
Kicking the Cornerstone of Responsible Government Legislators' Perspectives - the Case of Commercial-in-Confidence

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This session of the Conference aims to examine the privatisation of government and the implications of this for Parliaments and their committees. Our specific focus will be on the case of commercial-in-confidence claims by Governments to avoid the provision of information to Senate committees.

Much has already been said and written on this topic by those with greater standing on the issue and more interesting things to say. What we propose is to share with you a miscellany of views which have been aired in the Senate, both in the chamber and in committees. The realism and practical dimensions of grappling with this issue in the day-to-day work of the legislation should be a useful injection of reality and an anchor point to which we could relate our deliberations.

Before we come to that, a few observations. The issues we deal with here are simple and go to fundamental principles. There are some who seek to add layers of complexity, but we are cautious when we encounter this as it reminds us of the cloud of ink let off by the squid to mask its escape.

In considering the privatisation of government, there is a threshold question. Is Government totally divesting itself of the responsibility for the provision of a good or service, so that no taxpayer resources, financing or staffing, go to the provision of that good or service? If so, the relationship is clearly one between a citizen and the

marketplace, with all the consequences of that relationship. I do not deal with that circumstance, as the parliamentary responsibility there is to intervene as required (i.e. either as representatives or legislators) and not one of direct accountability.

The other type of privatisation of government and the one which concerns legislatures directly, is the Claytons, or false one, where government seeks to retain the provision of a good or service, but to simply deploy a different agent to that of the public sector, i.e. to use the private sector as its agent. In this case, the relationship is very different, it is the one of the citizen with rights against the state. Strictly speaking, to call this privatisation is inaccurate because in the main, citizens do not concern themselves with the technical specific means of engagement and payment which a public service provider enjoys i.e. permanent public servant contractor etc. From observing Senators' approaches to this latter circumstance, there has been widespread acknowledgement that, while the means of public service delivery may have changed, this had not in any way diminished the responsibility of the Government to account for the provision of that good or service, regardless of the mechanism which it chooses to carry out its responsibilities.

The cornerstone of responsible government is that an executive government is responsible and accountable to the legislature for its activities. Those activities relate to the administration of the executive branch of government in all aspects and, in particular, to account for its administration of the law and the disbursement of funds as appropriated by the legislature.

In the Commonwealth legislature, the mechanism by which the disbursement of appropriated funds is routinely checked is through committees of the Senate, meeting as legislation committees considering estimates of Government expenditure. I do not need to go into this because we are fortunate to have with us at this conference Senator Hogg who has inherited the mantle of a former Queensland Senator, McGibbon, to wield the sword of accountability against the Hydra of defence at the estimates process, who will deal with this topic.

In recent years there has been an increased effort by a federal Government to deliver goods and services through the most efficient means available and this has led to exploring means of delivery other than through traditionally engaged public servants. A variety of alternative mechanisms have been developed, ranging from wholly owned government companies to mixed Government and privately owned companies, to fully privatised service providers. This has led to some delightful Mikado-like scripts where a minister has made a decision, after very careful consideration, three days after he took the same decision as a chief shareholder.

From the legislature's perspective, these differing means by which public goods and services are being delivered do not, of themselves, attract veils of secrecy. A public good or service, publicly funded, must be administered in a manner which is fully accountable to the public who have funded it. This principle appears uppermost in the approach of legislators to public service delivery.

The privatisation of service delivery, notwithstanding its continued public finding has, however, attracted some notions of private sector behaviour, in particular that disclosure of information would jeopardise the operations of the good or service provider. To this end, claims for non-disclosure have increasingly been mounted by

the partial or fully privatised public service provider on the grounds of commercial confidentiality. Such claims are seriously flawed in principle, they kick out the cornerstone on which responsible government is founded.

The proper basis of commercial in-confidence claims is the avoidance of the disclosure of information which could cause damage to the commercial interests of a commercial trader, and does not cover any and all information relating to commercial activities. For a claim that information is commercial-in-confidence and should not be disclosed to be sustained, it must be established that disclosure of the information could cause harm to the commercial interests of a trader, for example, by giving an unfair advantage to a trader's commercial competitors and allowing them to undermine the trader's position. Only if that basis is established should a House or its committees refrain from requiring that public disclosure of the information in question.¹

In any event, the apprehended prejudice to the commercial interests of a trader may be avoided by the receipt of the information as in camera evidence.

The underlying principle should be that if information can be disclosed to the government of a confidential basis there is no reason for its not being disclosed to a parliamentary committee also on a confidential basis. The commercial-in-confidence principle militates, in appropriate cases of apprehended damage to commercial interest, against the publication of information, not against the provision as such of the information. Any claim that information is commercial-in-confidence should therefore be met by the question: what is the damage to commercial interests that may result from the publication of the information, and the purpose of this question should be to determine whether information is treated as in camera evidence rather than as public evidence²

The Senate has made it clear, in resolutions going back to 1971, and reaffirmed as recently as 1998, that the operations of bodies in receipt of public funds are open to parliamentary scrutiny and "there are no areas in connection with the expenditure of public funds where any person has a discretion to withhold details or explanations from the parliament or its committees unless the parliament had expressly provided otherwise."

In a recent question on notice, a Senator asked:

1. *"In addition to recent court rulings and advice from the Clerk of the Senate, the Auditor-General in his 1998-99 Annual Report states that the question as to whether or not commercial-in-confidence information should be disclosed to the Parliament should start from the general principle that information should be made public unless there*

¹ Clerk's submission to *Contracting out Government Services*, December 1996, p.1. (Emphasis added)

² *Ibid*, p.2.

is a good reason for it not to be. In other words, there should be, in effect, a reversal of the principle of onus of proof, which would require the party that argues for non-disclosure to substantiate that disclosure would be harmful to its commercial interests. Could the department please substantiate its position regarding the non-disclosure stance it has taken in regards to the Senate order for the return of documents?

2. *Further, could the department please explain where they have drawn the line between managing outsourcing and maintaining accountability?*

3. *Does the department take a different approach to public accountability to projects that are 100 per cent publicly funded as opposed to other projects that have a mix of both public and private sector funding?*

4. *Where does the department's responsibility end when it uses public monies to purchase services from another agency? Should the agency be expected to give an account of how it spent public funds?"*

In the Auditor-General's Annual Report of 1998-99, it was stated that:

It is important to recognise that the provision of public services is not just about realising the lowest price, or concepts of profit, or shareholder value. It is about maximising overall 'value for money' for the taxpayer and ensuring proper accountability for use of public resources and achievement of agreed results. This requires consideration of issues other than production costs, such as client satisfaction, the public interest, fair play, honesty, justice and equity.

Although the public sector may contract out service delivery, this does not equate to contracting out the responsibility for the delivery of the service or output. It is the responsibility of the agency to ensure that the service is both cost-effective and acceptable to recipients and key stakeholder groups.

The Auditor-General went on to say:

The ANAO considers that the question as to whether or not commercial-in-confidence information should be disclosed to the Parliament should start from the general principle that information should be made public unless there is a good reason for it not to be. In other words, there should be, in effect, a reversal of the principle of onus of proof, which would require the party that argues for non-disclosure to substantiate that disclosure would be harmful to its commercial interests. This new standard has also been supported by the Senate Finance and Public Administration References Committee as follows:

*The Committee agrees (with the ANAO and the Commonwealth Ombudsman)...where information is withheld on commercial confidentiality grounds, at the very least the reasoning behind the decision should be provided promptly to the committee.*³

As far as the Parliament has a "right to know", the Auditor-General stated:

While the existing powers of the Parliament and its committees may be sufficient to compel disclosure, if the Parliament determines this is appropriate in particular circumstances, the ANAO considers it important for the Commonwealth to have regard to the Parliament's 'need to know' when considering entering into contractual arrangements which provide for the non-disclosure of certain information which is regarded as 'commercial-in-confidence'.

Let us now see some examples of how Senate and Senate committees have been responding to the issue of commercial-in-confidence.

FRUSTRATIONS BUILDING IN THE SENATE

COMMERCIAL-IN-CONFIDENCE - NOT NECESSARILY A REASON

FOR NON-DISCLOSURE

[30 November 1998 (Senate Hansard, p. 937)]

Senator CROWLEY My closing remarks on the Job Network are that I am very concerned that much of this is now regarded as commercial-in-confidence and we are therefore denied a lot of access to the data through the estimates process. I have sought information and advice from the clerks and from previous Senate inquiries as to what constitutes commercial-in-confidence - 'we can say no more' - is not justified. It is necessary, I believe, for the Senate to make it clear to people who want to give the sort of answer that they are going to have to justify which, if any, parts of the answer are able to be legitimately restrained under commercial-in-confidence, and the rest must be provided to the parliament. These are, after all, precious taxpayers' dollars, and it is proper that the parliament follows exactly where they go and how they are spent.

I do not believe that, if we are not going to see that made clear in the committees, that kind of argument and debate will have to be brought into this place. A thorough clarification of what is allowed to be withheld under commercial-in-confidence needs to put this beyond doubt for the whole parliament. We cannot have the process that we have had up to this point in some of the committees. In our own committee at the last estimates we had a farcical answer from the head of Employment National, who refused to say what his salary was with the

³ Senate Finance and Public Administration References Second Report: *Contracting Out of Government Services*, Canberra, May 1998 p.71.

response, 'I'm not going to tell you. I don't have to tell you, and anyway it will be made public in the annual report that is coming out in a month's time.' What an absolute farce. Of course he should have told the committee; he had no right not to tell the committee.

[8 May 1997 (Finance and Public Administration Legislation Committee)

Committee Hansard, p. F&PA118]

Senator MACKAY - How many vendor responses did you get from RFI?

Mr Herron - Twenty-one.

Senator MACKAY - I understand that three of those indicated that they would establish regional data processing centres in Australia if they were successful. Whom are they?

Mr Herron - That is part of the commercial-in-confidence information, so I do not believe it is appropriate to provide that information at this time.

Senator MACKAY - Commercial-in-confidence is an interesting subject. Why is it that we as an estimates committee, asking a valid question as to who these three vendors were, cannot get an answer from you as to their capacity or willingness to establish effectively regional industries? Why is that commercial-in-confidence?

Mr Herron - In the sense that the RFI itself is very preliminary and we were seeking indicative figures and broad approaches, the actual respondents themselves did not give away a great deal of information. They wanted to keep their power dry, so to speak.

Senator MACKAY - But you cannot even tell us who they are. I am not asking how much or anything that may in fact jeopardise their business. I am asking who were the three that indicated that they may be prepared to have a regional focus?

Mr Maclean - When we approached the industry we said that their responses would be kept in strict confidence because of the intellectual capital that was tied up in them. So the industry would respond freely, we would not reveal any response to any other supplier, nor would we make that public. Some of these bids which the industry were putting forward were given in strict confidence.

Senator MACKAY - We have been through this process with EPEs and PEPEs and the CES privatisation. When do we as the parliament get to know who they are and whether we approve of them or not as being suitable vendors in terms of setting up regional industries or in terms of getting these tenders?

Mr Maclean - I would suggest that that would be in response to the RFTs.

Senator MACKAY - When the decision is made?

Mr Maclean - When the evaluation is being conducted, and the Department of Industry, Science and Tourism will be deeply involved in the industry evaluation.

Senator MACKAY - When the RFT process is complete, when can we as legislators determine whether or not we approve of the vendors and whether or not we think that they are in the best interests of Australia?

Mr Maclean - My understanding is that the recommendations would go back through ministers to the Government.

Senator MACKAY - That is the Government; I am talking about Parliament, the estimates process and the transparency of the whole nature of outsourcing and contracting out. When will we know who these people are, and will we have a chance to make our views known prior to a decision being made?

A SENATOR SAYS IT IS TIME TO TAKE STOCK

[23 November 1998 (Senate *Hansard*, p. 407)]

Senator MURRAY (Western Australia) (4:49p.m.) - by leave - Item 12(a) of the Notice Paper draws attention to the tabling of the documents of return to orders by the Department of Prime Minister and Cabinet and other departments relevant to the decision of the Senate of 24 June ordering the production of documents in relation to all advertising and promotional and/or public relations campaigns planned, commissioned or undertaken by any Commonwealth department or agency since March 1996, where the estimated or final cost - whichever is higher - of the campaign exceeded \$500,000. This is obviously very relevant to the scrutiny role of the Senate. We are talking about minimum expenditures of half a million dollars.

On 20 November 1998, the Government tabled, from the office of Senator Hill, Leader of the Government in the Senate, a return to order statement. I want to draw your attention to the penultimate paragraph of that statement which reads:

In accordance with Senate practice, documentation considered to be commercial-in-confidence, in the nature of policy advice to the minister, or prejudicial to the effective implementation of a decision, has been withheld.

I want you to take note of that remark because I consider it to be inaccurate and to be an aggressive statement of executive privilege over the function of the parliament as a whole, which is to hold the executive accountable and, indeed, to limit its power.

The conflict between the executive and parliament has been going on for centuries, as we all know, and it still goes on to this day. It is important that the Senate continually remind the executive, as the Senate as a whole, that in these matters the Senate acts as a representative body in a sovereign sense - that is, representative of the people - to limit the executive's role and to hold it accountable. As far as I am concerned, there is no Senate practice which allows commercial-in-confidence material to be withheld from the Senate.

DIRECTIONS FOR THE FUTURE**[2 June 1999 (Legal and Constitutional Legislation Committee)****p. L&C 395]**

Senator COONEY - Regarding the commercial-in-confidence, what I want is a description in writing of what that means in this context. This is in the contract drawn by Clayton Utz between the AMEP people and the Government or the department. Do you know who the parties to the contract are? Is it the Commonwealth or the department? Can you remember? It does not matter.

Mr McMahan - The Commonwealth is the contractor by agent of the department.

Senator COONEY - If I were to ask you and you were to say, 'No, I'm not going to give it to you because of the commercial-in-confidence' -

Mr McMahan - Excuse me, Senator. I do not think we have said no; we have said that we will examine the issue. We have not said no.

Senator COONEY - But, in case you come to the conclusion I expect you to come to and say, 'Look, after all due consideration we are going to say no,' could you give us an explanation as to why? You could even ask Clayton Utz - as long as they do not charge you too much - to set out the basis upon which you say it is commercial-in-confidence.

We have heard this argument again and again now. I think, if we could, it would be good to get it in writing. If Clayton Utz wants to charge \$1,000 I do not want you to do that. But they probably charge reasonable fees as it is now and they might be more than willing to set this out, with cases, and say, 'Look, this is what we say; this is commercial-in-confidence between the AME people and the department.' I do not think the department itself could claim commercial-in-confidence, because, clearly, you are subject to examination here. Can you follow that? I should imagine that, when they say it is commercial-in-confidence, the commercial-in-confidence is that of the providers.

Mr McMahan - As I understand it - and we will get back to you - there is the scope, if there is information released, for there to be damages against the Commonwealth. That certainly is a significant element of the decision.

Senator COONEY - Yes, and that could be put in. I am just repeating arguments that you have heard over the years, but what that means is that, if a proper examination by a Senate committee cannot take place, of a government or a department - and it does not matter who is in government, just in case the minister jumps in on me - because of there being such a clause in a private contract, that raises issues. So, if that is the position, I would like them to say something like 'Look, there is a clause in this which means that the government can be sued because there is a provision in the agreement that that should not be allowed.'

In that case we as a committee might then say, 'Well, that sort of clause shouldn't be put in.' Can you follow that? Perhaps you could give us a description of the contract. I know that you have not said no, but I am almost certain that you will say no. That is why I am setting out the sort of program I would like, if you could. We can take up the next estimates committee the issue of whether such a clause should be in the contract, and so it goes on.

[12 May 2000 (Finance and Public Administration References Committee:**Mechanism for Providing accountability to the Senate in Relation to Government Contracts) p. F&PA 45]**

CHAIR - Welcome, Mr Evans. Do you want to make an opening statement?

Mr Evans - Can I just skip through a few points that I think are relevant in this area. The requirement for information to be published is a safeguard against malfeasance. As with all safeguards, you cannot measure the effectiveness of the safeguard by attempting to measure how much of the information is used. Lots of public servants can be heard asking any day of the week 'Why are we publishing all of this information?' I am sure people in companies are asking, 'Why do we have to give the shareholders all this stuff? They never read it. Nobody reads it.' The requirement to publish it is to tell the person publishing it that all this is going to be known and it works as a safeguard on the person who has got control of the information. I would caution against any attempt to say, 'Because we do not have a terribly large number of people looking up the list on the Internet and so-on, the safeguard is useless.' That is the way in which safeguards operate.

The point has been made that a requirement for publication of information and the requirement that secrecy be justified is in itself a safeguard against excessive secrecy and therefore against malfeasance. In other words, it makes people think about whether their secrecy provisions are really necessary, whether they really have any justification for keeping something secret. I think in this area there is a requirement for government collectively - both the executive and the legislature - to give a lead; for government collectively to say to the private sector, 'Government has to operate more openly than we have been doing. The public are rightly demanding that we operate more openly, and we expect our transactions with the private sector to be more open than they have been and for any secrecy to be justified.' If government were to give the lead, for example, by mechanisms such as this, I do not think you would find that the private sector would go on strike and refuse to deal with the government any more. I think the private sector would react by saying, 'Yes, we understand that. We will fit in with that requirement which is imposed by government.' It seems to me the whole reason that Senator Murray has put up this motion and that we are having this inquiry is a perception that there is a creeping secrecy accelerating all the time. It seems to me the reason that is happening is that the private sector and the public sector are sort of feeding off each other and each is escalating each other's requirements for secrecy. If government would give that sort of lead, you could scale down the amount of secrecy that you are getting in this area.

Another point is that basically, as a society, we have a choice all the time between timely application of well thought out safeguards and the application of safeguards as a crisis driven matter. In other words, you wait until some crisis blows up and there is some great scandal about some particular contract and then you say, 'Good heavens, we will have to do something about the secrecy of contracts.' So you then start imposing safeguards, perhaps not as well thought out as they might be. It is prudent to think about what sorts of safeguards you should be putting in place before the crisis happens to scale down the creeping secrecy and not wait until some crisis breaks out.

Another point is that safeguards have their costs. Safeguards are always imposed at a cost. Secrecy also has costs. It has direct costs in the time and effort that people spend in administering secrecy provisions and in working out how to deal with information that is supposedly secret. Of course, it has an indirect cost further down the track when you get those accountability crisis breaking out. It is clear from what has been said in evidence before you so far this morning that, if

some version of this motion goes forward, there are going to be problems of application and interpretation.

I was going to suggest a possible solution to that. If a version of the motion goes forward, built into the motion a provision whereby this committee would have a power to make applications and interpretations, as it were; to make a sort of subdelegated legislation type provision under the resolution in the Senate so that this committee could, for example, receive applications for particular sorts of contracts to be exempt from this provision, and consider them and decide whether to grant them so that you would not have to be constantly adjusting the resolution of the Senate to meet with all the problems of application and interpretation that might arise.

Lastly, I am struck by the [submission] of the Australian Mint, which I thought would have been a fairly large operation with a few contracts on their books. In the submission the Mint said that they would avoid contracts with secrecy provisions and therefore avoid the problem. They did not think there would be a very great difficulty therefore in complying with the resolution or something like the resolution. That seems to be a slightly different message from the one you are getting from other agencies. I want to respectfully suggest that might bear some further investigation.

CHAIR - I wonder how many of the confidentiality provisions are being driven by the provider and how many are being driven by the agencies themselves, and maybe there is a clues in that in terms of what the Australian Mint has put in.

Mr Evans - That submission could very well give you a clue to that.

Conclusion

We finish by focusing on a thought following on from those remarks by Senator Cooney and Harry Evans - that public servants should think very carefully as to whether they should ever *enter* an arrangement which would require them to not disclose information to the legislature and the public.

The question for the Conference is that it may in fact even be *unlawful* for a member of the executive (because of the constitutional requirements of responsible government) or for a public servant (because of the operation of the statute governing their employment) to *enter* into any agreement that would require them to withhold from the legislature an accounting of their use of public money.

Attachment 1**CONTRACTING OUT****COLLECTIVE RESPONSIBILITY OF GOVERNMENTS**

- Ministers
- Departments
- Agencies

FIRST ISSUE:

- Ministers must be accountable to Parliament
- Government collectively is responsible for the terms of the contract, the prices, which are accepted, and the compliance by contractors with the terms of the contract.
- There should be no basis for any diversion from these principles

SECOND ISSUE:

- Wider accountability of contractors
- Should Parliament inquire into the provision of services contracted out beyond matters of terms, prices and compliance?
- The receipt of public funds by contractors involves public scrutiny of their activities in the parliamentary forums.

THIRD ISSUE:

- Issue of relevance

FOURTH ISSUE:

- Issue of privacy - Fees to counsel.

Attachment 2**COMMERCIAL-IN-CONFIDENCE**

- What information/activities fall into this category?
- Avoidance of disclosure of information which would cause damage to the commercial interests of a commercial trader.
- Does not cover any and all information relating to commercial activities.
- Need to establish the extent of harm or damage.
- If this can be demonstrated, then public disclosure should not be insisted upon.
- Don't forget. Use of In-camera evidence.

WHETHER IT IS DONE IN-HOUSE OR OUT-SOURCED, PROPER ACCOUNTABILITY OF PUBLIC MONEY MUST BE PARAMOUNT.