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School of Government

Transparency and the Performance of Outsourced Government Services

Occasional Paper No. 5

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The Queensland Office of the Information Commissioner and the Australia and New Zealand School of Government are collaborating on a partnership to identify the ways in which transparency can augment quality public administration. The Occasional Paper series is part of the partnership program.

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Professor Mulgan has specialised in the area of accountability, which includes transparency and performance information. This area of expertise has led to consultancy work with a number of mainly government organisations, including New Zealand Treasury; New Zealand Law Commission; Australian Local Government Association; South Australian Auditor-General; Metropolitan Ambulance Service Royal Commission (Victoria); AusAID; and the Business Council of Australia. Professor Mulgan has also published a number of books and articles on the topic of accountability and related fields.

Information Commissioner's foreword

National and international reforms in information access mean that there is an increasing expectation of greater openness by the public sector. In line with these changes, public sector information is also increasingly recognised in legislation as a community resource which community members must be able to access, unless this is contrary to the public interest. Importantly for public sector managers, who are charged with achieving important economic, social and environmental goals effectively, efficiently, economically and ethically, information can also be a strategic asset.

This paper is the fifth instalment of a series examining the impact of transparency and how it can be used as a strategic management tool. Other papers include:

- Transparency and public sector performance
- Transparency and policy implementation
- Transparency and productivity
- Transparency in practice: The United Kingdom Experience

This series is aimed at objectively evaluating the available evidence as to whether openness can be a far more powerful tool than secrecy in serving the public interest. Where transparency can be used as a tool, the series also identifies the practical application and the lessons learnt so far. Importantly, this series seeks to articulate the case for transparency by showing how transparency can be used as a means to the end: effective policy implementation while minimising costs to the taxpayer.

Transparency of information about expenditure and performance of contracts for government funded services is an important aid in enabling government and the community to ensure that

public funds are working as intended to meet community needs and to identify waste. It is also important that government has sufficient useful performance information on delivery of publicly funded services to strengthen decision-making, including for prioritising future expenditure.

This paper establishes the current state of evidence concerning transparency and the performance of outsourced government services. The paper discusses three aspects of outsourcing; value-for-money efficiency, effectiveness of performance, and publicity of performance information and explores a number of lessons for both government and public sector managers on how to increase the extent of transparency and, thereby, the quality of performance of outsourced services.

Governments are now beginning to realise the potential benefits of greater transparency and accountability in public administration, including for example, through Open Data initiatives. It is my hope that this paper and others in the transparency series will continue to challenge thinking and encourage the public sector to be more open and responsive to the community's needs and expectations.

Rachael Rangihaeata Information Commissioner (Qld)

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Making cost–benefit analyses public (with clearly documented assumptions) ...greatly improves the transparency of decision making. Such transparency strengthens the incentives for decision makers to focus on the overall net benefits of projects. It also allows particular estimates (for example, of construction costs or patronage) to be debated and testing done on how the use of different estimates would affect the projects' net benefits. Transparency can help to improve the quality of analyses because proponents and practitioners know that any flaws are likely to be exposed.

Productivity Commission, *Public Infrastructure* (2014), 92-3

Transparency is needed to ensure that no one within the contractor can hide problems and that it is in the contractors' commercial interest to focus on their client's (the government's) needs. This requires more than just the key performance indicators reported to the client.

For instance, it also requires public reporting and openness to public scrutiny; whistleblowing policies that encourage staff to report problems up the supply chain; and user feedback.

United Kingdom National Audit Office, *The Role of Major Contractors in the Delivery of Public Services* (2013), 16

Introduction and summary

The outsourcing or contracting out of government services has increased significantly over the last quarter century, into areas that were previously considered to be core government functions. These include the provision of security for government installations, the hiring and firing of public servants, the administration of prisons, the printing of government documents, and the provision of publicly funded social services. The latest OECD survey reports that in 2011, on average across all member countries, 44% of government production costs were consumed by outsourcing, compared with 47% by government employees. On average, outsourcing represented 10% of GDP (OECD 2013). (Outsourcing, it should be remembered, does not necessarily reduce the level of government spending, only the proportion of government spending consumed by government employees.)

Though generally viewed as a source of improved efficiency and effectiveness, outsourcing has always had its critics. The empirical evidence for the cost savings arising from outsourcing has been challenged, particularly the extrapolation from a few well-documented successes such as rubbish collection and cleaning to more complex services (the so-called 20% rule (Domberger et al. 1986; Domberger et al. 1993; Hodge 1996; Hodge 1998)). Some infrastructure projects championed as delivering major savings to taxpayers have failed to do so (e.g. Bloomfield et al. 1998; Greve and Ejersbo 2002; Johnston 2010) and the value-for-money verdict on public-private partnerships (PPPs) remains mixed (Hodge 2010).

Concerns have also been raised about the broader constitutional and political effects of transferring important government functions from the public to the private arena. Outsourcing has been seen as potentially undermining important democratic values such as accountability and transparency and the wider pursuit of the public interest (Taggart 1993; Minow 2003; Hodge and Coghill 2007).

Government transparency, the subject of this paper, can be valued both for reasons of democratic principle and also instrumentally, as a means of improving the efficiency and

effectiveness of government performance (Heald 2006). The paper focuses on the latter, instrumental concerns. It examines whether restrictions on government transparency sometimes associated with outsourcing can be shown to impair the quality of government performance in relation to efficiency and effectiveness and, conversely, whether greater transparency of government outsourcing will lead to better performance.

In this context, it is sometimes useful to distinguish different levels or degrees of government transparency, ranging from 'internal transparency', which refers to transparency within the contracting relationship, particularly access by government officials to information held by private contractors; through 'limited public transparency', including confidential access by agents of public accountability, such as independent auditors or reviewers, without full public disclosure; to full public transparency which implies availability to any members of the public. While full public disclosure is often the most desirable form of transparency, the lesser stages may be beneficial, both in themselves and as stepping stones to wider publicity.

The paper begins by briefly identifying the main types of outsourcing contract before giving an overview of the main restrictions on transparency caused by moving from in-house provision of public services to outsourcing from private contractors. It then examines arguments and evidence suggesting that lack of transparency relating to various aspects of the contracting process can have a harmful effect on government performance and that, by the same token, increased transparency can lead to positive improvements. Discussion centres on three aspects of outsourcing; value-for-money efficiency, effectiveness of performance, and publicity of performance information. Finally, a number of lessons are drawn out for both government and public managers on how to increase the extent of transparency, and thereby the quality of outsourced performance (see Boxes 1 and 2).

Box 1: Transparency in Outsourcing: Lessons for Governments

Lesson 1: List online details of all government contracts above a certain value (with minimum threshold set at around \$10,000).

Lesson 2: Strictly define commercial-in-confidence criteria and provide independent audit of government agency compliance with criteria.

Lesson 3: Maximise access of government auditors to design and implementation of outsourcing contracts.

Lesson 4: Require all major government contracts to adopt open-book accounting among contracting parties.

Lesson 5: Provide access for administrative monitors such as ombudsmen to private contractors delivering services to the public.

Lesson 6: Facilitate Freedom of Information access to information held by private contractors that is relevant to the provision of a publicly funded service.

Box 2: Transparency in Outsourcing: Lessons for Public Managers

Lesson 1: Recognise that public access to information about outsourcing is generally in the public interest.

Lesson 2: Recognise that value-for-money estimates of outsourcing proposals are always analytically contestable and subject to manipulation by vested interests.

Lesson 3: Recognise the value of ongoing consultation not only with contractors but also with affected stakeholders and communities.

Lesson 4: Recognise the value of publishing appropriate performance information.

The relevant evidence is often not conclusive and calls for judgment in weighing its significance. There have been a number of general empirical studies on the relative costs of outsourcing, generalising from reasonably-sized samples of individual cases, for example the research that demonstrated the reduced costs of outsourcing certain easily specified functions (Hodge 1996, 1998). More recently, PPPs have attracted considerable academic attention in relation to their costs (Hodge 2010). But these studies do not directly address the issue of transparency. For example, there is no research formally contrasting the costs or effectiveness of a large number of outsourcing arrangements differentiated by varying degrees of transparency. Indeed, the number and complexity of transparency mechanisms and the limited number of comparable examples make such multivariate research impracticable.

Instead, evidence in this area relies on the analysis and interpretation of individual cases or small sets of cases from which reasonable inferences may be drawn. Some of the case studies focus on the absence of transparency and the adverse effect of such a deficiency on performance, leading to a judgment that greater transparency would have improved performance. Others are more positive in emphasis, seeking to show examples of where the presence of transparency mechanisms has contributed to superior performance. Overall, this evidence can be seen to support a conclusion that improved transparency leads to improved performance. But it is a conclusion that depends more on the qualitative interpretation and judgment of individual cases than on any hard quantitative data.

Varieties of outsourcing

Outsourcing is to be understood as a contractual arrangement in which a government or government agency, acting as principal, purchases specified goods and/or services from a private organisation or individual, acting as agent. Outsourcing contracts come in a number of different forms (Alford and O'Flynn 2011, 85-91), which can affect issues of accountability and transparency.

One common distinction is between transactional and relational contracts. Transactional (or classical or spot) contracts are typical of a one-off market transaction in which all elements of the agreement, including the goods and services to be purchased and the price of purchase, are clearly specified in the contract and neither party can be obliged to act in ways not explicitly mentioned in the contract. Relational contracts, by contrast, are typical of ongoing relationships such as service contracts, in which the terms of agreement between principal and agent are more open-ended, allowing the parties more scope to exercise discretion and providing for adjustments to be made as the contract progresses. A typical example is a contract for managing

a detention centre.

In practice, the distinction is not hard and fast, with many contracts containing different proportions of specific and open-ended conditions. One feature of the distinction relevant for transparency is that, in transactional contracting, accountability is focused on stated terms and their performance which can be clearly documented and therefore potentially available for external inspection. Relational contracts on the other hand – because they leave more to ongoing elaboration – are less informative as documents and depend more on discretionary judgments which may be harder to access and disclose to the public. For this reason, contracts with more relational elements tend to pose particular challenges for transparency.

Relational contracts are sometimes referred to as ‘partnerships’, as in the term ‘public- private partnership’ which is used, for example, to describe long-term arrangements for the private sector to build and/or operate major transport infrastructure such as railways or motorways. Strictly speaking, the term ‘partnership’ implies that both parties come together in a spirit of collaboration and shared values, having an equal share in the project and deriving equal, if complementary, benefit from it. The notion of a partnership of equals is therefore incompatible with the principal-agent perspective that underlies outsourcing contracts, both relationship as well as transactional, and that places government in the role of controlling purchaser. Many academic analysts therefore make a sharp distinction between outsourcing contracts and partnerships (e.g. Bovaird 2004; Forrer et al. 2010; Reynaers 2013).

In practice, however, the terms partnership and PPP are applied to many different types of arrangement between governments and private organisations (Hodge and Greve 2007). Some partnerships are genuinely equal and cooperative, particularly where governments cooperate with not-for profit community organisations, as for instance when government agencies and private charities work alongside each other in a humanitarian crisis. In other so-called partnerships, however, the government plays a principal-like role with overall responsibility for the project. In the latter case, the description ‘partnership’ is more of a political euphemism, designed to gloss over the fact that governments are ultimately responsible and should be held accountable for a project even when large corporations are accorded considerable discretion over how the project is delivered.

Certainly, in many major infrastructure or service contracts, the private providers contribute their own expertise and resources which are beyond the capacity of government. They may also be given responsibility for raising the initial capital, as in ‘private finance initiatives’ (PFIs), and may be expected to take a share of the financial risks involved. They may even help to shape the goals of the project as it develops, in cooperation with government officials. Nonetheless, in spite of the size and complexity of their contribution, they are still engaged in delivering public goods and services mandated by governments and are not free to impose their own values or priorities against those of government (Klijn and Teisman 2003). Even in relatively informal agreements between governments and non-profit organisations, the government often retains a controlling responsibility which prevents such arrangements from being partnerships of equals (Gazley 2008).

In this respect, the logical framework of such ‘partnerships’ is essentially the same as that of all outsourcing contracts, though they lie more at the relational than at the transactional end of the spectrum of outsourcing contracts, where managing the ongoing relationships between the

partners is particularly important (Zou et al. 2014). To the extent that governments are held responsible for the eventual outcomes of a partnership, such a partnership is properly treated as a form of contracting out or outsourcing, with the same accountability expectations as other such contracts. In this paper, therefore, some so-called partnerships will be included under the general heading of outsourcing, provided they fit the logical template of government as principal and contractor as agent. Indeed, much of the research on outsourcing over recent years has focused on this type of public-private partnership.

Outsourcing and Transparency

As already mentioned, a private contractor in an outsourcing arrangement is exempt from a number of accountability and transparency provisions that apply to government agencies carrying out similar functions. The precise extent to which outsourcing affects levels of public transparency depends on the details of the individual outsourcing contract and on how far the private contractor is required to make information available to government officials, ministers and members of the public. In general, however, the main exemptions from public-sector transparency are:

(i) *freedom from political inquiry*. Private contractors are not accountable through the ministerial chain of command or through parliamentary scrutiny for their internal operations relating to how they provide the goods and services stipulated. For example, matters such as the employment conditions of staff and the detailed financial situation of the company, including the cost structure for the contract, are usually kept from public view, under the general provision of 'commercial-in-confidence'. These are matters that private companies operating in a competitive market would normally keep to themselves to avoid yielding advantages to their competitors, and which they would not expect to divulge to those with whom they do business. Government agencies, by contrast, are subject to political accountability and transparency, for example by legislative committees, in almost all areas of their activities.

(ii) *freedom from government audit*. Private contractors are covered by company ('corporations') law, which requires certain levels of financial audit depending on their precise legal status. However, the extent of audit is less extensive than that required for public agencies operating under government financial regulations policed by the government auditors. Government auditors also conduct regular performance audits of government programs but they are not normally free to investigate the performance of private contractors. Government performance audits of outsourcing therefore tend to concentrate on the government's role as contractor.

(iii) *freedom from administrative law*. Private companies or individuals, though regulated by a number of areas of law, including commercial and industrial law, are generally not subject to the demands of administrative law, which covers individual administrative decisions and publicly adjudicates on whether they are in accordance with law and with the principles of natural justice, such as procedural fairness and reasonableness (Taggart 1992). Administrative law is enforced by designated institutions such as tribunals and ombudsmen that usually have no jurisdiction over the private sector.

(iv) *freedom from Freedom of Information (FOI) legislation*. Private contractors are not directly subject to freedom of information laws that allow citizens to inquire after both information held

about them personally and about matters of general concern, subject to certain exemptions such as national security and confidentiality of decision-making.

In practice, these exemptions from public transparency do not fully apply to all outsourcing contracts. In some cases, governments have legislated to extend some aspects of government transparency to contractors. In addition, as will be seen, contracts can include stipulations intended to compensate for some aspects of a transparency gap by requiring that the private contractor makes certain information available to government or the public or that certain aspects of the contractor's operations be open to scrutiny from government accountability officers or parliamentary committees. Such exceptions to the normal private-sector exemptions constitute the main policy focus of the present paper and will be discussed in further detail below under the general description of lessons for government.

Transparency and performance

How differences in transparency involved in outsourcing services affect performance is a contested and evolving issue. Broadly speaking, the substance of the debate can be divided into two contrasting periods. The first period covers roughly the 1990s, in which discussion of outsourcing was dominated by a paradigm of outsourcing or contracting out as straightforward transactional contracting. In this model, objectives were easily specified and monitored by in-house government officials and the gains from market competition were readily harvested through a competitive market of alternative suppliers backed by relatively low costs of changing suppliers.

Advocates of outsourcing, such as the then Industry Commission (Industry Commission 1996), as well as claiming reduced costs, also stressed the benefits of increased transparency and accountability that came with the specification of objectives and the monitoring of performance. These formal communications over the terms of a contract constituted a new dimension of accountability for results and could also be said to increase transparency about performance, if only internal transparency between the contracting parties.

In addition, the reduced compliance costs due to freedom from, for example, government audit and political accountability, meant less concern with internal process and record-keeping, and therefore more efficient production. Less red tape implied less cost. On this view, outsourcing traded off certain levels of accountability and transparency of internal operations for greater accountability for results and a more efficient eventual outcome (Mulgan 1997; Flinders 2005).

Into the 21st century, the ground of argument has shifted significantly. In the first place, the argument that government agencies are unconcerned about specification of objectives and monitoring and measuring performance has lost its force with the widespread adoption of performance management within government bureaucracies. This trend has been reinforced by the common institutional separation of purchasing and providing within the structure of government itself, for example through the establishment of executive agencies controlled through contract-like performance agreements that specify desired outputs and means of assessing compliance. Outsourcing, while still encouraging specification and measurement of results (Blöndal 2005), can no longer be singled out as the only means of introducing new levels of transparency and accountability for outputs and outcomes (Marvel and Marvel 2007).

Moreover, since the late 1990s, the types of goods and services being outsourced by governments have extended beyond the more straightforward purchase of easily specified items to cover more complex tasks such as ongoing delivery of social services, as well as long-term public infrastructure projects viewed as contractual partnerships. As a result, the simple transactional contract is no longer the sole or even the dominant paradigm of outsourcing. That role has now been eclipsed by the relational contract and the PPP, which have become the main focus of research and discussion. In connection with these more complex types of contract, the former conclusions that outsourcing benefits from trading off the traditional public-sector demands of accountability and transparency no longer carry conviction. Indeed, evidence is mounting that more exposure of outsourcing arrangements to public view will improve rather than damage the quality of government performance.

This evidence will be discussed as it relates to three aspects of performance under outsourcing and how they are affected by the comparative presence or absence of transparency mechanisms: (i) the extent of costs to be borne by government, which directly impinges on efficiency and value for money, and which is the most commonly studied aspect of outsourcing; (ii) the quality of performance in meeting objectives (desired outputs and outcomes); (iii) the collection and dissemination of performance information intended to assess and improve performance.

Transparency and value for money

The issue that has most concerned analysts of outsourcing is that of value for money, understood primarily as the cost of a project if outsourced in comparison with in-house provision, and whether the outsourced contracts are in the public interest. In theory, while private sector commercial contractors can be assumed to be maximising their own profit, those on the government side of contractual negotiations, whether politicians or government officials, are expected to safeguard the public interest by securing value for money. In practice, however, government members are often under pressure to follow short-term objectives at the cost of the broader interests of the public.

In relation to long-term PPPs, politicians have an electoral incentive to enter into contracts with the private sector that deliver immediate benefits in the form of tangible facilities or services while postponing the costs well into the future. Treasury bureaucrats who advise them are naturally predisposed in favour of solutions that suit the government's short-term fiscal agenda. Governments also rely heavily on external consultants, many of whom are also advising the private sector partners and may have a conflict of interest (Monteiro 2010, 266-8). Transparency is therefore needed to ensure that governments and their advisers are exposed to a wide range of alternative views as they decide how to act in the public interest.

The Melbourne City Link road infrastructure project, begun in 1995, is a classic case of the difficulties arising from a lack of transparency that concealed the terms of the contract until it was too late to avoid serious cost overruns (see Box 3).

Box 3: The Melbourne City Link project

The Melbourne City Link road infrastructure project, begun in 1995, is a classic case of the difficulties arising from lack of transparency. The contract was structured as a BOOT ('build, own, operate-transfer') project eventually costing over \$2 billion. The project was mired in political controversy, which was fuelled by the lack of information available to the public about the details of the costings and the allocation of risk. The Freedom of Information Act did not apply to a 'special project', and the enabling legislation allowed due process requirements to be overruled. The Auditor-General was critical of the government's refusal to disclose the extent of its obligations to the contractor, Transurban, to manage future traffic flows to generate toll revenue for the contractor. Critics were sceptical about long-term financial benefits to the government, complaining that the interests of the contractor had been favoured over those of the taxpayer. If more information had been available earlier, the government could have been forced to drive a harder bargain on behalf of the public.

Key lesson: government secrecy about costings can lead to decisions overly favourable to contractors

Sources: Hodge 2004; Hodge and Coghill 2007; Auditor-General of Victoria 1996.

Many similar cases are reported internationally. Research into the accountability of PPPs in Belgium found that lack of openness over budgetary planning contributed to inefficiency and high transaction costs (Willems and Van Dooren 2011). A review of transport public-private partnerships in the United Kingdom found a number of PPPs where the public appeared to have suffered poor value for money, mainly because the terms of the contracts turned out to have unduly favoured the private contractors in the allocation of risk (Shaoul 2010; 2011). Whereas in theory PPPs are intended to allocate substantial risk to the private sector, in practice the risk often ends up rebounding on the government, for instance in the case of rail franchises such as the London Underground, which were claimed to be favourable to the taxpayer but have proved particularly costly and inefficient. Moreover, the inadequate financial reporting of a succession of failures meant that the reasons for failure, which depended on faults in the original contracts, were not sufficiently available to the public – and thus hampered any public questioning and adjustment of policy (Shaoul et al. 2013).

In the United States, PPPs have been popular at all levels of government, particularly state and local government, where many such contractual arrangements have proved efficient and effective. However, an analysis of less successful ventures suggests a link between poor performance and a lack of transparency (Bloomfield 2006, 403-6). In some cases, the main purpose for preferring a PPP has been for reasons of budgetary appearance, to avoid formally adding to public debt. Governments have sometimes given the false impression that the private sector is bearing most of the expense, to the financial benefit of taxpayers, and have been unwilling to reveal accurate details of costs.

In Plymouth County, Massachusetts, for example, county officials persuaded the local legislature to approve a non-bid contract with designated companies to build and operate a new correctional facility (Bloomfield 2006, 403-6). The government publicity for the project claimed that it was to be funded by private financing with no obligation of public funds, in spite of the fact that the government would be making significant payments to the contractors over a thirty-year period. These claims were repeated in government publications and taken up by pro-business

media outlets. In this way, government concealment and distortion of financial information prevented informed public criticism and contributed to a long-term financial outcome that gave poor value for money.

In Nova Scotia, Canada, the provincial government embarked on a pilot program for a new approach to funding new schools that was intended to give value for money while also not requiring any addition to government debt (Vining and Boardman 2008, 29-30). The government entered into a series of contracts with different private companies for the purchase of land, the construction of school buildings, and the ongoing administration of the school. Subsequent inquiry by the provincial auditor-general ruled that the lease should be regarded as a capital lease and liabilities recorded as provincial debt. Moreover, critics raised doubts about the costs of the project, pointing out that the total expenditure outlays were approximately the same as those that would have been expended under normal government provision. However, at the end of the contract, ownership of the school remained with the leading contractor, not with the government as would normally have been the case. The government eventually bailed out of its PPP school scheme at considerable cost to taxpayers. Without external investigation and scrutiny, the losses to the public would have been even more extensive.

In Ireland, which has had extensive experience with PPPs, a comparative study of three contracts for water service provision indicated the value of *ex ante* consultation and transparency (Reeves 2013a). In all cases, departmental public servants were found to have had difficulty in understanding the complexity of the contracts and, when faced with the self-interested demands of contractors and the less than fully impartial analyses of consultants, were unable to extract sufficient benefits in the interests of taxpayers.

However, the losses were much less severe in one of the contracts, where the government had allowed for initial discussion in a series of roundtable meetings. These included not only government representatives and consultants, but also stakeholders, such as existing employees, employees associations and independent experts (including the academic conducting the research). Although the government did not accept the final recommendation from the roundtable (that in-house provision be continued), the process of consultation and the information it produced helped the government secure much better value for money in the final contract.

In the Danish local municipality of Farum in Denmark, the longstanding mayor resigned in 2002 as a result of a series of scandalous incidents, including inducements and kickbacks from commercial companies (Greve and Ejersbo 2002). Central to the scandals was the mayor's handling of a number of major outsourcing contracts in which his government was found to have contravened EU standards in the tendering and letting of contracts on behalf of the municipality.

Compounding the impression of corruption was the fact that few details were publicly available about the particular contracts with the relevant finance company and other contractors. Though critics complained the government was committing the ratepayers to massive future payments, the mayor and his financial advisers vigorously asserted, on unsatisfactory evidence, that the deals delivered value for money. Before the issue could be satisfactorily resolved, the mayor's scandalous behavior precipitated his resignation and the national government took over administration of the municipality, radically restructuring the contractual arrangements. Spectacular failure of the outsourcing contracts had a number of causes but could be largely attributed to unorthodox financial dealings masked by a lack of transparency.

The general conclusion to be drawn from these and other examples is that governments and their paid advisers can have difficulty in securing value for money for the taxpayer in outsourcing arrangements, particularly long-term PPPs, if they are not subject to effective public scrutiny. Such scrutiny needs to apply to all stages of the contracting process, including the initial negotiation of the contracts, and allow for open public debate about the merits of the contracts in question. Public managers need to recognise that public disclosure of the financial aspects of outsourcing contracts is generally in the public interest. Merely holding public meetings, without disclosing adequate information, is insufficient to secure the full benefits of transparency, as in the badly managed Mangawhai wastewater scheme (see Box 4).

Box 4: The Mangawhai community wastewater scheme

In 2005, the Kaipara District Council in Northland, New Zealand entered into a PPP to build a wastewater treatment project in the Mangawhai estuary. The council sought innovation from the market, long-term certainty in wastewater treatment, affordability, and improved water quality in the Mangawhai estuary. The council's preference for a PPP was based on a preference to keep the debt off the council's balance sheet and to put as much risk as possible on the private sector provider. In the view of the New Zealand Controller and Auditor-General, however, the decision took the council 'out of its depth' and the project ended up as a 'woeful saga'. The council put too much emphasis on achieving a certain accounting outcome and the transfer of risk, and not enough on value for money and affordability. It relied too much on the advice of its contractors and failed to maintain adequate accounts. The project ended up costing nearly double what was originally envisaged.

The council allowed for a reasonable degree of local consultation, holding a number of public meetings at which it attempted unsuccessfully to answer public concerns about the project, particularly its costs to ratepayers. However, it did not give accurate details of the terms of the contract, partly through its own lack of expertise and dependence on the contractors for advice, and partly through its unwillingness to divulge commercial information. Greater transparency about the contract would have increased the pressure on the council to reconsider its plans and would have saved the ratepayers considerable additional expense.

Key lesson: to be effective, public consultation about a decision to contract needs to be provided with accurate information about projected costings.

Source: New Zealand Controller and Auditor-General 2013

One major factor in favour of transparency is the uncertainty that underlies government calculations of the comparative costs of alternative proposals. The costing of long-term contracts involves a large number of assumptions, many of which are contestable, which can lead to great variation in predicted outcomes (Hodge 2010; Boardman and Vining 2010). For example, most analysts agree that private sector contractors face some additional costs when compared with government, including higher interest rates for borrowing and the need to return a profit to shareholders. These additional costs therefore need to be offset by, for example, improved efficiency in delivery and the transfer of financial risk from government to private contractors. To estimate these benefits requires the adoption of certain assumptions, such as a discount rate applied to future expenditure or a method for calculating the 'public sector comparator' (PSC) used to estimate the extent to which government provision would be more expensive than private. All such assumptions can reasonably be given varying values, which crucially affect

whether or not the contract appears to offer value for money.

For example, the highly influential United Kingdom Treasury Green Book on public procurement, revised in 2003, required that when public provision was being compared with private provision, the estimated costs of public provision should be adjusted upwards by up to 24% in order to account for an 'optimism' bias in public service estimates. This inflator, which has been widely adopted internationally, was based on research that purported to show that most projects directly funded by government, rather than funded by private sector initiative (PFI), had a tendency to come in over budget. Allowing for this level of optimism bias usually meant that PFI provision came in at lesser cost. However, this supposed empirical base was later criticised for being highly unreliable, on the grounds that it depended on selection bias, small sample size and other methodological flaws (Pollock et al. 2007). Indeed, the possibility of establishing a reliable public sector comparator (PSC) has been largely discredited and, in the view of the Productivity Commission, such a benchmark figure should only be used as part of a transparent tendering process, allowing the PSC to be open to public contestation (Productivity Commission 2014, 136-9; see also Reeves 2013b, 82-3).

Similar arguments apply to the use of cost-benefit analysis (CBA), which is still regarded as the most reliable analytical tool for assessing public-private partnerships, especially in the infrastructure area. Many of the variables that enter into a CBA are based on assumptions that can be subject to dispute, particularly the attempt to quantify wider economic benefits. In the words of the Productivity Commission, 'the key is full transparency, as the necessity to justify the methodology and assumptions acts as a significant constraint on poor decision making and arbitrary, poorly constructed analysis to justify a favourite project' (Productivity Commission 2014, 104).

In the Commission's view all major projects should be subjected to rigorous cost-benefit analyses that are publicly released and made available for due diligence by bidders. It rejects the common argument that costings should not be revealed for commercial-in-confidence reasons. Instead, the public interest is better served by open disclosure and the opportunity for opposing views to be held. It quotes the example of the Northern Sydney Freight Corridor, which was the subject of a confidential CBA. When eventually disclosed under FOI, the CBA was found to contain several questionable assumptions exaggerating future usage of an expanded rail expansion (Productivity Commission 2014, 105). Earlier disclosure could have saved the Commonwealth and State governments hundreds of millions of dollars.

In a similar vein, in Canada the major contracting agencies for the province of Ontario (Infrastructure Ontario) and for British Columbia (Partnerships BC) have required that all PPP projects should be subject to publicly available value-for-money assessments at three important stages: at the point of selecting an appropriate procurement methodology; at the point of assessing bids; and at appropriate stages through the course of the contract (Murphy 2008, 109-10).

Value-for-money costings of major outsourcing contracts are not wholly technical, evidence-based analyses on which experts can rationally agree. To a considerable extent, they are multi-faceted arguments in which different players have different priorities (Johnston 2010; Hodge and Greve 2013), and supporters of a particular outcome choose methods and evidence that will advance their cause. This point applies equally to both critics of outsourcing and to its supporters.

As a consequence, decisions to accept or reject a particular contract involve value choices. As such, in a democratic polity, they need to be subject to widespread public consultation and debate, with as much of the evidence and argument as possible available to the public.

The case for transparency is particularly pressing when those privy to decision-making, including ministers, key bureaucrats, consultants, lobbyists and industry, are overwhelmingly disposed towards private provision, often for self-interested reasons. The necessary injection of skepticism, which might save governments and taxpayers from the more costly failures, depends on external critics having access to the relevant government information. Without such information being independently available, government claims to have achieved value for money must be treated with caution. Research shows that governments are unwilling to allow their optimistic forecasts of savings from outsourcing to be independently tested, thus suggesting that the forecasts themselves are unreliable (see Box 5).

Box 5: Overstating the financial benefits of outsourcing

A comparative study of outsourced clinical services in hospitals in a number of countries (Spain, Portugal, Australia and the United Kingdom) found that governments generally claimed that private provision was successful and superior to public provision. However, a number of conspicuous failures, where governments had been forced to take back clinical responsibility, suggested that the practice of outsourcing clinical hospital care was far from trouble free. Moreover, claims of improved efficiency often appeared to depend on biased cost comparisons, whereby certain costs that were typically borne by public sector hospitals may have been omitted from the calculation of contractor costs. However, analysts were unable to gain full access to the comparative costing and were therefore prevented from making an informed value-for-money judgment.

Key lesson: governments should allow full public access to comparative costings in the interests of avoiding unwise contracting decisions.

Source: Acerete et al. 2012

Public disclosure and debate over costing, it should be noted, need not necessarily lead to the rejection of original government proposals. For example, in Colorado in the United States, the state government sponsored a study of public libraries that recommended major changes based on a cost-benefit study of library use. Critics argued that the methodology did not provide an accurate projection of libraries' true return on investment. However, the government report's authors held meetings with their opponents and were able to explain the methodology to them, thus defusing much of the public concern surrounding the proposal (Pew-MacArthur 2003, 37). In this way, transparency and discussion helped to build community support.

Without full transparency and the opportunity for public debate, attempts to open up discussion of major contract proposals may fall short. For example, the European Union has introduced a new 'competitive dialogue' (CD) process for the handling of public-private procurement. The CD process is intended to reduce some of the harmful effects of overlooking the complexity of major procurement projects, such as infrastructure projects, at the time of initial contracting. Under its provisions, public procuring authorities and private bidders enter into pre-bid discussions over public needs and requests and proposed private solutions. The aim is to deal with complexity through a combination of different governance strategies of coordination (bringing the various

parties and interests together), competition (encouraging prospective bidders to compete for the contract), and cooperation (making the various parties work out the project and possible solutions together). However, research on the use of CD in the Netherlands indicates that the CD process has yet to deliver its promised benefits, mainly because the government side is too concerned with formal coordination while the private players are overly focused on competition (Lenferink et al. 2013). In the researchers' view, the process needs to give more emphasis to cooperation and to the possible benefits it can bring. It would also benefit from being more open to public dialogue and scrutiny.

Public managers therefore need to treat the costing of major public contracts as a multifaceted exercise, in which input from stakeholders and the public is to be welcomed and fed into the decision-making process. Their advice to their political masters and bureaucratic superiors should take the form appropriate to the analysis of complex policy issues – carefully setting out the various options, identifying both the technical aspects and the particular interests involved.

Transparency and quality of performance

As well as value-for-money issues centring primarily on costs and efficiency, outsourcing contracts need to be assessed on effectiveness and the quality of their performance. What effect does transparency have on these values? A certain minimal level of internal transparency about performance is implicit in the contracting process itself, when contractors, in order to be paid, need to report on outputs to their government principals. But such transparency can be quite limited if reporting is restricted in scope, confined to one-off or infrequent information on outputs, or is internal only, being confidential to only a small number of government officials. However, if the assessment process is more open, in both the matters covered and the range of people involved, evidence suggests that increases in transparency leading to improved communication can have a beneficial effect on the quality of performance. This more open approach to managing contracts fits well with the recent management emphasis on achieving public value, which is a multifaceted and open-textured objective, requiring consultation and cooperation with a range of interested parties (Teicher et al. 2006).

Particularly in ongoing relational contracts or partnerships, those involved need to be in regular communication in order to respond effectively to changing circumstances and to develop commitment to shared values (Forrer et al. 2010, 481). Where such contracts are for intra-organisational services, such as human resources or IT, the ongoing consultation and sharing of information, on which the success of the contract depends (Stewart and Ablong 2013; Tai-Yi 2014), is mainly confined to the government purchasers and private providers. However, where the contract is for services provided to the public, consultation between the contractual partners may also be usefully extended to external stakeholders. In this respect, partnerships become more like collaborative relationships, where different parties and stakeholders collaborate on the basis of trust and reciprocal exchange (Alford and O'Flynn 2012, ch 5), while still retaining the emphasis on delivering public value for governments and taxpayers that underpins all outsourcing.

A comparative study of two Melbourne infrastructure projects demonstrates the value of widespread consultation during the construction and operation phases of a major infrastructure partnership (Alam et al. 2014). Planning for the EastLink project emphasised the development of

trust between the partners through continuous cooperation together with independent audits of progress. It also allowed for community feedback, through informative public displays and discussion forums (see Box 6).

Box 6: The Melbourne EastLink project

The EastLink road project in Melbourne, begun in 2004 and completed in 2009, involved a contract between the state government and ConnectEast, a consortium including financial and construction interests who then engaged Thiess John Holland (TJH) to design and construct EastLink. Costing AU\$2.5 billion, it was the largest infrastructure project ever constructed in Victoria and was completed on budget and five months ahead of schedule. The management of the project had a number of innovative features. One was the provision for an independent reviewer to verify progress. The reviewer reported directly to the government and the ConnectEast consortium but had no links with TJH (the construction company), a degree of independence atypical of infrastructure projects.

In addition, the partnership was founded on management principles of dividing tasks between different sections and different regions and then coordinating the different units by processes of continuous coordination and consultation. The emphasis on collaboration and shared trust within the contracting partners extended outward to the wider community. During the course of the project, the central project consultation group arranged 48 meetings with community groups and consulted with nine municipal councils as well as interest groups such as the transport users association and business communities in neighbourhood suburbs. Community displays were also mounted and discussion forums held in shopping centres.

Key lesson: widespread stakeholder consultation can improve the quality of performance for outsourced services.

Source: Alam et al. 2014

The analysts contrasted the approach taken for this project with that for another less successful infrastructure project: the Southern Cross Station Redevelopment Project (Alam et al. 2014). In this partnership, collaboration and consultation were confined to formal meetings between the contracting parties, with little attempt to build relationships and trust. As a result, frequent misunderstandings and delays arose, which led to timing overruns, and therefore cost overruns as well as expensive litigation. Many variables no doubt contributed to the respective success and failure of the two projects. Nonetheless, a strong case can be made for linking the superior performance of EastLink with the readiness of the partners to consult informally in a spirit of cooperation, not only between themselves but also with external stakeholders and the wider community.

This conclusion is confirmed by studies of PPP infrastructure projects in the Netherlands. For example, Koppenjan (2005) examined nine cases of public-private partnerships for transport infrastructure, dividing them into three groups. One group, which yielded poor results, involved very little joint planning and collaboration between the partners, leading to few opportunities for beneficial tradeoffs and enrichment of the project. Another group, which was also comparatively unsuccessful, provided for a high degree of consultative process with many meetings between the parties. However, the consultations took place at a tangent from existing decision-making structures and encouraged the parties to engage in impractical objectives, removed from the reality of government policy and community expectations. The third, most successful group

engaged in intensive, ongoing consultations which were effectively embedded in the wider political environment and allowed for joint adaptation to changing circumstances and demands. The lesson, therefore, was that consultation in itself is not enough but it needs to be integrated with the political environment through open procedures and willingness to listen.

Research on the United Kingdom Highways Agency also demonstrated the advantages of building trust and cooperation with contractors. The Agency's original approach had been to offer contracts for road maintenance to the lowest bidder and then to rely on each individual contractor to implement the terms of the contract, often through the use of sub-contractors. In response to repeated failures to achieve satisfactory performance, the Agency tried a new approach, based on a shared management framework, involving all contractors as well as the agency. All members of the framework were encouraged to consult with each other and their relevant communities and to share in the financial benefits (Johnson and Elliott 2011).

The Wellington City Council entered into a PPP with a UK company for building and managing a modern sewage treatment plant. Initially, the Council adopted a very arms-length approach to contract management. However, a number of disputes over the cost and objectives of the project forced the Council to take a more active interest. As well as conducting more and more thorough inspections, the Council established a community liaison group that met 3-4 times per year and enabled the contractor to tailor its performance to take more account of community views (New Zealand Controller and Auditor-General 2006, Appendix 3).

Similarly beneficial outcomes from regular consultation and transparency are also reported in the area of social service contracting. Systems of social assistance provision involving private sector organisations contracted to government have long been noted for their dependence on informal networks and frequent inter-organisational consultation between professionals (Considine and Lewis 2003). In the United States, a survey of government social service administrators across 27 states that were engaged in performance-based contracting of social service provision found a strong consensus in favour of active collaboration with all relevant stakeholders (Collins-Camargo et al. 2011). Conversely, research into the health and housing sectors in the UK shows that where the outsourcing of social services has been dominated by short-term cost-cutting, mutual suspicion can lead to a loss of trust and a deterioration in the quality of service (Hebson et al. 2003).

To be effective, private social service providers need to be fully engaged with their government partners in all stages of policy development, implementation and assessment. In turn, providers themselves must also be prepared to consult with, and receive feedback from, the clients whom they are paid to serve, as well as the wider community. As the OECD Recommendation on Public-Private Partnerships points out, 'active involvement of NGOs and other civil society groups can create transparency about problematic issues that might otherwise be overlooked and become serious issues if not tackled at an early stage' (OECD 2012, A. 1).

The model of successful contractual performance that emerges from the social service sector is therefore one which adopts an open, 'learning' perspective, where all players and stakeholders are prepared to share and benefit from their various experiences. Transparency, both internally within the providing network and with external stakeholders and clients, is a necessary condition for successful learning. Public officials involved in the management of all long-term outsourcing contracts need to welcome openness and consultation

as essential to their effective performance.

A management culture of openness, it should be noted, applies both internally and externally. Managers who are prepared to share information with contractual partners and submit to independent internal audit are also more ready to be similarly open and transparent with the public and vice versa. Conversely, unwillingness to trust contractual partners or welcome independent review only serves to confirm a defensive and secretive approach that cuts public managers off from the benefits of public discussion.

Transparency of performance information

Contracting has always emphasised the importance of clarifying objectives and reporting performance showing how far such objectives have been achieved. Indeed, this has been the basis of the claim that outsourcing improved public accountability. The level of such accountability is much increased if the performance information is made available not only to government purchasers but also to the wider public. The most high-profile examples of such transparency are found in relation to the provision of services where individual members of the public are offered a choice between alternative providers. For example, Job Services Australia provides regular quarterly star ratings of the various private-sector job assistance providers in its network.

Internationally, similar ratings have been published with respect to private hospitals, medical practices, nursing homes and schools. The official rationale for such transparency is to inform the client's choice, thus harnessing market-style competition to improve the quality of performance. However, research has shown that consumers themselves tend to pay little formal attention to published ratings (Mulgan 2012, 14-24). The main beneficial effects of such publication are seen to derive from the effects on management and professional providers of being publicly praised or named and shamed. Indeed, ratings are similarly employed even when consumer choice does not apply, as with prisons in the United Kingdom, which are rated annually on a four point scale by the National Offender Management Service.

Government publication of performance information can apply across different sectors and its beneficial effects are not limited to outsourcing arrangements. On occasion, as with United States nursing home ratings, the providers are all private sector contractors. At other times, as with prisons, the relevant organisations may be drawn from both the private and the public sectors and assessed by an independent regulator applying similar standards to both outsourced and in-house provision. Yet again, the performance information may be confined to solely public agencies, such as police forces. In each case, however, the evidence in favour of public transparency of performance information is similarly robust, as it depends on the reputational effects on managers and professionals, which can be assumed to be similarly effective in all sectors. All public managers should therefore welcome the publication of relevant performance information about outsourced services as a spur to improved performance.

The effectiveness of publishing performance information in improving performance depends on the credibility of the information itself, particularly among those directly involved in providing the goods and services in question. Does the information faithfully capture the actual objectives of the organisation and the extent to which they have been met? Does it discourage gaming and the pursuit of more measurable objectives at the expense of other less tangible values? Is the

information collected reliable and not contaminated by dishonest reporting? Internationally, research has shown that performance measures are more effective if they include a range of relevant indicators (Dickinson 2009, 345-8) and have been discussed with those professionally engaged as well as with relevant stakeholders (Mulgan 2012, 25-6).

Transparency has a role to play both in the setting of objectives and in the choice of relevant performance measures. In an outsourcing context, the objectives are typically set out at the beginning of the contract, being certain deliverables or targets that are to be met at certain times. Transparency, as we have seen, can have an important role in the initial process of establishing the framework of objectives and measurement which underlie the collection and dissemination of performance information.

Moreover, where the contract is longer-term and comparatively open-ended in its terms, allowance must also be made for continuing consultation about many aspects of the project not excluding its overriding objectives. Such matters for ongoing discussion may also include the appropriateness of the relevant measures being used to assess performance. For example, the US state of Philadelphia operated a successful program of job assistance known as Philadelphia@Work which involved a contract with a trust-based organisation, Transitional Work Corporation. In spite of the goodwill on both sides, devising an appropriate set of objectives and performance targets proved very challenging because of the variety and complexity of individual cases. A process of ongoing consultation with stakeholders and regular adjustment was necessary in order to avoid targets that were either unrealistically demanding or too easily met (Cohen and Eimicke 2008, ch 8).

Similarly, star rating systems are often the subject of constant evaluation and amendment, a process that needs to call on the experience not only of actual participants but also of external experts. The Job Services Australia network system of star ratings has been regularly evaluated in consultation with providers and other stakeholders. The most recent review recommended a more risk-based approach to compliance, with departmental audits to concentrate on poorer performers, leaving the more experienced and better-performing providers more scope to make their own decisions (DOE 2012).

The greater the amount of relevant data that can be published about the assessment, the more informed and effective the comments of outside commentary. More broadly, transparency of data relating to contractual performance can help to encourage research and so improve performance. Particularly in the social services area, government contracting agencies are collecting increasingly large banks of data about the activities of their private sector partners. In the area of child welfare assistance, for instance, researchers in the United States have been using statistical modelling to help administrators compare contractors as well as make intra-agency comparisons (Collins-Camargo et al. 2011, 511). Using a learning organisation approach, administrators can encourage their staff at all levels to share data with clients and other key stakeholders as a means of gaining insights into how they could better meet their objectives.

In general, then, there is strong evidence to suggest that greater transparency surrounding all stages of the government outsourcing process, from initial planning through implementation to final assessment, can yield significant improvement in performance. This evidence has become stronger with trends to outsource more complex and politically contentious aspects of

government that require a more open and consultative style of management. In response, the learning approach has become the dominant model for handling public-private arrangements, in contrast to an earlier emphasis on predefining set objectives and monitoring through predetermined performance indicators. Indeed, the shift towards a learning paradigm is itself the result of a collective learning experience, as governments, contractors and commentators have come to see the wisdom of open-ended, consultative management. One essential prerequisite for such an approach to flourish is the transparency of information relevant to all aspects of the contracting process.

Increasing the transparency of outsourcing: lessons for governments

If increases in transparency help to improve the quality of outsourcing, what steps should governments take in order to make outsourcing more transparent? A number of strategies are listed below, which can be summarised as ‘lessons for governments’ (see Box 1 above).

Online publication of contracts

One standard transparency mechanism is online publication of government contracts on government websites, which has now become international best practice. The US has been a leader in this area, with its government website (www.USAspending.gov) operating under the Federal Accountability and Transparency Act 2006, which lists all outsourcing contracts with government suppliers, giving the names of the supplier and the contracting agency, the sum involved, and a general description of the purpose of the contract. There is no minimum cut-off sum for listing, though contracts under \$25,000 may be aggregated into related clusters. The website also provides summaries of trends in procurement spending.

The UK has followed suit with its own website, part of the government’s transparency policy (www.contractsfinder.gov.uk) – though, in the view of the National Audit office (NAO), the information given is less comprehensive than in its US counterpart, particularly in the number of contracts listed (NAO 2103, 52). In Australia, the Australian federal government’s AusTender website (www.tenders.gov.au) lists all contracts over \$10,000 for non-corporate agencies (for corporate agencies the limit is \$400,000 except for construction contracts where the limit is \$7.5 million) (DOF 2014). Most state and territory governments operate similar websites, though with varying thresholds (e.g. \$10,000 in Queensland (www.data.qld.gov.au), \$100,000 in Victoria (www.tenders.vic.gov.au) and \$150,000 in New South Wales (www.finance.nsw.gov.au)).

In all cases, tender submissions remain confidential and contracts are not listed until they have been agreed on, thus limiting the value of such disclosure for the initial planning and contracting stages. Moreover, the level of detail given is usually fairly limited. Nonetheless, such publication does help to expose the parties, both government and private sector, to a certain level of scrutiny. It can also be an entry point for further inquiry, for example under FOI legislation, in which case the Australian Commonwealth requirement that the listed details include whether or not the contract contains commercially confidential information (see below) can be helpful to inquirers.

Pushing back on commercial confidentiality

One of the key barriers to public transparency of value for money costings and other details of outsourcing arrangements is the principle of commercial confidentiality. This principle holds that matters relating to the contracting process should be treated as ‘commercial-in-confidence’ if their publication could adversely affect the commercial operations of private contracting

companies. The principle is well-established in administrative law, constituting one of the regular exemptions to disclosure under FOI legislation where the public interest in disclosure needs to be balanced against the case for confidentiality. In order to override the general presumption in favour of transparency, the potential damage to the contracting company needs to be more than simple embarrassment or discomfort but should constitute substantial damage with significant financial consequences. The New Zealand FOI Act, for example, allows information to be withheld that 'would disclose a trade secret' or is 'likely unreasonably to prejudice the commercial position of the person who supplied or is the subject of the information' (Official Information Act 1982, s 9 (2) (b)).

The principle itself is fully justifiable. Companies tendering for, or securing, a government contract should not be required to divulge information that, if disclosed, could materially damage their competitive standing in the market. However, the problem with the commercial-in-confidence principle lies in how it is applied. Governments themselves are typically the arbiters of what is to count as commercial-in-confidence and frequently extend the principle beyond its legitimate scope. In some cases where lack of transparency has caused governments to secure poor value for money in negotiating contracts, the reason has been the unjustifiable application of commercial confidentiality to information that could well have been open to public view. While the ostensible reason may be to protect the commercial interests of private contractors, the actual motive has often been government unwillingness to share information with the public.

The fact that refusal to disclose commercial information is sometimes unwarranted is demonstrated by regular successful appeals against government misuse of the FOI exemption on grounds of commercial confidence. For example, in the United Kingdom, the Bristol City Council in 2009 cited commercial confidentiality as a ground for turning down an FOI request about the cost of an information technology contract for schools managed by a private company. The contract was one of over a hundred contracts between the council and the contracting company which were routinely kept confidential. Appeal to the Information Commissioner's Office eventually led to the refusal being overturned on public interest grounds and the council was ordered to release both the costs of the information technology and the contract (Shaoul 2011, 218)

In many cases governments decide to withhold information received from contracting companies that the companies themselves would be prepared to disclose. The recent inquiry conducted by the United Kingdom House of Commons Public Accounts Committee (PAC) provides important evidence on this point. The inquiry was prompted by an earlier NAO report on the contracting services of four major international contracting companies: Atos, Capita, G4S and Serco (NAO 2013). Representatives of each of the four companies appeared before the PAC to answer questions. On the issue of transparency and commercial confidence, all agreed that their companies would be willing to disclose more information than was typically made available and that they would comply with many of the FOI requests that are made in relation to their contracts. Resistance to disclosure, in their view, came mainly from the government departments that acted as gatekeepers for the shared information. The inference is that governments, particularly departmental officials, are excessively cautious in releasing information and that they misuse the argument of supposed damage to commercial interests as a fig-leaf for their own reluctance to disclose.

Public disclosure need not entail full disclosure to all interested members of the public, but can

be restricted to the public's representatives, such as members of legislative committees or government auditors. In some more commercially sensitive areas, such people can be expected to respect the confidence of governments and contractors while exercising independent scrutiny in the public interest.

Auditors-General have internationally been in the frontline of opposition to the excessive application of the commercial-in-confidence principle to restrict their access to matters of government expenditure that they would normally be free to examine. The former Commonwealth Auditor-General, Pat Barrett, was an early critic (e.g. Barrett 2001) whose influence helped to develop the Australian National Audit Office's active role in carefully developing legitimate principles of commercial confidentiality. These principles are now set out in the Department of Finance's procurement policy and subject to annual scrutiny by the Auditor-General (see Box 7).

Box 7: Australian Commonwealth Senate Order on Departmental and Agency Contracts

The Senate Order, instituted in 2001, requires relevant ministers to table advice for each agency confirming that they have published online lists of relevant contracts valued at more than \$100,000. These must give certain details including the name of the contractor, the amount, the purpose, and the commencement date. The list must also specify any requirements for confidentiality and the reasons for such requirements. The Department of Finance gives advice on what criteria must be met for a matter to be legitimately considered commercial-in-confidence:

- the information to be protected is specifically identified.
- the information is commercially 'sensitive'.
- disclosure would cause unreasonable detriment to the owner of the information or another party.
- the information was provided under an understanding that it would remain confidential.

The Auditor-General reports annually (biennially from 2014) on whether the order has been complied with and samples a number of agency lists to see whether the commercial-in-confidence criteria have been met.

Key lesson: government auditors should monitor the use of commercial-in-confidence reasons for restricting transparency

Source: DOF 2014

The latest ANAO report records a general reduction in the proportion of government contracts containing confidentiality clauses (from 24% in 2001 to 4% in 2012), while a small but not insignificant proportion (9%) of contracts with confidentiality provisions, in the opinion of the ANAO, applied the criteria wrongly (ANAO 2103).

The value of the Australian Audit Office's approach to limiting the scope of commercial confidentiality was illustrated by a Canadian academic analysis. It used the ANAO's criteria to assess the British Columbian government's resort to commercial confidentiality in developing a PPP for an urban railway line in Vancouver (the Canada Line) (Siemiatycki 2010). Judged according to ANAO standards, the provincial government practice, though partly acceptable, was significantly deficient in many respects, including in the refusal to release certain information about the system design, construction methods and financial models in competing contracts after such information had ceased to be commercially sensitive. In addition, it was clear that the government was willing to release information that could properly have been judged commercial-in-confidence when such information suited the government's advocacy in favour of the successful contractors. In other words, the government was using political advantage, not commercial sensitivity, as its criterion for deciding on disclosure. Such a conclusion strengthened the case for an independent monitor, such as an auditor-general, to be the arbiter of what information is judged to be commercially confidential. In general, governments should make every effort to strictly define and constrain the scope of commercial-in-confidence criteria, while also providing independent audit of government agency compliance with criteria.

Access for government auditors and independent reviewers

As will have become apparent, government auditors have been very active in increasing the transparency of government outsourcing by exercising independent, critical scrutiny over the letting of government contracts. In many individual cases, an audit report has provided the most authoritative and influential critique of government inefficiency in the contracting process. More generally, auditors have sought to break down the secrecy surrounding many aspects of outsourcing in an attempt to subject the actions of officials engaged in contracting to the same, or similar, levels of oversight as those that apply to officials' other activities. As the OECD report on PPPs emphasises, supreme audit institutions have 'an important role in examining whether the risks involved in PPPs are managed effectively' (OECD 2012, A.2). Indeed, maximising the access of auditors in monitoring government contracts is an important instrument of government transparency.

One aspect of this campaign has been challenging the limits of commercial confidentiality, as discussed above. Another strategy is to extend the auditors' rights of access to contractors' information and premises by including a specific clause to that effect in the contract. The Australian Commonwealth, for example, has developed standard non-mandatory clauses that government agencies are encouraged to include in their contracts. These clauses only concern access to matters relating to the performance of the contract, but they cover issues such as keeping records, adopting Australian accounting standards, allowing audits of operational practices, security, and privacy protections (DOF 2007; ANAO 2012).

Traditionally, government audit has been confined to the auditing of government agencies. However, as guardians of the probity, efficiency and effectiveness with which public funds are spent, they have staked a claim for scrutinising all government expenditure, regardless of whether the responsibility for such expenditure lies with public or private agencies. In the common phrase, they have sought 'to follow the money', into the private sector if necessary. Amendments to the Commonwealth Audit Act passed in 2011 extended the jurisdiction of the Auditor-General to include performance audits of 'government partners' (section 18B) which included not only state and territory governments but also other contractors performing functions paid for by the Commonwealth. To date, however, no audits have been conducted of private contractors.

As well as government auditors, other types of independent monitors and auditors have proved useful in helping to oversee the conduct of contracts. Ireland, for example, established the position of a formal process auditor to examine all large-scale contracts (Reeves 2007, 337). Former New South Wales Premier, Nick Greiner, proposed an independent oversight authority to supervise all PPPs, in both the planning and the implementation stages, as a means of safeguarding the public interest which tended to be overlooked if decisions were left to the main players and their advisers (Johnston and Gudergan 579). Research from the Netherlands also reports on the value of independent monitoring of the progress of PPPs (Reynaers 2013, 46). Though such a body would not necessarily report in public, it would increase internal transparency.

Open-book accounting

Another potential mechanism for increasing transparency and also reducing the extent of commercial confidentiality is the use of 'open-book' accounting in the management of outsourcing contracts (Principle 4). Open-book accounting was first developed in the private sector in relation to partnerships between firms with interlocking functions, for example manufacturers of complementary products or buyers and suppliers in a particular industry. As the name suggests, open-book accounting provides partners with mutual access to aspects of each other's financial information as a means of facilitating contractual arrangements and building trust between them (Caglio and Ditillo 2012). On the same rationale, it can also be extended to public-private partnerships, particularly as a means of allowing the government to gain access to information held by private contractors that may be relevant.

Open-book accounting in PPPs has been particularly common in the UK, where some form of open-book provision is written into an increasing number of ongoing contractual arrangements. The NAO report into the four large contractors revealed that around two out of every five government contracts they held included open-book provisions (NAO 2013, 35). Under open-book accounting the contractor is required either to update the client department regularly on their costs and profit or to allow the client department to audit such costs on an ad hoc basis. The NAO report noted, however, that many client departments made little use of their access. From the NAO's perspective, the advantage of open-book accounting is that it allowed the NAO itself to have access to contractors' financial information that was available to the client department and thus to make its own judgments on such matters as the level of profit being made by the contractor.

The UK Public Accounts Committee in its follow-up response to the NAO report also emphasised the value of open-book accounting and recommended it be applied to all government contracts (UK PAC 2014, 5). It noted the Cabinet Office view that departments often lacked the ability to use open-book accounting and would need to improve their capability significantly to make it work in practice. The major contractors, by contrast, while differing over the details of what information they were ready to share, had no objection in principle. This view was echoed by the leading British business peak body, the Confederation of British Industry (CBI), which urged the adoption of open-book accounting for all government contracts and claimed that governments were typically more reluctant than businesses to disclose financial information (Plimmer 2014).

Open-book accounting does not necessarily entail full disclosure to the public and so does not necessarily enable open public discussion of all details of contracts. However, by guaranteeing that contractors make otherwise confidential information available not only to government officials but also to independent monitors such as auditors it does serve to lift, to some extent, the veil of commercial confidentiality that might otherwise surround the contracting process.

Access to administrative law remedies including Freedom of Information

Private individuals and companies are generally not subject to administrative law, which is normally confined to reviewing the decisions of public organisations. However, the increasing use of private sector providers to deliver publicly funded services, particularly services directly to members of the public, has raised the issue of whether the boundaries of administrative law are unduly constricted and whether citizens receiving services from private providers should have access to the same legal remedies as they have when dealing with public organisations (e.g. Minow 2002). This concern has led to the search for new ways to apply the values of administrative law, such as transparency, due process and equal protection, to third-party contractors (e.g. Rosenbloom and Piotrowski 2005; Benish and Levi-Faur 2012).

In some areas, the reach of an administrative law remedy can be extended to cover the actions of private contractors. For example, in some jurisdictions, ombudsmen are entitled to investigate complaints against government contractors as well as against government agencies (e.g. Commonwealth Ombudsman Act s 3BA). Alternatively, designated ombudsmen can be established to deal with public complaints about service delivery from private contractors. For example, the Victorian Public Transport Ombudsman is a not-for-profit agency established by the government but funded by public transport operators in response to public demands for an official avenue for passenger complaints (Hodge and Coghill 2007, 688-9).

Freedom of Information legislation is another major mechanism for securing transparency of outsourcing. Some states in the United States extend their FOI laws to grant direct access to private contracting companies performing publicly-funded functions (Rosenbloom and Piotrowski 2005, 114-5). Alternatively, access can be made via the government purchasing body. FOI requests to a purchasing agency can reach information held by a private contractor provided that information is available to the government agency and is not subject to overly restrictive commercial-in-confidence exemptions. For example, in the US state of Wisconsin, the Open Record Act (the state's FOI law) requires that each government authority should make available any record produced or collected under a contract 'to the same extent as if the record were maintained by the authority' (Wis. Stat. 19.36 (3), quoted in Benish and Levi-Faur 2012, 891-2).

Increasing the transparency of outsourcing: lessons for public managers

Government policies can do much to assist the transparency of outsourcing, but the most important contribution comes from public managers themselves, not only in faithfully implementing the policies but also in their general approach to dealing with contracts, contractors, interested stakeholders and the general public. This survey of research into the relationship between transparency and performance allows public managers to derive a number of positive lessons in favour of increasing transparency around the contracting process (see Box 2 above).

Lesson 1: Recognise that public access to information about outsourcing is generally in the public interest.

Public managers tend to be naturally cautious towards public disclosure of information relating to contracts, partly for fear of exposing themselves or their political masters to criticism and adverse publicity, and partly through a belief that all information held by private companies should be treated as commercial-in-confidence. They should realise that if public disclosure can lead to benefits in the public interest, both they and their political masters also stand to gain from such disclosure. They should learn to welcome critical public discussion as a useful aid to successful management. At the same time, they should accept, and teach their commercial partners, that commercial-in-confidence protection applies to only a limited set of commercial information.

Lesson 2: Recognise that value-for-money estimates of outsourcing proposals are always analytically contestable and subject to manipulation by vested interests.

In relation to value-for-money costings, including cost-benefit analyses, public managers should accept the inevitable methodological limitations in all such studies and should treat them as open to challenge from independent critics. They should take a skeptical approach to all analyses emanating from advisers with a vested interest in a particular outcome, including the government's own preferred consultants. In the interests of financial efficiency, they should make all value-for-money analyses available for public comment.

Lesson 3: Recognise the value of ongoing consultation not only with contractors but also with affected stakeholders and communities.

Public managers should also make sure that, once a contract is signed, they have established channels for continuing dialogue with contractors as a means of encouraging successful outcomes. Such dialogue should be as open as possible and should also include regular consultation with relevant stakeholders and communities. Continuing discussion is particularly important in the case of contracts lasting over several years or where contractors provide services directly to members of the public.

Lesson 4: Recognise the value of publishing appropriate performance information Public managers should aim to publish as much information as possible relating to the performance of contractors. Such information frequently forms part of the contractual agreement, being required for the authorisation of payment. But performance information should be available not just to the contracting parties but also to the wider public as a means of naming and shaming poor performers and encouraging improved performance.

Performance information needs to be appropriate to the performance being assessed. Minimal

quantitative indicators may be sufficient to assess a straightforward task, such as the management of a rail service, but for more complex services such as managing a medical practice or a prison, a greater range of more sophisticated measures may be necessary. In such cases, international experience has confirmed the value of aggregate measures (e.g. star ratings), which allow a multi-faceted judgment to be summarised into a manageable, if inevitably simplified, measure.

Putting all these lessons into practice will often not be easy. Managers are naturally constrained by their governments' policies on transparency, which may be overly restrictive. Moreover, longstanding habits of bureaucratic secrecy can discourage change towards a more open administrative culture. Managers who have themselves become convinced of the value of transparency need to be willing to challenge the prevailing culture of caution. They need to persuade not only their colleagues but also ministers and their political advisers that transparency of the contracting process is, in the long run, less risky and more prudent than secrecy.

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