REVIEW OF RECOMMENDATION NINE
FROM THE
MOSS REVIEW

Adj. Prof. Christopher M. Doogan AM FAIM FAICD
Reviewer.
26 June 2015
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G. CHRONOLOGY OF EVENTS

H. TRANSFIELD SERVICES INTELLIGENCE REPORTS DATED:
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   29 SEPTEMBER 2014; and
   30 SEPTEMBER 2014

I. NOTIFICATION TO THE AUSTRALIAN OFFICE OF THE INFORMATION COMMISSIONER

J. EXTRACTS FROM PROOF COMMITTEE HANSARD SENATE TRANSCRIPT RELATING TO THE REGIONAL PROCESSING CENTRE IN NAURU “Commonwealth government’s responsibilities relating to the management and operation of the Nauru Regional Processing Centre” ON 19 MAY AND 9 JUNE 2015
INTRODUCTION

Following a Ministerial announcement on 25 September 2014 that temporary protection visas were to be reintroduced, transferees in Nauru remained subject to regional processing on Nauru but were not eligible for temporary protection visas nor resettlement in Australia. Protest activity ensued.

2. On 28 September 2014, Transfield Services provided a Security Intelligence Report that said in Summary:

“Asylum Seekers (AS) involved in the ongoing protests at the NRPC will attempt to draw reactions from Service Providers and DISB staff to enhance the media effect and embarrass the Australian Minister for Immigration.”

3. On 29 September 2014, Transfield Services provided an Intelligence Report that gave information about possible Save the Children Australia (SCA) staff redundancies and about asylum seekers awareness of the process. Among other things, an assessment was made that it was likely that asylum seekers who interact with SCA staff “will feel a degree of angst and uncertainty…”

4. On 30 September 2014 Transfield Services provided a further Intelligence Report that included an assessment that:

“... it is considered certain there is a concerted effort on the part of Asylum Seekers and Refugees, with assistance rendered from some advocacy and human rights groups in Australia, to bring adverse attention to ongoing operations in Nauru around the processing of Asylum Seekers and the resettlement of Refugees ...It is probable that there are SCA staff engaged in this effort in a facilitative role on Nauru...It is considered probable that refugee advocates and some service providers are engaged with Asylum Seekers, and Refugees, to manufacture situations where “evidence” can be obtained of the
unsuitability of Nauru for processing and resettlement... It is probable there is a degree of internal and external coaching, and encouragement, to achieve evacuation to Australia through self-harm actions.”

5. On 2 October 2014, the Contract Authority for the contract between the Commonwealth of Australia represented by the Department of Immigration and Border Protection ("the Department") and SCA signed a letter to the [REDACTED] directing that SCA immediately remove ten named employees from work in respect of services provided under the contract.

6. On 3 October 2014, the Minister for Immigration and Border Protection (then being the Hon. Scott Morrison MP) announced a review concerning the Regional Processing Centre in Nauru. This review was undertaken by Mr Philip Moss, former Integrity Commissioner and Head of the Australian Commission for Law Enforcement Integrity (ACLI). He produced a report titled *Review into recent allegations relating to conditions and circumstances at the Regional Processing Centre in Nauru* that was dated 6 February 2015 ("the Moss Report").

7. Among the Moss Report recommendations was the following:

"RECOMMENDATION 9: Noting the current AFP investigation, the Department review its decision which required Save the Children to remove ten of its staff members from providing services in Nauru and in so doing consider the staff members individually. The review would include providing:

a. Save the Children with the information the Department relied on; and

b. the opportunity for Save the Children to address the allegations concerning its staff members."
In the event that the decision in relation to any of the ten Save the Children staff members is reversed, the Department make representations to the Government of Nauru about the Nauruan removal order and its consequences."

8. I have been engaged to undertake a review of the Department's involvement around the removal of the ten SCA employees.

TERMS OF REFERENCE

9. A copy of the Terms of Reference for the review is provided at Attachment A. The requirements of the review are to:

- assess information the Department relied on in making the decision
- review the Save the Children contract and assess whether the Department exercised appropriate authority under the contract in making the decision
- recommend strategies for managing the relationship with Save the Children including possible remedial action.

DOCUMENTS EXAMINED

10. For the purpose of undertaking this review I examined the following documents:

- The Contract between the Department and SCA (including the Confidentiality Deed and the Deed of Non-Disclosure of Personal Information).
- The Moss Report.
PERSONS INTERVIEWED

11. In addition to examining the documents referred to above, I interviewed two of the three Departmental Senior Executives who were primarily involved in the decision under review. Those persons being:

12. I endeavoured also to interview who was, at the time of the decision under review.
OBLIGATIONS OF CONTRACTOR STAFF

13. Employees of SCA have a series of obligations when performing their duties on Nauru. They are also obliged to maintain confidentiality in relation to information that they come across in the performance of their duties and are further obliged not to disclose personal information about the transferees and others with whom they have contact when performing their duties. A further obligation is placed on SCA in relation to the behaviour of their staff on Nauru and elsewhere. This obligation is outlined in clause 5.5 of the contract:

"5.5 Behaviour of Service Provider Personnel at the Sites

5.51 The Service Provider must ensure that all Service Provider Personnel at a Site:

a. are aware of, and comply with, the Code of Conduct at all times;

b. comply with the Department’s policy on smoking and other work health and safety matters as declared from time to time by the Department; and

c. carry out their duties and behave in such a way as to maximise the seamless interface between the delivery of the Services and:

i. any other services provided by the service providers; and

ii. the day to day activities of the Department,

so that services delivered by multiple service providers give the impression of being delivered by a single provider."
14. Each staff member is required to enter into a Confidentiality Deed and a Deed of Non-Disclosure of Personal Information. These Deeds are reflected in the Contract as Schedules 3 and 4 respectively. xi

15. In addition, each SCA staff member is obliged to abide by and comply with Codes of Conduct provided by both the Department and by SCA as their employer. xiii

THE CONTRACTUAL AUTHORITY FOR THE DECISION IN QUESTION

16. The authority for the decision in question is reflected in clause 5.7 of the Contract:

"5.7 Removal of Service Provider Personnel

5.7.1 The Department may, in its absolute discretion, give notice requiring the Service Provider to remove any Service Provider Personnel from work in respect of the Services. The Service Provider must promptly arrange for the removal of such Service Provider Personnel from work in respect of the Services and their replacement with Personnel acceptable to the Department and at no additional cost to the Department."

A copy of the Contract Authority's letter dated 2 October 2014 that lead to this review is contained at Attachment C.

CIRCUMSTANCES SURROUNDING THE DECISION IN QUESTION

17. The Moss Report deals with the conduct and behaviour of SCA staff members at pages 52-72 inclusive.

18. The context in which the decision in question was made was that many difficulties on Nauru had preceded the decision. Departmental officers had in mind a series of problems that had arisen since the major disturbance in July
2013 when buildings were destroyed by fire \(^{xiv}\) with resultant damage exceeding $70 million.

19. On 28 and 29 July 2014, it was alleged that five SCA staff members were observed actively encouraging protests and/or failing to comply with instructions given by security personnel. The allegations were that one person had given the thumbs-up to transferees when she was in a bus driving past the protestors; one person failed to comply with security officers instructions; one was said to have opined that it was good that the transferees were doing a silent protest; and two others were said to have conversed with transferees and ignored security officers instructions.

20. On 31 July 2014, **[REDACTED]** to remove the five staff members from front line duties. An investigation was subsequently undertaken by SCA, supported by Wilson Security (sub-contractor to Transfield Services). The allegations were found to be unsubstantiated. The five SCA staff members were then permitted to return to work.

21. In August and September 2014, the Department was made aware of three possible privacy breaches by SCA in earlier months. The breaches were:

- Three lost (or stolen) hard drives;

- One lost (or stolen) USB; and

- Unauthorised use of data by an SCA employee \(^{xv}\)

These events set the context in which further events occurred leading up to the decision in question being made.
22. Earlier in this report, I referred to the intelligence reports provided from Transfield Services. From the chronology of events attached to this report\textsuperscript{xvi}, it will be seen that there was close interaction between senior executive departmental staff and various representatives from Transfield Services and its sub-contractor, Wilson Security, leading up to... issuing... direction on 2 October 2014 for the 10 named SCA staff to be removed.

23. A departmental... arrived on Nauru on 28 September 2014, as the... xvii When interviewed for the Moss Report... xviii It was... who forwarded the email (that contained the 30 September 2014 intelligence report) to... xix, and various other senior departmental executives including... xx. xx

24. Later in the day, on 30 September 2014, ... told a representative from Transfield Services that he wanted advice ASAP of all identified SCA staff by the following day.

25. The next most senior departmental officer on Nauru after... was... So, too, did... also refer to a "circuit breaker" when interviewed by Mr Moss. When asked by Mr Moss about the ten SCA staff members removed from their duties on Nauru (nine really...),... said:
From analysis of all of the materials made available to me for this review, it is clear that the primary decision maker was [redacted].

When interviewed for the Moss Report he said: **
28. As [REDACTED] noted, [REDACTED] was the actual decision maker as the [REDACTED] When interviewed for the Moss Report, [REDACTED] referred to the context of the decision being that he was conscious of the earlier temporary removal of the five SCA staff members. xxiii
29. When talking about exercising authority under the contract he acknowledged [REDACTED] role but made it clear that he agreed with the decision and was relying on the intelligence reports [REDACTED] which he described as: [REDACTED]

30. He had earlier indicated that the Department [REDACTED] He indicated that it was "[REDACTED]"

31. When pressed, after the event, with the benefit of hindsight, about the decision to direct SCA to remove the 10 identified personnel he said: "...Whilst the evidence to substantiate the decision might be viewed in hindsight [REDACTED] it had to be viewed, in my view, in the context of a whole series of issues that had arisen under the contract, and the relationship that I saw that we had with Save the Children Australia."

32. [REDACTED]

33. [REDACTED]
35. The person who wrote the Transfield Services Intelligence Report submitted on 30 September 2014 was [redacted], who is the [redacted] for the Transfield Services sub-contractor, Wilson Security.
progressing the matter and copied the emailed names to a number of people including [REDACTED] the [REDACTED]. This was the basis for the letter issued by [REDACTED] on 2 October 2014 directing SCA to remove the ten named staff members from their contractual duties. Relevantly the original email naming the ten SCA staff members stated there was no firm evidence of SCA involvement at that stage. Presumably this lack of evidence referred to the outline of various actions listed in the 30 September 2014 Intelligence Report under the headings of Service Providers and DIBP that were said to be in contemplation by the asylum seekers (AS).

**INFORMATION ON WHICH THE DECISION WAS BASED**

39. From the foregoing outlined, it will be apparent that contractor staff on Nauru were being pushed to provide names and information to support what was perceived in Canberra to be SCA staff providing inappropriate support or assistance to transferees in various ways. As will become clear from the following outline, there was in fact no evidence nor reliable information on which to specifically name nine of the ten SCA staff.
50. I have searched the materials in an effort to identify what "emotive reporting" actually means. The only example I could find was provided by Mr Moss of Transfield Services. For the Moss Report, he was asked by Mr Moss whether he had formed a view – when reviewing seventy documents that underpinned the intelligence report of 30 September 2014 - as to whether the reporting was "emotive".

Intended Further Investigation

51. From review of the documentation it seems reasonably clear that the information provided in relation to the ten SCA staff members was not intended to be acted upon in the way it was acted upon. Rather it seems that
the intention was that further investigation would be undertaken before any action was taken.

52. By way of illustration, [redacted] from Transfield Services said in his email of 2 October 2014 – after naming the ten staff members "...We have no further evidence of SCA involvement at this stage, we will however, continue to monitor the situation ..." When interviewed by Mr Moss [redacted] referred to an email from [redacted] about people of interest and said:

53. [redacted] described a person of interest to Mr Moss as being ...

54. [redacted] went on to talk about his discussions with [redacted] from [redacted] When asked about the nature of these discussions he said:

55. For his part, when interviewed [redacted] from Wilson Security also [redacted] To illustrate he said to Mr Moss
56. The concern that further investigations were necessary was not limited to the Security Contractors or people on Nauru. When [REDACTED], discussed the Intelligence Report with Mr Moss.

CONCLUSIONS

57. On the basis of a close examination of transcripts of interviews for the Moss Review and the documents referred to in this report, together with discussions with [REDACTED], I have come to the following conclusions:

(a) Prior to the [REDACTED] issuing the letter dated 2 October 2014 to the acting CEO of SCA directing the removal of 10 named SCA staff
("the removal letter"), no consideration was given to seeking legal advice on the consequences of issuing the letter;

(b) Complete reliance was placed on the Department's absolute discretion in giving effect to clause 5.7 ("the removal clause") of the contract between the Commonwealth and SCA because it had been used previously elsewhere;

(c) No consideration was given to whether or not there were any legislative provisions that may impact or have a bearing on the consequences of issuing the removal letter, e.g., the Work Health and Safety Act 2009 (Cth);

(d) The information available at the time the removal clause was activated did not warrant issuing the removal letter;

(e) If senior Departmental officers formed the view that any of the claims made against the 10 named SCA employees constituted a breach of any of the relevant terms of the Contract, the related Deeds of Confidentiality and Non-Disclosure of Personal Information or RPC Guidelines, then a reasonable course of action would have been to notify SCA of the claims and request SCA to investigate whether there
was any substance to them, i.e., to follow the same course that had previously been taken with five different SCA employees;

(f) In strict contractual terms, the Department had an entitlement under clause 5.7 of the Contract with SCA to exercise its absolute discretion to direct removal of SCA staff. However, clause 2.2 of the Contract indicates that the parties intend to perform the Contract in a spirit of co-operation and good faith. In my review I have not come across evidence to indicate that the decision-makers did not act in good faith. The “spirit of co-operation” would suggest, however, the preferable course to have been followed was the course referred to in (e) above; and

(g) the primary impetus for issuing the removal letter was a perceived need to take action of some kind to prevent an escalation of the protest action then occurring on Nauru.

RECOMMENDATIONS

58. To remedy the overall conclusion I have reached that the issue of the removal letter was not justified on 2 October 2014, I recommend that "without"
prejudice" negotiations be entered into to identify losses experienced by SCA and each of the affected SCA staff members (excluding [REDACTED] who had resigned from SCA employment [REDACTED] prior to the removal letter being issued).

59. I further **recommend** that the negotiations be undertaken by an independent mediator and that the Department bear the cost of the mediation.

60. I also **recommend** that, in the course of negotiations, claims relied upon for the issue of the removal letter be put to each of the SCA staff members (excluding [REDACTED] so that – consistent with Recommendation 9 in the Moss Report – each has an opportunity to answer them. One related **recommendation** is that the Department do as has been suggested in recommendation 9 and make representations to the Government of Nauru about the Nauruan Removal Order and its consequences in the event that the Department agrees with my conclusions in earlier paragraph 57(d).

61. The intent of the foregoing **recommendations** is to put SCA and their nine staff members into the position they would have been in had the removal letter not been issued (so far as this is possible by the payment of compensation or by taking such other actions as may be agreed up between the parties).

62. Other **recommendations** are that:

(a) the Department give future consideration to having a Head Contractor to whom all Service Providers are sub-contracted. This would be consistent with the current individual Contracts where, for example, it is
stated in clause 5.5 that "... Services delivered by multiple Service Providers give the impression of being delivered by a single provider.". A similar principle is reflected in the documentation relating to expectations of each individual Contractor staff member;

(b) if one does not already exist, the Department develop a policy on Social Media and its use by contractors and staff and include compliance with that policy in the Contract and the documents signed by Contractor staff;

(c) the Department develop a procedure whereby Contractors are obliged to notify the Department that each of their employees has been made aware of the terms of clause 5.5 of the Contract, have signed a Confidentiality Deed and Deed of Non-Disclosure of Personal Information. The purpose is twofold: first, as a means of the Department knowing that the Contractor has given effect to its requirements in the Contract, and secondly, to act as a "memory jogger" for the Contractor to ensure that they give effect to this legal requirement including the applicable Code of Conduct documents.

63. A further **recommendation** is that before the discretion in clause 5.7 of the Contract is exercised in the future, the Contract Authority obtain legal advice to support the use of the discretion in relation to the particular circumstances that may arise in the future and **prima facie** indicate whether it is appropriate to use the discretion. The intent of this is to ensure that use of the discretion is seen as a last resort, not a routine option.
64. I **recommend** that the Department seeks legal advice on legislative provisions that could impact on a decision to exercise the discretion in clause 5.7 of the Contract. The purpose of this is so that the Contract Authority is fully aware of the circumstances and impact on the affected staff where a decision is made to direct removal of Service Provider personnel.

65. In conclusion I note that there is a three step process provided for in clause 14 of the Contract dealing with dispute resolution; and I further note that the *Public Governance, Performance and Accountability Act 2013* (Cth) makes provision for compensation for detriment caused by defective administration. If the Department accepts the conclusions I have reached and agrees with the recommendations I have made, then these may have application in the recommended negotiations.

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1. See Attachment H
2. See Attachment H
3. See Attachment H
4. See Attachment C
5. See Attachments D and E
6. See Attachment G
7. See Attachment H
8. See Attachment I
9. See Attachment G
10. See Attachment J
11. See Attachments D and E
12. [Redacted]
13. See Attachments D and E
CONFIDENTIAL

xi See Attachment F
xii Hansard Record of 9 June 2015 at page 44
xiii See Attachment I
xiv See Attachment G
xv See transcript of interview between Mr P Moss and [redacted] on 26 October 2014 at page 6
xivii Ibid at pages 16 and 17
xvi See transcript of interview between Mr P Moss and [redacted] on 21 November 2014 at page 5
xivx See transcript of interview between Mr P Moss and [redacted] on 9 December 2014 at page 11
xviI Ibid at page 12
xviII Ibid at page 23
xviIII See transcript of interview between Mr P Moss and [redacted] on 26 October at page 2
xviIV Ibid at page 3
xviV Ibid at page 13
xviVI Ibid at page 6
xviVII Ibid at page 5
xviVIII See transcript of interview between Mr P Moss and [redacted] on 8 December 2014 at page 2
xviIX Ibid at page 13
xviX See transcript of interview between Mr P Moss and [redacted] on 18 November 2014 at page 31
xviXI Ibid at page 26
xviXII Ibid at page 27
xviXIII See Attachment C
xviXIV [redacted]
xx See transcript of interview between Mr P Moss and [redacted] on 2 December 2014 at page 13
xxI Ibid at page 4
xxII See Transcript of interview between Mr P Moss and [redacted] on 22 January 2015 at page 23.
xxIII See Transcript of interview between Mr P Moss and [redacted] on 2 December 2014 at page 5
xxIV See Transcript of interview between Mr P Moss and [redacted] on 15 November 2014 at page 14
xxV See Transcript of interview between Mr P Moss and [redacted] on 12 December 2014 at page 18

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