

08 SEP 2009



25 August 2009

Submission No: 3-6

Ms Sharon Grierson MP  
Chair  
Joint Committee of Public Accounts and Audit  
Parliament House  
CANBERRA ACT 2600

Dear Ms Grierson

At the Committee's hearing on 22 June 2009 I undertook to provide the Committee with a copy of legal advice the ANAO obtained concerning the Auditor-General's power to interview Ministers under oath in connection with the performance audit relating to Motor Dealer Financing Assistance.

Attached for the Committee's information is a copy of legal advice the ANAO received that canvasses a number of aspects of the ANAO's access powers.

The advice does not suggest that any amendments to the existing access powers contained in the *Auditor-General Act 1997* are necessary.

I have copied this advice to the Prime Minister and the Treasurer given the specific reference to them in the advice.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Ian McPhee'.

Ian McPhee

Attch.



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26 June 2009

Mr Brian Boyd  
Executive Director  
Australian National Audit Office  
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Via email: [brian.boyd@anao.gov.au](mailto:brian.boyd@anao.gov.au)

Dear Mr Boyd

### **Scope of powers under section 32 of the *Auditor-General Act 1997***

We refer to your request for legal advice in relation to the scope of the powers of the Auditor-General under the *Auditor-General Act 1997*.

In particular, the Auditor-General is undertaking a general performance audit under section 18 and anticipates that he may require information or documents from certain people for the purposes of completing that audit. The people who may be able to assist the Auditor-General in the audit include the Prime Minister and Treasurer and possibly other Members of Parliament. The legal issue is whether the Prime Minister, and the Treasurer, come within the scope of the term 'person' for the purposes of section 32 of the Auditor-General Act.

#### **Short Answer**

- 1 The Hon Kevin Rudd MP and the Hon Wayne Swan MP are 'persons' for the purposes of section 32 of the Auditor-General Act.
- 2 However, depending on the character of information or documents sought under the section 32 notice, there may be issues as to whether the Prime Minister and the Treasurer, in their capacity as Members of the Parliament, can be compelled to provide information or documents relating to proceedings in Parliament.
- 3 There are some issues which may or may not arise depending on what information the Auditor-General is seeking. Some of these issues may arise under the Constitution and may be 'Tied Work' for the purposes of the Legal Services Directions.
- 4 We consider that if the Auditor-General is strategic and careful in how he seeks information or documents and about the type of information or documents, then the immunities afforded to Members of Parliament, referred to in section 30, become less problematic.

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- 5 As an example, if the Auditor-General made a direction to the Prime Minister or Treasurer under paragraphs 32(1)(a) and (c) to direct them to provide information and documents relating to the executive operations of their respective departments then the risks relating to immunities and privilege drop away.
- 6 The Auditor-General may still require the information or answers to be verified or given on oath or affirmation.

#### Reasoning

- 7 The standard process in determining the meaning and scope of a statutory term such as 'person' in section 32 is to assess:
- (a) whether the term is defined in the Act;
  - (b) whether the term is defined in the Acts Interpretation Act;
  - (c) the other sections in the Act to determine any common use of the term or sections which would give rise to an indication on how the term is to be applied;
  - (d) the ordinary meaning of the term;
  - (e) the term in the context of the provision to determine whether there are any implications that need to be taken into account; and
  - (f) the Auditor-General Act to determine the scope of the role of Auditor-General as an officer of Parliament and whether there are any relevant limitations to that role that may be express or implied (in relation to the Executive).
- 8 In addition to the above steps, we have also assessed all Commonwealth legislation and the Constitution to determine whether the individuals performing the function of the Prime Minister and Treasurer are afforded any particular relevant status, powers or immunities which would impact on the application of section 32 to those people or offices. There is no Commonwealth legislation which would provide an exception to the application of section 32 in respect of the Prime Minister and the Treasurer.
- 9 We have also sought to determine whether there are any conventions that are applicable to this issue. We have not been able to identify any conventions and, even if conventions regarding the office of Prime Minister and Treasurer were to exist, they would not be able to displace the specific power afforded to the Auditor-General under legislation.
- 10 We have considered, but not drawn any concluded view on, the immunities which are afforded Members of Parliament through section 49 of the Constitution. (Constitutional advice is identified as 'Tied Work' under the Legal Services Directions.)
- 11 As we have worked through these issues, we have been careful to draw a distinction between the power to require person to provide information and documents and the

nature of the information and documents that the person may provide. We understand that the ANAO has previous advice on the relevance of various privileges in relation to information and documents sought under section 32.

- 12 If the information that was sought under section 32 fell within the scope of the Parliamentary Privileges Act or certain immunities under section 49 of the Constitution then there is likely to be an issue in obliging the production of such information.

#### **Meaning of 'person'**

- 13 The term 'person' is not defined in the Auditor-General Act.
- 14 The term 'person' is defined in the Acts Interpretation Act as follows:

#### **22 Meaning of certain words**

*(1) In any Act, unless the contrary intention appears:*

*(a) expressions used to denote persons generally (such as "person", "party", "someone", "anyone", "no-one", "one", "another" and "whoever"), include a body politic or corporate as well as an individual;*

- 15 The term 'person' is used extensively in the Auditor-General Act. There is nothing in the context in which the term is used in other sections which indicates that a meaning, other than the standard ordinary meaning, should be attributed to that term or that the term should be read narrowly.
- 16 The ordinary dictionary definition of the term 'person' is relevantly defined in the Macquarie Concise Dictionary as:
- 'any human being or artificial body of people having rights and duties before the law'.*
- 17 The Hon Kevin Rudd MP and the Hon Wayne Swan MP are 'persons'.

#### **Operation of section 32**

- 18 We have set out section 32 in full below:

#### **32 Power of Auditor-General to obtain information**

*(1) The Auditor-General may, by written notice, direct a person to do all or any of the following:*

*(a) to provide the Auditor-General with any information that the Auditor-General requires;*

*(b) to attend and give evidence before the Auditor-General or an authorised official;*

*(c) to produce to the Auditor-General any documents in the custody or under the control of the person.*

*Note: A proceeding under paragraph (1)(b) is a "judicial proceeding" for the purposes of Part III of the Crimes Act 1914. The Crimes Act prohibits certain conduct in relation to judicial proceedings.*

*(2) The Auditor-General may direct that:*

*(a) the information or answers to questions be given either orally or in writing (as the Auditor-General requires);*

*(b) the information or answers to questions be verified or given on oath or affirmation. The oath or affirmation is an oath or affirmation that the information or evidence the person will give will be true, and may be administered by the Auditor-General or by an authorised official.*

*(3) A person must comply with a direction under this section.*

*Penalty: 30 penalty units.*

*Note 1: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.*

*Note 2: Section 4AA of the Crimes Act 1914 sets the current value of a penalty unit.*

*(4) The regulations may prescribe scales of expenses to be allowed to persons who are required to attend under this section.*

*(5) In this section:*

***authorised official** means an FMA official who is authorised by the Auditor-General, in writing, to exercise powers or perform functions under this section.*

- 19 The context in which the term 'person' appears in section 32 does not give rise to any implication that the term should be read narrowly or otherwise differently to the meaning ascribed under the Acts Interpretation Act and its ordinary meaning.
- 20 The Auditor-General has a central role in the accountability of the Executive to Parliament and it would seem that if the Executive were not subject to the power to obtain information, it would subvert the statutory role of the Auditor-General as an independent officer of Parliament (subsection 8(1)).
- 21 Although the Explanatory Memorandum does not provide much explanation of the purpose or scope of the provision, the policy that underpins section 32 would appear to be that the Auditor-General should have a strong coercive power to enable that office to gain information so that it may properly conduct the role.
- 22 There are express limitations to the scope of section 32 in the Auditor-General Act. Both sections 30 and 31 provide some qualification. Dealing with section 31, first, that section sets out the activities of the Auditor-General for which the Auditor-General may not exercise the power under section 32.

***31 Purpose for which information-gathering powers may be used***



*The powers under sections 32 and 33 may be used for the purpose of, or in connection with, any Auditor-General function, except:*

- (a) an audit or other function under section 20; or*
- (b) providing advice or information under section 23; or*
- (c) preparing a report under section 25 or 26.*

23 The current audit is a general performance audit under section 18 and therefore the limitations on section 32, imposed under section 31, does not arise.

**Section 30 and powers, privileges, and immunities**

24 Section 30 identifies certain laws which provide for some limitation on section 32 powers.

***30 Relationship of information-gathering powers with other laws***

*The operation of sections 32 and 33:*

*(a) is limited by laws of the Commonwealth (whether made before or after the commencement of this Act) relating to the powers, privileges and immunities of:*

- (i) each House of the Parliament; and*
- (ii) the members of each House of the Parliament; and*
- (iii) the committees of each House of the Parliament and joint committees of both Houses of the Parliament; but*

*(b) not limited by any other law (whether made before or after the commencement of this Act), except to the extent that the other law expressly excludes the operation of section 32 or 33.*

25 Section 49 of the Constitution sets out the powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House.

26 There are some issues relating to section 49 which may or may not arise depending on what information the Auditor-General is seeking. Constitutional advice is 'Tied Work' under section 2.1 and Appendix A of the Legal Services Directions and we cannot provide advice without the permission of the Attorney-General.

27 Below we have briefly discussed the scope of the rights and immunities related to Members of Parliament and set out the area which may need further consideration depending on the information sought by the Auditor-General.

28 The rights and immunities related to Members of Parliament individually may be grouped under the following headings:

- (a) freedom of speech;

- (b) freedom from arrest in civil actions;
- (c) exemption from jury duty; and
- (d) exemption from being subpoenaed to attend court.

29 Depending on the character of information or documents sought under the section 32 notice, there may be issues as to whether the Prime Minister and the Treasurer, in their capacity as Members of the Parliament, can be compelled to provide information or documents relating to proceedings in Parliament.

30 If the Auditor-General is purporting to exercise the power set out in paragraph 32(1)(b), to direct the Prime Minister or the Treasurer 'to attend and give evidence before the Auditor-General or an authorised official' then a further issue of immunity may well arise - that of a Member of Parliament from being compelled to attend court. This issue arises because of the nature of that particular power under paragraph 32(1)(b). The section note in respect of paragraph 32(1)(b) identifies the exercise of that power as involving a judicial proceeding. The note states:

*Note: A proceeding under paragraph (1)(b) is a "judicial proceeding" for the purposes of Part III of the Crimes Act 1914. The Crimes Act prohibits certain conduct in relation to judicial proceedings.*

31 The definition of 'judicial proceedings' in section 31 of the Crimes Act includes:

*'... a proceeding before a body or person acting under the law of the Commonwealth, or of a Territory, in which evidence may be taken on oath.'*

32 The exemption of Members of Parliament from compelled attendance at court is based on the principle that attendance of a Member in the House of Commons takes precedence over other obligations, and that the House has the paramount right and prior claim to the attendance and service of its Members. Individuals summoned to appear before the House or its committees also enjoy the privilege of not being summoned to appear in court at the same time.

33 In our preliminary view we consider that, as long as the requirement to attend and give evidence before the Auditor-General does not interfere with the Member's attendance at Parliament then there is an argument that the immunity of a Member from being subpoenaed to attend court does not arise. The immunity also would not prevent a Member from voluntarily attending Court. Again, there may be a limitation on the information that may be sought and provided during that attendance. The immunity would also not prevent a Member of Parliament from voluntarily attending to give information or documents to the Auditor-General.

34 The characteristic which makes 32(1)(b) a 'judicial proceeding' appears to be the component of the direction which requires a person to attend before the Auditor-General or an authorised officer to give evidence. As distinct from providing 'information' (paragraph 32(1)(a)). There is a risk that a direction under paragraph 32(1)(b) to the Prime Minister or the Treasurer attend and give evidence would raise immunity issues under section 30 of the Auditor-General Act.

- 35 We consider that if the Auditor-General is strategic and careful in how he seeks information or documents, and about the type of information or documents, then the immunities referred to section 30 become less problematic.
- 36 As an example, if the Auditor-General made a direction to the Prime Minister or Treasurer under paragraphs 32(1)(a) and (c) to direct them to provide information and documents relating to the executive operations of their respective departments then the risks relating to immunities and privilege drop away.
- 37 That is because the issues that are indicia of a 'judicial proceeding' as defined in section 31 of the Crimes Act are not present in the directions available to the Auditor-General under paragraphs 32(1)(a) and (c). While the Auditor-General has a power to direct that answers to questions be verified or given on oath (subsection 32(2)), it is a power in respect of all of the directions available to under subsection 32(1), including those paragraphs which are not identified in the note as being a 'judicial proceeding'.
- 38 The Auditor-General may require the information or answers to be verified or given on oath or affirmation.
- 39 As an observation, the discussion and conclusions relating to immunities and privileges concerning the Prime Minister and the Treasurer is also relevant to other Members of Parliament, such as the Leader of the Opposition. That means that the same statutory process followed by the Auditor-General in respect of obtaining information and documents from the Prime Minister and the Treasurer is relevant and appropriate for other Members of Parliament such as the Leader of the Opposition.
- 40 If the ANAO requires us to advise on the issues that may arise under the Constitution, we suggest that the Office of Legal Services Coordination be consulted and any Tied Work issues be addressed and resolved.
- 41 Finally, there are provisions in the Auditor-General Act which deal with confidential or sensitive information (sections 36 and 37). The Explanatory Memorandum states, in the context of (then) clause 36 - Confidentiality of information, the following:
- 66. In recognition of the Auditor-General's broad information gathering powers, legislative limitations have been imposed on persons in relation to the disclosure of information obtained in the performance of an Auditor-General function.*
- 42 These provisions support the view that the section 32 power should not be read down in respect of Executive offices.
- 43 There may also be issues in relation to the giving of the section 32 notice to the Prime Minister or the Treasurer on the Parliamentary precinct as one of the immunities afforded to Members is that no Member may be served with a subpoena or any other legal process within the Parliamentary precinct without the permission of the Speaker. A Member wishing to accept service of such a document may be encouraged to do so in a location outside the precinct.





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44 If you have any further questions on this matter, please contact either Lex Holcombe or Dennis Pearce on the contact numbers below.

Yours sincerely

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