LEGISLATIVE ASSEMBLY

Public Accounts Committee

GOVERNMENT (OPEN MARKET COMPETITION) BILL 2003

and visits of Inspection

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Membership & Staff

Chairman	Matt Brown MP, Member for Kiama
Vice-Chairman	Paul McLeay MP, Member for Heathcote
Members	Steve Whan MP, Member for Monaro
	Gladys Berejiklian MP, Member for Willoughby
	John Turner MP, Member for Myall Lakes
	Richard Torbay MP, Member for Northern Tablelands
Staff	David Monk, Committee Manager (to March 2004)
	Vicki Buchbach, Committee Manager (from March 2004), previously Project Officer
	Jackie Ohlin, Project Officer (from July 2004)
	Christine Lloyd, Committee Officer (to April 2004)
	Mohini Mehta, Assistant Committee Officer
Contact Details	Public Accounts Committee Legislative Assembly Parliament House Macquarie Street Sydney NSW 2000
Telephone	02 9230 2631
Facsimile	02 9230 2831
E-mail	pac@parliament.nsw.gov.au
URL	www.parliament.nsw.gov.au

Charter of the Committee

The Public Accounts Committee has responsibilities under Part 4 of the *Public Finance and Audit Act 1983* to inquire into and report on activities of Government that are reported in the Total State Sector Accounts and the accounts of the State's authorities.

The Committee, which was first established in 1902, scrutinises the actions of the Executive Branch of Government on behalf of the Legislative Assembly.

The Committee recommends improvements to the efficiency and effectiveness of government activities. A key part of committee activity is following up aspects of the Auditor-General's reports to Parliament. The Committee may also receive referrals from Ministers to undertake inquiries. Evidence is gathered primarily through public hearings and submissions. As the Committee is an extension of the Legislative Assembly, its proceedings and reports are subject to Parliamentary privilege.

Terms of Reference

The Terms of Reference for the Inquiry are as follows:

1) The Public Accounts Committee is to consider and report on the Government (Open Market Competition) Bill 2003.

In particular, the Committee is to report on:

2) Whether the Bill provides an appropriate balance between the public interest in government accountability and:
   a) government efficiency;
   b) business profitability;
   c) the interests of non-government organisations and other grant recipients; and
   d) any other relevant interests (eg the interests of indigenous persons in protecting culturally sensitive information).

3) Whether there are any alternative legislative and/or administrative frameworks, which may provide more appropriate, manageable or cost effective systems for meeting the policy objectives of the Bill. In reporting on this issue, regard may be had to:
   a) The operation of, and relationship between, the *Freedom of Information Act* 1989 and Premier's Memorandum No 2000-11 including:
      i) Whether the guidelines established by the Memorandum adequately determine the items of contract information that should remain confidential.
      ii) The extent to which the exclusions in Schedule 3 of the Memorandum, including commercial in confidence, are used for standard procurement.
   b) Current practices in NSW in making grants and how they compare with better practice, in particular:
      i) planning and alignment of grants;
      ii) selection of grants;
      iii) monitoring; and
      iv) evaluation.
   c) Consideration of administrative alternatives, such as improving current practices, requiring private sector audit certification, or allowing the Auditor-General access as a condition of the grant.
   d) Arrangements for Commonwealth funds that are distributed by the State Government.

4) The impact of the Bill on persons and bodies likely to be affected by it, including the Government, State Owned Corporations, Local Councils, the Ombudsman, the Auditor-General, the private sector (particularly businesses) and grant recipients.

Chairman's Foreword

I am pleased to present the Committee's report of its Inquiry into the Government (Open Market Competition) Bill. This is a Private Member's Bill by the Member for Bligh, which was referred to the Committee for consideration and report by the Legislative Assembly. In broad terms, the Bill proposes two undertakings, the first concerning the publication of and access to Government contracts and the second, the auditing of Government grant recipients.

In presenting this Report, I note the Committee's support for the principles of public disclosure.

I also note the view expressed by the Ombudsman, in his submission, that the intent of the Bill appears to be directed to contracts involving a commitment of significant public monies, such as the cross-city tunnel. For that reason, imposing a minimum threshold for disclosure would be appropriate, even though no such threshold is set out in the Bill.

As it stands, the Bill proposes wider application, with disclosure rules for even the smallest of Government contracts, for example, school lawn-mowing, at $50 per week. Indeed, most submissions indicated that the Bill would need a threshold to proceed, otherwise even the smallest of contracts, already part of adequate accounting practices, would be subjected to the same compliance regimes as contracts over $100,000.

But, if a threshold is an appropriate trigger for the enactment of the Bill, a more salient question, perhaps, becomes the nature of agencies' current compliance with Premier's Memorandum 2000-11 requiring public disclosure of documents relating to contracts over $100,000 in value. In this regard, the Committee has indicated support for the conduct by the Auditor-General of a compliance review of Premier's Memorandum 2000-11, as part of the Audit Office 2004-05 program, to establish a baseline of agency compliance with the provisions of the Memorandum.

The Committee's ultimate view, explored in this Report, takes into account the potential impact upon agencies of the Bill on *all* Government contracts, and suggests that there is a need for a *balanced,* cost-effective approach, to public disclosure.

However, the Committee's concerns with the Bill are compounded by its linkage of public disclosure requirements in relation to contracts with the second requirement, for the auditing Government grants by the Auditor-General. In this latter part of the proposal, again the Bill proposes auditing requirements potentially applying to all recipients of State and Local Government grants – including non-government organisations and individuals.

These proposals have been variously described in submissions by agencies and the non-government sector alike as 'heavy-handed'. The Committee notes that most organisational grant recipients are incorporated associations, and as such, are subject to external financial audit. Where individuals are in receipt of Government grants, (for example, lottery winners, recipients of drought assistance or victim's compensation, etc), the Committee is concerned to ensure that their privacy is maintained.

Further, as the Report illustrates, the Committee is mindful and supportive of a collaborative process under way with the non-government sector, to strengthen audit processes and accountability for Government grants.

I would like to thank all those who made submissions to the Inquiry, and those who presented evidence during public hearings. These sources of information were invaluable to the Committee during its deliberations.

I would also like to thank the representatives of those organisations in other States, the United Kingdom and the United States of America who provided invaluable information in the course of conducting this Inquiry. I would also like to express my appreciation to the Secretariat for its assistance in the preparation of this report, in particular to David Monk, Committee Manager until March 2004 and Jackie Ohlin who completed the drafting.

Finally, I would like to thank my fellow Committee members for their thorough examination of the issues addressed within the Report.

Matt Brown
Chairman

Findings and Recommendations

The Bill identifies some important issues in relation to the publication of and access to government contracts. As indicated in the following Chapters, the Committee, along with a good many agencies, is supportive of the principles of public disclosure. The Committee was, however, mindful of the additional cost and administrative burden that may be incurred, for little, or no benefit to the public. It therefore supports the need for a balanced approach to disclosure.

The Committee supports the conduct by the Auditor-General of a compliance review of Premier's Memorandum 2000-11, in the Audit Office 2004-05 program, as a means of establishing a baseline of agency compliance with the provisions of the Memorandum.

The Committee was not generally supportive of the proposals in the Bill regarding the auditing of government grants by the Auditor-General. While acknowledging the need for appropriate scrutiny of government funding, the Committee was of the view that:

- there are current, adequate audit provisions;
- that these can, and are in the process of being strengthened; and
- that the primary onus should be upon agencies to effectively administer grants programs.

These views are expressed in the following recommendations:

RECOMMENDATION 1:

That the Committee advises the Legislative Assembly of its view that Premier's Memorandum 2000-11 should be reinforced as the standard for compliance by agencies in relation to disclosure of government contract information.

RECOMMENDATION 2: That the Audit Office conduct a compliance review of Premier's Memorandum 2000-11, in its 2004-05 program as a means of establishing a baseline of agency compliance with the provisions of the Memorandum.

RECOMMENDATION 3: That the Committee advises the Legislative Assembly of its view that there are sufficient current checks and balances in place through agencies issuing grants to satisfy auditing conditions and address any breaches of funding agreements.

RECOMMENDATION 4: That the outcomes of the Grants Administration Review be referred to New South Wales' government agencies for consideration as a model for grants administration.

Chapter One - Introduction

On 3 July 2003, the Legislative Assembly referred the Government (Open Market Competition) Bill 2003 to the Public Accounts Committee for consideration and report. On 15 July 2003, the Committee agreed to commence the Inquiry by calling for submissions. The Committee formally adopted the Terms of Reference for the Inquiry on 28 August 2003. This Chapter outlines the proposed functions of the Bill and how the Bill has been dealt with to date.

FUNCTIONS OF THE BILL

Overview

1.1 Broadly, the Bill has two main functions:

- Where a public authority signs a contract for the provision of a good and/or service to that authority, that contract and the associated tendering documents would be made freely available for public inspection, including being placed on the Internet; and
- For all other payments by a public authority, the Auditor-General would be able to audit the recipient of that payment.

1.2 In order to determine the Bill's precise operation, a number of definitions need to be covered:

- Under the first function, the Bill only applies to "government contracts," which are as defined in paragraph 1.1 above;
- "Government contracts" excludes contracts of employment for privacy reasons;
- Only "public authorities" can enter into "government contracts." The term "public authorities" has the same meaning as in the *Ombudsman Act 1974*. Under section 5 of that Act, the term applies to a wide range of departments, statutory bodies (including universities), and local Councils. Any body that manages funds within the jurisdiction of the Auditor-General is also included.

1.3 The Bill's definition of "grants" means that, broadly, it would cover all public sector payments. If a payment relates to a good or service for an agency, the contract must be published. For any other payment, the Auditor-General can audit the recipient. Hence, the key to the Bill's operation is whether a payment can be categorised as a contract for a good or service to the agency concerned.

Publication of Contracts

1.4 The Bill has two main sets of provisions in relation to contracts. Firstly, the public authority must, for at least two weeks after the completion of a contract, put the contract on display at its head office and post the contract on its Internet site, or if not available, on the Government's central site. If the contract was awarded by tender, the successful tender documents should also be made available. If the contract requires performance reports, then these reports should also to be made public.

1.5 To complement these provisions, the Government would be required to establish a central index of all such documents.

1.6 To ensure that the Government complies with the publication provisions of the Bill, the Ombudsman would have powers to conduct preliminary inquiries (section 13AA of the *Ombudsman Act* 1974), investigative powers (section 13) and powers to report to Parliament (section 26).

1.7 Certain documents are exempt under the Bill for commercial reasons, but for the exemption to apply, the Ombudsman must certify that any particular document falls within the exemption. Broadly, the exempt category comprises any document which, if disclosed, would significantly interfere or prejudice the competitive commercial or contractual arrangements of that or any other public authority.

1.8 The Bill would not be retrospective. That is, it would not apply to any government contract entered into before the Governor's assent (clause 4(7)).

1.9 The Bill would apply despite any other Act or law to the contrary. Hence, it would override the *Freedom of Information Act 1989* (clause 6).

Auditing of the Recipients of Government Grants

1.10 The Bill would give the Auditor-General the power to inspect, examine and audit the accounts of any recipient of a government grant, as provided by Division 2 of Part 3 of the *Public Finance and Audit Act 1983*. This Division provides the Auditor-General with access powers. It would also give the Auditor-General the power to audit the books and accounts of any accounting officer who is subject to the provisions of that Act. Under section 35(4) in the Division, the Auditor-General would be required to provide a report on the results of the audit to the Treasurer.

1.11 The Bill would also give the Auditor-General the power to investigate and report to the Treasurer on the activities of the body that are funded by the grant. Such a report must indicate whether the recipient has used the public funds "in an economic, efficient and effective manner," which is similar to a performance review or performance audit.

1.12 The Bill would exempt grants between public authorities for its purposes. Therefore, a grant between two departments would not be subject to the Bill.

1.13 One of the aims of these provisions is to cover outsourced service providers. The Auditor-General could conduct a performance audit of an agency, and how well it is managing an outsourced service provider, but could not conduct a performance audit of the outsourced service provider itself.

PROGRESS OF THE BILL THROUGH THE PARLIAMENT

1.14 A similar version of this Bill was considered by the previous (52nd) Parliament. On 4 May 2000, the Hon Dr Arthur Chesterfield-Evans MLC gave notice of motion for the introduction of the *Government (Open Market Competition) Bill* 2000 into the Legislative Council. The Bill was introduced and had its first and second readings on 9 May 2002.

1.15 The Legislative Council debated the 2002 Bill on 13 June, 28 August, and 5 September 2002. The Council also debated amendments to the Bill on 5 September, where upon it passed and was forwarded by the Clerk of the Parliament for presentation to the Legislative Assembly. Ms Clover Moore MP introduced the Bill

on 17 September 2002. The Bill lapsed before proceeding any further on prorogation of the Parliament on 31 January 2003.

1.16 The 2002 Bill was almost identical to the 2003 Bill, except for the definition of a public authority. The earlier definition listed types of entities, such as the Government, statutory bodies representing the Crown and so forth. In the Committee stage in 2002, the Hon Dr Arthur Chesterfield Evans MLC moved an amendment to change the definition to that used in the *Ombudsman Act* 1974, but was unsuccessful. That attempted amendment has been incorporated into the 2003 Bill.

1.17 Ms Clover Moore MP gave notice of motion for the Bill in the Legislative Assembly on 7 May 2003 and introduced it to the Assembly on 22 May 2003. On 3 July 2003, the Legislative Assembly referred the Bill to the Public Accounts Committee for consideration and report.

THE INQUIRY PROCESS

1.18 The Inquiry commenced with the placing of advertisements in the *Daily Telegraph* and the *Australian Financial Review* calling for submissions on 26 July 2003 and 1 August 2003 respectively. The Committee received 49 submissions in total, the majority of which came from Government agencies and Ministers. A list of submissions is provided in Appendix Two.

1.19 Following the receipt of submissions, the Committee held public hearings on the Bill in Sydney on 23 and 24 October and 5 November 2003. Twelve groups gave evidence, comprising the Audit Office, five agencies, two industry associations, one Council and three non-government organisations. A list of witnesses is attached in Appendix Three.

1.20 Copies of the submissions, transcripts and this report were placed on the Committee's website at www.parliament.nsw.gov.au.

Chapter Two - Current Arrangements

INTRODUCTION

2.1 In order to place the requirements of the Bill in context, this chapter describes current practices in New South Wales. It does not seek to discuss the merits of the current arrangements. These will be discussed in Chapter Four.

PUBLICATION AND ACCESS TO CONTRACTS

Contract Summaries – State Government

2.2 The main process for releasing contract information, in terms of volume, is contract summaries. This system was initially a response to the growth in private sector financing arrangements. In 1993, the Public Accounts Committee recommended a special disclosure regime for these contracts. The Government adopted the Committee's recommendations in September 1995 in relation to private financing arrangements and widened it by introducing Premier's Memorandum 2000-11 to cover all government procurement. The memorandum is reproduced in Appendix Four.

2.3 Generally, the memorandum requires agencies to post contract summaries either on their website or a notice board accessible to the public where the contract's value is in excess of $100,000. For contracts less than this sum, contract summaries are to be provided on request. On the basis of information available, the Committee was unable to determine the quantum of requests for contracts less than $100,000.

2.4 The memorandum applies to the following:

- all agencies including government trading enterprises but excluding the Department of State and Regional Development;
- state owned corporations, who may elect to adopt the memorandum; and
- all government procurement (eg construction, infrastructure, property, goods and services, and information technology).

2.5 The memorandum applies only to contracts. Unsuccessful tender documents are excluded.

2.6 The summaries are to be published within 90 days of the award of the contract. They should include:

- a description of the project or the goods and services to be provided and the contract's commencement date and period;
- the identity of the other party including details of the cross-ownership of relevant companies;
- the contract price and the basis for future changes in price;
- the evaluation criteria and the weightings used in tender assessment; and
- provisions for renegotiation.

2.7 The items that should not be disclosed are:

- the contractor's financing arrangements;
- the contractor's cost structure or profit margins;
- the contractor's intellectual property; and
- any other matter that would place the contractor at a substantial commercial disadvantage with its competitors, either at the time of the contract or later.

2.8 The memorandum includes a process for resolving disagreements between an agency and a contractor as to what information can be disclosed. The agency is to approach the Chairman of the State Contracts Control Board (part of the Department of Commerce) for advice. The Chairman is to consult with the Crown Solicitor and independent experts and provide a report back to the CEO of the agency. In evidence, the Board advised that this process has not been used to date.[1]

2.9 The memorandum has special provisions for contracts over $5 million involving private sector financing, land swaps, asset transfers and similar arrangements. These arrangements tend to be complicated and long-term and may involve hundreds of millions of dollars. The additional items of disclosure for these arrangements include:

- details of asset transfers;
- all operation and/or maintenance provisions in the contract;
- results of cost-benefit analyses of the successful tender;
- risk sharing in the construction and operational phases expressed in net present value and specifying the major assumptions; and
- significant guarantees or undertakings between the parties, including loans.

2.10 In evidence, the Committee examined compliance with the memorandum. The Roads and Traffic Authority (RTA), as a larger agency, demonstrated a systematic approach to implementing the memorandum:

> **Mr YOUNGMAN:** ... Basically when the Premier's memorandum was issued we developed and issued a corporate policy statement across the RTA which set out what information had to be provided and it basically took its lean (sic) from the Premier's direction...
>
> That is the document circulated across the authority and the templates that we developed in the back reflect what information has been required. That is available from our computer network and basically it is a matter of people filling information in and forwarding it to us, and we then collate it, put it all up as a submission and it goes up in chunks and is put on to the web site.
>
> (Document tabled)
>
> **Mr MATTHEWS:** What we try to do is mainstream the requirements, so it becomes part of our business process.
>
> **CHAIR:** Have you had to utilise extra resources in personnel?
>
> .....
>
> **Mr MATTHEWS:** We have to some extent. We have introduced an extra screen into our contractor management system database. That makes it easier for our staff when they award a tender to then add that tender disclosure information to the screen, which

[1] p 50 of transcript of 23 Oct 03

> Phillip's group can then access to provide through to the internet, but it has not been very onerous. The implementation was a bit of a ramp up, but since then I think it has become part of the way we do business.
>
> **Mr YOUNGMAN:** We have nominated a contact person in each of our directorates who will act as a liaison person, so they gather all the information and send it off to my people who then put it all together, make sure the terminology is the same and the look and the feel is the same, and then we put it all together in a submission and it goes up and gets signed off and then it comes down and gets placed on the web site. I have two staff members who are involved in the process of pulling it all together and chasing up the ones that are due, finding out where they are and all that sort of stuff, getting it all together and putting it into a submission.[2]

2.11 Across the New South Wales public sector, however, implementation appears to have been patchy. The Auditor-General stated:

> **Mr SENDT:** ... I think it loses some importance in the minds of agencies. Even though it is a Premier's direction or a Premier's Department circular, I think having it in legislation would give greater attention to it in agencies. I suspect - and I have not looked at this in detail - it is observed almost as much in the breach as in the performance, the provision of that information in accordance with the circular.[3]

2.12 The State Contracts Control Board affirmed this view:

> **CHAIR**: I suppose the first question is whether a bill is required. At the moment it is a memorandum from the Premier's Department and this is trying to move that memorandum's principles actually to the force of law. Do you think that is necessary or do you think it should stay as a memorandum?
>
> **Mr JORDAN:** I think I mentioned that there was recently a Director-General's memorandum from the Premier's Department. A memorandum went to all agencies reminding them of the importance of adhering to, and fully complying with, the requirements of that Premier's memorandum.
>
> **Mr McLEAY:** The fact that there had to be a reminder suggests that there was not full compliance.
>
> **Mr JORDAN:** One could draw that conclusion. I think a number of agencies have had some difficulties in coming to terms with the administrative burden and the technical requirements in terms of putting this material onto internet sites.[4]

2.13 The document referred to in this evidence is Premier's Department Circular No. 2002-47, *Disclosure of Information in Government Contracts with the Private Sector*. It is a straightforward reminder of agencies' obligations under the Premier's memorandum.

2.14 In addition to contract summaries on agency websites, the Government has created a specific website for publishing contract summaries for private financing arrangements developed under the Government's policy *Working with Government*. The website is www.nsw.gov.au/wwg. Contract summaries are posted for the following projects:

- New Schools Privately Financed Project
- Cross City Tunnel
- Westlink M7

[2] Transcript of evidence, 23 October 2003 p 21
[3] Transcript of evidence, 23 October 2003 p 2
[4] Transcript of evidence, 23 October 2003 p 47

- Eastern Creek Alternative Waste Technology Facility.

There is also a note indicating that contract summaries will be available once they have been tabled in Parliament.[5]

Contract Summaries – Councils

2.15 Council procurement is governed by section 55 of the *Local Government Act 1993* and clauses 16 and 20 of the *Local Government (Tendering) Regulation 1999*.

2.16 Section 55(1) provides a wide range of cases where a Council must invite tenders. These include:

- the provision of goods or services;
- a contract for the disposal of property of the Council; and
- a contract requiring payments to or by the Council over a period of two or more years.

2.17 Section 55(3) provides a significant number of exemptions to these provisions, including:

- contracts between Councils;
- a contract with the Crown;
- a contract for the sale or purchase of land;
- a contract at public auction;
- a contract for the purchase of goods or services off a period contract run by the State or Commonwealth Governments;
- a contract made in case of emergency; and
- a contract of less than $100,000.

2.18 If a Council entered into a contract through a tender, the disclosure provisions in the regulation apply. Under clause 16, tenders are to be opened in public. As soon as practicable after the opening, the Council must ensure that a tender list showing the tenderers in apparent order of tender price. This list must be displayed in a public place.

2.19 Under clause 20, once a contract has been awarded, the Council must display in a conspicuous place, accessible to the public, the name and price of the winning tender.

2.20 The Department of Local Government, which assists the Minister in administering the *Local Government Act* 1993, commented that it was "not in a position to comment on the overall levels of compliance" with these provisions.[6] It should be noted, however, that in general the tenders are listed in Councils' annual reports, and as such are readily accessible.

2.21 The Department also noted that some Councils have begun entering into private financing arrangements, although the extent of such arrangements is unknown. The then current section 740 Inquiry by Commissioner Daly into Liverpool City Council

[5] Website: www.nsw.gov.au/wwwg
[6] Submission 49 p 3

examined such arrangements in relation to that Council with potential wider implications for local governments. At that time, the Department had not issued any guidance for contracts, but noted that the State Government's policies are relevant to local government. The Department also stated that it was unclear how significant these contracts will become for Councils.[7]

2.22 The Commissioner's final report in June 2004 includes a volume *Lessons from the Liverpool Council Experience: Recommendations for Public Private Partnerships in Local Government.* The Department of Local Government has subsequently issued a Circular, putting Councils on notice regarding the Commissioner's recommendations concerning public-private partnership contracts and alerting them that legislation is forthcoming.

Annual Reports

2.23 The annual reporting legislation requires a form of contract summary to be published. Schedule 1 of the *Annual Reports (Departments) Regulation* 2000 and Schedule 1 of the *Annual Reports (Statutory Bodies) Regulation* 2000 both have the same requirements:

- for consultancies in excess of $30,000, the agency must give the name of the consultant, the project and the fee;
- for consultancies below $30,000, the agency must give the number of consultancies and the total figure; and
- for grants to community organisations, the agency must give the name of the recipient, the amount and the program and program area, as defined in the Budget paper.

2.24 For an example of the scale of information released under these provisions, the Committee will use the 2003 annual report of the Department of Education and Training. The Department provided the following information:

- individual details on four consultancies in excess of $30,000 with a total value of $548,672;
- notification that the Department used an additional five consultancies, less than $30,000 with a total value of $70,508;
- individual details on over 30 types of grants to non-government organisations (approximately 2,000) with a total value of almost $89 million.[8]

Freedom of Information

2.25 In addition to contract summaries, the public may also access the actual contracts by making an application under the *Freedom of Information Act* 1989 (FOI). Section 16 of the Act states that a person has a "legally enforceable right to be given access to an agency's documents" in accordance with the Act. An agency is widely defined in section six to include departments, statutory authorities and Councils. Section 17 requires a written application for access to agencies' documents.

[7] Submission 49 pp 1-2
[8] www.det.nsw.gov.au *Annual Report*, 2003

2.26 Although the Act provides a broad right of access to documents, it also includes a wide range of exemptions, featured in schedule 1 of the Act. One of the key exemptions from the perspective of access to contracts is clause 7, which covers documents affecting business affairs. Generally, the clause states the following are exempt documents:

- any document that contains trade secrets;
- any document that contains other commercially valuable information, disclosure of which could reasonably be expected to at least diminish the commercial value of the information; and
- any document relating to commercial affairs (excluding the above categories) where disclosure could reasonably be expected to have an unreasonable adverse effect on those affairs, or prejudice the future supply of such information to the Government.

2.27 Another key exemption in the Act is clause 13 of schedule 1, which exempts documents with confidential material. The first type of confidential material, described in clause 13(a) is that which, if disclosed, would found an action for breach of confidence. The Crown Solicitor has advised that this includes the following categories:

- contractual confidence;
- equitable duty of confidence; and
- fiduciary duty of confidence, such as that held by a trustee.[9]

2.28 Therefore, if information in a government contract is subject to a confidentiality clause, the document is exempt under the Act and access may be refused. If, during the drafting of a government contract, public officials request a confidentiality clause to cover the contract, and the other party agrees, then the public may be refused access under FOI.

2.29 The Crown Solicitor advised the Committee that, to be legally effective, such a clause would need to be appropriately drafted. For example, it would need to recognise that there may be circumstances where disclosure is required under law such as to the Auditor-General under section 36 of the *Public Finance and Audit Act* 1983.

2.30 The Committee considered the extent to which agencies in New South Wales made use of the contractual confidence exemption. In response to written questions, the RTA stated that it did not use blanket confidentiality clauses.[10] On the other hand, the Committee received evidence that there is routine use of such clauses. For example, the Auditor-General stated:

> **Mr SENDT:** Well, certainly just anecdotally I have had contracts prepared in my organisation by outside parties, third party legal advisers, and they seem to automatically put in a commercial in confidence exclusion simply because they think that is the way Government wants to operate and I have gone back and said, "I don't agree, I don't think that is necessary".[11]

[9] Crown Solicitor's advice, 24 February 2004
[10] Submission 48, p 2
[11] Transcript of evidence, 23 October 2003 at p 5

2.31 In response to a written question in relation to the use of confidentiality clauses, the Ombudsman stated:

> It would be fair to say that such clauses are the norm in the various government contracts that we have perused in our oversight role. The staff of this Office who deal with FOI complaints cannot recall any contract (that has been the subject of an FOI complaint) which did not contain a commercial-in-confidence or FOI clause.[12]

2.32 Further, the Committee notes that Premier's Department Circular No. 2000-47, *Engagement and Use of Consultants*, includes a standard contract with a confidentiality clause prepared by the Crown Solicitor.[13] However, the Committee concludes that these clauses are not used in the majority of contracts.

2.33 In relation to an equitable duty of confidence, the Crown Solicitor advised that the following is required:

- the information must be confidential, that is, not commonly known and possess some objective degree of secrecy;
- the information must be conveyed in circumstances importing an obligation of confidentiality;
- there is unauthorised use of the information by the recipient of the information to the detriment of the party communicating it; and
- in Australia, where the government holds the information, the government must prove that public interest demands non-disclosure.[14]

2.34 The second category of the confidential material exemption in the Act, described in clause 13(b), is similar to information held under an equitable duty of confidence. The requirements are broadly:

- the information is obtained in confidence;
- disclosure could reasonably be expected to prejudice the future supply of such information to the Government; and
- disclosure is contrary to the public interest.

2.35 The remaining two categories of exempt documents, relevant to the Bill, are documents affecting the economy of the State (clause 14) and documents affecting financial or property interests (clause 15). Both clauses feature the requirement that disclosure would be contrary to the public interest. Provided the public interest test is met, the clauses prohibit disclosure where any of the following categories would reasonably be met:

- to have a substantial adverse effect on the ability of the government to manage the economy;
- to expose any person to an unfair competitive advantage or disadvantage as a result of the government's management of the economy; or
- to have a substantial adverse effect on the financial or property interests of the State.

[12] Submission 38, p 2
[13] page 42 of Premier's Department Circular 2000-47
[14] Mason J, *Esso Australia Resources Ltd v Plowman* (1994) 183 CLR 10 at pp 31-2

2.36 There are two sets of characteristics relevant to these exemptions. The first is whether they include a public interest test. The business affairs and contractual confidentiality exemptions do not include this test, but the other exemptions do. The other characteristic is whether they include a "substantial" or "unreasonable" adverse effect. Most of the exemptions include this requirement, apart from the following:

- the trade secret exemption;
- the diminishing of commercial value exemption; and
- the confidential material exemptions;

2.37 Therefore, the business affairs and confidential material exemptions operate more widely than the other two exemptions.

2.38 If a document contains some exempt material, section 25(4) of the Act requires agencies, if practicable, to provide a copy to the applicant with this material deleted.

2.39 In August 2003, the Auditor General published a report examining FOI arrangements in three government agencies. The report found that FOI Coordinators and their staff were supportive of the legislation, but that improvements could be made. It made the following recommendations in relation to agencies:

- that agencies should assist applicants by clarifying the scope of FOI requests at the earliest opportunity, particularly for large and complex applications;
- that fees and charges are applied consistently;
- that agencies conduct thorough and complete searches for documents and document the types of searches undertaken to locate information;
- that adequate records management systems are in place to facilitate document searches;
- that the decision-making process be documented;
- that supporting reasons be provided for refusing access to information and that applicants be advised of their right to appeal;
- that all relevant documents to the applicant be identified;
- that CEOs be advised of the outcome of decisions in parallel with issuing the determination to applicants
- that decisions on access to information are made independent of undue influence
- that all staff are aware of the FOI Act and that staff involved in the FOI process have full authority to make decisions as required;
- that internal reviews are conducted in accordance with the provisions of the Act; and,
- that formal systems for reviewing the outcomes of internal and external reviews be introduced.

2.38 The Auditor-General's report proposed that the Government consider a review mechanism which routinely oversees FOI arrangements in NSW government agencies. It also proposed that any review of FOI legislation in NSW should consider the intended purpose of *Statements of Affairs* (detailing an agency's role and functions)

and *Summaries of Affairs* (listing policy documents produced; and, whether timelines could be extended when consulting the applicant or handling multi-faceted requests.[15]

Access to Council Documents

2.40 Under section 12(6) of the *Local Government Act 1993*, Councils must allow the inspection of their documents free of charge, unless a Council can demonstrate in relation to a particular document that inspection would be contrary to the public interest. Section 12(8) states that causing embarrassment to or loss of confidence in the Council is irrelevant to the public interest test.

2.41 In its submission, the Department of Local Government stated that it was unable to comment on the extent to which commercial in confidence reasons are cited in the operation of this provision. The Department has not issued guidance on commercial-in-confidence provisions in contracts, although it notes that guidance is issued by the Ombudsman.[16]

AUDITING GOVERNMENT EXPENDITURE

The Auditor-General

2.42 The Auditor-General's powers are laid out in the *Public Finance and Audit Act 1983*. Generally, the Auditor-General may conduct financial or performance audits of all NSW public sector agencies, excluding Councils.

2.43 A financial audit is largely limited to determining whether financial statements are materially correct. The Auditor-General would audit the agency's expenditures and assets in a financial audit, but only to the extent to check that the money was actually spent on the stated item, rather than whether the agency achieved value for money. Further, the audit only determines whether the financial statements are materially correct. Therefore, it is likely that only the larger payments would be carefully checked.

2.44 A performance audit is much more flexible and examines whether an organisation is operating:

- effectively, ie delivering results;
- efficiently, ie having a favourable ratio of work done compared with inputs (money, staff etc); and
- economically, ie purchasing inputs cheaply.

2.45 In the auditing standards, a performance auditor can also consider the entity's internal controls. Therefore, a performance audit also extends to considering whether an agency's performance indicators are accurate.

2.46 The sources of power for the Auditor-General include:

[15] Audit Office of New South Wales, *Performance Audit Report: Freedom of Information*, August 2003, pps 2,3, 26
[16] Submission 49 pp 1-2

- sections 38A and 38B, which give the Auditor-General the power to conduct performance audits of agencies where the Auditor-General already has other audit powers;
- section 41C, which gives the Auditor-General the power to audit statutory bodies listed in schedule 2;
- section 45F, which gives the Auditor-General the power to audit departments listed in schedule 3;
- section 49, which gives the Auditor-General to audit the total state sector accounts; and
- clause 20 of the *Public Finance and Audit Regulation 2000*, which requires the Auditor-General the power to audit additional prescribed statutory bodies and superannuation funds;

2.47 The Auditor-General has access powers to support these audits. Under section 36 of the Act, the Auditor-General can access the accounts or records of any person for the purposes of any audit under the Act. The Committee understands that this is interpreted to mean that the Auditor-General can access any records of the organisations subject to audit, but not contracting parties such as an outsourced service provider.

2.48 Therefore, the Auditor-General's powers are limited to conducting audits of agencies, but not of any recipient of government funds, such as a volunteer group contracted to perform a community service.

Grants Management: State Government

2.49 The submission of the Council of Social Service of New South Wales (NCOSS) noted that current Government estimates indicate that over $6 billion was allocated through grants or subsidies in 2002-03 to non-government organisations (NGOs), which represents 20% of total budget outlays.[17]

2.50 The NCOSS submission also provides an overview of the measures in place:[18]

- The vast majority of funds provided to not-for-profit NGOs is provided to incorporated entities, which are required to have their financial statements audited. The Committee understands that the auditing requirement is not defined under the *Associations Incorporation Act* 1984, but rather as a general requirement of grant applications;
- The vast majority of funding agreements for not-for-profit NGOs include the requirement for the auditing of the grant funds
- The majority of funding agreements including performance reporting targets which, in most cases must be met before further money is paid out or before the NGO can apply for a further grant under the same program;
- Many NGOs providing human services are required to adopt quality assurance processes as a condition for the grant. In some programs, the NGO is required to be independently accredited;

[17] Submission 11 p 3
[18] ibid.

- Many funding agreements include provision for the agency to engage an external auditor to investigate the grant recipient if there have been significant breaches of the funding agreement. In evidence, NCOSS noted that, it was likely that agencies had engaged private sector auditors for this task, rather than the Auditor-General.[19]

2.51 Although there appear to be considerable processes in relation to the financial management of grants, such as to protect against fraud, processes to maximise effectiveness and value for money may be less apparent. In the December 2002 performance audit, *Managing Grants*, the Auditor-General made the following findings in relation to a sample of three agencies:

- there were often no procedures for assessing applications;
- no assessment guidelines for advisory committees;
- often no clear rationale for assessments;
- poor documentation of the reasons for decisions;
- not enough evaluation by agencies of the results achieved from individual grants; and
- not enough formal reviews of grants programs to assess their benefits and determine whether they continue to be relevant.[20]

2.52 However, the majority of grants to NGOs are relatively small sums, provided for specific purposes. Most go to small organisations, based in local communities or communities of special interest, frequently offering one type of service.[21] As such, acquittal can be readily checked through current reporting arrangements to funding agencies.

2.53 The Committee notes that a Grants Administration Review providing a framework and principles for the administration of New South Wales' government grants to NGOs and individuals is being conducted by the Premier's Department. Processes are being progressively implemented in negotiation with the non-government sector.[22]

Grants Management: Council Guidance

2.54 The Department of Local Government has not issued guidance to Councils on the management of grants.[23] However, some Councils do have formal processes in place for the management of grants. It has been suggested that Councils could also adopt the better practice guides issued by Auditors-General.

2.55 In New South Wales, the Auditor-General does not have jurisdiction over Councils, and hence there is reduced opportunity for the external review of the effectiveness of Council grants. In evidence, Blacktown Council noted that its grants program was a relatively small component of its overall budget (see below). Were this practice the case for all Councils across New South Wales, the risk posed by fraud or mismanagement in relation to Council grants is likely to be low.

[19] Transcript of evidence, 24 October 2003, p 9
[20] *Managing Grants,* NSW Audit Office*, 2002,* p 2
[21] Research Paper 15, 1997-98, Commonwealth Parliamentary Library, p 6
[22] www.communitybuilders.nsw.gov.au
[23] Submission 49, p 2

Grants Management: Blacktown Council

2.56 Blacktown Council, New South Wales' largest Council by population, provided the Committee with some evidence how its grant programs operate. Its main program is a total of $50,000 annually for local community groups, with a probable maximum of $5,000 in total for any one group.[24] The main controls on this program are that grants must be approved by Council and an applicant must provide recent financial statements with an audited balance sheet for grant requests in excess of $500.

2.57 Blacktown Council also runs two smaller grants programs. One program is to support State or Australian representatives in sport, arts, culture, and education. The maximum payment is $500. The main control required is written proof that the applicant has been selected as a representative.

2.58 The other program is a subsidy of up to $1,000 per property, on a dollar for dollar basis, to help maintain culturally significant sites in the City. The main controls are:

- Owners must inform Council of the proposed work so that it may be assessed by Council staff;
- Copies of receipts must be provided to Council; and
- Council will inspect the work, take photographs and make a decision regarding satisfactory completion of the work.[25]

[24] Transcript of evidence, 24 October 2003 p 43.
[25] Blacktown Council, submission 16, attachment.

Chapter Three - Other Jurisdictions

INTRODUCTION

3.1 To assist in researching and understanding the issues in relation to the Bill, the Committee conducted two study tours. In the first of these, from 17 August to 21 August 2003, the Committee visited representatives of the Governments of Queensland, Victoria, the Commonwealth and the Australian Capital Territory. In the second study tour, from 17 September to 5 October 2003, a delegation of the Committee visited Government representatives in the United Kingdom and the United States of America.

3.2 Information on the practices in these jurisdictions is presented below. A discussion of arrangements in New Zealand in relation to the publication and access to contracts is also provided.

PUBLICATION AND ACCESS TO CONTRACTS

Freedom of Information

3.3 All the jurisdictions discussed below have FOI legislation and the general approach is the same across jurisdictions. Members of the public have a general right to access government documents, subject to the exemptions in the legislation. The key to the manner in which FOI works lies in the exemptions.

3.4 The discussion of FOI is limited to the use of exemptions relating to business affairs and confidential information because these are the two key areas of concern raised by the New South Wales' Ombudsman.[26]

3.5 To assist in comparing the contractual exemptions in the jurisdictions, a table is provided overleaf. The main points to note are:

- there is variation across jurisdictions on whether to apply a public interest test or a "substantial loss" or "unreasonable" component; and
- neither Victoria nor New Zealand have an exemption for business information, disclosure of which would prejudice the future supply of such information; and
- there is considerable variation across jurisdictions on how to handle material received in confidence.

The Commonwealth

3.6 The relevant legislation is the *Freedom of Information Act* 1982, particularly section 43 on documents relating to business affairs and section 45 on documents containing material obtained in confidence.[27]

[26] Submission, 20 August 2003, p 2
[27] *Freedom of Information Act* 1982, Sections 43 and 45

Commercial Exemptions in Freedom of Information Legislation in Selected Jurisdictions

FOI Category	NSW	Commonwealth	Victoria	Queensland	ACT	New Zealand
Business Information						
Trade secrets	✓	✓	✓	✓	✓	✓
• Public interest test	×	×	✓	×	×	✓
Diminishing the value of commercial information	✓	✓	✓	✓	✓	✓
• Public interest test	×	×	✓	×	×	✓
• Loss must be substantial or unreasonable	×	×	✓	×	×	✓
Causing loss in relation to other business information	✓	✓	✓	✓	✓	✓
• Public interest test	×	×	✓	✓	×	✓
• Loss must be substantial or unreasonable	✓	✓	✓	×	✓	✓
Prejudice the future supply of business information	✓	✓	×	✓	✓	×
• Public interest test	×	×	NA	✓	×	NA
Information Received in Confidence						
Found an action for breach of confidence	✓	✓	×	✓	✓	×
• Public interest test	×	×	NA	×	×	NA
• Loss must be substantial or unreasonable	×	×	NA	×	×	NA
Prejudice the future supply of confidential information	✓	×	✓	✓	×	✓
• Public interest test	✓	NA	✓	✓	NA	✓

Notes:

- Sources provided in text.
- Victoria has an additional exemption for information received in confidence, excluding trade secrets. A document in this category will be exempt if the information would be exempt matter if it were generated by an agency or minister.
- New Zealand also exempts information received in confidence where disclosure would damage the public interest.
- ✓ = exempt; × = not exempt

3.7 The Commonwealth currently operates the Gazette Publishing System, GaPS. It is currently Government policy that all contracts and standing offers with a value of $2,000 or more be listed in the gazette. All contracts in excess of this sum are placed on the one website at www.contracts.gov.au. In these respects it exceeds Premier's Memorandum 2000-11. GaPS, however, does not include information on tender criteria and weightings.

3.8 During the 1990s, a number of parliamentary committees, especially Senate estimates committees, were prevented from obtaining information on government contracts due to claims of contractual confidentiality. In 2000, the Senate Finance and Public Administration Committee considered a draft Senate motion proposed by Senator Murray. It proposed that agencies place, on their websites, and index of contracts. The index would include the following information:

- the contractor and matters covered by each contract of $10,000 value or more for all current contracts and all contracts entered into within the past 12 months;
- whether the contract contains confidentiality provisions and a statement of the reasons for confidentiality; and
- whether either party considers provisions of the contract to be confidential and a statement of the reasons for confidentiality.

3.9 The motion proposed that the Auditor-General would table a report by the Australian National Audit Office (ANAO) within six months of the listing whether the confidentiality claims were appropriate.

3.10 In response to the proposal, the Commonwealth Auditor-General tabled the performance audit report, *The Use of Confidentiality Provisions in Commonwealth Contracts* in May 2001. The key findings of the report were:

- There was a lack of government-wide guidance for agencies on the use of confidentiality provisions.
- During the development of contracts, agencies did not rigorously address the issue of what information would be confidential.
- The confidentiality provisions in contracts did not usually specifically state what information was confidential.
- Officers working with contracts were uncertain about what information should be classified as confidential.

3.11 The Auditor-General recommended that government contracts include provisions for information to be disclosed to parliamentary committees, at least on a confidential basis. The report also recommended that the guidance be revised.

3.12 In October 2001, the Department of Finance and Administration published revised guidance on the use of confidentiality clauses in contracts and the need to inform contractors of public accountability requirements, including disclosure to parliamentary committees. The criteria are based on the discussion in the audit report. They are:

- the information to be protected must be identified in specific, rather than global terms;

- the information must have the necessary quality of confidentiality;
- disclosure would cause detriment to the contractor or other third party; and
- the information was provided under an understanding that it would remain confidential.

3.13 The Department lists the information it would regard as confidential:

- trade secrets;
- proprietary information, eg the provision of a particular business solution;
- information on internal costs or profit margins;
- pricing structures, to the extent they reveal profit margins; and,
- intellectual property that relates to a contractor's competitive position.

3.14 The Department also lists the information it would not regard as confidential:

- performance and financial guarantees;
- indemnities;
- the price of an item, or groups of items and goods and services;
- rebate, liquidated damages and service credit clauses;
- performance measures for the contract;
- the management of intellectual property rights; and
- payment arrangements.[28]

3.15 As originally envisaged under the Murray motion, the Auditor-General is monitoring compliance with these new principles. The latest report, tabled in February 2004, was *The Senate Order for Departmental and Agency Contracts (Financial Year 2002-2003 Compliance)*. The Auditor-General found that agencies were generally well advanced in establishing their websites.

3.16 The report then examined the practices of six agencies in detail. In relation to these agencies, the report found:

- The information on the websites of five of the agencies was likely to be complete;
- The understanding of how to implement the changes under the Senate order was not uniform across or within agencies;
- There was little evidence of confidentiality being considered at the contract stage. Rather, agencies were considering this matter when they were listing the contract on the Internet. The listing tended to reflect the views of staff, rather than what was in the contract; and,
- Confidentiality claims still exceed what should occur under the guidance. The audit examined 30 contracts that should have been listed as having confidentiality provisions. The ANAO only considered that five of these met the criteria for confidentiality.

[28] Department of Finance and Administration website: www.finance.gov.au (Best Practice Guidance, Confidentiality of Contractors' Commercial Information

3.17 In previous monitoring reports, the ANAO had found between 15% and 38% of confidentiality claims were appropriate. The ANAO explained this result by noting that many contracts had been signed before the Department of Finance and Administration had issued its guidance. In this report, however, the majority of the 30 contracts had been entered into after the Department had issued its guidance on contracts. The report considered that the agencies should have performed better than 17%.

3.18 The ANAO suggested that more effort should be put into internal promotion of guidance and accountability information within agencies to ensure compliance at all levels of their organisation.[29]

Victoria

3.19 The relevant access legislation in the *Freedom of Information Act* 1982. Section 34 relates to business information and section 35 covers documents containing material obtained in confidence.

3.20 The Victorian Public Accounts and Estimates Committee published its landmark report, *Commercial in Confidence Material and the Public Interest* in March 2000. The Committee commenced the inquiry in response to the concerns raised by the Auditor-General in accessing government information. The Committee acknowledged that while cases of refused access were rare, there had certainly been delays in providing information to the Auditor-General about commercially confidential material.[30]

3.21 The Committee also stated that confidentiality clauses were becoming routine and claims of commercial confidentiality were too broad. It argued that information on government contracts should be made publicly available, except where it was against the public interest. The report's recommendations in relation to contracts included:

- Contract summaries (similar to the provisions in Premier's Memorandum 2000-11) should be published;
- Where contractual information is covered by a confidentiality provision, the Government should provide an explanation to requestors as to the public benefit to be gained by keeping the information confidential;
- All government contracts should contain a standard clause that states that the contract is subject to legal disclosure requirements and *prima facie* public;
- Ministers must approve the insertion of confidentiality clauses in contracts and certify that the clauses are in the public interest; and,
- Parliamentary committees should be able to at least access commercially confidential information in closed hearings.

3.22 During the conduct of this inquiry, there was a general election in Victoria with a change of Government. After the tabling of the report, the new Government initiated its own independent inquiry, *Audit Review of Government Contracts, Contracting, Privatisation, Probity and Disclosure in Victoria 1992-1999*. The review largely

[29] *The Senate Order for Departmental and Agency Contracts (Autumn 2003)*, Australian National Audit Office, p 43

[30] *Commercial in Confidence Material and the Public Interest,* Public Accounts and Estimates Committee, March 2000, Victoria, p xx

supported the Committee's report, although it did propose that, as far as possible contracts should be disclosed to the public. It also suggested that this process should be effected through special purpose legislation.[31]

3.23 In October 2000, the Victorian Government released its policy on openness and probity in government contracts, which, in relation to contract disclosure, has been converted to a ministerial direction by the Minister of Finance, FRD 12. For contracts greater than $10 million, the "accountable officer" (usually the agency head) must:

- certify that those contracts have been publicly released, in part or in full;
- provide the date when confidential information will be disclosed; and
- where the contracts have been disclosed.

3.24 The direction also refers the guidance of the Victorian Government Purchasing Board, which publishes summaries of contracts over $100,000, as well as publishing the full text of contracts over $10 million (apart from deletions of exempt material as authorised by the *Freedom of Information Act* 1992).[32]

Queensland

Queensland does not have any contract publishing process beyond its *Freedom of Information Act 1992*, which appears to most closely resemble FOI arrangements in New South Wales. Section 45 covers business information and section 46 relates to matter communicated in confidence.

3.25 In 2001, the Queensland Government tabled *Auditor-General's Report No. 2, 2000-2001*. This report included commentary on industry assistance provided to secure the location of Virgin Airlines in Queensland. Commercial-in-confidence issues arose from the contract and the Auditor-General's recommendations included the following:

- Confidentiality clauses should be the exception, rather than the rule;
- Material should only be classified as commercial-in-confidence if there is a legal requirement or if it is in the public interest to do so; and,
- Commercial-in-confidence should not be applied to whole agreements when elements can be released.[33]

3.26 Following its review of this report, the Queensland Public Accounts Committee commenced its own inquiry into commercial-in-confidence and create a transparency regime for confidentiality clauses in contracts. The recommendations include:

- contracts with confidentiality clauses should be identified as such, along with a statement explaining why the clauses were used;
- agencies should identify alternative accountability mechanisms when information is classified commercial-in-confidence;
- time limits should be applied to the confidential nature of commercial information, which should also be publicly disclosed; and

[31] *Ausit Review of Government Contracts,* Russell, EW, E Waterman and N Seddon, May 2000, Victoria, p 169

[32] www.vgpb.vic.gov.au and www.contracts.vic.gov.au

[33] *Auditor-General's Report No. 2, 2000-2001*, Queensland, p 83

- confidentiality clauses should be tailor made for each contract and focus only on the relevant information, rather than make the whole contract confidential.[34]

3.27 The Queensland Government did not adopt the recommendations, particularly in the context of incentive payments to attract industry investment.[35]

Australian Capital Territory

3.28 The Australian Capital Territory's access arrangements are governed by the *Freedom of Information Act* 1989, which closely resembles the Commonwealth Act. Section 43 covers business affairs and section 45 covers material obtained in confidence.

3.29 The ACT has taken the contract publication process further than any other Australian jurisdiction in the sense that its system has been given legislative standing, initially through the *Public Access to Government Contracts Act* 2000. This Act was largely introduced in response to community concerns about the management of the Bruce Stadium development.

3.30 The Act had the following requirements:

- A public text of government contracts with a value in excess of $50,000 is to be prepared and made publicly available.
- The contractual material that can be made confidential is limited. If a confidentiality clause is to be used, the contract must use the model provisions in the Act.
- Territory owned corporations were exempt.
- Agencies must provide copies of all contracts with confidentiality clauses to the Auditor-General. Every six months, the Auditor-General is to report to a committee of the Legislative Assembly and provide a list of these contracts.

3.31 The Auditor-General reported on the Act in June 2002. The audit report found that the Act was not effective and was not being administered effectively. In particular:

- not all contracts with confidentiality clauses were submitted to the Auditor-General;
- of the 41 contracts received by the Auditor-General, only five complied with the provisions of the Act;
- agencies were not required to disclose contracts;
- the Act was provided no guidance on what type of information was to be regarded as confidential; and
- agency heads were not required to certify compliance with the Act.[36]

3.32 In response to a recommendation by the ACT Public Accounts Committee, a review of the *Public Access to Government Contracts Act* 2000 was conducted, with the result that the Act was repealed in July 2003 and replaced by the *Government Procurement Amendment Act* 2003.

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[34] *Commercial-in-confidence arrangements,* Report No 61, Queensland Public Account Committee, pps 1, 2
[35] Hansard, 3 December 2002, 5186 and "Honouring the Public Interest" (editorial), *The Courier Mail*, 5 December 2002
[36] *Operation of the Public Access to Government Contracts Act*, Auditor-General, Australian Capital Territory, June 2002, p 4

3.33 Additional requirements include:

- Agencies are now required to furnish the Auditor-General with either a list of contracts containing confidentiality clauses or a statement that the agency did not enter into a contract with such a clause;
- Agency heads are now required to ensure compliance with the Act;
- The grounds for making text confidential are listed in the Act. They comprise personal information, trade secrets, diminishing the commercial value of information and an unreasonable disclosure of business affairs. Text cannot be made confidential if it is not in the public interest or for longer than would be reasonably necessary to protect the interest.[37]

New Zealand

3.34 The business affairs and confidential information exemptions for freedom of information are covered by section 9 of the *Official Information Act 1982*.

3.35 New Zealand also has a contract listing system, which commenced on 30 November 2001. Agencies can list their contracts either on their own website, or on the Industrial Supplies Office website, with links between the two. The threshold is $50,000 and above. The details to be published are:

- the nature of the contract, including the quantities involved;
- the name and address of the contractor;
- a range of dollar values within which lies the total value of the contract. This can be determined through a number of means, including the highest and lowest offers in the tender, or providing a 10%-20% band;
- the term of the contract, where the contract is a term supply contract; and
- a departmental e-mail address (individuals do not need to be identified).

3.36 The exemptions under the policy include:

- information exempt under the *Official Information Act* 1982;
- contracts for litigation and other contentious or sensitive matters;
- employment contracts;
- individual purchases under a term supply contract;
- proprietary spare parts where necessary;
- subcontracts;
- public utilities services and fuel;
- real property leases; and
- contracts for the provision of public health, education and social welfare services

[37] *Government Procurement Amendment Act* 2003, Australian Capital Territory

United Kingdom

3.37 In 2000, the United Kingdom Parliament passed its *Freedom of Information Act*, which will become fully operative in 2005. The exemptions relevant to this inquiry are disclosures that:

- would prejudice the effective conduct of public affairs (this provision could include the proper flow of information), section 36(2)(c);
- would constitute a breach of confidence, section 41(1)(b);
- relate to a trade secret, section 43(1); or
- prejudice the commercial interests of any person section 43(2).

3.38 The Act does not apply a public interest test or significant loss test to these provisions.

3.39 The Committee is not aware of any contract listing system in the UK. The Office of Government Commerce, however, released new guidance in September 2002 in relation to privately financed projects. The key points are:

- As much contractual information as possible should be placed in the public domain;
- The presumption of openness should be made clear at the start of tenders;
- After short-listing, agencies should start negotiating what information is commercially sensitive and agree when commercially sensitive matters will lose their confidential status;
- Confidentiality provisions should recognise the right for the National Audit Office to access the contract;
- Greater openness will assist the greater public sector by allowing other agencies to obtain a sense of what is the current market practice and rates for these arrangements.[38]

3.40 In discussion, the National Audit Office stated that compliance with this guidance was still low, but they expected compliance to improve with time, especially with the implementation of the *Freedom of Information Act* 2000. The National Audit Office agreed that the financial model used to underpin privately financed projects was commercial-in-confidence at the time of the contract, but that the information's commercial value would probably expire after two years, or at least be greatly diminished.

United States of America

3.41 Staff from the Congressional Committee on Government Reform and General Services Administration outlined the tender process:

- Tenders are precisely specified. For example, a handgun contract might require a certain number of bullets in the clip. There is often a lot of negotiation and discussion over tender specifications as companies attempt to steer the specifications to suit their product;

[38] Study tour discussions, September 2003

- After awarding the contract, two weeks are set aside for post-tender debriefs with losing tenderers. After this period, companies have 10 days, if they wish to file a complaint with the Government Accounting Office (the equivalent of the Auditor-General's office at the federal level). The debrief tends to clear up most issues so complaints to the GAO are limited;
- The winning tender documents are publicly available, including an explanation of how they met the tender criteria;
- Losing tenders are not made public;
- Contracts awarded are listed on Government websites;
- The full texts of contracts are not displayed on the internet due to limits on server space. Hard copies are, however, available for inspection at agency offices. Before these copies are released, the company would usually request that the commercially sensitive parts of the contract be blacked out. These deletions were called "redactions"
- The pricing in long term contracts can be structured as "cost-plus," where contracts can be changed during their term. Any such changes would be publicly notified and probably be subject to scrutiny by the agency's Inspector-General (see below). Further, a ceiling applies to these changes. If the ceiling is breached, then a new tender would be required.

3.42 Federal agencies have a special type of internal auditors called the Inspectors-General, who are internal auditors with public responsibilities. Features of these positions are:

- They report to the secretary, but their employment cannot be terminated by them;
- Inspector-General reports are made public, although agency secretaries are not obliged to implement them;
- The Congressional Committee on Government Reform regularly follows up the reports, and a failure to implement the recommendations can be taken into account in the budget process.

3.43 The Massachusetts State Audit Office and the Office of the Inspector-General (similar in operation to the Independent Commission Against Corruption) provided information on the Public Records Law that operates in that State. Generally, all tenders and tender assessments are publicly available.

3.44 In the case of complicated tenders, agencies in Massachusetts try to hold pre-bid meetings with firms to establish the best design. The view was expressed that the technical aspects of most contracts are straightforward; innovations are rare. Massachusetts tends to have a low cost system of tenders.

3.45 These two agencies have been preparing a number of reports on a major transit project in Boston colloquially known as the "Big Dig." The original $4 billion budget for this project grew to $15 billion, largely through incremental increases and a fear that the money invested at each point would be lost if the project did not proceed. The discussions noted that the transparency provided by the Public Records Law did not prevent the cost increases for this project.

AUDITING GOVERNMENT EXPENDITURE

3.46 In all jurisdictions, there is a financial audit function, which means expenditures and/or systems of internal control receive some scrutiny from external auditors. As discussed previously, this examination is high level and restricted to ensuring payments are made to the correct parties, rather than any examination of effectiveness or efficiency. The discussion below concentrates on the auditors' powers to access contractors' records, generally in relation to performance audits.

The Commonwealth

3.47 In its follow-up inquiry into the Auditor-General's report into the new submarine project in 1998, the Joint Committee on Public Accounts and Audit recommended that the Minister for Finance give the Auditor-General the legislative power to access contractors' records in relation to Commonwealth contracts. The power could be through legislation or the Finance Minister's Orders.[39]

3.48 The Department of Finance has drawn up standard provisions that agencies can use in their contracts to provide the Auditor-General access to contractors' records in relation to Commonwealth contracts. The provisions are not mandatory, but the Department recommends that their inclusion be considered on a case-by-case basis. Agencies are also requested to consider the cost implications of the provisions on business.[40]

Victoria

3.49 The Victorian Auditor-General has been given access to a wide range of private records, including those of contractors, under section 16C of the *Audit Act* 1994. The Auditor-General can conduct an audit to determine whether a financial benefit given by the State or an agency thereof has been applied economically, efficiently and effectively for the purposes for which it was given.

3.50 A financial benefit is defined as any form of financial benefit, except for a financial benefit received as consideration for goods or services provided by them under an agreement on commercial terms. Hence, the arrangement is similar to that envisaged by the Bill.

3.51 Section 16C provides that other sections of the *Audit Act* 1994 also apply in relation to recipients of financial benefits, in particular sections 11 and 12. Section 11 gives the Auditor-General powers to access documents and take extracts from them. Section 12 gives the Auditor-General power to include such information in audit reports where the material is relevant to the audit and disclosure is in the public interest.

Queensland

3.52 Through discussions with the Queensland Auditor-General, the Committee understands that sections 85 to 87 of the *Financial Administration and Audit Act* 1977, which provide a general power of access to documents, would probably also apply to the records of recipients of government funds.

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[39] Joint Committee on Public Accounts and Audit, *Review of Audit Report No 34, New Submarine Project* p 43.
[40] Department of Finance, *Procurement Guidance, Standard Contract Clauses to Provide ANAO Access to Contractors' Information*, downloaded from www.finance.gov.au/ctc/standard_contract_clauses_to_p.html on 4 April 2004.

3.53 Although the Queensland Audit Office has these access powers, it should be noted that, due to its legislation, an audit conducted by the Queensland Audit Office would be considerably different to that proposed by the Bill. Firstly, its mandate only extends to auditing public sector agencies. Any audit would focus on a public sector agency, rather than a contractor or grant recipient. Audit conclusions would have to relate to the agency. The Bill, however, proposes that the Auditor-General would make conclusions about the grant recipient.

3.54 Secondly, the Queensland Auditor-General only has the power to determine whether an agency has systems in place to manage its performance. That office holder does not have the power to determine whether an agency has performed effectively or efficiently.

Australian Capital Territory

3.55 Through discussions with the Australian Capital Territory's Acting Auditor-General and staff, the Committee understands that the Audit Office is usually able to obtain access to contractors' records through the contract itself. They also noted they are having discussions with agencies with a view to having legislation introduced into the Territory's Legislative Assembly to give them statutory power to access these records.

United Kingdom

3.56 The Government recently introduced the *Government Resources and Accounts Act* 2000 *(Rights of Access of Comptroller and Auditor General) Order* 2003, which was a response to Lord Sharman's report on accountability. The Order's explanatory note effectively sums up its operation and intent:

> The Order gives the Comptroller and Auditor General access, for the purpose of his financial audit of the accounts of government departments and non-departmental public bodies, to documents held or controlled by train operating companies, registered social landlords, and the regulator of the Landfill Tax Credit Scheme.
>
> The Order also gives the Comptroller and Auditor-General access for that purpose to documents relating to grants of public money [other than such payments as social security and child support] to documents relating to contracts for the provision of goods or services to bodies audited by the Comptroller and Auditor General, and to documents relating to subcontracts in relation to such contracts.[41]

3.57 This wider audit power, therefore, is limited to financial audit, rather than performance audit.

3.58 In 1998, the Government of the United Kingdom entered into a compact with the voluntary and community sector (VCS), which clarified the parties' roles and responsibilities. The compact recognised the importance of the sector in community building and delivering public services, but also noted their accountabilities in operations and financial management.

3.59 Appendix Three of the Home Office's publication *Compact, getting it right together, Funding: a Code of Good Practice* outlines the standard terms and conditions for grants:

- the Home Office, the National Audit Office and their nominees may inspect the recipient's records relevant to the grant and make copies;

[41] Downloaded from www.hmso.gov.uk/si/si2003/20031325.htm on 6 November 2003

- the National Audit Office may examine the economy, efficiency and effectiveness with which the grant has been used;
- the grant will be separately identified in the recipient's audited accounts (or notes thereto) and annual report; and
- the grant recipient will maintain a record of its internal financial controls and provide a copy to the Active Community Unit in the Home Office.

3.60 Appendix Four of that document lists the financial audit and accounting requirements of the Charity Commission. If income or expenditure exceed £10,000, then an external audit of the entity's accounts will be required. If income exceeds £100,000 or expenditure exceeds £250,000, then the accounts must be prepared using accrual accounting.

United States

3.61 The provisions in the United States Code are a hybrid of a legislative and contractual system. The United State Code has a legislative requirement for agencies to include access provisions for the Comptroller General in their contracts. Section 2313 of Title 10 of the Code requires contracts to provide such access to the relevant records of the contractor or subcontractor where the contract was awarded by using procedures other than a sealed bid (ie a tender).

3.62 Section 254 of Title 41 of the Code regulates contracts that are not awarded through a sealed bid. For example, a cost plus a percentage of cost system shall not be used. If the price of the contract is determined by cost or cost plus a fixed fee, then the agency and any of its authorised representatives (which the Committee understands includes the Comptroller General) have the power to access the records of the contractor and subcontractor.

3.63 The financial audit of federal grants is generally managed by the single audit process. Recipients of federal funds found that the requirement to have an overall financial audit, and then individual audits for each grant, was expensive and inefficient. A single audit instead comprises the overall financial audit for the entity (eg state government, local government, or non-government organisation) and then, included within that overall audit, a minimum of 50% of the grants funds must also be specifically audited.

3.64 In the case of a state government, the single audit would often be undertaken by that state's Auditor-General. Private firms tend to conduct the audits of local governments.

3.65 If an entity that receives federal funds spends more than $300,000 of those funds in a financial year, then it is required to hold a single audit. If a non-federal entity spends less than $300,000 of federal funds in a financial year, then it is required to make its records available for review or audit by appropriate officials. Following discussions with the National Association of State Auditors, Comptrollers and Treasurers, the Committee understands this threshold is expected to increase to $500,000.[42]

3.66 Another feature of the single audit is that audit reports are made public. The entity is to draw up a corrective action plan for audit findings and reporting the status of its

[42] Study tour discussions, New York, September 2003

corrective actions for previous years' audit findings. A database of the audit reports is centrally maintained in the Federal Audit Clearinghouse, currently managed by the Bureau of the Census.

3.67 The single audit process is governed by the *Single Audit Act* 1984, and the 1996 amendments. To implement the legislation, the federal Office of Management and Budget issued Circular A-133 *Audits of States, Local Governments, and Non-Profit Organisations*.[43]

3.68 At the state level, the Office of the Massachusetts Auditor-General advised that it is a standard contractual requirement for contracts to allow them access to contractors' records, especially in relation to capital projects, because these involve the largest amounts of public funds.

CONCLUSION

3.69 This scan of jurisdictions indicates the wide variety of approaches being taken by governments in relation to both disclosure of government contracts and scrutiny of grants processes. Some moves towards increased provision for disclosure and scrutiny have been motivated by excessive secrecy in relation to contracts or scandal regarding their administration. In Victoria and the Australian Capital Territory, where there were concerns about the cloak of secrecy around government contracts, there is now a range of prescribed contract reporting and audit access arrangements.

3.70 Commentators have queried whether these approaches can be adopted by other Australian jurisdictions. The immense "administrative and technical burden" of publishing all of the contracts to which the NSW Government and its agencies are a party has been particularly noted[44]. They also note that balanced against this is the community's and media's desire for greater access to information on how government revenue is spent, which may lead other jurisdictions to reduce the scope for confidentiality clauses in government contracts.

[43] Grants Management Committee and Chief Financial Officers Council *Highlights of the Single Audit Process* (2001)

[44] "Is disclosure at all costs the future of government contracting?", *Law Society Journal* August 2001, pps 66-68

Chapter Four - Potential Impacts of the Bill

INTRODUCTION

4.1 This Chapter addresses potential impacts of the Bill, if introduced in its current form on businesses, government and the non-government sector. The issues have been identified in submissions, through the experience in other jurisdictions and through Committee deliberations. There is also consideration of alternative legislative and administrative frameworks or management systems which could be applied to meet the policy objectives of the Bill.

The Framework of the Bill

4.2 The key objective of the Bill is to achieve transparency in the administration of Government contracts and in the administration of grants. In responses to the Inquiry, there appears to be broad agreement with this objective as a general principle. The main concerns about the Bill relate to the need for appropriate balance by Governments in achieving that objective: balance in terms of cost-effectiveness, legitimate protection for commercial information, enabling and supporting NGOs to achieve their community roles and protecting the privacy of individuals.

Cost Implications

4.3 In their submissions, many agencies queried what they perceived as onerous conditions which would result from the application of the Bill to all purchase orders and small contracts with values as low as $50 per week. The impracticality of the Bill's provisions in this regard was noted, in spite of the advantage of knowing that all government contracts would be accounted for. In its current form, the Bill applies to *all* government contracts, regardless of their size. Technically, a purchase order for stationery for $100 is a contract and, under the terms of the Bill, would need to be made publicly available. The Committee notes that many submissions stated this arrangement would be unworkable.[45]

4.4 In its submission, the Premier's Department indicated that it would not be possible, without the expenditure of significant time and Government resources, to reliably estimate the precise cost to the Government of implementing the Bill. It did, however, comment that it was anticipated that the costs to the Government of implementing the Bill would be "considerable" and that the Bill would be likely to impact upon agency resources in the following areas:

- information technology infrastructure (increasing bandwidth, upgrading hardware and software);
- upgrading information management systems;
- development and dissemination of written policies;
- allocation of additional office space and personnel to enable public inspection of documents; and,

[45] For example: Audit Office, NSW Ombudsman, ICAC, Department of Education and Training, Department of Housing, Minister for Transport Services, Minister for Mineral Resources, Blacktown Council, etc

- training and employment of personnel to identify and certify the contents of contract data for public listing.[46]

4.5 Further, the Committee took note that the current Government disclosure policy, set out in Premier's Memorandum 2000-11, in fact covers a broader range of contract types than those intended in the Bill (for example, construction, infrastructure, property, goods and services and information technology), under a threshold of $100,000.[47] Thus the Bill would, in this instance, truncate disclosure provisions.

Proposed Extent of Public Accountability

4.6 The Committee noted that the majority of agencies, local Councils and NGOs tendering submissions indicated their concern that the measures for disclosure and accountability were too onerous. On the one hand this could simply be interpreted as an attempt to maintain the *status quo*. On the other hand, agencies provided examples of the negative impacts that were anticipated should the Bill be introduced. These included:

- The sheer volume of contracts would be likely to make the Bill unworkable. Many agencies made this point. Landcom, for example, indicated the administrative burden associated with uploading in excess of 300,000 pages of contract per annum to the internet.[48] Many agencies flagged the potential need to upgrade their website hardware to meet this requirement;
- Outsourcing of corporate service functions such as training, information technology, stationery and property maintenance may be withdrawn, because of the resourcing implication of administering new arrangements;
- An anticipated increase in the cost of Government contracts, as administrative and service costs are 'passed on';
- The very deliberate 'at arms length' arrangement provided through legislation for State-Owned Corporations would be compromised by the provisions of the Bill.[49]

4.7 The Committee heard from a good many agencies that the Premier's Memorandum 2000-11 is a sufficiently strong, practicable and cost-effective public accountability measure, and as such is their preferred alternative to the Bill. Many agencies also indicated the extent of their compliance with the disclosure provisions of Premier's Memorandum 2000-11. Were the provisions of Premier's Memorandum 2000-11 to remain, in place of the Bill, the Committee is of the view that the extent of compliance alluded to so strongly in agency submissions would need to be tested, particularly in the light of alternate views expressed to the Inquiry. In a response to follow-up questions, the Auditor-General indicated the Audit Office would be prepared to conduct a compliance review of Premier's Memorandum 2000-11, which it will consider for its 2004-05 program.[50]

4.8 The intent of the Bill to prevent misuse of 'commercial-in-confidence' clauses has drawn a mixture of support, but also concern that open disclosure would fail to

[46] Submission, p 3
[47] submission by Special Minister of State
[48] Landcom submission, p 3
[49] response by NSW Treasury, p 2
[50] response by Auditor-General, p 1

properly protect tenderers' commercially sensitive information. The Auditor-General supported the use of contract summaries as an effective means of distilling the key information relating to long and complex contracts, but cautioned the need for legislative force to ensure against inordinate delays between the Audit Office verification of the contract summary and its public release.[51]

4.9 The Australian Information Industry Association (AIIA) indicated that most information and communications technology companies would generally seek to have their entire contracts kept confidential from public disclosure, including performance agreements which may inadvertently disclose commercially sensitive material to competitors.[52]

4.10 Under the Bill, the Ombudsman would have the function of certifying whether the disclosure of certain information would prejudice a public authority's commercial activities or contractual negotiations. The Committee heard from the Ombudsman that a preferred variation of this proposal could involve agencies making publicly available information about contracts and successful tenderers, but where the protection of commercially sensitive information could be effected by empowering agencies to remove legitimate commercial information from contracts, together with an explanation for the removal.[53] The Auditor-General agreed.[54] The AIIA opposed such a proposal, based on its view that what is deleted is a "highly subjective exercise".[55]

4.11 Some agencies expressed the view that the Bill may result in protracted negotiations and decisions upon commercially sensitive material which would unnecessarily slow down the contract process. Others, such as the Roads and Traffic Authority, indicated that the difference between the tender document, which is a public document, and the executed contract is almost exclusively commercially sensitive information and there would therefore be little value in proposing disclosure.[56] The RTA also indicated that, similar to the AIIA, it undertakes regular performance reviews of contracts, but that it regards these as sensitive documents and was not contemplating public release of this information.

FOI Issues

4.12 Would the Bill provide greater public accountability, and therefore relief for parties otherwise needing to seek information through Freedom of Information (FOI) provisions? Several individual submissions believed this would be the case, and cited the current restrictions of FOI legislation to support this view. Still other believed that the current provisions and the presence of the *Freedom of Information Act* 1989 provided an appropriate balance between the accountability, public interest and privacy considerations.

4.13 The Ombudsman discussed the difficulty in assessing the current level of interest across the community and in business for access to commercial information such as contracts. Current FOI annual reporting obligations do not require agencies to identify

[51] *op cit* p 2
[52] response by AIIA, p 2
[53] Ombudsman's submission, p 3
[54] Submission, p 2
[55] *op cit* p 2.
[56] Response, p 3

the clauses of Schedule 1 which were used as the basis for refusing access to documents.

4.14 The Ombudsman's audit of compliance by agencies with FOI annual reporting requirements identified that some 36% of FOI applications were for documents that did not concern the personal affairs of the applicant, but there was no way of determining what percentage of these applications were for commercial purposes. The Ombudsman noted that from experience, unsuccessful applications for commercial information are primarily made by members of Parliament, journalists, public interest groups and people potentially affected by proposed developments, asset sales, etc, and to a lesser extent by unsuccessful tenderers.

4.15 The Ombudsman indicated the need for an overriding public interest test to be applied under the FOI Act, before access to documents can be refused.[57]

4.16 The Committee noted the Auditor-General's August 2003 Performance Audit Report *Freedom of Information: Ministry of Transport; Premier's Department, Department of Education and Training*, which recommended changes by government agencies to improve compliance with FOI requirements. (See Chapter Two of this report). The Committee supports adherence to existing FOI guidelines by government agencies.

The Need for Further FOI Exemptions?

4.17 The Attorney-General and Minister for the Environment indicated the belief that the terms of the Premier's Memorandum 2000-11, together with the *Freedom of Information Act 1989* already provides "an appropriate and workable information disclosure regime", balancing the interests of parties seeking access to information with those of parties providing information to agencies. However, the Attorney-General also indicated that, should the FOI Act not allow sufficient Government information to be made available, the FOI exemptions should be amended, rather than introducing a "new and additional scheme for public access to information".[58]

4.18 The Bill currently provides an exemption for information which, if disclosed, would compromise an agency's commercial activities or contractual negotiations. In his submission, the Auditor-General noted that there is a wide range of other exemptions that would need to be included, for example, security, policing, and privacy.

4.19 The Ombudsman noted that public sector agencies have needed to be encouraged to make information public available and "left to their own devices" they would place a low priority on this action. Yet in the Ombudsman's audit of compliance by agencies with FOI annual reporting requirements, the comment was also made that local Councils and area health services had excelled at public disclosure, with the result that this had significantly brought down the number of FOI requests in those sectors.

4.20 At the federal level, the Australian National Audit Office supported the view that agencies had been overly cautious in their interpretation of contract information which should be protected as confidential. In a 2003 analysis of a sample of contracts, only six of the twenty contracts examined were appropriately identified by agencies as containing confidential information.[59]

[57] Answers to Questions on Notice, p 3
[58] Submission, p 2
[59] *Audit Report No 5*, 2003-04, Australian National Audit Office, p 53

4.21 In part, this caution was attributed to the 'joint ownership' of information which occurs when a contract is signed between a private sector contractor and a Commonwealth agency, but the ANAO noted that the contractor must put a sound case for protecting information as confidential to justify the use of the confidentiality clause.

4.22 The Attorney-General noted that State Owned Corporations (SOCs) need to be excluded from the operations of some parts of the Bill. This is because SOCs as providers of goods and services have contracts with the private sector as part of their supply chain, and under these circumstances, confidentiality is regarded as necessary[60]. The Treasurer supported this view.

4.23 Treasury Guidelines are mandated for SOCs through a specific reference in their Statements of Corporate Intent in relation to capital and maintenance expenditures. Thus, while SOCs are subject to limited disclosure, their compliance in these key areas is assured and subject to ongoing scrutiny.

Lack of a Threshold for Contract Disclosure

4.24 The Committee received many expressions of concern that the Bill failed to identify a threshold for contract disclosure, and the ensuing administrative burden for disclosure of all contracts, however minor.

4.25 If the implication is that a threshold should be set, the next issue would be addressing the process by which this should occur. The typical approach, used in Premier's Memorandum 2000-11 and in Victoria, is to set a threshold purely on the value of the contract (currently $100,000). Tendering requirements work in a similar manner. Under clauses 19 and 27 of the *Public Sector Management (Goods and Services) Regulation* 2000, the State Contracts Control Board has set the threshold for requiring a tender for a contract is $150,000. The previous limit was $100,000.[61]

4.26 The Independent Commission Against Corruption suggested a number of other factors, the most important of which was the importance of the contract to the agency in terms of the proportion of its budget being spent on the contract.[62] This proposal captures the idea of risk to the specific agency. For example, a contract of $50,000 for an agency with a $200,000 budget represents a higher degree of risk than a similar contract for the Department of Education.

4.27 Another concern with a straight value threshold is that inflation can reduce the real value of the threshold over time. In evidence, the Local Government and Shires Associations noted:

> **Mr HILZINGER:** For quite a while the threshold has been $100,000. It has not been adjusted for many years. In some cases we consider that to be too low. What can you get for $100,000? You could not build a public dunny for $100,000 nowadays. By the time you carry out all the environmental concerns—
>
> **CHAIR:** We are very interested in the threshold amount. The State Government recently lifted it to $150,000, but we would be happy to hear whether you think the threshold should be higher. Do you have some suggestion on the threshold?

[60] Attorney-General's submission, p 3
[61] www.dpws.nsw.gov.au/sps/sccb/html/sccb%20link.htm, downloaded on 2 March 2004.
[62] ICAC submission, p 1

> **Mr HILZINGER:** I suppose $150,000 is not too bad, it is reasonable. But by the same token, just to put in a public toilet you have to have a huge tender process and usually the people in the community are hammering us saying, "What is going on? You said it would be there for Christmas for the tourist season down near Myola caravan park." Yet here we are out on a three to six months tendering process to build the public toilet...I suppose $150,000 is better than $100,000, but by the same token it has been locked on there for a long time. It is very difficult in some cases to have to go out to tender for those sorts of things, because of the tendering process.[63]

4.28 The Committee noted that although a value threshold is capable of refinement and runs the risk of falling in real value, it is very simple to administer and largely captures the elements of risk involved in procurement.

Timing Issues for Publication of Contracts

4.29 Currently, the Bill requires contracts to be on display for two weeks. The Committee received comment from a number of sources that this period was too short. For instance, the Minister for Community Services noted that many contracts within her portfolio are finalised by regional offices, which would not make it practicable for the contracts to be immediately placed on an agency website.

4.30 The Ombudsman noted that, in complex and detailed contracts, extensive negotiations may occur as to material that should be excluded from publication. Should these processes take more than two weeks to complete, and the contract not been made public by this time, under the current wording of the Bill there would be no requirement to make the contract public. This matter would need to be addressed.

4.31 The Committee noted that there are potential time delays in the administrative requirements to place a contract on public display and that there could similarly be difficulties in removing posted items after only two weeks. The continued cost in server capacity to store a contract on a website was also noted. And, as time passed, this cost would eventually exceed the value of keeping the contract on display as public interest in the contract diminished.

4.32 An extra factor to consider is the delay in operational issues arising in a contract, following its finalisation. The Massachusetts Inspector-General's Office noted that it could take up to two years before issues arise and the public may wish to scrutinise the contract. Similarly, the ACT Auditor-General recommended that contracts be on display for at least three years.

4.33 In balancing these factors, it appears that a minimum period of three years would need to be considered in the Bill for any contract in excess of a minimum threshold such as the $150,000 indicated above. This availability period could be extended for larger contracts over a second threshold such as $10 million to either the life of the contract or five years, whichever is greater.

4.34 It was also noted that privately financed contracts such as for tollroads or prisons have long lives, often in excess of 30 years. These contracts may generate ongoing public interest. Other long term contracts, such as for wood supply, may also continue to attract the interest of the community.

4.35 In evidence, there was discussion with Transparency International (TI) Australia about practicalities of putting up some of the information related to contracts on the web.

[63] Evidence, p 37

For instance, large maps and drawings may be difficult to reproduce. Further, tenders and contracts often sometimes include physical attachments and exhibits. TI Australia took a common sense approach and stated that using some other descriptive method to record these aspects of contracts would not compromise the spirit of the Bill. [64]

4.36 Often, large contracts are long and complex documents that would be difficult for most of the community to understand. In evidence, TI-Australia suggested that one way of addressing this problem is to present the information in layers.[65] The public, when accessing the site, would first see a contract list, then selection of a particular contract would display a contract summary. Selection of the summary would then allow the public to access the contract.

4.37 One issue with placing a lot of material on the internet is the costs this imposes in maintaining additional servers. The Auditor-General suggested one method of avoiding this problem by only posting summaries on the Internet, but then keeping copies of the contract on display at the agency's head office.[66]

Compliance Powers - Disclosure

4.38 Under the Bill, the Ombudsman has the function of certifying whether the disclosure of certain information would prejudice a public authority's commercial activities or contractual negotiations.

4.39 Both the Ombudsman and the Auditor-General in their submissions suggested their preferred approach concerning the authority's commercial activities would be to require the head of the agency to make a declaration and publish the reasons for so doing. This declaration could then be later checked by an oversight agency (eg the Ombudsman). The responsibility for the proper administration of the agency would then lie with the CEO, and leave the Ombudsman with responsibility for oversight.

4.40 The NSW Treasurer comments that it is unclear, however, what criteria the Ombudsman should use in deciding whether disclosure of a contract provision would disadvantage a party, nor whether the Ombudsman's Office would have the necessary expertise for this role. Each of these matters would have resource implications for this provision of the Bill.

Auditing of Grant Recipients

4.41 In relation to the powers of the Auditor-General, the Committee is concerned that the language of the Bill is unclear. The title of clause 5 states that the accounts of private organisations receiving government grants are "to be audited by the Auditor-General," which suggests it is an obligation. Clause 5(1), however, states that their accounts "may be subject to inspection, examination and audit."

4.42 The Auditor-General states that this provision would be "completely unworkable" if it were an obligation, both in terms of the sheer volume of work, but also in terms of reporting on economy, efficiency and effectiveness of non-government organisation, in relation to their 'performance'.[67]

[64] Transcript of evidence, 5 November 2003 p 4
[65] Transcript of evidence, 5 November 2003 p 5
[66] Submission 12 p 2
[67] ibid, p 2

4.43 Agencies and non-government organisations, alike, expressed concern that the Auditor-General's powers, as outlined in the Bill would be a particularly onerous imposition upon organisations charged with the responsibility of delivering community services, and argued that current provisions are sufficient. NCOSS submitted that the involvement of the Auditor-General in non-government organisation audits was "superfluous"[68]. Many agencies commented that most grant recipients are incorporated associations, and as such are already subject to external audit. Agencies also remarked that the compliance focus should appropriately be on the processes used by agencies to make the grant, not on the recipient organisations. It should be noted that this view was shared by the National Audit Office in the United Kingdom. The current provisions for the Auditor-General to determine breaches of the agreements between funding agencies and grant recipients was also noted. NCOSS indicated that difficulties with the financial audit requirement could be experienced by small organisations, without paid staff, who only receive a small level of funds.[69] As indicated in Chapter 2, this is the case for the majority of non-government organisations.

4.44 But agencies and non-government organisations were also concerned that the proposed powers were overreaching. For example, the Salvation Army submitted that the Bill is drafted in such a manner as to allow the Auditor-General to audit not only the specific activities for which the grant was received, but also the wider organisation in its entirety.[70] Many saw this provision as "heavy-handed", but the intrusion could also be seen as unwarranted by a sector whose very independence and autonomy from Government defines its capacity both to provide trusted client service and to critique policy. NCOSS identified that many NGOs who "bring to their operation an array of other fiscal, capital and human resources quite separate from Government funds" would oppose the imposition of the audit requirement.[71] The Committee was similarly concerned that the proposed powers might adversely affect voluntary organisations such as meals on wheels or local cricket clubs.

Auditing of Grants – Impacts on Individuals

4.45 Similarly, there are concerns that the Bill would impact on individual recipients who would be subject, under the Bill, to audits of their personal accounts. The Committee heard that this power could extend to recipients of victims compensation payments, lottery winners and farmers receiving drought payments.

4.46 The Auditor-General responded to this point in evidence:

> **CHAIR:** But the bill is so widely worded and as currently drafted it considers payments such as lottery winnings, victims compensation, drought relief payments to farmers as grants. Do you think that there should be some limitations put on the proposed powers of the organisation in auditing purposes?
>
> **Mr SENDT:** I think if it is a grant that is made with no expectation of any service in the term, the question of efficiency and effectiveness does not really arise on the part of the recipient. For example, you could even perhaps include pensioner rate rebates in the definition of grants now. As an auditor I may be interested in seeing whether the agency has examined applications properly to ensure the applicant is entitled to the payment.

[68] NCOSS submission, p 2
[69] Response by NCOSS to additional questions, p 2
[70] Salvation Army submission, p 2
[71] *ibid*

> For that purpose I might need to go beyond the organisation, but generally I understood the intention, and perhaps it isn't reflected in the words, but I understood the intention was more where there was some service being provided from the grant.[72]

4.47 In its submission, the Department of Education and Training also indicated concern about implications for individual recipients of public monies under its Vocational Training Assistance Scheme (4,300 trainees annually) and the Mature Workers Training Voucher (1,700 recipients). These individuals would potentially be subject to audit of their personal accounts under the Bill. The Committee considers that such a measure would contravene privacy provisions.

Cost of Auditing

4.48 Another implication of the audit requirement identified by agencies and non-government organisations concerned additional costs. The Salvation Army was among those who commented that grant recipients should not have to bear the cost of such an audit. NCOSS noted that the costs of current compliance were among the issues being discussed through the Review of Grants Administration, where it was hoped the "compliance nightmare" would be resolved cooperatively.

4.49 The Review is being conducted by the Premier's Department and is initially focussing on the human services area. The Review is in the process of finalising guidelines to support good practice assessment of grant applications. These have developed collaboratively with non-government sector organisations. They will relate to the terms and conditions of the funding program, the objectives of the grant and how these were met.

4.50 Rather than a "standard" funding agreement, a model is being developed which includes basic information for straightforward grants and includes additional information for more complex agreements.

4.51 The Premier's Department is currently assessing the cost-effectiveness of the business case for an on-line application system for grants. Some agencies currently offer on-line application facilities. A proposed centralised on-line facility offering information about grants, together with "hot links" may prove to be equally effective.

4.52 The Review has also developed a Principles Paper for grants administration. The topics discussed include value for money, accountability, and monitoring and evaluation.

4.53 When fully developed, the Review's documents and processes should have application across all New South Wales' government agencies with grants programs.

4.54 The view was expressed by many agencies and organisations that the provision in the Bill for financial auditing of grant recipients could act as a deterrent to non-government organisations or potential recipients of grant programs applying for much needed funds, because of the additional cost and administrative burden involved in complying with grant conditions, as well as the potential threat to autonomy, identified above. It was indicated that the cost of audits could be high in proportion to the overall grant. Government agencies indicated that the cost of the audit would

[72] Transcript of evidence, p 10

mean that less of the grant could be available for its original purpose and thus potentially affect the level of service which could be provided.[73]

4.55 The Minister for Juvenile Justice was one of a number of people who commented that a potential negative impact of this provision could be a reduction in the number of service organisations prepared to deliver specific services. She further indicated that the proposed requirements of the Auditor-General's report at clause 5(3), to give opinion as to whether the grant was applied "in an economic, efficient and effective manner" may not be workable parameters for some Departmental grants to community organisations to "work creatively with the broad aim of community reintegration for juvenile offenders".[74]

4.56 NCOSS indicated that, should the Bill proceed without exemption for the non-government sector, a threshold ought to be applied for organisations subjected to audits. NCOSS mentioned the $100,000 GST registration benchmark as a possible threshold.[75]

Definitions

4.57 There are also particular implications inherent in the definitions of the Bill. These include principally, issues associated with the definitions for "government contracts", and "public authorities".

4.58 A further disadvantage for NGOs under the proposed definition of "government contracts" would be determining whether, for them, a funding agreement is technically a contract. The Committee heard evidence that this may be the case for up to half of the $6.9 billion of State Government monies processed annually through NGOs, and that case law determinations had made this a difficult area to master.[76]

4.59 The Committee also received information pointing to the inconsistency of definitions referring to "public authorities". As previously noted, in the Bill, the term "public authorities" proposes the same meaning as in the *Ombudsman Act* 1974. The Ombudsman's submission also noted that some public authorities are individuals.[77] Thus, there would need to be clarification in this regard as to how the definition applies. Further, the *Public Finance and Audit* Act 1983 excludes local Councils from the definition of "authority(ies)" over which the Auditor-General has jurisdiction, yet they are included in the definition for the purposes of the Bill. Not just a matter of legislative inconsistency, this points to a larger issue. Councils are already subject to layers of scrutiny under the *Local Government Act* 1993 and the *Local Government (Tendering)* Regulation 1999. Thus, under the Bill, they would potentially be required to ensure a higher degree of accountability than other public authorities.

Conclusion

The Committee notes that the impacts of the Bill in its current form are potentially overreaching and likely to be onerous for agencies and those overseeing compliance in terms of additional cost and administrative burden. In many ways, the impositions

[73] Response by NSW Treasury to additional questions
[74] Submission, p 2
[75] NCOSS response to additional questions, p 2
[76] NCOSS evidence, 24 October 2003, p 2
[77] Submission 5, page 2

upon non-government agencies and individual grant recipients would also appear to be unjustified.

Chapter Five - Refinements to the Bill and Alternative Arrangements

INTRODUCTION

5.1 This section deals with suggested changes to the Bill, should it proceed, in order to meet its overall objectives on the one hand and, on the other, to balance the public interest in government accountability with efficiency, profitability and the needs of non-government recipients. The comments generally relate to either the practicalities of the proposal or amending the Bill so that it meshes with other legislative systems.

THE FRAMEWORK OF THE BILL

5.2 The Committee noted concerns expressed in submissions and evidence about the link in the Bill between contract disclosure and audit processes. The Committee believes that this link should be removed. There should be a general contractual disclosure requirement and a general audit access power and they should not depend on each other.

PUBLICATION OF CONTRACTS

Definitions

5.3 The Committee is strongly of the view that definitions within the Bill need to be clarified.

The Need for a Threshold

5.4 The Committee noted the concerns expressed about the need for a threshold for contract disclosure. The Committee is satisfied that a value threshold would be sufficient for the purposes of the Bill.

5.5 While there was agreement on the need to set a threshold, most submissions and witnesses were reluctant to put a figure on where the threshold should lie. The Auditor-General suggested $100,000 or $200,000.[78] Transparency International suggested that the threshold should be "reasonably low".[79] The current threshold for requiring agencies to go to tender for general procurement is $150,000. The Committee is of the view that maintaining parity with the tender threshold is practical and would make it easier to ensure compliance.

Period of Availability

5.6 The Committee noted concerns about the administrative burden and additional costs which agencies would incur in posting contract information on the internet. The Committee believed that, should the Bill proceed, the agreed disclosure threshold of $150,000 must apply, in order to minimize the administrative burden, and the two week period be re-examined as to its practicability.

5.7 The Committee considered that very long term contracts, once they exceed a second threshold, should possibly be put on public display for the life of the contract. There

[78] Submission, p 2.
[79] Transcript, 5 November 2003, p 3

was no discussion among Committee members as to how this second threshold should be determined. However, the Committee would suggest a contract threshold of $10m.

5.8 The Committee considered that the Bill would also be improved by the inclusion of the following elements in relation to publication of contracts:

- A practicality element should be considered to enable interpretation as to the inclusion or otherwise of particularly resource intensive aspects of contracts (eg long contracts, maps and physical exhibits);
- A wider range of exemptions from publication, based on, but not limited to that used in the *Freedom of Information Act 1989* is required. Consultation with affected agencies and organizations about the application of exemptions would be essential;
- Exemptions should only be made to the extent necessary to protect legitimate confidential information; and,
- A requirement that agency heads certify that they have ensured compliance.

Role of the Ombudsman

5.9 If the Bill were to proceed, the Ombudsman would need to be provided with appropriate powers to require relevant public authorities to provide information; to keep relevant systems under scrutiny; to consult with those authorities; and to issue guidelines and report to Parliament annually on operations.

5.10 The Ombudsman advanced a model, building on the present Premier's Memorandum 2000-11, but with legislative support for disclosure; closer scrutiny of how agencies perform their functions and a clear complaints process.[80]

Contract Disclosure Exemptions

5.11 While supportive of the principles of public disclosure, the Committee is, however, mindful of the additional costs and administrative burden falling upon agencies for little, or no, public benefit. It believes, therefore, that the element of contract disclosure supporting government accountability should be strongly weighed up against the public interest in order to measure the benefit gained. Indeed, the Committee would be supportive of the Ombudsman's proposal, to amend clause 7 to include an overriding public interest test before the exemption clause can be relied upon to refuse documents.[81]

5.12 Having said that, the Committee believes that additional exemptions would need to be inserted into the Bill, to make it workable. The exemptions raised in submissions are similar to those listed in schedule 1 of the *Freedom of Information Act* 1989, addressing restricted documents; law enforcement and public safety; personal affairs; trade secrets; research interests; legal professional privilege, etc.

5.13 The Committee does not necessarily endorse the scope of those exemptions, but does suggest they are a starting point for determining proposed changes to the Bill, should it proceed.

[80] Submission 5, p 1
[81] ibid

Auditor-General's Powers

5.14 The Committee initially believed there was a need to clarify the intent of the Bill in relation to the power or obligation of the Auditor-General to examine accounts. As stated in Chapter 4 the Auditor-General was concerned that if there was an *obligation* to do so, this would be unworkable.

5.15 The Committee noted that there are currently provisions for access powers by the Auditor-General where agencies have concerns about grant inconsistencies. The Committee is not convinced that there is merit in the provisions of the Bill for the additional auditing of grant recipients. It accepts the view that current audit provisions provide the necessary protections in relation to expenditure of public monies, and that these provisions are being streamlined through the Grants Administration Review in collaboration with grant recipient organisations.

5.16 The Committee would support the outcomes of the Grants Administration Review being used as a model for grants administration across New South Wales' agencies, as its provisions already address the majority of agencies and organisations in receipt of grants funding from the government.

5.17 The Committee is further of the view that the proposed Auditor-General's powers in clause 5(3), seeking an opinion by the Auditor-General as to whether the recipient has used the public money in an economic, efficient and effective manner are inconsistent with powers defined under Division 2 of Part 3 of the *Public Finance and Audit Act* 1983, relating to whether financial statements are materially correct. Further, it acknowledges the proposed powers may be counterproductive to the objectives of programs, where these emphasise, for example, social objectives.

5.18 The Attorney-General's submission noted that the Bill is so widely drafted that the Auditor-General would have the power to audit recipients of victims compensation payments, lottery winners and farmers receiving drought relief payments. If this were the intent of the Bill, the Committee would be opposed on privacy grounds.

5.19 Given the issues addressed above, the Committee is thus disinclined to support the sections of the Bill providing the Auditor-General with additional powers to investigate grant recipients.

5.20 The Committee noted the Auditor-General's comment that the Bill, as drafted, gives the Auditor-General no powers to report to Parliament. It concurs with the Auditor-General that, if this were the intent, it would be an inappropriate constraint on the Auditor-General's power to report to Parliament.[82]

5.21 The Committee noted the Auditor-General's comment that clause 5(1) of the Bill indicates its powers would allow examination of a grant made by a Local Government authority to another party but not *to* a Local Government authority. Again, the intent of the Bill would need to be clarified in this regard.

5.22 The Committee would also be concerned that where the Bill addresses the anomaly of the Auditor-General's powers in relation to local Councils, these authorities should not be subjected to a greater degree of scrutiny than other public authorities. Therefore any proposed changes should be checked against the relevant provisions of the *Local Government Act* 1993 and the *Local Government (Tendering) Regulation* 1999.

[82] Submission, p 3

Chapter Six - Conclusion

The Bill identifies some important issues in relation to the publication of and access to government contracts. As indicated in the preceding Chapters, the Committee, along with a good many agencies, is supportive of the principles of public disclosure. The Committee was, however, mindful of the additional cost and administrative burden that may be incurred. It therefore supports the need for a balanced approach to disclosure.

The Committee supports the conduct by the Auditor-General of a compliance review of Premier's Memorandum 2000-11, in the Audit Office 2004-05 program, as a means of establishing a baseline of agency compliance with the provisions of the Memorandum.

The Committee was not generally supportive of the proposals in the Bill regarding the auditing of government grants by the Auditor-General. While acknowledging the need for appropriate scrutiny of government funding, the Committee was of the view that:

- there are current, adequate audit provisions;
- that these can, and are in the process of being strengthened; and
- that the primary onus should be upon agencies to effectively administer grants programs.

These views are expressed in the following recommendations:

RECOMMENDATION 1:

That the Committee advises the Legislative Assembly of its view that Premier's Memorandum 2000-11 should be reinforced as the standard for compliance by agencies in relation to disclosure of government contract information.

RECOMMENDATION 2:

That the Audit Office conduct a compliance review of Premier's Memorandum 2000-11, in its 2004-05 program as a means of establishing a baseline of agency compliance with the provisions of the Memorandum.

RECOMMENDATION 3: That the Committee advises the Legislative Assembly of its view that there are sufficient current checks and balances in place through agencies issuing grants to satisfy auditing conditions and address any breaches of funding agreements.

RECOMMENDATION 4: That the outcomes of the Grants Administration Review be referred to New South Wales' government agencies for consideration as a model for grants administration.

Appendix One – Government (Open Market Competition) Bill 2003

Introduced by Ms Clover Moore, MP

First print

New South Wales

Government (Open Market Competition) Bill 2003

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are:

(a) to ensure that copies of all Government contracts, together with copies of all associated tendering documents and results of all performance monitoring, are kept publicly available by all public authorities, and

(b) to ensure that the accounts of persons and bodies that receive public money from a public authority by way of a grant are subject to inspection, examination and audit by the Auditor-General under the *Public Finance and Audit Act 1983*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent.

b03-700-p01.18

Clause 3 defines the expressions ***government contract***, ***public authority*** and ***public money*** for the purposes of the proposed Act.

Clause 4 requires a public authority to ensure that copies of its government contracts, together with copies of the associated documents for any successful tender and results of all performance monitoring, are freely available for public inspection at its head office and on the Internet. The proposed section charges the Ombudsman with the supervision of public authorities in their performance of those duties, and provides that for that purpose the Ombudsman may conduct investigations and make reports to Parliament with respect to their performance of those duties. The proposed section will not apply to or in respect of any commercially sensitive contracts or any government contracts entered into before the date of assent to the proposed Act.

Clause 5 provides that the accounts of a person or body that receives public money from a public authority by way of a grant are subject to inspection, examination and audit by the Auditor-General, and that such of the activities of the person or body as are funded by the grant are subject to investigation and report by the Auditor-General.

Clause 6 provides that the proposed Act is to apply despite any other Act or law to the contrary, and despite any agreement or other document that purports to exclude, restrict or modify the operation of the proposed Act.

Introduced by Ms Clover Moore, MP

First print

New South Wales

Government (Open Market Competition) Bill 2003

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New South Wales

Government (Open Market Competition) Bill 2003

No , 2003

A Bill for

An Act to require Government contracts, and tenders relating to Government contracts, to be made available for public inspection, and to enable the Auditor-General to audit the accounts of persons and bodies that receive public money by way of grant.

The Legislature of New South Wales enacts:

1 Name of Act

This Act is the *Government (Open Market Competition) Act 2003*.

2 Commencement

This Act commences on the date of assent.

3 Definitions

In this Act:

government contract means a contract between a public authority and some other person (which may consist of another public authority) under which the other person undertakes to provide the public authority with goods or services, or both goods and services, but does not include a contract of employment.

public authority has the same meaning as it has in the *Ombudsman Act 1974*.

public money has the same meaning as it has in the *Public Finance and Audit Act 1983*.

4 Government contracts and associated tendering documents to be freely available for public inspection

(1) A public authority that enters into a government contract must ensure that, for at least 2 weeks from the date on which the authority entered into the contract, copies of the contract, and (if the contract was awarded on the basis of tenders) copies of the successful tender for the contract:

(a) are made available during ordinary business hours for public inspection, free of charge, at the head office of the authority, and

(b) are made available on the authority's Internet site or (if the authority does not have an Internet site) on the Government of New South Wales Internet site.

(2) If the contract contains provisions requiring its performance to be monitored, the public authority must ensure that results of the monitoring are made available in the same way as the contract is required to be made available under this section.

(3) The information concerning a contract or tender that is required to be made available under this section must also be referenced, from the Government of New South Wales Internet site, in a central index of all such contracts and tenders.

(4) The Ombudsman is charged with the scrutiny of public authorities in their performance of the duties imposed on them by this section and, for that purpose, may conduct a preliminary inquiry into and investigate, and report to Parliament on, their performance of those duties.

(5) The Ombudsman has the same functions and immunities with respect to an investigation or report under subsection (4) as the Ombudsman has with respect to a preliminary inquiry, investigation or report under the *Ombudsman Act 1974*.

(6) This section does not require a public authority to make available for public inspection any information whose disclosure the Ombudsman has certified could reasonably be expected:

(a) to prejudice significantly the competitive commercial activities of that or any other public authority, or

(b) to interfere significantly with contractual or other negotiations relating to the competitive commercial activities of that or any other public authority.

(7) This section does not apply to or in respect of any government contract entered into before the date of assent to this Act.

5 Accounts of private organisations receiving government grants to be audited by Auditor-General

(1) The accounts of any person or body (other than a public authority) that receives public money from a public authority by way of a grant may be subject to inspection, examination and audit by the Auditor-General under Division 2 of Part 3 of the *Public Finance and Audit Act 1983*.

(2) In conducting an inspection, examination or audit under subsection (1), the Auditor-General may also investigate, and report to the Treasurer on, such activities of the person or body concerned as are funded by public money received from a public authority by way of a grant.

(3) A report given by the Auditor-General under subsection (2) in relation to a person or body that has received public money from a public authority by way of a grant must indicate whether or not, in

the opinion of the Auditor-General, the person or body has applied the public money, for the purposes for which it was granted, in an economic, efficient and effective manner.

(4) The Auditor-General has the same functions and immunities with respect to an investigation or report under subsection (2) as the Auditor-General has with respect to an inspection, examination or audit under subsection (1).

(5) For the purposes of this section, a person or body receives public money by way of a grant if it receives public money otherwise than as consideration under a contract for the provision of goods or services.

6 Application of Act

This Act applies despite any other Act or law to the contrary, and despite any agreement or other document that purports to exclude, restrict or modify its operation.

Appendix Two – Submissions

Submission Number	Name and Title	Designation
1	FC Crook	Individual
2	Ms Elizabeth George	Individual
3	Mr Keith Sole	Individual
4	Dr David Fayle Managing Director	BioAccent Pty Ltd
5	Mr Bruce Barbour Ombudsman	NSW Ombudsman
6	Mr Gregory Briscoe-Hough	Individual
7	Mr Christopher Hudson	Individual
8	Mr Peter Rooke, Board Member	Transparency International Australia
9	Mr Robert Street, Lt-Col, Chief Secretary	The Salvation Army Australian Eastern Territory
10	Mr Brian Wilkinson General Manager	Richmond Valley Council
11	Mr Gary Moore Director	Council of Social Service of NSW
12	Mr R Sendt Auditor-General	The Audit Office of NSW
13	Mr Mark Hummerton Director Governance Management and Information Services	Randwick City Council
14	Ms Irene Moss AO Commissioner	Independent Commission Against Corruption
15	Mr Warren Taylor Deputy Director, Strategic Services	Local Government and Shires Associations of NSW
16	Mr Ian Reynolds General Manager	Blacktown City Council
17	Mr Michael Hedley NSW Executive Officer	Australian Information Industry Association
18	The Hon John Della Bosca MLC	Minister for Commerce
19	Mr John Burgess, Director, Corporate and Community Services	Wyong Shire Council
20	Mr Peter Rolfe Secretary	Homicide Victims Association
21	The Hon Andrew Refshauge MP	Minister for Aboriginal Affairs

22	The Hon Carmel Tebbutt MLC	Minister for Community Services
23	The Hon Michael Egan MLC	Minister for State Development
24	The Hon David Campbell MP	Minister for Small Business
25	Mr Roger Wilkins Director-General	Cabinet Office, NSW
26	The Hon Michael Costa MLC	Minister for Transport Services
27	Mr Terry Barnes Director-General	NSW Department of Housing
28	Mr Sean O'Toole Managing Director	LandCom
29	Mr Paul Forward Chief Executive	Roads and Traffic Authority
30	The Hon Robert Debus MP	Minister for the Environment
31	The Hon Michael Egan MLC	Treasurer
32	The Hon John Hatzistergos MLC	Minister for Justice
33	The Hon Diane Beamer MP	Minister for Juvenile Justice
34	Mr Martin Bowles Deputy Director-General, Corporate Services	NSW Department of Education and Training
35	The Hon Ian MacDonald MLC	Minister for Primary Industries
36	The Hon Kerry Hickey MP	Minister for Mineral Resources
37	Ms Clover Moore MP	Member for Bligh
38	Mr Bruce Barbour	Ombudsman
39	Mr Perce Butterworth Executive Director	Department of State and Regional Development
40	Mr Gary Moore Director	NCOSS
41	Ms Kerry Schott Executive Director	NSW Treasury
42	Mr Brendan Hartnett Director, Strategic Services	Local Government and Shires Associations on NSW
43	Mr Ned Jordan Executive Officer	State Contracts Control Board
44	Mr Ian Reynolds General Manager	Blacktown City Council
45	Ms Bridget Larsen Policy Manager	AIIA

46	Mr RJ Sendt Auditor-General	Audit Office of NSW
47	Mr Dennis O'Neill Chief Executive Officer	AusCID
48	Mr Paul Forward Executive Officer	RTA
49	Mr James Mitchell Assistant Director-General	Department of Local Government

Appendix Three – Witnesses to the Inquiry

The following witnesses appeared before the Committee during the course of the Inquiry:

Mr Robert Sendt, Auditor-General
Mr Tom Jambrich, Assistant Auditor-General
NSW Audit Office

Mr Russell O'Neill, Chief Executive Officer
Australian Council on Infrastructure Development

Mr Ian Matthews, General Manager, Infrastructure and Contracts
Mr Phillip Youngman, Manager, Records and Access Unit
Roads and Traffic Authority

Mr Martin Smith, Principal Policy Analyst, Financial Management Directorate
Mr Edward Shestovsky, Director, Asset Management and Procurement Branch
NSW Treasury

Mr Ned Jordan
Executive Officer
State Contracts Board

Mr Gary Moore, Director
Ms Demi Chung, Student Placement
Council of Social Service of NSW

Mr James McAdam, General Manager
Mr Michael Hedley, NSW Executive Officer
Ms Bridget Larsen, Policy Manager
Mr Ross Raine, NSW Government Business Manager
Mr Peter Clarke, Member
Australian Information Industries Association

Mr Perce Butterworth, Executive Director, Policy And Resources
Mr Warwick Glenn, Executive Director, Investment Division
Department of State and Regional Development

Mr Shaun McBride, Senior Policy Officer
Cr William Hilzinger, Treasurer
Local Government and Shires Associations of NSW

Mr Ronald Moore, Director, Finance and Corporate Strategy
Blacktown City Council
Mr James Mitchell
Assistant Director-General
Department of Local Government

Mr Peter Rooke
Board Member
Transparency International

Appendix Four – Premier's Memorandum 2000-11

MEMORANDUM NO. 2000 - 11

DISCLOSURE ON INFORMATION ON GOVERNMENT CONTRACTS WITH THE PRIVATE SECTOR

(Memorandum to all Ministers)

This memorandum introduces guidelines designed to clarify what information relating to the Government's contractual arrangements with the private sector should, and should not, be made public.

Cabinet has approved the guidelines which are detailed in the attached document. The guidelines will ensure a uniform approach across government to the disclosure of contract information to industry and the public in general.

The guidelines have immediate effect and apply to all contracts entered into by NSW Government agencies from the date of this memorandum (excepting those entered into by the Department of State and Regional Development which involve industry support). It should be noted that privately funded public infrastructure projects will additionally need to comply with the disclosure guidelines set out in the *Guidelines for Private Sector Participation in the Provision of Public Infrastructure* (first issued September 1995, revised October 1997 – Treasury Circular TC 95/15).

The guidelines provide agencies with a practical model to determine what items of contract information should be disclosed and what should remain confidential. The Chairman of the State Contracts Control Board is the authority nominated to provide independent advice to CEOs should any disagreement arise prior to contract award between an agency and the preferred tenderer as to what parts of a contract will be subject to disclosure.

Ministers should ensure that all agencies under their administration, including Government Trading Enterprises, adopt the disclosure guidelines and incorporate them into their tender documents and related policy manuals. The shareholding Ministers and boards of State Owned Corporations may also give consideration to voluntarily adopting the guidelines by incorporating them into their statements of corporate intent.

Bob Carr
Premier

Issued by: Public Works and Services
Contact officer: Alan Griffin
Telephone: 02 9372 8818
Date: 27 April 2000

Attachment to Premier's Memorandum No. 2000 - 11

GUIDELINES FOR THE DISCLOSURE OF INFORMATION IN NSW GOVERNMENT CONTRACTS

The purpose of this procedure is to provide NSW government agencies with a practical model to determine what items of information contained in government contracts with the private sector should be disclosed and what should remain confidential following award of the contract.

The procedure:

> is to be implemented by all agencies including Government Trading Enterprises (but excluding the Department of State and Regional Development). The procedure may also be implemented by those State Owned Corporations that include the guidelines in their statements of corporate intent by way of agreement between their shareholding Ministers and boards.
>
> applies to all procurement contracts (construction, infrastructure, property, goods and services, information technology etc).

Schedules of disclosure (based on the disclosure requirements of *Guidelines for Private Sector Participation in the Provision of Public Infrastructure*) are attached. The schedules establish it is government practice to:

> vary the disclosure of information according to the size of the project;
>
> limit the extent of commercial-in-confidence material to very specific areas and not disclose it unless required by law; and
>
> treat the information in an unsuccessful tender as commercial-in-confidence and not disclose it unless required by law.

In addition to these guidelines privately funded public infrastructure projects will also need to comply with the disclosure guidelines set out in the *Guidelines for Private Sector Participation in the Provision of Public Infrastructure.*

Agencies must ensure that:

> **For all contracts above $100,000** (or where government transfers ownership of property over the value of $100,000) a summary of the main items of the contract listed in Schedule 1 is routinely released within 90 days of award of the contract. (Note: For contracts under $100,000 Schedule 1 items need only be released upon request).
>
> **For contracts over $5 million involving private sector financing, land swaps, asset transfers and similar arrangements** a summary of the main items of the contract listed in Schedule 1 **and** 2 is routinely released within 90 days of award of the contract.

The information included in an unsuccessful tender is treated as commercial-in-confidence material. In exceptional circumstances, such information may be released with the agreement of the unsuccessful tenderer(s), or if the original tender provisions allowed for the release of such information.

Tender documents contain information about the disclosure process and schedules of items to be disclosed.

Tenderers are invited to nominate items they consider should not be disclosed and why.

In the event of disagreement between an agency and the 'preferred tenderer' as to what should be disclosed (for example, there may be some debate as to what the contractor claims as intellectual property) the agency seeks the advice of:

The Chairman

State Contracts Control Board

Level 23 McKell Building

2-24 Rawson Place

Sydney NSW 2000

The Chairman, who has responsibility for reviewing complaints about government tendering, may consult with the Crown Solicitor and may seek the advice of independent experts. The Chairman will provide a report and recommendations to the Chief Executive Officer of the agency involved in the tender.

Specific requests for information outside the ambit of the contract details, for example enquiries regarding an unsuccessful tender, continue to be dealt with under the provisions of the Freedom of Information Act.

Method of disclosure:

The table below shows the relationship between the size of the project and the level of contract disclosure.

Project size	**Level of disclosure**	**Agency's responsibility:**
$0 to $100,000	Schedule 1 Items	Disclose on request
$100,000 and above	Schedule 1 Items	Disclose routinely

$100,000 and above	Schedule 1 Items	Disclose routinely
$5M and above involving private sector financing, land swaps, asset transfers and similar arrangements	Schedule 1 **and** 2 Items	Disclose routinely

All information should be provided by the agency free of charge within 90 days of the award of the contract. The means of disclosing information is left to the discretion of the agency, but should take a form which is readily accessible to the public.

It is suggested that:

> where an agency is required to routinely disclose contract information (Schedule 1 Items for all projects over $100,000 and Schedule 1 and 2 items for projects over $5M which involve private sector financing, land swaps, asset transfers and similar arrangements) the information be either posted on a notice-board accessible to the public or released on the agency's Internet site; and
>
> where a request is made to an agency for contract information which is not routinely disclosed (Schedule 1 items for projects under $100,000) the agency, in consultation with the entity making the request, shall determine the most suitable method of delivering that information.

SCHEDULES OF DISCLOSURE

SCHEDULE 1

Items to be disclosed for <u>all</u> contracts

▪	Details of contract (description of project to be completed or goods/services to be provided or property to be transferred; commencement date of the contract; the period of the contract);
▪	The full identity of the successful tenderer including details of cross ownership of relevant companies;
▪	The price payable by the agency and the basis for future changes in this price;

▪	The significant evaluation criteria and the weightings used in tender assessment;
▪	Provisions for re-negotiation (where applicable).

SCHEDULE 2

Additional items to be disclosed for contracts over $5 million involving private sector financing, land swaps, asset transfers and similar arrangements

▪	Details of future transfers of assets of significant value to government at no or nominal cost and details of the right to receive the asset and the date of the future transfer;
▪	The identification and timing of any assets transferred to the contractor by the agency;
▪	All operation and/or maintenance provisions in the contract;
▪	The basis for changes (price variation clauses) in the price payable by the agency;
▪	The results of cost-benefit analyses of the successful tender;
▪	The risk sharing in the construction and operational phases of the project, quantified in net present value terms (where possible) and specifying the major assumptions involved;
▪	Significant guarantees or undertakings between the parties, including loans entered into or agreed to be entered into;
▪	To the extent not covered above, the remaining key non-commercial-in-confidence elements of the contractual arrangements.

SCHEDULE 3

Commercial –in-confidence information -

Items <u>not to be disclosed</u> for any contracts

▪	The contractor's financing arrangements;
▪	The contractor's cost structure or profit margins;
▪	Items of the contractor having an intellectual property characteristic (eg. non-tangible property that is the result of creativity, such as patentable ideas or inventions, trademarks, copyrights, etc.);
▪	Any other matters where disclosure would place the contractor at a substantial commercial disadvantage with its competitors both at the time of entering into the contract and at any later date when there would be an effect on future competitive arrangements.

NOTE: In addition to these guidelines privately funded public infrastructure projects will still need to comply with the disclosure guidelines set out in the *Guidelines for Private Sector Participation in the Provision*

Appendix Five - International Study Tour

OVERVIEW

The Study Tour took place between 19 September and 5 October 2003, and included visits to agencies in London, Edinburgh, Boston, New York and Washington.

The purpose of the Study Tour was principally so that the Committee could further its understanding of present inquiries, including the Government (Open Market Competition) Bill 2003, academics' paid outside work and ambulance response times.

LONDON

The delegation arrived in London on Sunday 21 September 2003.

International Accounting Standards Board

On 22 September 2003, the delegation met with Mr Tom Jones, Vice-Chairman and Mr Thomas R Seidenstein, Director of Operations, International Accounting Standards Board.

Key issues discussed included:

- The impacts on a nation taking up international accounting standards (IASs), and whether it loses flexibility or sovereignty
- The impetus for IASs
- Who is taking up IASs
- How IASs compare with Generally Accepted Accounting Principles (GAAP) in the United States
- Applicability of IASs for the public sector
- Australia's progress in adopting IASs
- The attitude of the Australian Press to the valuing of intangibles
- Issues from the perspective of the European banks and the concessions they have gained.

Home Office

Also on 22 September 2003, the delegation met with Mr John Marshall, of the Active Community Unit Delivery Support Team with the Home Office.

The main issues discussed included:

- The role of the Active Community Unit with particular reference to grants
- Typical problems experienced in relation to grants
- Key actions in giving grants to ensure value for money
- The question of whether it is worth giving the Auditor-General power to access grant recipients, or is this just and undue burden on small groups
- Whether grants are basically set up like contracts
- Would it be effective to publicly list all grants?
- What guidance is given to agencies?
- To what extent do agencies follow guidance, and should guidelines be converted to regulations or similar?

National Audit Office

On 23 September 2003, the delegation met with officials from the National Audit Office.

In the meeting with Mr Keith Hawkeswell, Director, the following issues were discussed:

- The history of the National Lottery Grants
- The Attorney-General's rights of access to individuals in receipt of grants
- Lessons from the Grants programs in terms of management, the business case for the grant and the Government's need to encourage capacity-building
- Development of a 'gateway review methodology' for projects
- Management risks for agencies issuing grants
- Lessons from a Charities Audit of 150 grant recipients, particularly the need for financial expertise, simple planning issues to be addressed, etc
- The PAC's role in reviewing reports.

In the meeting with Mr Phil Airey, Audit Manager, the delegation discussed:

- The change in focus for the NAO in relation to Public-Private Partnerships (PPPs) from negotiating deals to implementation
- Criteria for claiming commercial-in-confidence exemption from public disclosure
- Implementation of FOI legislation
- Processes for publicising tender documents
- How the need for improved financial auditing and the greater outsourcing of government activities led to legislative change for more access to contract documentation.

Audit Committee of the Scottish Parliament

On 24 September 2003, the delegation met with Mr Brian Monteith MSP and Ms Shelagh McKinlay, Clerk of the Committee.

Issues discussed included:

- The Committee's remit to look at reports of the Auditor-General and powers to summon witnesses
- Consultation with the Auditor-General about the Audit Office work program (but with the final decision resting with the Auditor-General)
- Operations of the *Public Finance and Accountancy Act* (the second Act passed by the Scottish Parliament)
- The philosophy of not examining a program/project until the funds are spent
- Operations of the Committee.

Audit Scotland

Also on 24 September 2003, the delegation met with Robert Black, Auditor-General and Russell Frith, Director of Audit Strategy, Audit Scotland.

Matters discussed included:

- The effect of devolution on improving scrutiny of reports
- The implementation of IASBs for listed companies from 2005 as per European Union requirements, with likely adoption by the public sector

- The 'bigger issue' of bringing budgetary decisions in line with financial reporting systems
- Access on a case by case basis to grant recipient accounts, as a contractual requirement, but with focus on the agency for audits
- The National Audit Office study on ambulance response times, particularly prioritisation of calls
- Value-for-money audits as a continuous management process, with very clear professional standards and the granting of time for improvement before Committee scrutiny.

Auditor of the Commonwealth of Massachusetts

On 25 September 2003, the delegation met with officers of the Auditor, as follows:

- Mr A Joseph De Nucci, Auditor
- Mr Glen Briere, Director of Communications
- Mr Nick D'Alleva, Director of Policy, Planning and Quality Assurance
- Mr John Beveridge, Deputy State Auditor
- Mr Richard M Giovino, Manager of Audit Policy.

Issues discussed included:

- The structure of the State, with notably the greatest number of elected Constitutional Officers
- The role of the Auditor-General in relation to performance and financial audits
- The role of the Auditor-General in the auditing of outsourced government services, including its discretionary role based on risk assessments
- Auditor-General's reports on a major transit project (where an original $4b budget blew out to $15b)
- How government contracts are made public (but not on the web)
- The focus on balanced reports.

Office of the Inspector General

Also on 25 September 2003, the delegation met with staff of the Inspector-General's Office.

The delegation met with Mr Neil Cohen, Deputy Inspector-General and Ms Pamela Bloomfield, Chief of Management.

Issues discussed included:

- The history behind the establishment of the Inspector-General's Office
- The role of the Inspector-General's Office in examining systematic issues relating to fraud and corruption
- The effects of the Public Records Law in relation to public disclosure of contract documentation
- The effects of the Open Meeting Law as a discipline in ensuring disclosure
- The proposed two-week timeframe for disclosure in the draft NSW Bill as too short, two years as a more likely scenario
- Posting of contracts on websites, eg "Doing Business" and "Com-pass".

House Post-Audit and Oversight Committee

On 26 September 2003, the delegation met with Mr John T Colton, Chief of Staff; Mr Eric S Berman; Deputy Comptroller and Mr Jim Tansey; House Post-Audit and Oversight Committee.

The discussion included:

- Conditions under which matters relating to accounting standards would be discussed by a Committee (ie if it were a legislative matter)
- Processes for working with the Auditor-General
- Powers of the Committee
- Appointment process and powers of the Comptroller
- Levels of citizen involvement in civic issues.

Harvard Business School

Also on 26 September 2003, the delegation met with Professor Paul M Healy at Harvard Business School.

Matters discussed included:

- Citizen's perspectives about the competitiveness of bidding processes, and how are disclosed contracts to be 'legible' to the average person?
- The appropriateness of having to accept the lowest bid (eg what about qualitative matters?)
- Does full disclosure lead to Value-For-Money?
- What is the aim of the push for transparency: does it merely provide information to attack projects, or is it about the quest for quality?
- The need for a 'knowledge of the business' in the audit process
- The need for an independent audit committee
- The need for more business skills on audit committees
- Should 'one size fit all' in International Accounting Standards?

New York City's Comptroller's Office

On 29 September 2003, the delegation met with Mr Dennis Hochbaum, Director of Support Services, Comptroller's Office.

The issues discussed included:

- The Charter and extent of the Comptroller's activities
- The size of the Comptroller's Office ($50m budget, 720 employees)
- Issues for consideration of the City's financial statements (breadth of roles, agency breakdown)
- The need for sound financial statements to support the borrowing program
- The need for good contract registration
- Decentralisation of the contracting process – all awarded contracts are public information
- The extent to which transparency acts as a deterrent for some contractors
- The conduct of audits - main financial audits are undertaken by the private sector, each agency is subject to some type of audit by the Comptroller at least once every 4 years
- Effects of new government accounting standards
- Processes for internal agency audits
- The Comptroller's access to vendors for audit purposes
- The effect of the requirement of the Federal Single Audit Act for a financial audit of any organisation in receipt of more than $300,000 of federal funding.

Public Interest Research Group

Also on 29 September 2003, the delegation met with Mr Chris Meyers, Director of the Public Interest Research Group.

Issues discussed included:

- The origins, roles and funding base of the PIRG
- The PIRG's actions for greater public disclosure by public authorities, and concern about shortfalls in enforcement of the FOI Act
- PIRG's information interests generally relate to environmental issues
- Concern about the 'bureaucratic' treatment of grants by Government, given provision of the Comptroller to audit these.

New York City Fire Department

On 30 September 2003, the delegation met with Mr John J Peruggia, Deputy Assistant Fire Chief, New York City Fire Department (Emergency Management Services).

Matters under discussion included:

- Management of ambulance responses, via a queueing system designed to respond on a priority basis to life-threatening conditions
- Use of traditional performance measures to indicate response times
- Use of report to indicate how to respond to need for more ambulance stations
- KPIs have not changed since report – response times have improved
- Why stations have different start times
- Issues for and stresses upon managers
- The effects of peak times (eg influenza outbreak) upon ambulance diversions from hospitals, and subsequent audit
- Electronic systems for monitoring ambulances and caseloads.

General Accounting Office

On 1 October 2003, the delegation met with Mr John Fretwell, Assistant Director and Ms Mary Denigan-Macauley, Security Manager with the US General Accounting Office.

Issues discussed included:

- The roles and programs of the General Accounting Office
- The emphasis of the Office upon 'evaluation' rather than 'audit'
- The use of consultation in the drafting of audit reports, although with some Departments this is a formal process, so consultation occurs through correspondence
- The process of peer review of the GAO (this year to be undertaken externally, by Canada)
- The implementation of a full public sector standards project, from 1999, converting relevant commercial standards to governmental use
- The mandate of the GAO to do general audit of the total government sector, but it does not issue an opinion on the Government's accounts
- GAO role in processing protests from companies losing contract bids.

House Government Reform Committee, US House of Representatives

On 2 October 2003, the delegation participated in a Hearing of the House Government Reform Committee, US House of Representatives.

The delegation also met with Mr John Cuarderes, Senior Professional Staff Member with the House Government Reform Committee.

Matters under discussion included:

- The Government Reform Committee
- The role of State politicians
- Issues of interagency efficiencies
- Transparency in procurement, through public disclosure of contract documents (where confidentiality is requested, those parts are blacked out
- Removal of intellectual property from winning tenders
- Public explanations as to why a tender was successful (eg price and meeting of technical specifications)
- Consideration of quality in the assessment of contracts
- Widespread and familiar use of agency websites for the posting of contract information
- Handling of complaints about contract specifications
- The role of Inspectors-General within agencies
- Issues concerning reports of Inspectors-General, ie they do not have force of law.

US General Services Administration

Also on 2 October 2003, the delegation met with Mr David Drabkin, Deputy Associate Administrator, Office of Intergovernment Solutions. The discussion included:

- The US practice of putting contracts on display such as a departmental head office, and removing the commercially sensitive information;
- Their current deliberations about putting everything on the Internet, and the barrier of sufficient server space;
- The conduct of a public inquiry on the above issue, with few responses, and those from agencies arguing against the proposal;
- Exceptions for the posting of building plans which relate to secure facilities.

Comptroller's Office, George Washington University

On 3 October 2003, the delegation met with officers from the Comptroller's Office, George Washington University. They included:

- Mr Jim Hess, Executive Director
- Mr Gerald B Kauvar, Special Assistant to the President
- Ms Helen Spencer, Assistant Vice-President for Research Services
- Ms Carol Blum.

Issues discussed included:

- The University's role as part of the Council of Government Relations, relating to the Government and lobbying re regulations about the organisation and funding of university research
- The management and form of grants from federal agencies

- Difficulties with the audit process – effectively a single audit grants focus, not favoured by the University because they are assigned an agency to do the audit and it excludes other parties
- The role of Inspectors-General in also auditing the grant from a performance aspect
- Unintended consequences of some contracts, eg scientific research can involve the University in areas it was not contracted to deliver on
- Proscriptive conditions attached to grants
- Issues with academics' paid outside work, including source of funding streams; intellectual property/copyright; patentable materials; measurement of government's goals
- George Washington University allows academics to do outside consulting for, on average, 1 day per week, but this must be reported to the University.

National Association of State Auditors, Comptrollers and Treasurers

Also on 3 October, the delegation met with Cornelia Chebinou, Washington Director of the National Association of State Auditors, Comptrollers and Treasurers.

Issues discussed included:

- Operational aspects of the Single Audit, including the proposed raising of expenditure threshold to $500K; details of Circular A133 regarding conduct of an audit; the number of audits conducted annually (35 per year, of State and Local Governments and NGOs); and focus of the single audit on financial matters and compliance
- The results of clearinghouse analysis conducted by the Government on single audits
- The effects of single audits on a particular State (Virginia), including overall grant receipts ($4-5b); the process of meeting 14 requirements, eg State matching funds, procurement regulations, cash management; how auditors are appointed; and the quality of the single audit, especially regarding CPA firms which, in Virginia audit Local Governments – in other States CPA firms do 100 per cent of single audits
- The advantages of single audits, including efficiency, consistency and the capacity to double up as the financial audit
- The disadvantages of the single audit, including the potential for overkill (ie if 8 agencies contributed funding, there would be 8 audits and a separate external audit); and the potential for small programs to be overlooked
- The coordination and facilitation role of NASACT.

On 4 October, the delegation travelled back to Sydney, arriving on 5 October 2004.

Appendix Six - Domestic Study Tour

OVERVIEW

The study tour comprised meetings over four days, 18 August to 21 August 2003. The aims of the study tour were to:

- familiarise the members of the newly appointed Committee to public finance issues;
- compare the issues in New South Wales with those in other Australian jurisdictions; and
- research interstate practices in relation to the Bill and other Committee inquiries.

The delegation comprised the following individuals:

- Matt Brown MP (Chairman);
- Paul McLeay MP (Vice-Chairman);
- Steve Whan MP;
- Gladys Berejiklian MP;
- John Turner MP; and
- David Monk (Committee Manager)

Due to other commitments, the following members returned early to New South Wales:

- Steve Whan MP, on the evening of 20 August 2003;
- Gladys Berejiklian MP, on the evening of 20 August 2003; and
- John Turner MP, midday on 21 August 2003.

BRISBANE

On Sunday, 17 August, the delegation departed New South Wales and travelled to Brisbane, except for Steve Whan MP and David Monk, who travelled on the Monday morning.

Queensland Audit Office

On Monday, 18 August, the delegation first met with the following individuals:

- Len Scanlan, Auditor-General
- Kaylene Cossart, Executive Officer
- Jane Didlock, Principal Policy Officer

The topics of discussion included:

- the scale and extent of the Queensland Audit Office's operations;
- the characteristics of an effective public accounts committee;
- the Government (Open Market Competition) Bill 2003;
- the relationship between the Queensland Audit Office and its Public Accounts Committee;

- tendering processes in Queensland; and
- auditing and reporting requirements for small agencies in Queensland (refer to the Committee's inquiry on this topic).

Queensland Public Accounts Committee

Later on 18 August, the Committee met the following representatives of the Committee:

- David Watson MP, Acting Chair;
- Tim Mulherin MP;
- Jan Jarratt MP;
- Leanne Clare, Research Director; and
- Deborah Jeffrey, Senior Research Officer

The topics of discussion included:

- sources of inquiries;
- relationship with the Audit Office;
- the private financing of public infrastructure and services; and
- the Government (Open Market Competition) Bill 2003.

Following this meeting, the delegation then departed for Melbourne.

MELBOURNE

Victorian Audit Office

On Tuesday, 19 August 2003, the delegation met with the following representatives of the Office:

- Wayne Cameron, Auditor-General
- Edward Hay, Deputy Auditor-General
- Joe Manders, Assistant Auditor-General

The topics of discussion included:

- grants management in Victoria;
- the Auditor-General's powers to access contractors' records;
- the scale of the Audit Office's operations;
- the development of its annual plan with the Public Accounts and Estimates Committee;
- follow-up of Auditor-General's reports by the Parliament; and
- Victorian practices in making contracts publicly available.

CPA Australia

Also on 19 August, the Committee met with representatives from CPA Australia, one of the peak accounting bodies. CPA's representatives were:

- Greg Larsen, CEO;

- Kevin Lewis, Director of Policy and Research;
- Adam Awty, Director of CPA's Public Sector Centre of Excellence;
- Naomi Carroll, Technical Advisor, Accounting and Audit; and
- Trevor Rowe, Government Relations Manager.

The topics of discussion included:

- the importance of public sector entities being encouraged to comply with the accounting standards; and
- the private sector's attitudes to making contracts publicly available.

Victorian Public Accounts and Estimates Committee

On 20 August, the Committee met representatives of the Victorian Committee. Representatives were:

- the Hon Christine Campbell MP, Chair
- the Hon Bill Forwood MLC, Deputy Chair
- the Hon Bill Baxter MLC
- Mr Robert Clark MP
- Mr Luke Donnellan MP
- Ms Danielle Green MP
- Mr James Merlino MP
- Ms Glenyys Romanes MLC
- Ms Michele Cornwell, Executive Officer

Topics were

- Estimates process
- Staffing arrangements
- Relationship with the Auditor-General's Office
- Practices in Victoria regarding publication of contracts and comparison against the Bill
- Practicalities of the Bill in relation to auditing grants

Victorian Department of Treasury and Finance

Also on 20 August, the Committee met Jeff Byrne, Director, Revenue Policy Branch.

The topic was the Victorian review of fire service funding run by that Dept (refer to the Committee's current inquiry on this topic). In particular, there was discussion about:

- The process re submissions, stakeholder briefings, interstate visits (but no hearings)
- The structure of the Victorian funding system, largely through insurance companies
- Transparency issues

- Under and over collection of fire services revenue by the insurance companies
- The pattern of benefits of fire services

The delegation then travelled to Canberra.

CANBERRA

Joint Committee on Public Accounts and Audit

On 21 August, the Committee met with representatives of the Joint Committee. Representatives were

- Mr Robert Charles MP, Chair
- Ms Tanya Plibersek MP, Deputy Chair
- Ms Catherine King MP
- Mr Peter King MP
- The Hon Alex Somlyay MP
- Senator the Hon John Watson
- Mr James Catchpole, Committee Secretary

Topics were:

- History of the Committee
- Functions and powers of the Committee
- Commonwealth practices in relation to Auditor-General access to contractors' records
- Report writing practices
- Staffing arrangements

Australian National Audit Office

Also on 21 August, the Committee met with officers from the National Audit Office. They included:

- Oliver Winder, Deputy Auditor-General
- John Meert, Group Executive Director, Performance Audit
- Warren Cochrane, Group Executive Director, Performance Audit
- Jeff Storer, Business Manager and Parliamentary Liaison, Performance Audit

Topics were:

- The relationship with the Joint Committee, its secretariat and the wider Parliament.