

Briefing Note

Subject: Senate Order for Entity Contracts – Assurance from the Accountable Authority

To: Robert Morgan, Chair

Cc: Adrian Collette, CEO

From: Rebecca Kenny, General Counsel

Date: 10 July 2024

Recommendations

It is recommended that on behalf of the Board the Chair:

- REVIEWS this paper; and
- PROVIDES ASSURANCE that none of Creative Australia’s relevant contracts contain inappropriate confidentiality provisions.

Background

The Senate Procedural Order of Continuing Effect: Entity Contracts (“the Senate Order”) was introduced in 2001 to improve public access to information about government contracting for all *Financial Management and Accountability Act 1997* agencies (now referred to as non-corporate Commonwealth entities or “NCEs” under the *Public Governance Performance and Accountability Act 2013*). In February 2017 the Department of Finance (‘Finance’) advised from 1 July 2017 the Senate Order would also apply to corporate Commonwealth entities (‘CCEs’), which includes Creative Australia.

The Senate Order requires ministers to table letters of advice twice a year confirming that all relevant agencies within their portfolio have placed lists of their contracts on their website identifying all contracts entered into during the preceding calendar or financial year, valued at or above \$100,000 (GST inclusive), along with details relating to each of those contracts including whether each contract contains any confidentiality provisions and if so, a statement of reasons for these.

The Senate Order was based on the principle that parliamentary and public access to government contract information should not be prevented, or restricted, by confidentiality provisions unless there is a sound reason to do so.

At the time it was believed a lot of information was being treated as “confidential information” simply because it related to, or was contained in, a contract. This tendency led to the use of confidentiality clauses to unnecessarily protect the terms of the entire contract and all related information.

Successive governments have agreed to comply with the Senate Order since its introduction in 2001 and have required entities to put in place suitable procedures to support ministers to comply with it.

An estimate of the cost of the resources required to assist their minister to comply with the Senate Order, along with an overview of the method used to reach the estimate, must also be published.

Finance have published 'Meeting the Senate Order for Entity Contracts: Resource Management Guide – 403' ([RMG-403](#)) to assist entities in complying with the Senate Order.

The template provided in RMG-403 to be used by agencies to publish their list of contracts includes the following sentence:

“The accountable authority of [Insert agency’s name] has assured that the listed contracts do not contain any inappropriate confidentiality provisions.”

Discussion

Timelines

Letters are required to be tabled by ministers within two months of the end of the reporting period to which the listing(s) relate. For financial year listings, the letter must be tabled by 31 August, and in the case of calendar year listings, 28 February (29 February in a leap year).

The Office for the Arts have requested that notification be provided to them that Creative Australia had complied with the Senate Order by 12 July 2024.

The Confidentiality Test

There is no definition of an “inappropriate confidentiality provision” in the Senate Order or RMG-403. However, reference is made to Finance’s guidelines contained in “Confidentiality throughout the Procurement Cycle” which explains the Confidentiality Test, designed to assist entities to determine the “appropriate” inclusion of confidentiality provisions in commercial contracts.

The test consists of four criteria, ALL of which must be met for commercial information to be considered confidential. These are:

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

Categories of information that *may* meet the requirements of the Confidentiality Test include:

- internal costing information or information about profit margins;
- proprietary information, for example information about how a technical or business solution is to be provided that may compromise the supplier’s commercial interests elsewhere, including competing in future tender processes;
- pricing structures (where this information would reveal whether a potential supplier was making a profit or loss on the supply of a good or service);

- artistic, literary or cultural secrets. These may include photo shoots, historic manuscripts, or secret and sacred indigenous culture; and
- intellectual property including trade secrets and other intellectual property matters where they relate to a potential supplier's competitive position.

Types of Confidentiality clauses

The Senate Order defines three types of confidentiality clauses, two of which require a statement of reasons to be provided with reference to the Confidentiality Test, when compiling the list of contracts.

Contract: this refers to a provision that makes specific information contained in the contract confidential;

Outputs: this refers to a provision that makes specific information obtained or generated in carrying out the contract confidential (where this information cannot be specifically identified when the contract is entered into); and

General: this refers to provisions readily found in Commonwealth contracts that protect Commonwealth material, personal information and trade secrets amongst other things.

Creative Australia is required to identify which contracts contain “contract” and “output” confidentiality provisions and provide a statement of reason(s) for the inclusion of these provisions.

Contracts with “general” confidentiality provisions do not need to be identified but the listing must contain the following statement if appropriate:

Most of the contracts listed contain confidentiality provisions of a general nature that are designed to protect the confidential information of the parties that may be obtained or generated in carrying out the contract.

The reasons for including such clauses include:

- ordinary commercial prudence that requires protection of trade secrets, proprietary information and the like; and/or*
- protection of other Commonwealth material and personal information.*

The scope of the Senate Order

Operational type contracts with consultants and suppliers, deeds, grants, leases and disposals by an entity are to be included on the list. An enquiry was previously made to the Office for the Arts as to whether contracts that involve income rather than expenditure (such as subleases) were to be included. As the template to be used provides no real way to differentiate between income and expenditure, and noting most Commonwealth agencies do not generate income, Creative Australia was advised this may potentially cause an inconsistency in reporting, so it was recommended to exclude them.

Determining the start and “anticipated end date” of a grant could be interpreted in various ways. Following consultation with members of the Executive it was decided that the most consistent and efficient definition was for the start date to be deemed as the decision date made by Creative Australia and the “anticipated end date” as the activity end date as per the grant application. An exception is where the decision has been made but has not yet been conveyed to the applicant or the contract is not intended to be executed for some time.

RMG-403 acknowledges that agencies should take appropriate steps to protect the Commonwealth's confidential information which includes observing legal obligations under the *Privacy Act 1988*. Office for the Arts has previously confirmed that non-EBA employment contracts would be excluded from the list for this reason, however Creative Australia must advise how many otherwise relevant contracts have been excluded from the list.

Developing the list of relevant contracts

Creative Australia uses several "types" of contracts to undertake its functions; operational contracts for goods and services, grant agreements (generated through Fluxx) including a hybrid contract used for special initiatives that may involve using a consultant or supplier, but the contract is managed through Fluxx and the Australian Cultural Fund ('ACF') funding agreements which are managed through Salesforce.

Reviewing the confidentiality clauses

During the development of the listing General Counsel reviews each contract for its confidentiality clauses. In summary:

- Most of Creative Australia's goods and services contracts over \$100K contain a "general" confidentiality provision which reads (or words to the effect) "*Creative Australia is not bound to keep any information in connection with the Contract confidential except to the extent it has agreed in writing to keep specified information confidential*" or "*The Parties agree not to disclose each other's Confidential Information without prior written consent unless required or authorised by law, the Australian National Audit Office or Parliament*".
- Where information is "specified" in any of the relevant contracts this has been noted with a statement of reasons on the list.
- Contracts where we have used the other party's terms and conditions vary but where there is a specific confidentiality clause this has also been noted and explained in the listing.
- Most grant agreements do not have a confidentiality clause at all however those that do are "general" in nature.

Finalising the list

On 9 July 2024 the draft list of contracts, as confirmed by Creative Australia's contract managers, was circulated to the Executive for review and endorsement the list is accurate. This was endorsed by all (apart from Georgie McClean who is on leave) on 10 July 2024. The final list of contracts is at Annexure 1.

Conclusion

Based on the comprehensive process and review undertaken by Creative Australia management, and endorsement of the list of contracts by the CEO and Executive Director Corporate Resources, it is management's recommendation to the Chair that he agree, on behalf of the Board, that the relevant Creative Australia contracts worth over \$100K (inclusive of GST) for the relevant reporting period do not contain any "inappropriate confidentiality provisions".

APPROVED



Mr Robert Morgan
Chair

Date: 12 July 2024

Annexure 1: Senate Order for Entity Contracts list relating to the period 1 July 2023 – 30 June 2024

Senate Order for Entity Contracts Listing relating to the period 1 July 2023 to 30 June 2024

Pursuant to the Senate Order for entity contracts the following table sets out contracts entered into by Creative Australia which provide for a consideration to the value of \$100,000 or more (GST inclusive) and which:

- a. have not been fully performed as at 30 June 2024; or
- b. which have been entered into during the 12 months prior to 30 June 2024.

Most of the contracts listed contain confidentiality provisions of a general nature that are designed to protect the confidential information of the parties that may be obtained or generated in carrying out the contract.

The reasons for including such clauses include:

- a. ordinary commercial prudence that requires protection of trade secrets, proprietary information and the like; and/or
- b. protection of other Commonwealth material and personal information.

The accountable authority of Creative Australia has assured that the listed contracts do not contain any inappropriate confidentiality provisions.

Statistics

	Count	%	Value (AUD)
Total	431	100%	\$651,108,069
Confidentiality (Contract)	6	1.4%	\$28,196,738
Confidentiality (Output)	0	0	0

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
Various (2)	Four Year Funding - Strategic Organisations 2021-24	\$2,417,589	01/01/2021	31/12/2024	N		N	
Various (2)	Four Year Funding - Territory Orchestras 2021-24	\$1,913,355	01/01/2021	31/12/2024	N		N	
Dancehouse Incorporated	Keir Choreographic Award 2024 - Strategic Investments	\$165,000	20/6/2023	03/07/2024	N		N	
Confederation of Australian International Arts Festivals	Major Festivals Initiative 2023-24 to 2026-27	\$6,820,000	01/07/2023	30/06/2027	N		N	
Queensland Ballet Company Ltd	MPA core funding	\$5,265,754	01/01/2019	31/12/2024	N		N	
Various (103)	Arts Projects for Organisations	\$11,123,151	01/12/2020	25/09/2026	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
Various (87)	Four Year Funding 2021-24	\$117,044,098	01/01/2021	30/06/2025	N		N	
Various (13)	National Performing Arts Partnership - Circus Partnership	\$5,889,188	01/07/2022	31/03/2027	N		N	
Various (36)	National Performing Arts Partnership - Core Investments	\$419,564,015	01/01/2021	31/12/2024	N		N	
Various (29)	National Performing Arts Partnership - other projects	\$3,841,797	01/07/2023	01/02/2027	N		N	
Various (10)	Playing Australia - Multi Year Investment	\$1,837,000	01/01/2022	31/12/2024	N		N	
Various (28)	Playing Australia - Project Investment	\$9,328,708	02/04/2023	14/11/2025	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
Various (7)	Visual Arts, Craft & Design Framework - Contemporary Touring Initiative	\$1,801,498	23/08/2021	08/08/2027	N		N	
Various (19)	Visual Arts, Craft & Design Framework - Individuals	\$1,940,000	01/04/2023	03/08/2025	N		N	
Various (34)	Visual Arts, Craft & Design Framework - Leadership Organisations	\$22,086,859	01/01/2021	31/12/2024	N		N	
Various (4)	Music Australia International Conference Contribution grants	\$588,500	08/02/2024	30/09/2025	N		N	
Various (4)	Music Australia – pilot programs; growth and development within the contemporary music industry	\$990,000	15/02/2024	31/12/2024	N		N	
Various (3)	ATSIA Indigenous Arts Centres Program (CVAC)	\$505,256	26/05/2022	31/12/2025	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
Various (21)	Australian Cultural Fund (ACF) grants	\$3,220,603	30/08/2023	31/01/2027	N		N	
MusicNT Inc	First Nations Arts & Culture - Audience & Market Development - Music	\$148,500	11/06/2024	10/09/2024	N		N	
Australian Publishers Association Ltd	Australia Reads	\$165,000	14/06/2024	31/12/2025	N		N	
National Aboriginal & Torres Strait Islander Music Office (NATSIMO)	First Nations Contemporary Music Investment	\$319,000	08/04/2024	30/06/2025	N		N	
Australian Recording Industry Association Ltd	Branding/Marketing /PR	\$165,000	12/06/2024	29/08/2025	N		N	
MusicNT Inc	Regional and Remote Music Summit	\$110,000	20/06/2024	16/08/2024	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
Arts Access Society Inc	d/Deaf and Disabled Leadership Program	\$110,000	13/06/2024	30/06/2025	N		N	
Creative Victoria	Australian Performing Arts Market (APAM)	\$1,320,000	25/06/2019	31/07/2024	N		N	
International Society for the Performing Arts (ISPA)	ISPA Australia Fellowship Program	\$144,833	07/08/2019	31/12/2024	N		N	
Salesforce	Salesforce licences	\$346,948	31/01/2024	31/01/2026	Y	Costing/ profit information and intellectual property	N	
TechnologyOne	Finance software licence fees and implementation	\$408,187	29/03/2023	29/03/2026	N		N	
Fluxx Labs Inc	Annual support and hosting of Fluxx Grant Management System	\$522,629	01/04/2024	31/03/2027	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
AFIAA Australia 1 Pty. Ltd.	Lease for premises at 60 Union St Pymont	\$25,183,838	01/09/2019	31/8/2029	Y	Internal costing/profit information	N	
The GPT Group	Lease for premises at Level 17 at 360 Elizabeth St Melbourne	\$574,383	01/07/2023	30/06/2025	Y	Internal costing/profit information	N	
Department of Finance	Whole of Australian Government (WoAG) Travel Arrangement	\$400,000	01/09/2021	30/6/2031	Y	Internal costing/profit information	N	
Centorrino Technologies	IT Managed Services Partner	\$1,449,719	31/05/2021	30/05/2025	Y	Internal costing/profit information and intellectual property	N	
DTA - Digital Transformation Agency	VSA5 (Volume Sourcing Agreement) for Microsoft Products and Services - Common Cloud Commitment (CCC) and Master	\$350,637	01/07/2022	30/06/2025	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
	Agreement with DTA							
Data#3	VSA5 (Volume Sourcing Agreement) for Microsoft Products and Services - Supplemental Agreement with Data#3	\$447,938	01/07/2022	30/06/2025	N		N	
La Fondation de la Cité Internationale des Arts	Cite international des arts - Paris residency programs	\$1,400,000	28/06/1985	22/03/2060	N		N	
American Academy in Rome	Development and Strategic Partnerships	\$188,000	11/05/2022	31/12/2026	N		N	
BDO	Internal Audit Services	\$205,657	17/09/2022	16/09/2025	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
Pulse Software	Human Capital Management System	\$372,737	11/11/2022	10/11/2025	N		N	
Aurion Software	Payroll and Timesheet System	\$241,850	01/10/2023	30/09/2028	Y	Internal proprietary information, including technical and business information, and intellectual property	N	
WINconnect Pty Ltd	Embedded network energy provider for Sydney office	\$156,870	01/06/2019	30/06/2026	N		N	
Smartapps Pty Ltd	Smartapps Salesforce Support Partner	\$247,500	01/04/2021	31/03/2025	N		N	
Ernst and Young	Advice	\$129,800	04/08/2023	31/12/2024	N		N	

Contractor	Subject matter	Amount of consideration	Start date	Anticipated end date	Whether contract contains provisions requiring the parties to maintain confidentiality of any of its provisions (Y/N)	Reason (s)	Whether contract contains other requirements of confidentiality (Y/N)	Reason (s)
McAtamney and Advisors	Music economic study	\$104,610	24/06/2024	31/01/2025	N		N	

Estimated cost of complying with this Order: ~~xxx~~ \$5,800

Basis of method used to estimate the cost: Applying salary costs to the number of hours spent by staff across various divisions to collect and analyse the information.