

## FOCUS ARTICLES

### **Balancing Risk Management With Accountability - The Role And Impact Of The Legislature And Parliamentary Committees In The Process Of Public Accountability**

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It is worth pausing to consider the balance between risk management and accountability as officers of the public sector are increasingly being asked to embrace the greatest risk of all, to entrust to the private sector the provision of public goods and services.

This is a fascinating and complex topic. The provision of public goods and services exposes particular and unique issues of principle. In particular, such goods and services are funded by taxpayers and the relationship between the parties is therefore not the usual contractual one between a consumer and a provider; the relationship is the far more onerous one of that between a citizen and the state. These issues of principle are for examination at another time, suffice to say they provide an important backdrop to our topic.

Others will no doubt address the present whirlwind trends in public administration towards privatisation and contracting out or outsourcing. I will be making references to outsourcing as a case study of the high end of risk management. I will be so bold as to say that as far as public and parliamentary accountability is concerned, if executive government was looking for the big break – (get those Senate estimates committees off my back) – then it does not take much foresight to predict that it is in for a big shock because it is my prediction that nothing will change. It is not just that the public and the Parliament are more than ever in the mood for accountability, it is because the Senate, through its house of review function, has both a tradition and variety of well established mechanisms which have the pursuit of public accountability for expenditure of public revenue as their prime goal.

Under whatever employment terms those spenders of public funds may be engaged then, privatised, outsourced, or a last remaining few in the weightwatchers new slimline version of the Commonwealth Public Service, each category will have to maintain high levels of accountability. The principle underlying this is simple and derives from the public nature of the money being spent. While the responsibility for the provision of public goods and services can be delegated to any form of delivery mechanism, the accountability for that delivery and expenditure cannot. It is a matter of complete irrelevance to the citizen under what employment terms a public service provider is engaged, what is relevant to the citizen is that the public goods and services are provided to them in accordance with their entitlements and the law. And so to the topic, *Balancing risk management with accountability – the role and impact of the legislature and parliamentary committees in the process of public accountability.*

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This is the edited text of a presentation to a seminar entitled *Effectively Managing Risk in the Australian Public Sector* organised by IIR and the Commonwealth Attorney-General's Department, 26 May 1997, Rydges Hotel, Canberra

The purpose of this paper is to suggest just a single thought and a single inclusion for any approach which public sector managers ought to adopt in future strategies for managing risk. The suggestion is this – the prudent public sector risk manager will not forget parliamentary accountability, and in particular the Senate’s capacity and techniques for the pursuit of public accountability for taxpayers’ dollars.

In addressing this topic, I wanted to share with you some perspectives from the legislature. I will summarise some of the accountability mechanisms of the legislature, and in particular of the Senate, what to watch out for as you embrace risk. I will then make some comments on that crucial balance of risk management versus accountability and I will conclude with some observations on successful and unsuccessful interactions with legislators, how to sell them risk and innovation. In covering these matters I intend to refer, in particular, to the Finance and Public Administration Committee’s current reference into the contracting out of government services.<sup>1</sup> This reference and the evidence which it has already received, holds much food for thought in the area of risk management.

As a parliamentary officer I write as an impartial observer of parliamentary and particularly of Senate affairs. I have no authority to speak for senators, or to represent their views. These observations are therefore made solely in an attempt to assist prudent public sector risk managers to a better understanding of some of the operational and procedural accountability mechanisms of the Senate.

While the trend to an increased pace in outsourcing is new to Australia, it has been established practice overseas. With the United Kingdom experience in particular before us, public sector managers ought to take the benefits and omit the pitfalls experienced by that country in implementing the ministerial policy instructions given in this area.

The private sector is often espoused as the holy grail in terms of management and the one which the public sector should emulate. Here lies an important lesson for prudent public sector risk managers. It should not be forgotten that on one of the key performance indicators, financial management, the private sector has a well documented and notorious record of monumental failure. It has demonstrated a level of failure which has not been permitted to occur in public sector management. (Support for this assertion is encapsulated in the summary statement “the corporate failures of the ’80s”.) Prudent public sector risk managers will anticipate that senators will, as a result of these failures, be placing any outsourced responsibilities under a scrutiny regime of electron microscope intensity. They will hold those remaining public servants and the holders of the contracts, accountable.

Further, it must be remembered that the private sector has a demonstrated record of failure on a second key performance indicator, a willingness, or indeed a capacity, to account in relevant and timely detail to its shareholders for its activities. Prudent public sector risk managers, in knowing of these serious failings of the potential new delegates to be contracted to carry out portions of a public sector agency’s responsibilities, will devise watertight contractual arrangements which will ensure that these private sector propensities to fail will not occur with public funds. On this score, I commend you to pay close attention to the words of Dr Trosa from the Department of Finance who recently gave evidence on this point to the Senate inquiry on outsourcing, and to the Commonwealth Department of Administrative Services, which has already done good work in this area from which we can all learn.<sup>2</sup>

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On the other hand, senators have been observed to expect that prudent public sector risk managers will vigorously pursue those positive ideals of the private sector model such as sensitivities to market and customer requirements, initiative and obtaining value for money.

The leading edge public sector risk managers are the ones who first grasp the principle that outsourcing does not diminish parliamentary and ministerial accountability responsibilities. On the contrary, it increases them. It is the public sector agency which, despite its delegation of a task to a private sector agency, remains accountable to the legislature and through its elected representatives to the Australian constituency for that task. I can see the Senate Estimates questions being formulated already – “why did you as the officer responsible for arranging the contract, let it to that particular company? Surely the fact that it has now failed to meet requirements is not a surprise to you given the company’s previous record – you mean you were unaware of its previous record?”

I noted in my introductory remarks that outsourcing and contracting out cannot be used as a means of evading scrutiny by the legislature. We have both public sector and private sector examples of this which have alerted senators to the need for extra vigilance where such a delegation of responsibilities occurs. Senators now appear to be acutely sensitive to this issue and the prudent risk manager can expect questions on it. The leading edge risk manager will have a strategy thought out for dealing with the issue, a strategy which can be provided when asked for.

The most notorious public sector example being used by senators at present is the United Kingdom one of the minister trying to blame contractors for failings in the outsourced management of prisons.<sup>3</sup> We can laugh with all the benefit of hindsight at the naivety of such a ministerial position. Did the minister really think that the House of Commons and the British public would say that some technically different means of delivering prison services somehow absolved the minister of responsibility when it failed? As I say while we are laughing at such naivety, executive government in Australia may be heading down the same road. The job for public sector managers, and only the leading edge public sector risk managers will be able to accomplish it, will be to see that public sector advisers provide advice of such a high calibre that Australian ministers don’t repeat those now well documented mistakes made by those overseas who took this road before us.

A recent private sector example of this trend to rev up and take to the outside lane of risk management was the case study of employing outworkers in the garment industry.<sup>4</sup> The high costs and industrial relations issues associated with permanent employees led some big names in garment manufacture to divest themselves of employees and to the adoption of subcontracting arrangements. The scheme was full of promise for the big companies concerned. Not only was there a divesting of responsibility for large factories of plant and equipment, all those intractable and costly staffing problems disappeared overnight. Furthermore, the ferocity of open market competition drove labour costs way below award rates. It was, in short, nirvana! However there was an unplanned cost of the scheme. Some of the short term profits of the scheme were consumed in the subsequent adverse publicity for the big brand names involved as subcontractors engaged in labour market practices which evoked the description of sweatshop conditions. Although the proceedings of these companies to contract the manufacture of their garments through subcontractors to outworkers may have been perfectly legitimate arms length contractual arrangements, it was the big brand names, not the little subcontractors, which took a battering from the public because they had not ensured good labour market practices in their subcontractors and were thereby held – in the public opinion stakes at least – as vicariously responsible for them.

*Accountability mechanisms of the legislature – what to watch out for as you embrace risk*

So public sector managers are going to take risks, their continued employment in this brave new public sector world, let alone their bonus payment, is going to depend on it. Besides, they will want to show how competent they are in embracing those private sector ideals – cut through the red tape, get rid of the bureaucratic entanglements and get on with results. Some words of warning, if those results aren't for the taxpayer – watch out. If those results don't follow due process – watch out. Finally, if those results aren't achieved by lawful and publicly defensible means – watch out.

To do this effectively managers need to know what the rules are. The ultimate rules are those of parliamentary accountability and adherence to due and legal process. The latter evokes far reaching and complex issues relating to the application of administrative law via public sector agents to the private sector – and this is a matter for a separate paper. It is the practical mechanics of parliamentary scrutiny which is the purpose of this paper.

Prudent public sector risk managers will watch for these mechanisms of Senate scrutiny. They can be summarised as legislative, including delegated legislative scrutiny, financial scrutiny and general administrative scrutiny.

Political scrutiny will, of course, always be there – but under present rules, that remains squarely in the court of the minister.

The accountability mechanisms operational in the Australian Senate are set out on the basis that these are the ones most likely to impact on public sector activities, whether privatised or not. These mechanisms are long established procedural requirements in the Senate and the wise public sector risk manager is firstly aware of them and secondly, factors them into operational strategies. Firstly, looking at the plenary body, the Senate itself, these mechanisms include:<sup>5</sup>

*Question time* – the short sharp high political drama and point scoring exercise. Public servants should not forget in crafting questions briefs that there are strict time limits on questions and answers, that supplementary questions are routinely asked and that, at the end of question time, ministers frequently meet undertakings given at earlier question times to provide additional information. Furthermore question time is followed by a period of time during which debate may take place on the issue of a question, a debate in which a minister and his or her supporters may wish to participate.

*Questions on notice* – this is the deeper delve, piece by piece, the forensic assembly of the jigsaw, often seeking large scale documentary material from departments and agencies. This will be a real growth area once outsourcing gains momentum as both public sector dealings with contractors and the internal operations of contractors, in so far as they relate to the spending of public funds or the provision of public goods and services, are inquired into.

*The rule which requires a response to questions within 30 days* – failure by the minister to answer within the time frame may attract further political pressure, by triggering a mechanism which can require a minister to explain the delay. Other sanctions against the minister may follow if a majority of the chamber so determines.

*Notices of motion* – the technical term by which senators lodge matters on the agenda of the Senate. The prudent risk manager monitors these contemporaneously and does not wait for media reporting. Media reporting will at best be inaccurate or incomplete for public service managers' purposes; it will in all cases be late.

*General debate* – there is a need for prudent public sector risk managers to monitor all debate in so far as it relates to their agency.

*Committee of the whole* – this is the factory floor where legislation is assembled. Prudent risk managers are aware of every comment made in the course of that process in relation to their portfolio's legislation as this will alert them to such vital information as possible future amendments, policy developments, or ministerial undertakings.

*Orders for the production and creation of documents* – while not as well known as freedom of information requests, this device is a far more powerful tool for gaining public access to government information, ranging from formal reports to handwritten notes for file and e-mails. Any senator who can muster a majority on the floor of the Senate, can require a minister to produce or create documentation. This device will be used extensively in the future to monitor the activities of contractors. It is by monitoring notices of motion (one of the more usual ways of initiating an order for the production of documents) that the public service can forewarn itself that one of these exocets is on its way.

*Senate resolutions requiring statutory bodies to be accountable* – the Senate has repeatedly affirmed its view that while “statutory bodies are not accountable through the responsible Minister of State to Parliament for day-to-day operations, they may be called to account by Parliament itself at any time and that there are no areas of expenditure of public funds where those corporations have a discretion to withhold details or explanations from Parliament or its committees...”.<sup>6</sup>

Secondly, in the committees of the Senate, the following accountability mechanisms exist:

*Estimates committees* – perhaps the most well known of the Senate's accountability mechanisms. These are the twice yearly examinations of Commonwealth departmental expenditure and performance, during which both the responsible minister and departmental officers are questioned, both on notice and in person before the committees. Some new features though – since a modification in late 1994 to the rules under which the committees operate, the Senate Standing Orders, a minister no longer has the discretion as to who in the department will answer a question, the committee has the power to call for specific officers to attend and to bring specific documentation.<sup>7</sup> There have already been cases of this, for example, in relation to an officer of the National Media Liaison Office and officials of the Commonwealth Bank. We will see many more cases of this, perhaps even in relation to contractors to the public service. Secondly, the followup of an estimates round used to occur with further questioning of the minister in committee of the whole Senate. This is no longer the case and, instead, supplementary hearings are held. This has had the practical effect of shifting the spotlight from the minister back on to public servants who are now required to attend at further and further hearings until the accountability requirements of senators are met.

*Operations of the Selection of Bills Committee* – and the taking of public evidence on legislation. Now that the Senate is routinely referring large numbers of bills off to committees so that public evidence can be heard in relation to them, prudent risk managers are not only thoroughly conversant with the ins and outs of the process but are aware immediately it occurs in relation to a bill from their portfolio. This is done by monitoring the reports of the Selection of Bills Committee and networking with the committee secretary to whose committee the bill has been referred.

*Policy references* – the committees of the Senate engage in the most diverse examination of Commonwealth policy. All and any issues of public policy may be inquired into. As

the trigger for such an inquiry is usually a perceived problem with the policy's development or implementation, all prudent risk managers are aware of this possibility and stand prepared to account for the policy's implementation and, if required, to assist a committee with ideas and initiatives for improving the policy or its implementation. Such references may be given to the Senate's standing committees or a select committee may be established specifically for the matter in question. In the latter instance, prudent risk managers become intimately acquainted with the resolution of the Senate establishing the select committee as such resolutions enumerate the committee's powers and terms of reference.

*Annual reports scrutiny* – the prudent risk manager is aware of the Senate's continuing oversight of annual reports and the requirement for the Senate Legislative and General Purpose Standing committees to report on these. The prudent risk manager is also aware of the use by senators of annual reports as an integral tool in the estimates questioning process.

*Scrutiny committees* – these are the Scrutiny of Bills Committee and the Regulations and Ordinances Committee. Prudent risk managers are aware of the jurisdiction of these committees and subscribe to their publications. Long before any request as to how to deal with concerns raised by either committee filters down into a department, prudent risk managers already have a strategy in place to deal with those concerns.

In summary then, in dealing with committees, prudent risk managers establish contact with committee secretaries and ensure that all public information, including documentation, is made available. The leading edge risk managers test out hypotheticals and network extensively with committee secretaries.

Prudent risk managers are alert to the jurisdiction of the Senate and its committees. The jurisdiction of Senate committees is argued to extend to all areas within the legislative competence of the Commonwealth.

Prudent risk managers are alert to the powers of committees and their manner and frequency of use. The powers of committees can be summarised as being awesome, the power to call for persons and documents and the power to move from place to place. Think of a permanent royal commission into everything which the Commonwealth is empowered to do under section 51 of the Constitution, remove the royal commissioners and place politicians in their place, and lo and behold you have the Senate committee system!

*Interaction with legislators: how to sell them risk and innovation*

In considering the crucial balance: risk management versus accountability, there are some broad principles which senators appear to subscribe to:

Firstly – wherever public monies flow, the requirement for public accountability will follow. As a subset of this principle, no matter how complex and arms length the devolution, privatisation or outsourcing arrangement, if public money is involved, the parliamentary accountability responsibility of the public sector agency making that arrangement and its minister remains a certainty.

Secondly, no matter how enthusiastically the private sector focus on clients is embraced, when public money is involved, the so called "clients" will never be clients in the private sector meaning of the word, they will remain citizens, with legislative entitlements and obligations in relation to public goods and services. Decisions relating to these entitlements are thereby often reviewable and are ones for which the public sector agency, regardless of the manner or extent of its outsourcing, always remains accountable to the legislature.

On this score, I commend to you a reading of the submission by the Public Sector Research Centre of the University of New South Wales to the Senate Finance and Public Administration Committee inquiry into the Contracting Out of Government Services.<sup>8</sup> The submission puts its finger right on this important and inescapable relationship between a government and its citizens which cannot be dislocated by any fancy outsourcing or contractual arrangements.

The submission also describes how public services have become more accountable and accessible and how service workers have rights to information, to privacy and to access to review and appeal processes. Senators, and the Australian constituency which they represent, now expect these features and once such an expectation has been raised, it cannot be diminished. Regardless of the public sector's outsourcing, devolution or risk management techniques, public sector officials will be required to account for them before the Senate's processes. The same submission goes on to re-enforce this view by quoting an Industry Commission conclusion, that "whatever method of service provision is used, a government agency remains accountable for the efficient performance of the functions delegated to it by government".<sup>9</sup>

The legislature is not alone in its advocacy for this position. It is supported by such other independent agencies as the Auditor-General and the Commonwealth Ombudsman.

So what is the summary of how far risk managers may go? There are neither absolute nor quantifiable limits to the exercise of risk and the exercise of initiative. The test is simple – will the outcome withstand public scrutiny and was the process lawful. Top marks will, of course, be awarded to the risk manager who achieves that extra component of good value and benefit for the taxpayer's dollar.

The prudent risk manager incorporates this primary rule of accountability as a central feature of all strategies. Risk management can only be exercised and embraced in so far as it does not traverse or undo that public accountability requirement.

How often are senior public servants observed to appear to have forgotten the basics about the way senators appear to work. Senators are elected and they have constituents. While they may technically represent a State, they are often as a result of their politics, their skills and their interests more particularised in their representation than that. Through electoral and political representations, our fellow Australians put senators under enormous pressure. Senators react to that pressure, they distil it and analyse it and they direct it in a concentrated form at those with responsibility for delivery of the public service in question. As they are constantly driven very hard by their constituencies, so senators in turn set high standards of performance against which they measure the work of the public sector. Many is the public servant who may have been heard over the years saying that senator so and so is not informed on an issue; maybe, but you can bet that one of the constituents behind that senator most certainly is. It is those constituents' view about public sector operations of which public sector managers must be mindful.

So senators have a keenly honed sense of how taxpayers' money is being spent and will hold those responsible for its spending to account.

The path of risk management does not come with the sign post saying "You will no longer be held to account". In fact the reverse is the case. The further the path of risk taking is travelled, the larger will be the signs saying "You must account to the legislature and the taxpayer for your actions."

It is often raised as a concern by public servants: why the nit picking as to process. The leading edge risk manager's answer to this is to demonstrate that provided the outcome is beneficial to

the taxpayer and the process is lawful and in accordance with policy, then there can be no criticism. This is the way to sell risk and innovation to senators.

To revert to my opening theme in which I raised the publicly recorded failure of the private sector in relation to two key performance indicators, financial management and willingness or capacity to report on activities, any prudent risk manager who surveys the Senate Hansard will be familiar with the healthy scepticism which senators have of the activities of the private sector and their concerns to protect taxpayers' dollars from the predatory activities of the private sector. As in any form of interaction with the legislature any effort to sell senators risk and innovation must be aware of this scepticism and must devise strategies for overcoming it. Effective outcomes, good value for taxpayers' dollars and the capacity to demonstrate this are sure fire ways to overcome that scepticism. That means the leading edge risk manager will anticipate how to protect taxpayers' dollars and maximise the benefit in the deployment of those dollars in any contractual arrangements with the private sector.

Now for some suggested don'ts! The prudent risk manager avoids hiding behind the veils of public interest immunity, commercial in confidence and national security unless the circumstance acutely warrants it. Too ready a resort to these smokescreens appears to antagonise senators and devalues the currency.

In relation to public interest immunity, surely the executive was on safer ground when this was referred to as executive privilege. That name said what it meant, reserving confidentiality in the interests of the executive government. This new name has drawn from the senators, the not unnatural reaction that they, as elected representatives, are better determiners than unelected bureaucrats as to what is in the best public interest.

In relation to commercial in confidence claims – reserve your seats now for a really good stoush in the making. This claim is being used more frequently lately and appears to be attracting the ire of senators. The prudent risk manager will be aware of this already and the leading edge risk manager will by now have come to an understanding that 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 most certainly does not cover any and all information in relation to commercial activities. It would appear that senators are starting to say that, for a claim to be sustained that information is commercial in confidence and should not be disclosed, 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 other commercial competitors and thereby allowing them to undermine the trader's position.

In being aware of this, the leading edge risk manager will recommend that such material may be given to a parliamentary committee as in camera evidence. Further, the leading edge risk manager will at least have thought through the proposition that if information can be disclosed to the government on a confidential basis then there is no reason for its not being able to be disclosed to a parliamentary committee on the same basis.<sup>10</sup>

So, in conclusion, public sector risk managers will be aware of the Senate and its wide-ranging accountability mechanisms. Some time has been spent looking at outsourcing and the contracting out of public services to the private sector because this is the high end of risk management, because it is the current trend, and because it appears from the way senators have started questioning recently, that this is where the skills of a risk manager will be tested to the utmost.

You could say that here lies the riddle which will challenge even leading edge risk managers. The fundamental objective of the private sector, which is to increase the wealth of its shareholders,

may be inimical to the public benefit. The answer to the riddle is of course to coincide private greed with public good. While this is by no means impossible, all I can say is good luck.

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Notes

- <sup>1</sup> “The necessity for public accountability of all government services provided by government contractors”, referred to the Senate Finance and Public Administration References Committee on 4 November 1996.
- <sup>2</sup> Dr S Trosa, Department of Finance, evidence before the Senate Finance and Public Administration References Committee, Canberra, 3 April 1997, p 26 and Mr B Godfrey, Department of Administrative Services, evidence before the Senate Finance and Public Administration References Committee, Canberra, 4 April 1997, p 164.
- <sup>3</sup> Senate Finance and Public Administration References Committee, reference on public accountability of all government services, submission no 22, Public Sector Research Centre, The University of New South Wales.
- <sup>4</sup> *Outworkers in the Garment Industry*, Report of the Senate Economics References Committee, December, 1996.
- <sup>5</sup> A full exposition of these and other mechanisms is contained in Evans, H (ed.) *Odgers’ Australian Senate Practice, 8th Edition*, Canberra, 1997.
- <sup>6</sup> *Senate Standing Orders*, August 1997, p 128.
- <sup>7</sup> *Senate Standing Orders* 25 (15) and 26 (5).
- <sup>8</sup> See Note 3 above.
- <sup>9</sup> See Note 3 above.
- <sup>10</sup> H Evans, Clerk of the Senate, submission no 2 to the Finance and Public Administration References Committee, reference on public accountability of all government services.