements with the Senate Table Office to table these letters out of session.

31. The audit found that only one of the six audited agencies had published a complete contract list for the 2007 calendar year. Lists in a further four agencies were 90 per cent or more complete (see Figure 1). This situation represented a considerable improvement on the results of the previous audit of the Senate Order, which reported that the completeness of the listings of the audited agencies ranged from 64 to 96 per cent.

Figure 1

Completeness of audited agencies' 2007 Internet listings ^(a)



Note: (a) Completeness refers to the proportion of the 'number of contracts listed' (excluding the 'number of contracts incorrectly included') remaining after deducting the proportion of the number of 'contracts incorrectly omitted'.

Source: ANAO testing of contracts in 2007 Internet listings for selected agencies.

32. There was no evidence to indicate that those contracts excluded from agencies' Internet listings were more (or less) likely to include confidential provisions. Rather, they were omitted due to oversight or because of a misunderstanding by the respective agencies about their reporting obligations.

33. The total estimated cost of complying with the Senate Order, as derived from agencies' 2007 Internet listings, was approximately \$996 000. In 2006, the cost was approximately \$900 000. This represented an average cost of compliance per agency of approximately \$14 000 (2006: \$14 000).

Processes for compiling Internet listings at the audited agencies (Chapter 4)

34. Overall, the ANAO found that each of the audited agencies had reasonably sound systems, processes and quality controls in place to support the compilation of 2007 Internet listings and that these processes had lead to largely complete and accurate listings.

35. However, the many errors in relation to the use and reporting of confidentiality provisions identified by the ANAO suggest that there are further opportunities to strengthen processes. While the principle of not treating contracting information as confidential, unless there is good reason to do so, is generally well established in agencies' procedural and guidance material, it is not yet sufficiently entrenched into agencies' practices.

36. As shown by the relatively low proportion of contracts which correctly included confidentiality provisions (see Table 1), the use of confidentiality provisions is only warranted in the special circumstances which are set out in Finance's guidance. The re-enforcement of this point in agencies' guidance and training is likely to assist decision-making on the inclusion of confidentiality provisions.

Sound and better practices observed during the audit

37. Examples of sound and better practices identified during the audit were:

- Centrelink produced a monthly internal newsletter titled *Procurement Times*, which was distributed to staff with procurement-related roles. This publication provided advice on current procurement policy, requirements, regulations and activities, as well as information on the use of confidentiality provisions in contracts and associated reporting requirements;
- DIAC outlined the process and format for preparing the 2007 contract listing to staff in its business areas, including advice on what should be reported and the process for confirming the information to be reported; and
- Centrelink records contract numbers in its Financial Management Information System, AusTender and contracts register. The use of a common contract number enabled Centrelink to identify more accurate and complete information for the Senate Order listing.

Summary of agencies' responses

38. Each of the audited agencies, together with the Department of Finance and Deregulation, agreed with, or supported the recommendation in this report. Agencies' responses to the recommendation are shown in Chapter 2. Any additional comments provided by agencies are shown in Appendix 4.

Recommendation

The following recommendation is based on the findings of fieldwork at the audited agencies. The ANAO considers the recommendation is relevant to all Australian Government agencies subject to the Senate Order. Therefore all agencies subject to the Senate Order should assess the benefits of implementing the recommendation in light of their own circumstances, including the extent that the recommendation, or part thereof, is addressed by practices already in place.

Recommendation

No. 1

Para 2.25

The ANAO **recommends** agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.

Audit Findings and Conclusions

1. Introduction

The chapter provides background information about the Senate Order and explains the audit approach.

The Senate Order

1.1 The Senate Order for Departmental and Agency Contracts (the Senate Order) was originally made in June 2001 and has been amended several times, most recently in December 2003. The Senate Order is one of several measures, introduced against a background of increased use of contracted service providers by Australian Government agencies, designed to improve the openness and public knowledge of information on procurement and the expenditure of public moneys.

1.2 In particular, the requirements of the Senate Order underline the principle that the Parliament's and the public's access to information on government programs and services should not be prevented, or otherwise restricted, through the use of commercial contractual arrangements, unless there is a sound reason to do so.

1.3 Specifically, the Senate Order requires agencies⁴ to place lists of contracts valued at \$100 000 or more on the Internet. Amongst other things, these lists must indicate whether each contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any other requirements of confidentiality.

1.4 The Senate Order also requires Ministers to table in the Senate, letters of advice that the agencies they administer have listed their contracts on the Internet. The letters of advice are to be tabled no later than two calendar months after the last day of each financial and calendar year. The Senate Order also requests the Auditor-General to annually review contract lists and to report any inappropriate use of confidentiality provisions.⁵

⁴ Under the Senate Order, Australian Government agencies required to comply are those within the meaning of the *Financial Management and Accountability Act 1997* (FMA Act). The three Parliamentary Departments, although classified as agencies under the FMA Act, are not Departments of State administered by Ministers and, as a result, are not included in the Senate Order. However, the Department of the Senate and the Department of Parliamentary Services voluntarily comply and list their contracts on the Internet in accordance with the Senate Order.

⁵ The full text of the current Senate Order is reproduced at Appendix 1 of this Report.

1.5 In February 2007, the Senate Standing Committee on Finance and Public Administration (FPA Committee) issued its second report on the operation of the Senate Order.⁶ The FPA Committee report contained 13 recommendations to improve the operation of the Senate Order and its future direction. The previous ANAO Senate Order audit discussed the findings and recommendations of the FPA Committee report.⁷

1.6 The Government Response to the Committee's second report, which supported 11 (and noted one) of the 13 recommendations, was presented to the President of the Senate on 21 August 2008, and tabled in the Senate on 26 August 2008.⁸ The one recommendation that was not supported by the Government related to extending the coverage of the Senate Order to include bodies operating under the *Commonwealth Authorities and Companies Act 1997*.

Finance guidance on the use and reporting of confidentiality provisions in contracts

1.7 It is important that agencies manage confidential information during the procurement process. This includes protecting the Australian Government's confidentiality interests and carefully assessing, on a case by case basis, all claims by potential suppliers for the protection of information. Equally, agencies must maintain accurate records of the use of confidentiality provisions in contracts and ensure these details are reported correctly.

1.8 In assessing claims for confidentiality, agencies must be cognisant of the rights and obligations arising from the Government's various accountability and disclosure mechanisms, including: the interests of Parliamentary committees; the protection and disclosure of information principles enshrined in the *Freedom of Information Act 1982* and the *Public Service Act 1999*; and the access rights of the Auditor-General.

1.9 In light of the Government's positive response to the Senate Order, the Department of Finance and Deregulation (Finance) has produced a range of Financial Management Guidance (FMG) that provides information to agencies

⁶ Standing Committee on Finance and Public Administration, *Departmental and agency Contracts, Second report on the operation of the Senate order for the production of lists of departmental and agency contracts (2003–06)*, February 2007. This report is available at <http://www.aph.gov.au/Senate/committee/fapa_ctte/completed_inquiries/2004-07/contracts/index.htm>.

⁷ ANAO Audit Report No.7 2007–08, *The Senate Order for Departmental and Agency Contracts (Calendar Year 2006 compliance)*, p. 11-12. All ANAO reports are available from <www.anao.gov.au>.

⁸ The Government Response to the FPA Committee's report is available at <http://www.aph.gov.au/Senate/committee/fapa_ctte/contracts/index.htm>.

about the listing of contract details on the Internet and in AusTender, including on the use (and reporting) of confidentiality provisions. Specifically, the following three publications⁹ have direct relevance:

- FMG 8: *Guidance on the Listing of Contract Details on the Internet (Meeting the Senate Order on Departmental and Agency Contracts)*, January 2004;
- FMG 3: *Guidance on Confidentiality in Procurement*, July 2007; and
- FMG 15: *Guidance on Procurement Publishing Obligations*, July 2007.

1.10 FMG 8 was designed to assist agencies understand the basis and objectives of the Senate Order, and to clarify the various terms and requirements in the Order. Specifically, it interprets the requirements relating to confidentiality in paragraph 2 (c) of the Senate Order as:

- ‘provisions requiring the parties to maintain confidentiality of any of its provisions’ - as those provisions that make specific information contained in the contract confidential; and
- ‘other requirements of confidentiality’ - as those provisions that protect confidential information of the parties that may be obtained or generated in carrying out the contract. FMG 8 also indicates that ‘other requirements of confidentiality’ are ‘generally in the form of standard confidentiality provisions of a general nature’.¹⁰

1.11 FMG 8 has not yet been updated to bring it into line with the two more recent publications (FMG 3 and FMG 15). Finance has advised that it plans to revise the guide, subject to any changes arising from the Government’s response to the FPA report. Accordingly, at the time of the audit, FMG 8 applied.

1.12 FMG 3 replaces the former *Guidance on Confidentiality of Contractors’ Commercial Information* that was issued in February 2003. FMG 3 is designed to assist agencies to: manage confidentiality information during procurement processes; correctly identify what type of information should be considered confidential; make appropriate use of confidentiality provisions in contracts;

⁹ Each of the Department of Finance and Deregulation publications can be obtained from <<http://www.finance.gov.au/procurement/procurement-policy-and-guidance/index.html>>.

¹⁰ Department of Finance and Deregulation, FMG 8 – *Guidance on the Listing of Contract Details on the Internet*, January 2004, p. 25. General confidentiality clauses are included in many contracts to deal with information which can only be identified in general terms and impose a duty of confidentiality. Such clauses either restate legislative obligations for confidentiality (such as under the *Privacy Act 1998* or statutory secrecy provisions) or set out a general understanding between parties in relation to how they will deal with information when performing the contract.

and properly report the use of confidentiality provisions in contracts. It also contains a series of examples to illustrate the application of the 'confidentiality test'.¹¹

1.13 Importantly, FMG 3 highlights that as well as information determined to be confidential by agencies during the procurement process, some information is deemed to be confidential through the operation of legislation. For example, through the requirements of the *Privacy Act 1998* personal information held by the Australian Government and certain private entities is required to be kept confidential. Information that an agency can determine to be confidential can belong to the private sector or the Government. The information could be contained in a contract, or be obtained or generated in performing a contract.

1.14 FMG 15 is designed to assist agencies to implement procedures meeting procurement publishing requirements, including reporting details of: annual procurement plans; approaches to the market; and contracting and other agency arrangements.

1.15 All three guides were current at the time that agencies compiled their Internet lists for calendar year 2007. This has created some problems for agencies, as there is some inconsistency in the guidance about criteria for reporting whether contracts have 'confidential provisions protecting information contained in the contract', 'confidential provisions protecting information obtained or generated in performing the contract', 'general confidentiality clauses' and 'other requirements of confidentiality'.

1.16 A number of other publications are also relevant, albeit less directly. The *Commonwealth Procurement Guidelines*¹² refer to the requirements of the Senate Order, as does *Guidance on the Mandatory Procurement Procedures*¹³ and *Guidance on Ethics and Probity in Government Procurement*.¹⁴ These guides stipulate, amongst other things, that confidentiality arrangements should be clearly articulated in request for tender documentation, and that draft contracts made available at tender stage should identify relevant Australian

¹¹ The 'confidentiality test' is discussed in paragraph 2.5.

¹² Department of Finance and Deregulation, FMG 1, *Commonwealth Procurement Guidelines*, January 2005.

¹³ Department of Finance and Deregulation, FMG 13, *Guidance on the Mandatory Procurement Procedures*, January 2005.

¹⁴ Department of Finance and Deregulation, FMG 14, *Guidance on Ethics and Probity in Government Procurement*, January 2005.

Government policies relating to confidentiality and accountability requirements for disclosure of information.

AusTender

1.17 Finance administers AusTender, the Australian Government's central repository for the publication and reporting of information relating to procurement and contracting activity. AusTender has been available for agencies to report procurement contracts from September 2007.

1.18 Agencies are required to report the use of two different types of specific confidentiality provisions in AusTender. These are provisions designed to protect:

- confidential information contained in the contract (AusTender reporting field 'Confidentiality – Contract'); and
- confidential information obtained or generated as a result of performance of the contract (AusTender reporting field 'Confidentiality – Outputs').

1.19 Finance has proposed that AusTender should be used as the main procurement and contracting reporting mechanism, replacing both the Senate Order and the requirement for consultancies to be recorded in annual reports. The Senate FPA Committee considered it was premature to revoke the Senate Order and recommended that the Order be retained while the new AusTender system for reporting procurement contracts is implemented. The Government Response to the Committee's report (see paragraph 1.5) supported this recommendation, observing that meeting the requirements of the Senate Order through the new AusTender system, will improve the quality and consistency of contract information available to stakeholders.

1.20 The re-engineered AusTender system did not contain sufficient information to facilitate agencies' preparation and reporting of contract lists for calendar year 2007. Currently there are dual reporting arrangements, with agencies required to publish information about contracts on both AusTender and on their Internet sites. As discussed in paragraph 1.15, there are some differences in the reporting criteria required to be used. Finance has advised that from September 2007, agencies are progressively implementing new policy requirements for specific confidentiality reporting on AusTender.

Audit approach

1.21 This audit is the tenth in a series of audits fulfilling the Senate's request. The audit examined information reported for contracts contained in agencies' 2007 calendar year listings, that is, contracts entered into during the twelve months ending 31 December 2007; or contracts entered into before 2007, that were not fully performed at 31 December 2007.

Audit objectives and criteria

1.22 The audit objective was to assess whether all agencies compiled Internet listings of contracts as required by the Senate Order and to examine the appropriateness of the use, by selected agencies, of confidentiality provisions.

1.23 To achieve this objective, the audit had two phases. In the first phase the ANAO ascertained if Ministerial letters of advice were tabled by the due date, and undertook a desk-top examination of the Internet sites of each of the agencies subject to the Senate Order to determine:

- whether agencies listed their contracts by the due date;
- the total number (and value) of contracts listed and the proportion of contracts reported as containing confidentiality provisions; and
- whether agencies reported an estimate of the costs of complying with the Senate Order.

1.24 In the second phase of the audit, the ANAO assessed whether selected agencies (the audited agencies) had:

- appropriately used and reported confidentiality provisions in a selection of listed contracts;
- reported all the details required by the Senate Order;
- reported a complete and accurate listing of contracts; and
- put in place processes to support a complete and accurate list of contracts, including the accurate identification and reporting of confidentiality provisions.

1.25 A series of audit criteria were developed for each of these matters, using the relevant guidance material referred to at paragraph 1.9. These audit criteria represent the management environment and internal controls that an agency should have in place to comply with the Senate Order. The audit criteria for each component of the audit are outlined in Chapters 2, 3 and 4 of this report.

Audit methodology

1.26 In respect of each of the audited agencies, the audit involved:

- reviewing the Senate Order listing on the agency's Internet site (as of 29 February 2008);
- conducting interviews and examining files and records relating to the compilation of the Internet listing and the individual contracts selected for testing;
- discussing major audit findings; and
- issuing a management report detailing the audit findings and recommendations or suggestions for improvement.

1.27 The following agencies were selected for detailed examination: Australian Research Council (ARC); Australian Securities and Investments Commission (ASIC); Centrelink; Department of Immigration and Citizenship (DIAC); Federal Court of Australia; and National Archives of Australia (NAA).

1.28 The selection of agencies for detailed examination was biased towards agencies that reported a higher proportion of contracts as containing confidentiality provisions, while at the same time, achieving coverage of a mix of small, medium and large agencies.

Previous ANAO Senate Order audits

1.29 The ANAO has undertaken nine previous audits of compliance with the Senate Order for Departmental and Agency Contracts. The previous Senate Order audit reports, and the recommendations made in each of those reports, are listed in Appendix 2.

Auditing standards

1.30 The audit was conducted under Section 18 of the *Auditor-General Act 1997*. The cost of the audit to the ANAO was approximately \$320 000.

Report structure

1.31 The report consists of an introductory chapter and three chapters that focus on:

- Confidential Provisions in Contracts (Chapter 2);
- Compliance with Senate Order Requirements (Chapter 3); and
- Processes for Compiling Internet Listings (Chapter 4).

2. Confidential Provisions in Contracts

This chapter contains an assessment of the extent to which agencies appropriately used confidentiality provisions in contracts and satisfied the associated reporting requirements of the Senate Order in their calendar year 2007 Internet listing.

Background

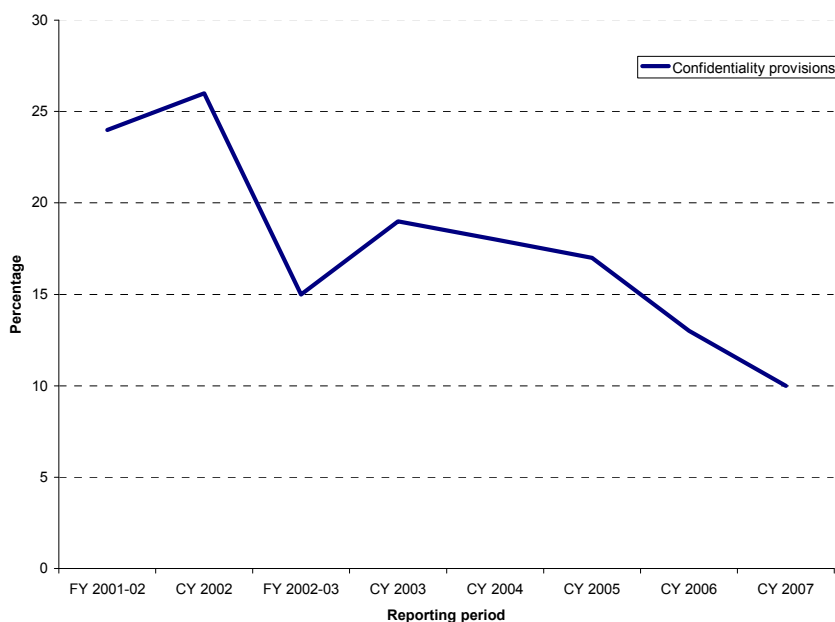
2.1 One of the main objectives of the Senate Order is to require agencies to make considered decisions in relation to the inclusion of confidentiality provisions in Government contracts. In particular, the Senate Order requires agencies' Internet listings identify those contracts that contain such provisions.

Trends in the use of confidentiality provisions in contracts

2.2 The 2007 Senate FPA Committee report¹⁵ observed that the number of contracts listed by agencies as containing confidentiality provisions protecting information in the contract has generally declined. Noting that the Senate Order was a response to a perceived expansion in confidentiality provisions in contracting, the report considered the reversal of that trend to be significant.

2.3 ANAO's audits have also found a continuing general decline in the proportion of contracts reported as containing confidentiality provisions protecting information in the contract by the agencies audited each year. Figure 2.1 shows that the proportion of contracts reported as containing such provisions has decreased significantly over the period that the Senate Order has been in operation. In particular, it has declined steadily from 19 per cent reported in the calendar year 2003 listing to some 10 per cent reported in the latest 2007 listing.

¹⁵ Senate Standing Committee on Finance and Public Administration, op. cit., p. 23.

Figure 2.1**Proportion of contracts reported as containing confidentiality provisions by the audited agencies**

Source: ANAO analysis of contracts in 2007 Internet listings for selected agencies, and previous ANAO Senate Order audits.

2.4 This trend is significant, as it reflects the impact of the Senate Order in reducing the use of confidentiality provisions, and the continuing implementation of the Government's policy that contracting information should not be treated as confidential, unless there is a sound reason to do so. However, as discussed in the next section of this Chapter, the ANAO continues to find considerable misreporting of contracts and also errors in decisions to include confidentiality provisions.

Assessing confidentiality provisions in contracts

2.5 The ANAO's criteria for assessing whether agencies have appropriately included confidentiality provisions in contracts were drawn from the guidance material produced by Finance, listed at paragraph 1.9. This guidance outlines a confidentiality test which is to be used to assess whether information should be kept confidential. The confidentiality test consists of four criteria as follows:

1. The information to be protected must be specifically identified.

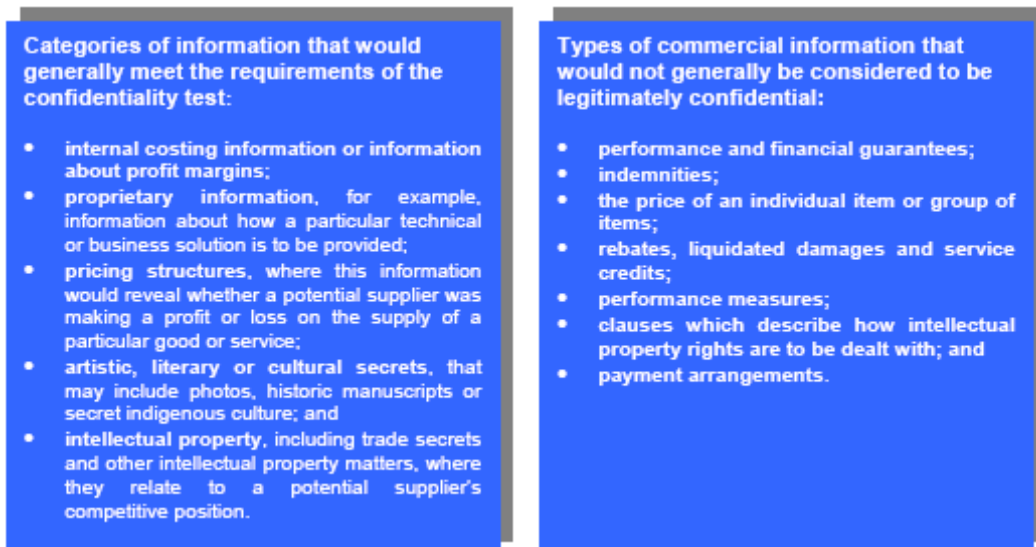
2. The information must be commercially sensitive – this means that the information should not generally be known or accessible.
3. Disclosure of the information would cause unreasonable detriment to the owner of the information, or to another party.
4. The information was provided under an understanding that it would remain confidential.¹⁶

2.6 All four criteria must be met for information in contracts to be properly treated as confidential. The decision about whether information is to be protected as confidential should be made on a case-by-case basis. It is important to document the reasons for agreeing to include any specific confidentiality provisions.

2.7 FMG 3 provides examples of how to apply the confidentiality test, and also identifies categories of information that would (and would not) generally be considered confidential (see Figure 2.2).

Figure 2.2

Categories of information that would (and would not) generally be considered confidential



Source: Department of Finance and Deregulation, FMG 3, *Guidance on Confidentiality in Procurement*, July 2007, p. 11.

¹⁶ Each of these criteria is described in detail in Appendix 3.

2.8 At each of the audited agencies, the ANAO examined a selection of contracts that were listed as containing confidential provisions¹⁷ to assess whether the use of confidentiality provisions was appropriate and in accordance with Finance guidance.

2.9 Consistent with the approach in previous audits, the ANAO's assessment of the use of confidentiality provisions was based on the review of the individual contracts selected for testing, a review of associated procurement documentation and, where necessary, interviews with relevant staff. The ANAO did not discuss its assessments with the respective suppliers or contractors.

Use of confidentiality provisions in 2007 Internet listings

2.10 Table 2.1 sets out, for each of the audited agencies, the total number (and value) of contracts listed and the number of contracts listed as containing confidential provisions protecting information in the contract.

Table 2.1

Details of contracts reported by the six audited agencies in 2007 Internet listings

Agency	Number of contracts listed	Value of contracts listed (\$)	Contracts listed as containing confidential provisions protecting information in the contract	
			Number	(%)
ARC	750 ^a	2 285 488 768	0	(0)
ASIC	90	56 955 597	40	(44)
Centrelink	1 139 ^b	3 401 204 126	131	(12)
DIAC	947	3 510 221 894	124	(13)
Federal Court	40	33 446 411	10	(25)
NAA	42	87 313 085	5	(12)
Total	3 008	9 374 629 881	310	(10)

Notes: (a) Funding agreements comprised 97 per cent of the ARC's listing.¹⁸

(b) Centrelink's listing included 1 100 contracts relating to the procurement of goods and services and 39 contracts relating to the generation of revenue.

Source: ANAO analysis of 2007 Internet listings for selected agencies.

¹⁷ The internet listing at ARC did not identify any contracts as containing confidentiality provisions protecting information in the contract. Accordingly, the ANAO examined 14 contracts listed as containing other requirements of confidentiality.

¹⁸ Agencies are required to report grants and funding agreements where they qualify as 'contracts'.

Appropriateness of the use of confidentiality provisions

2.11 The ANAO assessed the appropriateness of the inclusion of confidentiality provisions by examining a selection of those 310 contracts listed as containing confidentiality provisions against the criteria shown at paragraph 2.5.

2.12 As shown in Table 2.2, the ANAO examined 190 of the 310 contracts reported by the audited agencies as having confidentiality provisions. The audit found that only 101 of these 190 contracts¹⁹ (or 53 per cent) actually contained such provisions. As also shown in Table 2.2, each of these 101 contracts was categorised as either:

- correctly containing confidentiality provisions protecting information in the contract (all four criteria were met); or
- incorrectly containing confidentiality provisions because the decision to use those provisions was incorrect (criteria two or three have not been met).

¹⁹ The remaining 89 examined contracts are discussed at paragraph 2.33.

Table 2.2**Correctness of use of confidentiality provisions by the six audited agencies in contracts examined by the ANAO**

Agency	Contracts reported as containing confidentiality provisions examined	Contracts actually containing confidentiality provisions	Contracts correctly containing confidentiality provisions	Contracts incorrectly containing confidentiality provisions
	No.	No. (%) ^a	No. (%) ^b	No. (%) ^b
ARC	0	n/a	n/a	n/a
ASIC	39	1 (3)	0 (0)	1 (100)
Centrelink	66	51 (78)	14 (27)	37 (73)
DIAC	70	35 (50)	11 (31)	24 (69)
Federal Court	10	9 (90)	2 (22)	7 (78)
NAA	5	5 (100)	1 (20)	4 (80)
Total	190	101 (53)	28 (28)	73 (72)

Notes: (a) Percentage shown is the number of contracts actually containing confidentiality provisions as a proportion of the number of contracts listed as containing such provisions.

(b) Percentage shown is the number of contracts either correctly or incorrectly containing confidentiality provisions as a proportion of the number of contracts actually containing confidentiality provisions.

Source: ANAO analysis of contracts in 2007 Internet listings of selected agencies.

Contracts correctly including confidentiality provisions

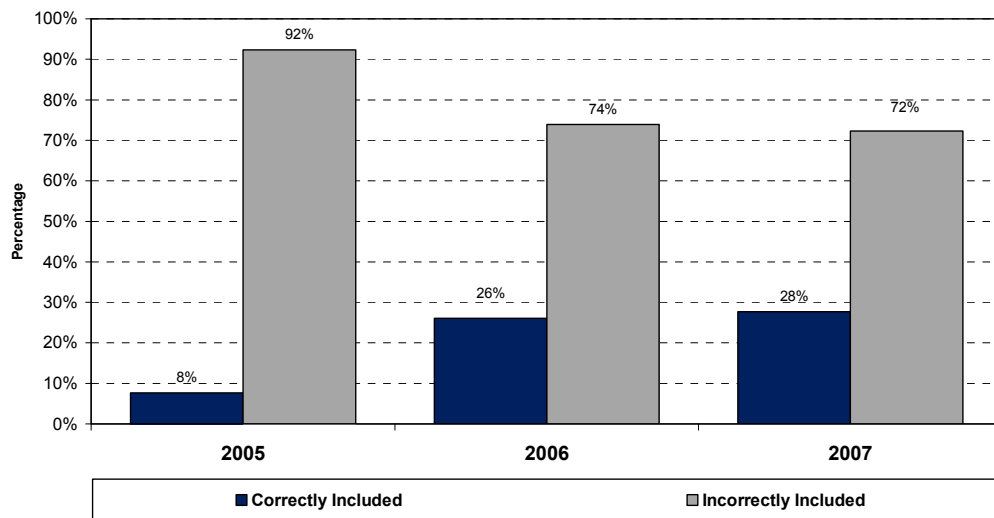
2.13 As shown in Table 2.2, only 28 of the 101 contracts containing confidentiality provisions protecting information in the contract were considered to correctly include such provisions. This result is broadly consistent with the ANAO's most recent Senate Order audit (2006 Internet listings), which found that the proportion of such contracts that correctly included confidentiality provisions was 26 per cent. It is, however, an improvement on the results of the audit of 2005 Internet listings, which found that the proportion of such contracts correctly including confidentiality provisions was only 8 per cent (see Figure 2.3).

2.14 Contractual information found to be correctly included as confidential typically related to financial capability (such as profit and loss statements, customised discounts and mark up rates), original business methodologies and trade secrets (such as unique specifications or requirements, and the

methodology for delivering the required products or services) and specific personal information (such as the educational qualifications or employment background of specified personnel).

Figure 2.3

Appropriate use of confidential provisions in selected contracts in the audited agencies



Source: ANAO analysis of selected contracts in the audits of the Senate Order listings of 2005, 2006 and 2007.

Contracts incorrectly including confidentiality provisions

2.15 As indicated in Table 2.2, the ANAO considered that the audited agencies had incorrectly included confidentiality provisions protecting information in the contract in 73 of the 101 contracts identified as containing such provisions. This indicates that agencies had incorrectly applied the confidentiality criteria when assessing claims for confidentiality.²⁰

2.16 The audit observed that around 55 per cent of those 73 contracts (40 contracts valued at \$127 million) related to the acquisition of Information and Communications Technology products or services. Given the significant amount of government expenditure each year on Information Communications and Technology related activities, it is important that

²⁰ These 73 contracts contained 85 different confidentiality provisions that the ANAO assessed to be incorrectly included.

contractual information associated with this expenditure is accurately and fully reported.

2.17 In 70 (or 96 per cent) of these 73 contracts (valued at \$589 million), the contractors' hourly rates or fees and pricing information were protected as confidential. Finance's guidance indicates that a claim for confidentiality of pricing information will only be legitimate where that information reveals details of a supplier's internal costing or profit margins:

Generally, the fact that disclosing pricing information would make life more difficult for the supplier is not sufficient reason. For example, a potential supplier may claim confidentiality on the basis that it does not want its competitors to know its prices. However, transparency of such information could, potentially, lead to increased competition and better value for money outcomes for the Government.²¹

2.18 Other types of information protected as confidential in these 73 contracts related to service level agreements, third party indemnity arrangements, liability arrangements and insurance and bank account details.

2.19 Incorrectly including confidentiality provisions in contracts can potentially undermine the purpose of the Senate Order by preventing or reducing access to such information²². It also does not allow the Parliament and others to be informed about the use of contracts, and in particular, about the use of confidentiality provisions in contracts. Accordingly, the ANAO considers that agencies need to improve their decision-making about the use of confidentiality provisions in contracts.

2.20 There is usually a degree of subjectivity and interpretation involved in the assessment of claims to classify information as confidential. This is particularly the case in the assessment of claims that information is commercially sensitive, provides sufficient information to make an estimate of a supplier's profit margin, and is likely to cause unreasonable detriment if disclosed to another party. Typically this judgement is formed through discussion and negotiation with prospective suppliers, in the broader context of determining if the supplier is fully capable of undertaking the contract at the best value for money. For the most part, the ANAO was unable to find any evidence to support the basis on which these decisions were made.

²¹ Department of Finance and Deregulation, FMG 3, *Guidance on Confidentiality in Procurement*, July 2007, p. 32.

²² The Parliament's right to access information is protected through the inclusion of clauses in contracts that provide for disclosure of information to the Parliament and its committees (see paragraph 2.41).

2.21 Often, the sensitivity of contractual information will diminish over time. Accordingly, the need to reconsider the appropriateness of decisions on the use of confidentiality provisions is likely to be greater in older contracts. In this regard, 54 of the 73 contracts (74 per cent) that were found to incorrectly include confidentiality provisions were entered into before 31 December 2005, and 12 (22 per cent) of these were entered into before 31 December 2003.

2.22 The audit found that agencies have typically not reviewed, during the term of a contract, the use of confidentiality provisions or the classification of information that has previously been accepted as confidential.

2.23 The ANAO considers that agencies can improve decision-making on the use of confidentiality provisions by having measures in place to examine proposals to include confidentiality provisions in contracts when preparing, varying or extending contracts. Such arrangements can ensure appropriate levels of review and achieve greater consistency in the application of Finance's guidance on confidentiality provisions in contracts.

2.24 The implementation of any review measures should be cost effective and targeted towards those contract types which historically have a higher level of confidentiality provisions. Ideally, the responsibility for these measures would be allocated to specialist procurement areas, to legal advisors, or to a supervisory position. This latter approach may be most appropriate for smaller agencies and for agencies with devolved procurement arrangements.

Recommendation No.1

2.25 The ANAO **recommends** agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.

Agencies' responses

ARC

2.26 The ARC supports the recommendation.

ASIC

2.27 ASIC agrees with the recommendation and confirms that the recommendation has been, or is currently being reviewed for implementation.

Centrelink

2.28 Centrelink agrees with the recommendation and has commenced reviewing all 'live' contracts containing confidentiality provisions in relation to

the appropriateness of the decision to include the provisions, is taking corrective action where necessary, and is providing feedback to staff involved in the relevant procurement. In addition it is continuing to deliver targeted training on the appropriate use of confidentiality provisions.

DIAC

2.29 DIAC agrees with the recommendation that agencies implement review measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement. DIAC is committed to implementing the relevant internal procedures to give effect to the recommendation.

Federal Court

2.30 The Federal Court agrees with the recommendation and will implement measures to assess the appropriateness of decisions to include confidentiality provisions in contracts and provide suitable feedback to staff involved in procurement.

Finance

2.31 Finance supports the recommendation.

NAA

2.32 The NAA agrees with the recommendation.

Misreporting the use of confidentiality provisions in contracts

2.33 The ANAO considered the audited agencies had misreported the use of confidentiality provisions in 89 of the 190 contracts listed as having confidentiality provisions protecting information in the contract that were examined. The audit found that none of these contracts identified any information in the contract as confidential. Rather, these contracts contained only general confidentiality provisions or identified information to be generated during the performance of the contract as confidential.²³

2.34 Misreporting the use of confidentiality provisions, on its own, does not reduce the rights of the Parliament (or the public) to access an agencies' contractual information, nor does it undermine the purposes of the Senate

²³ As well as provisions protecting information in the contract, the 73 contracts discussed at paragraph 2.15 contained 68 claims for confidentiality where the information to be protected was not specifically identified in the contract and a further 43 claims relating to information to be generated during the performance of the contract.

Order. However, it can mislead interested parties as to their ability to access to contractual information.

2.35 The high level of misreporting suggests, however, that agencies continue to find it difficult to differentiate between confidentiality provisions designed to protect information identified in the contract, and confidentiality provisions designed to protect information generated during the performance of the contract (such as reports). It also suggests a misunderstanding between specific clauses that protect the confidentiality of part of the contract itself and general confidentiality clauses. For example, general confidentiality clauses can restate legislative obligations for confidentiality (such as the under the *Privacy Act 1998*) or set out in general terms how they will impose a duty of confidentiality (such as describing how Intellectual Property rights will be dealt with).

2.36 The ANAO considers that the inconsistencies in the reporting criteria in Finance's guidance (see paragraph 1.15) has contributed to this result. Finance has advised that it plans to revise the guidance, subject to any changes arising from the Government's response to the second FPA Committee report.

Contracts excluded from the Internet listings

2.37 Contracts can be excluded from reporting under the Senate Order in circumstances where disclosure of the existence of the contract could damage the Australian Government or harm any other interests. For example, contracts can be excluded from Internet listings where disclosure would be contrary to the public interest or any statutory secrecy provisions, or in order to safeguard national security. In such instances, agencies are required to:

- assess each contract against the criterion of non-disclosure and any specific legislative, security or other requirements; and
- refer to contract exclusions in the Minister's letter of compliance to the Senate.²⁴

2.38 ANAO's testing confirmed that none of the six audited agencies had excluded any contracts from their Internet listing for any of the above reasons.

2.39 An analysis of the Ministers' letters of compliance identified that six of the 96 agencies covered by the Senate Order had excluded contracts from their listings. Two of the agencies excluded all of their contracts for reasons of

²⁴ Department of Finance and Deregulation, January 2004, op. cit., paragraph 5.4.

national security. Three of the four remaining agencies indicated that some contracts were excluded for reasons relating to public interest and national security. The fourth agency indicated only that some contracts were excluded as they were confidential. None of the four agencies, however, specified the number of contracts excluded, as required by FMG 8.

2.40 The exclusion of contracts can be used to protect the Australian Government's confidentiality interests. However, the apparent low rate of contract exclusions indicates that agencies are acting in accordance with the policy that contracting information, including Australian Government information, should not be treated as confidential unless there is a sound reason to do so.

The Government's accountability and disclosure mechanisms

2.41 As well as providing for the inclusion of confidentiality provisions, where appropriate, contracts should contain clauses dealing with the rights and obligations arising from the Government's various accountability and disclosure mechanisms. Specifically, contracts should contain clauses dealing with:

- disclosure of contract-related information to the Parliament or Parliamentary Committees; and
- access by the ANAO to a contractor's premises.

2.42 The inclusion of these clauses is significant as it means that both parties are aware, regardless of the use of confidentiality provisions, that there is no absolute guarantee of confidentiality of any information.

2.43 Table 2.3 shows that overall most of the contracts examined contained appropriately worded clauses. This largely reflected the fact that the standard contract templates developed by the audited agencies contained such clauses.

Table 2.3

Extent to which contracts examined at the audited agencies contained clauses providing for disclosure of information to the Parliament and the ANAO

Agency	Number of contracts reviewed	Percentage of contracts dealing with disclosure to Parliament	Percentage of contracts dealing with ANAO access
ARC	14	93	100
ASIC	39	44	46
Centrelink	66	88	88
DIAC	70	97	99
Federal Court	10	50	90
NAA	5	100	100
Total	204	81	83

Source: ANAO analysis of agency contracts in 2007 Internet listings of selected agencies.

2.44 The high rate of non-compliance at ASIC primarily arose from the use of non-standard contracts. While there are legitimate reasons for using non-standard contract terms and conditions, care is required to ensure that the appropriate clauses are included to inform contractors of these requirements. During the audit, ASIC introduced new contract templates containing the relevant clauses. Accordingly, it is expected that use of the required clauses will improve as ASIC enters into new contracts, or existing contracts end or are renegotiated.

2.45 The low proportion identified at the Federal Court in relation to disclosure of information to the Parliament was due to the Court's use of a whole of government contract template for the supply of Information and Communications Technology products and services. Whilst this template refers to the need to comply with the Government's policies on disclosure of confidential information, it does not specifically mention the disclosure of information to the Parliament. The audit observed, however, that the Federal Court's standard contract template did contain the model Parliamentary disclosure clause.

2.46 The overall result is an improvement on last years' Senate Order audit. The proportion of contracts examined that contained clauses that provided for disclosure of information to the Parliament increased from 55 per cent to 81 per cent, and that contained ANAO access clauses increased from 56 per cent to 83 per cent.

3. Compliance with Senate Order Requirements

This chapter reports the ANAO's assessment of the extent to which agencies complied with the requirements of the Senate Order for 2007, including timely listing on the Internet, and providing complete and accurate records of relevant contracts.

Background

3.1 The ANAO undertook a desktop review of the existence and timing of contract reporting for all agencies covered by the Senate Order, and also assessed the timing, accessibility, content, completeness and accuracy of Internet listings for each of the six audited agencies, for 2007.

Timing, accessibility and content of contract reporting

Existence and timing of the Ministers' letters of advice

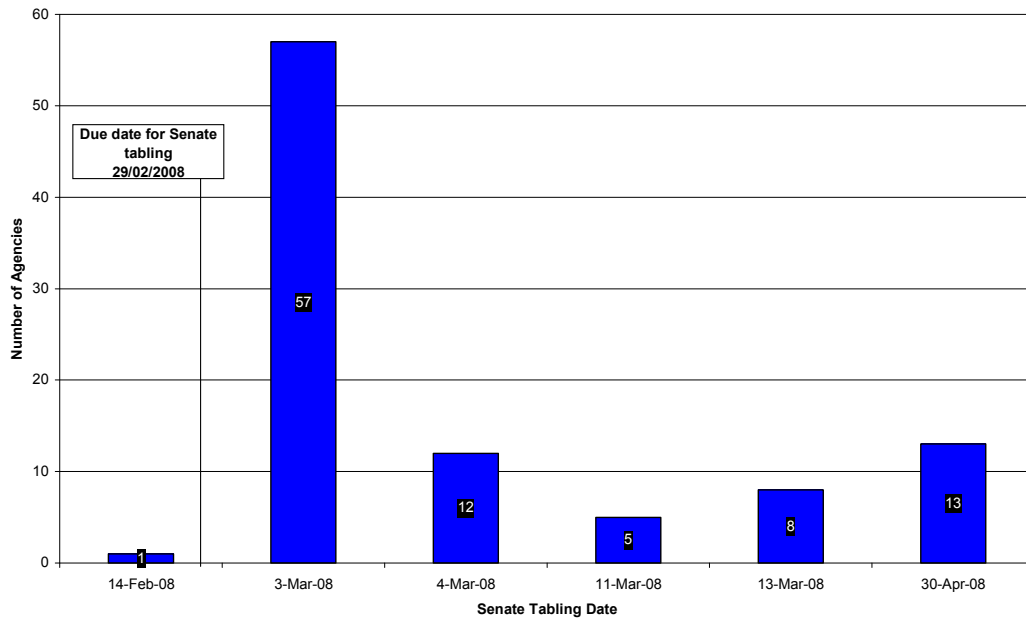
3.2 The ANAO reviewed whether the Ministers' letters of advice on Senate Order reporting requirements were tabled in the Senate by the due date of 29 February 2008.

3.3 Figure 3.1 shows that the Minister's letter relating to the 2007 calendar year reporting period was tabled in the Senate by the due date for only one of the 96 agencies covered by the Senate Order. Letters encompassing 57 agencies were tabled the next business day (3 March 2008), and letters relating to the remaining agencies covered by the Senate Order were tabled in the Senate by 30 April 2008.

3.4 The one agency for which the Minister's letter had been tabled by the due date was the ARC, one of the six audited agencies. For each of the remaining five audited agencies the respective Ministers' letters were not tabled by the due date, but were tabled as follows: NAA and the Federal Court on 3 March 2008; DIAC on 4 March 2008; Centrelink on 11 March 2008; and ASIC on 30 April 2008.

Figure 3.1

Timing of tabling in the Senate, by all agencies, of Ministers' letters regarding compliance with Senate Order requirements for 2007



Source: ANAO analysis of 2007 reporting of all agencies covered by the Senate Order.

3.5 The ANAO found that Ministers' letters relating to 47 of the 96 agencies covered by the Senate Order were received in the office of the President of the Senate before the due date of 29 February 2008. However, these letters were received after the Senate's scheduled sitting dates in February.²⁵ Where the due date for tabling the Ministers' letters falls outside of the Parliamentary sitting schedule, agencies should make arrangements with the Senate Table Office to table the letters out of session.

Timing, accessibility and content of Internet listings

3.6 The ANAO assessed whether each of the 96 agencies covered by the Senate Order had placed a list of contracts on the Internet, and also tested whether the six audited agencies' Internet listings met the reporting requirements of the Senate Order. The Senate Order requires each agency to have:

²⁵ The Senate was scheduled to sit on three days in February before the due date of 29 February 2008; 12 to 14 February 2008.

- placed a list of contracts on the Internet;
- listed all the details specified in paragraph 2 of the Senate Order; and
- established an accessible path to the listing on its Internet home-page.

Timing and accessibility

3.7 The ANAO's review of the 96 agencies covered by the Senate Order found that 75 agencies published a 2007 calendar year contract listing on the Internet by the due date of 29 February 2008.²⁶ A further ten agencies published a 2007 listing after the due date. In total, these 85 agencies reported a total of 35 800 contracts valued at approximately \$80 billion.²⁷

3.8 Of the remaining eleven agencies: two did not publish lists for reasons of national security (see paragraph 2.39); four published financial year listings that covered the 2007 calendar year reporting period; and five did not publish contract lists. Of these five agencies, four were only prescribed as FMA Act agencies during the reporting period. If at the end of a reporting period an agency is prescribed as an 'agency' within the meaning of the FMA Act, it is required to report a list of contracts in accordance with paragraph 2 of the Senate Order. Alternatively, if an agency does not have any contracts within the scope of the Order, it is advised to place a notice on its website notifying that it had no contracts to report.

3.9 Each of the six audited agencies published Internet listings by the due date of 29 February 2008. In addition, the ANAO found that the listings of each of these six agencies were readily accessible from their home-pages.

Content of Internet listings

3.10 Table 3.1 shows that, for the most part, the Internet listings of the six audited agencies complied with the information requirements of the Senate Order.

²⁶ One agency, which was established during 2007, placed a notice on its website that it had not entered into any contracts that met the reporting criteria as at 31 December 2007.

²⁷ The value reported for each contract should be an estimate of the full amount to be paid or received over the life of the contract.

Table 3.1

ANAO assessment of audited agencies' 2007 Internet listings - compliance with the information requirements of the Senate Order

Information required	NAA	ARC	ASIC	DIAC	Centrelink	Federal Court
Name of contractor	✓	✓	✓	✓	✓	✓
Amount of consideration	✓	✓	✓	✓	✓	✓
Subject matter	✓	✓	✓	✓	✓	✓
Commencement date of contract	✓	✓	✓	✓	✓	✓
Anticipated end-date of contract	✓	✓	✓	✓	✓	✓
Twelve month period relating to listing	✓	✓	✓	✓	✓	✓
Provisions requiring information in the contract to be kept confidential	✓	✓	✓	✓	✓	✓
Statement of reasons for confidentiality	✓	✓	✓	✓	✓	✓
Cost of compliance	✓	✓	✓	✗	✓	✓
Method of calculating cost of compliance	✓	✗	✓	✗	✓	✓

Source: ANAO analysis of 2007 Senate Order reporting of selected agencies.

Completeness and accuracy of Internet listings

3.11 Previous audits of the Senate Order have found that it is not uncommon for agencies to inadvertently exclude contracts from their listings, to double-count contracts, or include contracts that do not fall within the appropriate reporting period. As a result, the ANAO tested the completeness and accuracy of the audited agencies' Internet listings. This testing comprised checking the Internet listing against:

- contracts in AusTender;
- details of selected 2007 transactions in the agencies' Financial Management Information Systems (FMIS); and
- contracts recorded in the agencies' contract registers.

3.12 Table 3.2 shows the extent of completeness of the 2007 Internet listing for each of the audited agencies. Only one of the six agencies was found to have published a complete Internet listing. The level of completeness for the remaining audited agencies ranged from 79 to 99 per cent.

Table 3.2**Completeness and accuracy of audited agencies' 2007 Internet listings**

Agency	Number of contracts listed	Number of contracts incorrectly included	Number of contracts incorrectly omitted	Percentage completeness of Internet listing ^a
NAA	42	0	4	90
ARC	750	0	0	100
ASIC	90	3	18	79
DIAC	947	6	48	95
Centrelink	1139	4	4	99
Federal Court	40	0	2	95

Notes: (a) The percentage of completeness refers to the proportion of the 'number of contracts listed' (excluding the 'number of contracts incorrectly included') remaining after deducting the proportion of the 'number of contracts incorrectly omitted'.

Source: ANAO analysis of 2007 Internet listings of selected agencies.

3.13 This result represents a considerable improvement on the results of the previous audit of the Senate Order, which reported that the level of completeness of the listings of the audited agencies ranged from 64 to 96 per cent. Those agencies with a higher level of completeness were found to have a better understanding of the reporting requirements of the Senate Order.

3.14 ASIC achieved a relatively low proportion of 79 per cent completeness as compared to the five other agencies that were 90 per cent or more complete. This was primarily due to the fact that it did not report any contracts entered into before 1 January 2007 that were not fully performed by 31 December 2007.²⁸ The ANAO understands that determining the reporting obligations under the Senate Order, when transitioning to the FMA Act during the reporting period, has presented some challenges to agencies.

3.15 There was no evidence to indicate that those contracts omitted from agencies' Internet listings were more (or less) likely to include confidential provisions. Rather, they were generally omitted because agencies did not identify the appropriate reporting dates, or due to oversights during the processes used to compile the Internet listings.

²⁸ ASIC was only prescribed as an FMA Act agency from 1 July 2007.

Cost of complying with the Senate Order across all agencies

3.16 The Senate Order requires agencies to report the cost of complying with the Senate Order and the methodology for determining the cost of compliance. The ANAO's desktop review indicated that 72 of the 85 agencies (85 per cent) which published 2007 Internet listings, including five of the six audited agencies, reported the cost of complying with the Order. 64 of these 72 agencies also published details of the methodology used to determine the cost of compliance.

3.17 Nearly all of these 64 agencies reported that they had estimated the cost of compliance with the Senate Order on the basis of the time spent by, and the hourly-rates of, the staff involved in the preparation and publication of the listings. However, two agencies reported the actual costs incurred since 2001 in establishing and maintaining the requisite contract information. To estimate the compliance costs for 2007 for each of these agencies, the ANAO apportioned the reported cumulative costs over the period involved.

3.18 The estimated cost of complying with the Senate Order, as derived from the 72 agencies' 2007 Internet listings, was approximately \$996 000 (2006: \$900 000). This represented an average cost of compliance per agency of approximately \$14 000 (2006: \$14 000), and an average cost per contract of \$55 (2006: \$60).

4. Processes for Compiling Internet Listings

The chapter reports the results of the ANAO's assessment of the adequacy of agencies' processes for preparing Internet listings.

Background

4.1 The ANAO examined whether audited agencies' processes were likely to lead to complete and accurate lists of contracts, including the accurate identification and reporting of confidentiality in contracts. In this regard, the ANAO expected that each agency would have:

- developed policies, guidance and training on the requirements of the Senate Order to assist staff in the preparation of the Internet listings, and also determine whether information included in the contracts should be treated as confidential;
- developed tendering and contracting processes that informed potential contractors about the Government's reporting and disclosure requirements;
- implemented a system to capture the information required to be reported by the Senate Order;
- allocated responsibility for preparing and posting the Senate Order listing on the agency's Internet site; and
- implemented controls to ensure that the list was accurate and complete.

Informing staff about the requirements of the Senate Order

4.2 The ANAO considers that having guidance material available and providing regular and targeted training are important ways to assist in improving the level of understanding of the Senate Order. Increasing the level of understanding in turn facilitates the production of more accurate and complete Internet listings.

Policy and guidance material

4.3 The Chief Executive's Instructions (CEIs) at DIAC, Federal Court and the NAA included information on the reporting requirements of the Senate

Order. The CEIs at Centrelink, ASIC and ARC on the other hand, did not explicitly refer to the reporting requirements of the Senate Order, although ASIC's CEIs referred to Finance's guidance.

4.4 The CEIs were supplemented, at each of the audited agencies, with more detailed procurement-related policy and guidance material, which included information on the requirements of the Senate Order, and the use of confidentiality provisions in contracts. Each of the audited agencies included references to the relevant guidance published by Finance in procurement policy and procedural documents.

4.5 In an example of better practice, Centrelink produced a monthly internal newsletter titled *Procurement Times*, which was distributed to staff with procurement-related roles. This publication provided advice on current procurement policy, regulations and activities, as well as information on the use of confidentiality provisions in contracts and the associated reporting requirements.

Training

4.6 Each of the audited agencies provided on-the-job training to their staff responsible for the Internet listings. To supplement on-the-job training, Centrelink and DIAC had developed comprehensive instructions to assist staff in the production of the Senate Order listing. The use of these detailed instructions was helpful to these two agencies given their devolved procurement structures and their large numbers of contracts.

4.7 Each of the audited agencies advised that relevant staff attended the various procurement forums and seminars presented by Finance. In addition, two of the audited agencies (Centrelink and ASIC) provided training programs on procurement and contracting for all relevant staff during 2007. These programs included guidance on confidentiality in procurement and procurement reporting requirements.

4.8 In an example of better practice, DIAC provided information to staff in the Department's business areas on the process and format for preparing the 2007 contract listing, including advice on what should be reported and the process for confirming the information to be reported.

4.9 However, the many errors in the use and reporting of confidentiality provisions suggest that there is a need to strengthen these processes. While the principle of not treating commercial contracting information as confidential, unless there is good reason to do so, is generally well established in agencies'

procedural and guidance material, it is not yet sufficiently entrenched into agencies' practices.

4.10 In this regard, the results of the audit suggest that agencies can make more effective use of the guidance available from Finance, as well as the findings and recommendations in the ANAO's previous audit reports on the Senate Order. Many of these recommendations were designed to improve agencies' understanding of the requirements of the Senate Order.²⁹

4.11 More specifically, depending on the size and nature of each agencies' procurement activity, the ANAO believes that the design of relevant policy and procedural documentation and associated training programs should: outline the reasons for maintaining the confidentiality of information; explain how to manage confidential information during the procurement process; contain examples of the categories of information that typically meet (and do not meet) the confidentiality test; and emphasise the importance of appropriately documenting decisions about confidentiality.

4.12 As shown by the relatively low proportion of contracts which correctly included confidentiality provisions (see Figure 2.3), the use of confidentiality provisions is only warranted in the special circumstances which are set out in Finance's guidance (see Figure 2.2). The re-enforcement of this point in agencies' guidance and training is likely to assist decision-making on the inclusion of confidentiality provisions.

Tender and contract documentation

4.13 Agencies should inform prospective contractors about when they will consider requests for the use of confidentiality provisions in contracts, and the circumstances where they will provide information to others, for example, the Parliament and its committees, other government agencies and the Auditor-General.

4.14 Each of the audited agencies were found to have appropriately worded tendering and contracting documents to inform potential contractors about the Government's procurement policies, including its reporting and disclosure requirements. All of the templates included or contained a reference to the confidentiality criteria contained in the relevant Finance guidance.

²⁹ See Appendix 2 for a list of previous ANAO audit reports on compliance with the Senate Order, and the recommendations for improvement made in those reports.

Processes for compiling the Internet listing

Systems used for capturing contracting information

4.15 Typically, there are three main systems that agencies use to source contract details and information for the purpose of contract reporting. These systems are: the agencies' contract registers and Financial Management Information Systems (FMIS); and AusTender.

4.16 Contract registers were the primary source of data for the Senate Order listing in each of the audited agencies. In all of the agencies, overall responsibility for the management of the contract register and compilation of the Senate Order listing was allocated to a centralised procurement area. Centrelink's contract register allowed staff with procurement-related roles to enter contract details, access various contract templates, customise the templates to their needs and save these documents in the system.

4.17 Purchase orders and contract payment transactions were processed through each of the agencies' FMIS, which provided a source of information on the value of contracts throughout their life. Linking an agency's contract register and FMIS can help eliminate duplication in recording contract details and also improve an agency's ability to capture all relevant contract details for Senate Order reporting.

4.18 However, linking these systems may not be cost effective or appropriate in all cases. Decisions on the use of such links should depend, and be made in light of, the size or nature of each agency's procurement activity. At the time of the audit, none of the six audited agencies had linked these two systems.

4.19 An alternative approach is to require a unique identifier, such as a contract number, to be recorded and reflected consistently across the systems. At the ARC, NAA, ASIC and Centrelink, the relevant contract number is captured at the time of processing purchase orders and payment transactions in the FMIS. The Federal Court and DIAC were implementing unique contract identifiers at the time of the audit. Only Centrelink was found to have implemented the use of a common contract number across the three systems. The audit found that through the use of a unique identifier more accurate and complete information could be identified for the Senate Order listing.

4.20 As discussed in paragraph 1.17, AusTender, which is administered by Finance, has been available for reporting contract information since September 2007. Agencies can customise their FMIS and/or contract registers to automate

the process of reporting multiple contract records into AusTender. At the time of the audit, only Centrelink and NAA had the functionality to report multiple contract records to AusTender.

Processes for helping ensure the completeness and accuracy of Internet listings

4.21 A range of additional processes aimed at ensuring the completeness of their Internet listings were implemented by the six audited agencies. For example at DIAC, ASIC and ARC the Internet listing was provided to the relevant business areas to verify the accuracy and completeness of the contracts listed, together with a request for the details of any amendments or deletions.

4.22 Centrelink and the Federal Court manually reconciled data on the three systems containing contract information, and the ARC and NAA manually reconciled their FMIS and contract registers. At the time of the audit, DIAC advised that it had commenced a reconciliation to confirm the accuracy and completeness of their contract information.

4.23 The need for improved quality control is a recurring theme in the ANAO's audits on the Senate Order. A number of the recommendations from these earlier audits were designed to help agencies improve the accuracy and completeness of their Internet listings.³⁰ As discussed in paragraph 3.13, the level completeness of the audited agencies 2007 Internet listings indicates that there was a better understanding of the reporting obligations, and that the processes and systems used to compile the Internet listings have improved.



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Auditor-General

Canberra ACT
25 September 2008

³⁰ For example: Recommendation No. 1, Audit Report No.7 2007–08; Recommendation No. 1, Audit Report No.5 2006–07; Recommendation No. 1, Audit Report No.11 2005–06; and Recommendation No. 1, Audit Report No.8 2002–03.

Appendices

Appendix 1: The Senate Order for Departmental and Agency Contracts

(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 2 calendar months after the last day of the financial and calendar year, a letter of advice that a list of contracts in accordance with paragraph (2) has been placed on the Internet, with access to the list through the department's or agency's home page.

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

(a) each contract entered into by the agency which has not been fully performed or which has been entered into during the previous 12 months, and which provides for a consideration to the value of \$100 000 or more;

(b) the contractor, the amount of the consideration, the subject matter of each such contract, the commencement date of the contract, the duration of the contract, the relevant reporting period and the twelve-month period relating to the contract listings;

(c) whether each such contract contains provisions requiring the parties to maintain confidentiality of any of its provisions, or whether there are any 'other requirements of confidentiality', and a statement of the reasons for the confidentiality; and

(d) an estimate of the cost of complying with this order and a statement of the method used to make the estimate.

(3) If a list under paragraph (1) does not fully comply with the requirements of paragraph (2), the letter under paragraph (1) indicate the extent of, and reasons for, non-compliance, and when full compliance is expected to be achieved. Examples of non-compliance may include:

(a) the list is not up to date;

(b) not all relevant agencies are included; and

(c) contracts all of which are confidential are not included.

(4) Where no contracts have been entered into by a department or agency, the letter under paragraph (1) is to advise accordingly.

- (5) 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, by not later than 30 September each year, 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.
- (6) In respect of letters including matter under paragraph (3), the Auditor-General be requested to indicate in a report under paragraph (5) that the Auditor-General has examined a number of contracts, selected by the Auditor-General, which have not been included in a list, and to indicate whether the contracts should be listed.
- (7) The Finance and Public Administration References Committee consider and report on the first and second years of operation of this order.
- (8) This order has effect on and after 1 July 2001.
- (9) In this order: "**agency**" means an agency within the meaning of the *Financial Management and Accountability Act 1997*; and "**previous 12 months**" means the period of 12 months ending on either 31 December or 30 June, as the case may be.

Appendix 2: Previous ANAO Audit Reports on the Senate Order

Audit Report	Recommendations contained in the report
Audit Report No. 07 2007–08 (Calendar Year 2006 Compliance)	<p>Recommendation No. 1 - the ANAO recommends that agencies improve the accuracy and completeness of their Internet listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that Internet listings are complete and accurate. This could include, for example, reconciling the Internet listing details to AusTender and other relevant sources of information such as Financial Management Information System records; and • developing quality assurance processes to improve the accuracy of the Internet listing.
Audit Report No. 05 2006–07 (Calendar Year 2005 Compliance)	<p>Recommendation No. 1 - the ANAO recommends that agencies improve the accuracy and completeness of their contract listings by:</p> <ul style="list-style-type: none"> • implementing controls to assist in confirming that contract listings are complete and accurate. This could include, for example, reconciling the contract listing details to other relevant sources of information, such as FMIS records or to AusTender; and • developing quality assurance processes to improve the accuracy of the contract listing. <p>Recommendation No. 2 –the ANAO recommends that agencies provide guidance to those staff responsible for negotiating contracts and completing the Senate Order contract listing, to improve the level of understanding of the Senate Order, particularly relating to the use of confidentiality provisions.</p>
Audit Report No. 11 2005–06 (Calendar Year 2004 Compliance)	<p>Recommendation No. 1 - The ANAO recommends that agencies, that have not already done so, implement additional controls designed to ensure the completeness and accuracy of their Internet listings. These controls could include reconciling the Senate Order listing to AusTender information and/ or contract details include in their FMIS.</p> <p>Recommendation No. 2 - The ANAO recommends that agencies provide further guidance, together with training and/ or awareness raising sessions on the requirements of the Senate Order to all staff responsible for negotiating contracts.</p> <p>Recommendation No. 3 - The ANAO recommends that agencies ensure adequate documentation of the reasons for agreeing to identify specified information in contracts as being confidential.</p>
Audit Report No. 10 2004–05 (Calendar Year 2003 Compliance)	The Report did not contain any recommendations

Audit Report	Recommendations contained in the report
Audit Report No. 31 2003–04 (Financial Year 2002–03 Compliance)	The Report did not contain any recommendations
Audit Report No. 5 2003–04 (Autumn 2003 Compliance)	The Report did not contain any recommendations
Audit Report No. 32 2002–03 (Spring 2002 Compliance)	The Report did not contain any recommendations
Audit Report No. 8 2002–03 (September 2002)	<p>Recommendation No. 1 - To assist with the compilation of the Internet listing, the ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • give priority consideration to establishing contracts registers where the number of contracts makes it a practicable solution; and • implement quality assurance processes, as necessary, to ensure the completeness and accuracy of the contract information listed on the Internet. <p>Recommendation No. 2 - the ANAO recommends that all FMA agencies, as appropriate:</p> <ul style="list-style-type: none"> • review the standard forms of request for tender and contract to ensure contractors are made fully aware of the Commonwealth's governance and accountability requirements; • implement procedures which require a case-by-case consideration of requests for information in, or associated with, contracts to be treated as confidential; • provide guidance and training for procurement officers to assist them determine the appropriateness of claims of confidentiality made by potential contractors; and • establish a training and staff awareness program covering the new governance and accountability framework for contracting for all relevant staff.
Audit Report No. 33 2001–02 (Audit of the Senate Order of 20 June 2001)	The Report did not contain any recommendations

Appendix 3: Confidentiality Test

Criteria to be used to determine whether information should be protected as confidential

Criterion 1: The information to be protected must be specifically identified.
Agencies are to consider what specific information, if any, is legitimately protected from disclosure. A request for inclusion of a provision in a contract that states that all information is confidential does not pass this test. Individual items of information, for example pricing, must be separately considered.
Criterion 2: The information must be commercially sensitive – this means that the information should not generally be known or ascertainable.
The specific information must be commercially 'sensitive' and it must not already be in the public domain. A request by a potential supplier to maintain the confidentiality of commercial information would need to show that there is an objective basis for the request and demonstrate that the information is sensitive.
Criterion 3: Disclosure would cause unreasonable detriment to the owner of the information or another party.
A potential supplier seeking to maintain confidentiality would normally need to identify a real risk of damage to commercial interests flowing from disclosure, which would cause unreasonable detriment. For example, disclosure of Internet price lists would not harm the owner, but disclosure of pricing information that reveals a potential supplier's profit margins may be detrimental.
Criterion 4: The information was provided under an understanding that it would remain confidential.
This criterion requires consideration of the circumstances in which the information was provided and a determination of whether there was a mutual, express or implied understanding that confidentiality would be maintained. The terms included in request documentation and in draft contracts will impact on this. For example, a request for tender and draft contract which included specific confidential provisions would support an assertion by a potential supplier that the agency has agreed to accept information on the understanding that it would remain confidential.

Source: Department of Finance and Deregulation, *Guidance on Confidentiality in Procurement (FMG 3)*, July 2007, p. 10.

Appendix 4: Comments from the Audited Agencies

This Appendix contains general comments received on the audit report that are not shown in the body of the report.

Each of the agencies selected for the audit, together with the Department of Finance and Deregulation, were asked to comment on the proposed audit report in accordance with the provisions of section 19 of the *Auditor-General Act 1997*. In addition, the Australian Senate was asked to comment on an extract of the proposed report dealing with the tabling of the Ministers' letters of advice

Responses to the report's recommendation have been included in Chapter 2 of the report under the subheading 'Agencies' responses' directly following the recommendation. Other general comments provided by the agencies responses are reproduced below.

Australian Research Council (ARC)

The ARC advised that:

The ARC acknowledges the findings of the ANAO audit of the Senate Order for Departmental and Agency Contracts (Calendar Year 2007) and supports the recommendation proposed in the report. The ARC found the audit process to be a valuable exercise and will be working to implement the opportunities for improvement identified in the management report provided.

Australian Securities and Investments Commission (ASIC)

ASIC advised that:

ASIC welcomed the confirmation by the ANAO, as outlined in the management report, that ASIC is consistently working towards increasing our accuracy in reporting and compliance with the requirements. ASIC is continuing to refine its processes and to design additional communication and training for our staff in the relevant areas.

Centrelink

Centrelink advised that:

It was pleased the report recognises the effort that Centrelink has made to improve compliance with the confidentiality requirements.

Centrelink notes the ANAO's finding that there is an overall decline in all agencies' listed contracts containing confidentiality provisions and advises that the trend in Centrelink's listed contracts reflects a similar decline.

Centrelink notes the ANAO's findings at Tables 1 and 2.2 on the correctness of use of confidentiality provisions in the listed contracts and agrees with the recommendation in the report.

Centrelink appreciates the consultative process that took place throughout the audit and will use the findings and recommendation in the report to improve its decision making about the use of confidentiality provisions in contracts.

Department of Finance and Deregulation (Finance)

Finance advised that:

Finance has reviewed the report in line with our responsibility for the financial management framework. Finance supports the report's recommendation.

It is pleasing to note the continuing decline in the proportion of contracts reported as containing confidentiality provisions. As transparency encourages the efficient, effective and ethical use of Commonwealth resources, confidentiality provisions should only be used when absolutely necessary. Therefore, agencies should review the appropriateness of decisions to include confidentiality provisions in contracts, as recommended in the report.

Finance notes the audit's comments with regards to the various guidance and will review the Finance guidance in line with the recent Government Response to the *Second Report on the Operation of the Senate Order for the Production on Lists of Departmental and Agency Contracts 2003–2006*.

It is pleasing to see that the efforts of Finance and the ANAO to promote the use of clauses which provide for the disclosure of information to Parliament and clauses which provide the ANAO access to confidential information have resulted in a substantial increase in the use of these clauses.

Department of Immigration and Citizenship (DIAC)

DIAC advised that:

DIAC acknowledges the findings of the ANAO audit of the *Senate Order for Departmental and Agency Contracts (Calendar Year 2007 Compliance)* and undertakes to work towards implementing the recommendation proposed in the audit. To this end, a newly formed Procurement and Tendering branch within DIAC is due to commence operations in mid-October 2008. It is intended that this new branch will provide a central focus for all procurement related matters within DIAC and as such, will have carriage of measures to review and implement the suggestions made in the recommendation. Further, DIAC has recently revised the design and content of its internal Contract Information Form to more clearly set out the requirements in regard to confidentiality and to better assist in the assessment of whether or not provisions have been kept confidential and if so, whether these provisions would comply with the requirements of the Financial Management Guidance on *Confidentiality in Procurement* (FMG 3). DIAC will also review the training requirements of all officers involved in procurement to ensure the appropriate level of knowledge in relation to government policy on confidentiality. In addition, DIAC has undertaken an extensive cross-checking project to ensure the completeness and accuracy of reportable information and has recently implemented a system which creates a common contract identifier between financial and contract reporting. Together these measures will generate greater efficiency and accuracy in future Internet listings.

Federal Court of Australia

The Federal Court advised that:

The Federal Court concurs with the ANAO consideration at clause 2.36 that the inconsistencies in reporting criteria published in Department of Finance and Deregulation guidance documents have contributed to instances where agencies had misreported the use of confidentiality provisions in contracts.

It is pertinent to acknowledge that it is the responsibility of the Portfolio Minister (the Attorney-General), and not the Federal Court, to table the Ministerial letter by the due date (see clause 3.4).

National Archives of Australia

NAA advised that:

The NAA found the audit process beneficial and will be further examining opportunities for improvements in its reporting requirements for the Senate Order and its procurement and contract business function.

Australian Senate (Senate)

The Senate advised that:

In the past, it has been the practice to table [the Ministers' letters] in the Senate on the next available sitting day if they were provided to the Table Office when the Senate was not sitting. This practice has now been changed and these documents will be tabled out of sittings if the Table Office is requested to do so by the responsible agency.

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