
The Parliament of the Commonwealth of Australia

Report 419

Inquiry into the *Auditor-General Act 1997*

Joint Committee of Public Accounts and Audit

December 2010
Canberra

© Commonwealth of Australia 2010

ISBN 978-0-642-79400-0 (Printed version)

ISBN 978-0-642-79401-7 (HTML version)



Contents

Foreword	vi
Membership of the Committee	viii
Terms of reference	xi
List of abbreviations	xiii
List of recommendations	xv
1 Introduction	1
Background	1
The <i>Auditor-General Act 1997</i>	3
Purpose of the inquiry	4
Conduct of the inquiry	5
Structure of the report	5
2 Legislative support for new functions	7
Introduction	7
Explicit recognition of assurance activities	9
3 Clarification of rights and responsibilities	15
Introduction	15
Government Business Enterprises	16
Auditing performance indicators	20
Legal professional privilege	25
Fees for financial statement audits	30
Acting as auditor under the <i>Corporations Act</i>	31
Providing advice and information	33

Auditing standards	34
Parliamentary privilege.....	34
Exemptions from FOI and the Privacy Act.....	36
Definitions of ‘persons’ giving evidence	40
Explicit access to Cabinet documents	41
Whistleblowers	41
Comments on reports and extracts of reports	43
Tabling embargo during the caretaker period.....	45
Provision of information to committees	46
4 Strengthening the audit independence of the Auditor-General.....	51
Background	51
Appointment of the Auditor-General.....	52
Budget resourcing	54
5 Jurisdictional issues – ‘following the dollar’	57
Introduction	57
Cross-jurisdictional arrangements – grants to States/Territories	58
Commonwealth jurisdiction – auditing related entities/contractors	68
Other Commonwealth activities.....	71
Conclusion	72
Appendix A – List of Submissions	75
Appendix B – List of Exhibits	77
Appendix C – List of Public Hearings	79



Foreword

This report completes an inquiry into the provisions of the *Auditor-General Act 1997* undertaken by the Joint Committee of Public Accounts and Audit in the 42nd Parliament.

The *Auditor-General Act 1997*, which replaced the *Audit Act 1901*, formally recognised the Auditor-General as an “Independent Officer of the Parliament”, and greatly strengthened the audit independence of him and the Australian National Audit Office (ANAO). The Act reflected many of the recommendations made by the Committee in its October 1996 report *Guarding the Independence of the Auditor-General*, and earlier reports.

In February 2009 the Committee resolved to review whether the provisions of the *Auditor-General Act 1997* remain adequate in the modern public sector environment, noting at the time that eight years had passed since the Committee’s last such review.

This report contains 13 recommendations. Amongst other things, the recommendations are directed to:

- ensuring that the Auditor-General has sufficient legislative backing for assurance reviews the Parliament may wish him to carry out (for example, the ANAO’s work on the annual *Defence Major Projects Report* and its former role in scrutinising proposed government advertising campaigns);
- removing antiquated restrictions on the Auditor-General’s capacity to initiate audits of Commonwealth Government Business Enterprises;
- enhancing the Auditor-General’s role in reviewing the adequacy of agencies’ performance indicators; and
- giving the Auditor-General greater authority to “follow the dollar” where non-Commonwealth bodies are in receipt of Commonwealth funding to deliver agreed outcomes.

Although this report is being released by the Committee in the 43rd Parliament the work for the inquiry, including the conduct of the public hearings and the preparation of this report, was undertaken by the previous Committee. I thank the members of that Committee, chaired by Sharon Grierson MP, for their work. I also thank those who gave evidence to the inquiry for their contribution.

Robert Oakeshott MP
Chair



Membership of the Committee

43rd Parliament

Chair Mr Robert Oakeshott MP

Deputy Chair Mrs Yvette D’Ath MP

Members The Hon Dick Adams MP
Mr Jamie Briggs MP
Ms Gai Brodtmann MP
Mr Darren Cheeseman MP
Mr Josh Frydenberg MP
Ms Deb O’Neill MP
Ms Laura Smyth MP
The Hon Alex Somlyay MP

Senator Guy Barnett
Senator Mark Bishop
Senator Annette Hurley
Senator Helen Kroger
Senator Glenn Sterle

42nd Parliament

Chair Ms Sharon Grierson MP

Deputy Chair Mr Petro Georgiou MP

Members

The Hon Dick Adams MP (from 17/08/09)	Senator Guy Barnett
The Hon Arch Bevis MP	Senator Mark Bishop
The Hon Bronwyn Bishop MP	Senator David Bushby (until 02/02/10)
Mr David Bradbury MP	Senator David Feeney
Mr Jamie Briggs MP	Senator Helen Kroger (from 02/02/10)
Mr Mark Butler MP (until 15/06/09)	Senator Kate Lundy
Ms Catherine King MP	
The Hon Sussan Ley MP (from 03/02/10)	
Mr Shayne Neumann MP	
Mr Stuart Robert MP (until 03/02/10)	

Committee secretariat

Secretary	Mr Russell Chafer
Inquiry Secretary	Dr Kris Veenstra
Other research staff	Ms Pauline Cullen
	Dr Narelle McGlusky
	Mr Ian McDonald



Terms of reference

On 25 February 2009, the Committee resolved to review and report on whether the provisions of the *Auditor-General Act 1997* remain adequate in the modern public sector environment, including but not limited to:

- a) whether the Act's focus on the Auditor-General's traditional assurance audit and performance audit roles gives the ANAO sufficient legislative backing for newer functions, for example the Defence "Major Projects Report" and, from July 2008, the Auditor-General's reviews of government advertising to give the public confidence that campaigns are legitimately authorised, properly targeted and non-political;
- b) any amendments necessary to clarify the ANAO's rights and obligations in relation to conducting audits and reviews;
- c) whether there should be changes to the categories of agencies that the Auditor-General audits, in particular section 16 of the Act which limits the Auditor-General's capacity to audit Government Business Enterprises (GBEs);
- d) any proposed amendments to the Act which would strengthen the audit independence of the ANAO and the Auditor-General's capacity to fulfil his role as an Independent Officer of the Parliament; and
- e) the Auditor-General's capacity to examine the financial and performance outcomes from Commonwealth investments in the private sector and Commonwealth grants made to State and local governments.

The inquiry shall have regard to the recommendations made by the Committee in its August 2001 *Report 386: Review of the Auditor-General Act 1997* and the consequent amendments to the Act made by the *Auditor-General Amendment Act 2009*.



List of abbreviations

ACAG	Australasian Council of Auditors-General
A-G	Auditor-General
ANAO	Australian National Audit Office
APRA	Australian Prudential Regulation Authority
ASAE	Standard on Assurance Engagements
BER	Building the Education Revolution
CAC Act	<i>Commonwealth Authorities and Companies Act 1997</i>
CEO	Chief Executive Officer
COAG	Council of Australian Governments
DEEWR	Department of Education, Employment and Workplace Relations
DMO	Defence Materiel Organisation
FMA Act	<i>Financial Management and Accountability Act 1997</i>
FOI Act	<i>Freedom of Information Act 1982</i>
GBE	Government Business Enterprise
GST	Goods and Services Tax
IPAA	Institute of Public Administration Australia

JCPA(A)	Joint Committee of Public Accounts (and Audit)
MPR	Major Projects Report
NBN	National Broadband Network
OECD	Organisation for Economic Co-operation and Development
PBS	Portfolio Budget Statement
SPPs	Specific Purpose Payments



List of recommendations

Recommendation 1 (page 13)

That the *Auditor-General Act 1997* be amended to provide the Auditor-General with explicit authority to conduct assurance engagements. In circumstances where such assurance engagements have been identified as priorities by the Parliament, they should be subject to the same information-gathering powers that pertain to performance audits undertaken by the Auditor-General. The Auditor-General should have the authority to determine arrangements, including reporting arrangements to the Parliament, to be followed in the conduct of these assurance engagements.

Recommendation 2 (page 20)

That the Act be amended to provide the Auditor-General with the authority to initiate performance audits of Commonwealth controlled Government Business Enterprises.

Recommendation 3 (page 25)

That the Act be amended as necessary to enable the Auditor-General to review an agency's compliance with its responsibilities for a sub-set of performance indicators. Proposed performance indicators to be audited should be identified annually by the Auditor-General and forwarded to the Parliament, via the JCPAA for comment, in a manner similar to the annual performance audit work program for the ANAO.

The Auditor-General should be resourced appropriately to undertake this function.

Recommendation 4 (page 30)

That the Act be amended to make clear that claims of legal professional privilege do not override the Auditor-General's information gathering powers. The Act should also be amended to make clear that access to documents upon which legal professional privilege is claimed does not amount to a waiver of such privilege.

Recommendation 5 (page 31)

That subject to consultation with affected bodies, consideration be given to amending the Act so that all statutory authorities or other bodies that fall outside the ambit of the CAC Act are liable to pay audit fees for financial statements.

Recommendation 6 (page 32)

That section 21 of the Act be amended to reflect that the Auditor-General is able to audit any Commonwealth-controlled entity including Commonwealth-controlled companies and their subsidiaries.

Recommendation 7 (page 34)

That the Act be amended to require the Auditor-General to set auditing and assurance standards.

Recommendation 8 (page 36)

The Committee suggests that the Privileges Committee of both the Senate and the House of Representatives examine in more detail the application of parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers, noting the Auditor-General's status as an 'independent officer of the Parliament'.

Recommendation 9 (page 45)

That the Auditor-General continue to provide the recipients of extracts of proposed audit reports with clear guidelines to clarify expectations around the submission of comments (e.g., the importance of brevity and clarity) and also the implications for naming other persons/entities /organisations in those comments which are published in full.

Recommendation 10 (page 64)

That all funding agreements between the Commonwealth and other levels of Government include standard clauses providing the Auditor-General with access to all information and records, and a capacity to inspect work on all projects, relating to the use of Commonwealth funds under those agreements.

Recommendation 11 (page 67)

That the Act be amended as necessary so that the Auditor-General may conduct a performance audit to directly assess the performance of bodies that receive Commonwealth funding in circumstances where there is a corresponding or reciprocal responsibility to deliver specified outcomes in accordance with agreed arrangements if a Minister or the Joint Committee of Public Accounts and Audit requests the audit.

The Auditor-General may ask a Minister or the Joint Committee of Public Accounts and Audit to make such a request.

Recommendation 12 (page 71)

That the Act be amended so that the functions performed by entities including private contractors on behalf of the Commonwealth in the delivery of government programs can be subject to direct audit by the Auditor-General.

Recommendation 13 (page 71)

That the Act be amended to ensure that when a decision is made by the Auditor-General to conduct an audit of a non-Commonwealth body, the reasons for that decision should be disclosed in the publication of the report.

Introduction

Background

- 1.1 On 25 February 2009, the Joint Committee of Public Accounts and Audit (JCPAA) resolved to conduct an inquiry into the *Auditor-General Act 1997*. The terms of reference can be found at page xi.
- 1.2 The *Auditor-General Act 1997* (the Act) was enacted in October 1997. The Act, along with two companion Acts, the *Financial Management and Accountability Act 1997* (the FMA Act) and the *Commonwealth Authorities and Companies Act 1997* (the CAC Act) was introduced to replace the *Audit Act 1901*. This package of legislation is a principles-based accountability framework which was widely acknowledged as representing best practice.¹
- 1.3 The *Audit Act 1901*, the fourth Act to be passed by the first Federal Parliament, provided a legislative basis for the financial management of Commonwealth monies and the audit of related accounts. The *Audit Act 1901* also provided a legal foundation for the appointment of an Auditor-General.²
- 1.4 In 1989 this Committee's predecessor, the Joint Committee of Public Accounts (JCPA) initiated an inquiry as a result of its concern about public sector auditing at that time.³ The JCPA's report, *The Auditor-General – Ally of the People and the Parliament* addressed the key problems facing the then Auditor-General and was the impetus for the suite of new legislation

1 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 2.

2 Joint Committee of Public Accounts, *Report 296, The Auditor-General: Ally of the People and Parliament*, p 13.

3 Joint Committee of Public Accounts, *Report 296, The Auditor-General: Ally of the People and Parliament*, p 3.

to replace the outdated *Audit Act 1901*.⁴ The JCPA's 1989 report also recommended that a parliamentary committee, an Audit Committee, be established to advise the Auditor-General on Parliament's audit priorities and consider the Australian Audit Office's finances in detail.⁵

1.5 In June 1994, the then Minister for Finance, the Hon Kim Beazley MP, introduced three Bills: the *Auditor-General Bill 1994*; the *Financial Management and Accountability Bill 1994*; and the *Commonwealth Authorities and Companies Bill 1994*.⁶

1.6 The Bills were referred to the Joint Committee of Public Accounts for review and in September 1994, the JCPA tabled *Report 331: An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*. The Committee made 39 recommendations several of which were designed to enhance the independence of the Auditor-General.⁷ However, the 1996 election was called and the Parliament was prorogued before agreement could be reached between the House of Representatives and the Senate on the Bills. The 1994 Bills therefore lapsed.

1.7 In 1996, the then Minister for Finance, the Hon John Fahey MP, indicated that a revised package of legislation would be introduced in the Spring sittings and requested the JCPA to:

Suggest appropriate measures that could be incorporated into the Auditor-General Bill, or other legislation, to support the functional independence of the Auditor-General, in keeping with the nature of that Office.⁸

1.8 In October 1996, the JCPA tabled *Report 346: Guarding the Independence of the Auditor-General*. The report contained 16 recommendations outlining a legislative framework to underpin the independence of the

4 Joint Committee of Public Accounts, *Report 346: Guarding the Independence of the Auditor-General*, p 5.

5 Joint Committee of Public Accounts, *Report 296, The Auditor-General: Ally of the People and Parliament*, p xvii.

6 Joint Committee of Public Accounts, *Report 331: An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament*, p 1.

7 Joint Committee of Public Accounts, *Report 346: Guarding the Independence of the Auditor-General*, p 5.

8 Joint Committee of Public Accounts, *Report 346: Guarding the Independence of the Auditor-General*, p vii.

Auditor-General.⁹ The creation of an audit committee of the Parliament was also key to achieving the functional independence of the Auditor-General.¹⁰

The Auditor-General Act 1997

1.9 The *Auditor-General Act 1997* came into effect on 1 January 1998. At the same time, legislative amendments to the *Public Accounts Committee Act 1951* made the Joint Committee of Public Accounts the audit committee of the Parliament.

1.10 The main features of the *Auditor General Act 1997* included:

- a number of provisions that strengthened the independence of the office of the Auditor-General and the Australian National Audit Office (ANAO). In particular, the Act made the Auditor-General an independent officer of the Parliament;
- the strengthening of the Auditor-General's role as external auditor of Commonwealth agencies, authorities and companies and their subsidiaries. The Act provided the Auditor-General with a comprehensive mandate to conduct, with some limited exceptions, financial statement and performance audits of all government entities; and
- clarification of the Auditor-General's mandate and powers.¹¹

1.11 In 2001, the JCPAA conducted a review into the effectiveness of the Act. The objectives, scope and focus of that review were stated as follows:

...to provide an assurance function and test whether the functions of the Act are being properly fulfilled. This examination has identified a number of sections of the Act that could be enhanced through legislative amendment.¹²

1.12 In particular, the Committee examined *Section 19 – Comments on proposed reports; Sections 32 and 33 – Information gathering powers; and Section 37 – Sensitive information not to be included in public reports*. The review also

9 Joint Committee of Public Accounts, *Report 346: Guarding the Independence of the Auditor-General*, p xii.

10 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 2.

11 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 3.

12 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 5.

focused on various aspects of the operation and procedures of the ANAO such as the circulation of reports to relevant Ministers and the Auditor-General's powers in regard to the actions of Ministers.¹³

- 1.13 The JCPAA tabled *Report 386: Review of the Auditor-General Act 1997* in August 2001. The Committee made five recommendations, four of which were accepted by Government. These recommendations were designed to clarify the distribution of performance audit reports; make provision for the inclusion of any comments on a proposed report in the final report; clarify the circumstances in which the Auditor-General may disclose copies or extracts of reports to entities and other parties during the course of the audit; and clarify the powers of the Auditor-General when sensitive information, the disclosure of which would be contrary to the public interest, was not to be included in a public report.
- 1.14 One recommendation was that the Privileges Committees of both Houses of Parliament examine whether ANAO draft reports and extracts of draft reports attract parliamentary privilege and if not, whether they should. To date, no action has been taken on this recommendation by either Privileges Committee (see discussion at page 34 onwards).
- 1.15 The *Auditor-General Amendment Bill 2008* introduced legislation to implement and build on the recommendations made by the JCPAA in its 2001 review. The Bill was passed unamended in February 2009 and although some recommendations had already been implemented administratively, they provided legislative certainty for the practices of the Auditor-General in relation to matters such as the distribution of draft reports.¹⁴

Purpose of the inquiry

- 1.16 The purpose of this inquiry is to review and report on whether the provisions of the *Auditor-General Act 1997* remain adequate in the modern public sector environment.
- 1.17 The Committee's review is timely. The Auditor-General now performs a number of functions which do not sit precisely within the traditional financial assurance and performance audit roles of his office. Nor are they explicitly provided for in the Act. For example, the ANAO now reviews information provided by the Defence Materiel Organisation (DMO) and reports annually to Parliament along with the DMO on the status of major

13 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 7.

14 *Auditor-General Amendment Bill 2008*, Explanatory Memorandum, p 1.

Defence acquisition projects. Between July 2008 and March 2010 the Auditor-General also held responsibility for reviewing government advertising campaigns which exceeded \$250,000 for compliance with the *Guidelines on Campaign Advertising by Australian Government Departments and Agencies*.¹⁵

- 1.18 In 2001, the JCPAA stressed the need to periodically review critical legislation such as this Act to ensure that its objectives are being met.¹⁶ It has been nine years since the JCPAA conducted a review.

Conduct of the inquiry

- 1.19 The terms of reference for the inquiry were advertised in March 2009. Additionally, all major portfolio agencies, private sector organisations and individuals were invited to provide submissions. The terms of reference and other information about the inquiry were also advertised on the JCPAA's internet homepage at:

■ <http://www.aph.gov.au/house/committee/jpaa/agact/index.htm>

- 1.20 Nineteen submissions were received. A list of the submitters can be found at Appendix A. The Committee also received one exhibit the details of which can be found at Appendix B.
- 1.21 Four public hearings were held during 2009 and 2010 (see list at Appendix C) during which a number of witnesses gave evidence to the Committee.
- 1.22 Transcripts from the hearings are available through the Committee's website.

Structure of the report

- 1.23 The report comprises five chapters largely corresponding to the inquiry's terms of reference. Chapter two discusses legislative support for new functions the Auditor-General has recently undertaken and chapter three addresses a number of areas in the Act that require clarification such as the Auditor-General's capacity to audit Government Business Enterprises. Chapter four examines submissions made to strengthen the audit independence of the Auditor-General and the final chapter addresses cross-jurisdictional and Commonwealth jurisdictional arrangements.

15 See Department of Finance and Deregulation, *Campaign Advertising by Australian Government Departments and Agencies*.

16 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 1.

- 1.24 The Committee makes a number of recommendations on the basis of the evidence it received. These recommendations are set out in full at page xv.

Legislative support for new functions

Introduction

- 2.1 Part 4 of the *Auditor-General Act 1997* sets out the main functions and powers of the Auditor-General. The main functions include undertaking financial statement audits, performance audits, audits by arrangement, and functions under other Acts.
- 2.2 Traditionally, the primary functions performed by the Auditor-General have included the auditing of financial statements¹ and performance audits.² More recently, however, the Auditor-General has taken on a range of individual assurance activities (or audits by arrangement).
- 2.3 These assurance activities generally consist of reviews undertaken by agreement with the client, either at the request of the client or in response to requests from stakeholders, including Ministers and parliamentary

1 In a financial statement audit, the auditor's objective is to enable the auditor to express an opinion whether the financial statements are prepared, in all material respects, in accordance with the applicable financial reporting framework. Extracted from Australian National Audit Office, *Occasional Paper, Panel Discussion: Performance Audit Reports – An Auditor-General's Perspective*, March 2007, p 3.

2 In a performance audit, the auditor's objective is to express an opinion whether, in all material respects, the administration of a particular programme or entity has been carried out economically and/or efficiently and/or effectively. Extracted from Australian National Audit Office, *Occasional Paper, Panel Discussion: Performance Audit Reports – An Auditor-General's Perspective*, March 2007, p 3.

committees.³ These assurance activities may be handled through the publication of a formal report or by correspondence as determined by the relevant arrangement.⁴

- 2.4 Currently the main assurance activity the ANAO is engaged in is the annual assurance review of the Defence Major Projects Report (MPR). The MPR reports on the status of selected Defence equipment acquisition projects.
- 2.5 From July 2008 to March 2010, the Auditor-General was also involved in reviews of government advertising. The focus of these reviews was to allow the Auditor-General to express a conclusion as to whether anything had arisen to indicate that government advertising campaigns did not comply with the relevant guidelines.
- 2.6 Assurance activities such as the MPR (and the reviews of government advertising previously) are carried out under section 20 of the Act (Audits etc. by arrangement) and in accordance with the ANAO's Auditing Standards. These standards include the Standard on Assurance Engagements ASAE 3000 *Assurance Engagements Other than Audits or Reviews of Historical Financial Information* issued by the Australian Auditing and Assurance Standards Board.
- 2.7 Assurance activities of this kind provide a different level of assurance to that provided by financial statement, and performance audits.⁵ This difference is set out in the submission from the Australasian Council of Auditors-General (ACAG)⁶ as follows:

[A]n audit provides reasonable assurance which is defined as:

a high, but not absolute, level of assurance. This is where the assurance practitioner's objective is a reduction in performance engagement risk to an acceptably low level in the circumstances of the performance engagement as the basis for a positive form of expression of the assurance practitioner's conclusion.

3 Australian National Audit Office, Assurance Activities, viewed at http://www.anao.gov.au/director/publications/AG_Assurance.cfm on 20 May 2010.

4 Australian National Audit Office, sub 3, p 1.

5 Mr Ian McPhee PSM, transcript, 22 June 2009, p 18.

6 The Australasian Council of Auditors-General (ACAG) is an association established by Auditors-General in 1993 to provide mutual support and share information. Membership is open to the Auditors-General of all audit jurisdictions in Australia, New Zealand, Fiji and Papua New Guinea. For the purposes of preparing its submission to this inquiry ACAG canvassed the views of all Australian members with the exception of the Commonwealth Auditor-General.

Whereas, a review provides limited assurance. In a limited assurance engagement the assurance practitioner's objective is a reduction in performance engagement risk to a level that is acceptable in the circumstances of the assurance engagement, as the basis for a negative form of expression of the assurance practitioner's conclusion. The acceptable performance engagement risk in a limited assurance engagement is greater than for a reasonable assurance engagement.⁷

2.8 More straightforwardly, Mr Geoff Wilson, Independent Auditor of the ANAO, explains:

The difference between limited assurance and reasonable assurance is the amount of work that you actually do. In a limited review you are doing certain discussions and reviewing certain documents. In terms of reasonable assurance you are increasing the level of work that you are doing, including reviewing and testing various systems. That is a choice that is part of the engagement.⁸

2.9 There was some consensus in the evidence that the area of assurance engagements was one that required attention. For example, as Professor Wanna from the Institute of Public Administration Australia (IPAA) states:

It seems clear now, from a decade of this act, that there are areas where the mandate is unclear. I think one of the roles of this committee should be to help clarify the audit mandate...in relation to their assurance functions across government.⁹

Explicit recognition of assurance activities

2.10 As outlined above, assurance activities are currently carried out in accordance with section 20 of the Act. This section, in part, states:

- (1) The Auditor-General may enter into an arrangement with any person or body:
 - (a) to audit financial statements of the person or body; or

7 Australasian Council of Auditors-General, sub 8, npn.

8 Mr Geoff Wilson, transcript, 11 March 2009, public hearing for the JCPAA's inquiry into the role of the Auditor General in scrutinising government advertising, p 9.

9 Professor John Wanna, transcript, 22 June 2009, p 31.

(b) to conduct a performance audit of the person or body;
or

(c) to provide services to the person or body that are of a kind commonly performed by auditors.¹⁰

2.11 The submission from ACAG clarifies further:

Where the work negotiated is an audit, then Section 20 (1) sub-sections (a) or (b) apply. Where the work negotiated is a review, then Section 20(1)(c) applies although the word review is not explicitly included in this Section. Instead, reference is made to “services ... of a kind commonly performed by auditors”. Auditors commonly conduct “reviews”.¹¹

2.12 A number of submissions to the inquiry suggest that rather than falling under the auspices of section 20, the Act should make explicit provision for these assurance activities.¹²

2.13 The Committee is in receipt of no direct evidence to suggest that the main assurance activity currently being conducted by the Auditor-General under section 20 of the Act (i.e., the MPR) is problematic. However, there is evidence to suggest that assurance activities undertaken by agreement with agencies could potentially create challenges.

2.14 This is because assurance activities conducted under section 20 of the Act do not provide the Auditor-General with the formal information-gathering powers that normally apply to the conduct of financial statement or performance audits.¹³ This restriction is set out in subsection 31(a) (Purpose for which information-gathering powers may be used) as follows:

The powers under sections 32 and 33^[14] may be used for the purpose of, or in connection with, any Auditor-General function, except:

(a) an audit or other function under section 20.¹⁵

10 Section 20 of the *Auditor-General Act 1997* (Cth).

11 Australasian Council of Auditors-General, sub 8, npn.

12 See submissions 3, 6 and 8.

13 Australian National Audit Office, sub 3, p 1.

14 Sections 32 and 33 relate to the power of the Auditor-General to obtain information, and access to premises respectively.

15 Subsection 31(a) of the *Auditor-General Act 1997* (Cth).

- 2.15 Additionally, as outlined in ACAG's submission below, the fact that audits or reviews are conducted by arrangement significantly constrains the role of the Auditor-General:

ACAG also notes that under Section 20, any such audits or reviews are by arrangement (therefore negotiated) between the A-G and any person or body. This must mean that the "person or body" could refuse to have the audit or review conducted or seek to impose conditions with which the A-G may, or may not, wish to comply. For example, the person or body could agree to the conduct of an audit or review but limit the scope in such a way as to make the audit or review meaningless.¹⁶

- 2.16 Professor Wanna from IPAA commented in a similar vein:

I am not fully aware of what the problems are with the Defence reports but there seems to be a concern, certainly from the audit community, that they do not have the same strength of powers...when they are negotiating these. You must remember that the culture of the Audit Office is to be very consensual and to get agreement. Of course, that then puts them in that kind of bargaining position. One interpretation of that section of the act would be that you can refuse to cooperate then. So an agency or a minister would be within their powers to say, 'No, I'm not cooperating.'¹⁷

- 2.17 At the hearing on 22 June 2009, the Auditor-General, Mr Ian McPhee PSM, further explained the potential problems using the MPR as an example:

The importance of [assurance reviews] being treated specially is that you can link up my normal powers to obtain evidence and to undertake these reviews without the agreement of the other Commonwealth agency. So it allows the Auditor General more authority. Take a position: conceivably, you are doing the [MPR], and, hypothetically, the government has a change of heart and thinks these...reviews are actually disclosing a bit too much information and are not very satisfactory. At the moment, I rely on the agreement of the DMO to provide me with access, to provide the necessary information to allow me to do the audit. Under a provision that I have got in mind, I would have the authority to

16 Australasian Council of Auditors-General, sub 8, npn.

17 Professor John Wanna, transcript, 22 June 2009, p 31.

undertake those reviews knowing it was important for the committee no matter what.¹⁸

2.18 Both ACAG and the ANAO argue on the basis of the information set out above, that assurance activities should be explicitly recognised in the Act.

2.19 ACAG proposes that the Act should be broadened in two respects: first, in circumstances where the Parliament has sought audits or reviews, these audits or reviews should be conducted at the discretion of the Auditor-General and not by arrangement; and, second, explicit provision should be included in the Act for the Auditor-General to conduct reviews. ACAG also submits that any requests for additional functions should be accompanied by appropriate resourcing.¹⁹

2.20 Paragraph 1 of the appendix to the ANAO's primary submission (no 3) outlines the provisions that would need to be incorporated into the Act should such an amendment be recommended by the Committee as follows:

- provide the Auditor-General with the explicit authority to undertake assurance activities consistent with his other functions,
- provide for the coercive information-gathering powers in the Act to be used for the purpose of carrying out assurance activities, and
- provide the Auditor-General with the authority to determine arrangements, including reporting arrangements to the Parliament, to be followed in the conduct of assurance activities.²⁰

2.21 While not specific about the form increased legislative backing should take, the Defence Materiel Organisation (DMO) also provides some support for explicitly recognising assurance activities in the Act as follows:

From a DMO perspective, I support the broadening of the Act to give sufficient legislative backing for new functions such as reviews, eg the "Major Projects Report".²¹

18 Mr Ian McPhee PSM, transcript 22 June 2009, p 17-18.

19 Australasian Council of Auditors-General, sub 8, npn.

20 Australian National Audit Office, sub 3, p 10.

21 Defence Materiel Organisation, sub 6, p 1.

Committee comment

- 2.22 On the basis of the evidence received, and there being no evidence to the contrary, the Committee believes it is appropriate that the Auditor-General be provided with explicit authority to conduct assurance engagements.
- 2.23 In light of its experience with oversight of the MPR, the Committee notes that these assurance activities, while not full performance audits, can be an extremely effective way of monitoring public accountability.
- 2.24 The Committee expects that implementation of Recommendation 1 below would not render section 20 of the Act redundant.
- 2.25 Additionally, the Committee also notes that any amendments to the Act to provide explicit recognition of assurance engagements would result in consequent amendments to reflect that change (for example, sub-section 8(4) and section 24 would need to refer to audit *and assurance* activities).²²
- 2.26 The Committee has an expectation that the Parliament and the Australian public will continue to be informed of the outcomes of these assurance activities.

Recommendation 1

- 2.27 **That the *Auditor-General Act 1997* be amended to provide the Auditor-General with explicit authority to conduct assurance engagements. In circumstances where such assurance engagements have been identified as priorities by the Parliament, they should be subject to the same information-gathering powers that pertain to performance audits undertaken by the Auditor-General. The Auditor-General should have the authority to determine arrangements, including reporting arrangements to the Parliament, to be followed in the conduct of these assurance engagements.**

22 See Australian National Audit Office, sub 3, p 2.

Clarification of rights and responsibilities

Introduction

- 3.1 The ANAO submits that the *Auditor-General Act 1997* has 'served the Parliament and the Office well'.¹ The Committee is also of the view that the fact that the inquiry received so few submissions from public sector agencies could also be taken to imply support for this idea.
- 3.2 That said, the regular revision of Acts of Parliament is important. As Professor Wanna states:
- I think we need to revise acts regularly, because if you look back at the audit acts from 1901 up to this act, you find that audit effectiveness was impeded by the acts not being regularly reviewed and revised and governments being reluctant to initiate changes to the act, through the parliament.²
- 3.3 It became clear over the course of the inquiry that there are a number of areas in the Act which remain somewhat ambiguous and in need of clarification. Some main areas of concern include: auditing Government Business Enterprises (GBEs); auditing performance indicators; and clarifying issues around legal professional privilege.
- 3.4 Some further areas of the Act that submitters suggested need clarification include:
- fees for financial statement audits;
 - acting as auditor under the *Corporations Act 2001*;

1 Australian National Audit Office, sub 3, cover letter.

2 Professor John Wanna, transcript, 22 June 2009, p 31.

- clarifying the Auditor-General's responsibilities around the provision of advice and information;
- auditing standards;
- parliamentary privilege;
- exemptions from the *Freedom of Information Act 1982* and the *Privacy Act 1998*;
- defining 'persons' giving evidence;
- access to Cabinet documents;
- a role for the Auditor-General with regard to whistleblowers;
- dealing with comments on extract reports; and
- the possibility of a blanket reporting embargo during caretaker periods.

3.5 A question was raised about the provision of information and documents to the Committee and other parliamentary committees. This issue is also addressed in this chapter.

Government Business Enterprises

3.6 In its inquiry into reform of the Australian Audit Office and subsequent report (i.e., *Report 296, The Auditor-General: Ally of the People and Parliament*) tabled in March 1989, the Joint Committee of Public Accounts recommended that the Auditor-General be reinstated as the external auditor of Government Business Enterprises.³

3.7 However, in its response to that report, the Government considered that there was little to be gained by subjecting GBEs to efficiency audits as they are subject to the commercial discipline imposed through the focus on targets and related performance measurement.⁴

3.8 In its 1996 consideration of appropriate measures to be incorporated into the Auditor-General Bill, the Joint Committee of Public Accounts again recommended that the Auditor-General be appointed as the auditor of all Commonwealth entities, and he/she have a mandate to initiate the full

3 Joint Committee of Public Accounts, *Report 296, The Auditor-General: Ally of the People and Parliament*, p 107.

4 Government response to Joint Committee of Public Accounts, *Report 296, The Auditor-General: Ally of the People and Parliament*, p 11.

range of audits of Commonwealth entities including performance audits of Government Business Enterprises.⁵

3.9 Again, the Government of the day decided against subjecting GBEs to performance audits by the Auditor-General given that 'they are subject to the overlaying accountability framework that requires them to pursue optimal market performance and to improve the return to the Commonwealth as shareholder'.⁶

3.10 Consequently, subsections 16(2) and 17(2) of the *Auditor-General Act 1997* provide that the Auditor-General may only conduct audits of Commonwealth authorities that are GBEs, and wholly owned Commonwealth companies that are GBEs, if the responsible Minister, the Finance Minister or the Joint Committee of Public Accounts and Audit requests the audit. Subsections 16(3) and 17(3) of the Act also state:

Nothing prevents the Auditor-General from asking a responsible Minister, the Finance Minister or the Joint Committee of Public Accounts and Audit to make a particular request under subsection (2).⁷

3.11 The ANAO has no record of such a request to undertake a performance audit of a GBE since the Act came into effect.⁸

3.12 In the years since the Act was established in 1998 there have been changes to the number and character of GBEs. As the Auditor-General states:

...we probably had companies like Qantas, the Commonwealth Bank and even Telstra back then...with the passage of time our stable of GBEs is not what it used to be.⁹

3.13 As at May 2010, there were six GBEs falling under the *Commonwealth Authorities and Companies Act 1997* (CAC Act): ASC Pty Ltd; Australian Government Solicitor; Australian Postal Corporation; Australian Rail Track Corporation Limited; Defence Housing Australia; and Medibank Private Limited.¹⁰

5 Joint Committee of Public Accounts, *Report 346, Guarding the independence of the Auditor-General*, p 21.

6 The Hon John Fahey, Second Reading Speech, House of Representatives Hansard, 12 December 1996, p 8341.

7 Subsections 16(3) and 17(3) of the *Auditor-General Act 1997* (Cth).

8 Australian National Audit Office, sub 3, p 5.

9 Mr Ian McPhee PSM, transcript, 22 June 2009, p 17.

10 Viewed at the Department of Finance and Deregulation <http://www.finance.gov.au/property/gbe/index.html> on 25 May 2010.

- 3.14 It is this reduction in market significance of the current GBEs as well as the centrality of the principle to the Auditor-General's mandate that he/she should have the authority to conduct performance audits in all Commonwealth entities that underpins the ANAO's argument that GBEs should be subject to performance audits conducted by the Commonwealth Auditor-General.¹¹
- 3.15 Extending the Auditor-General's mandate to Commonwealth controlled GBEs received support from a number of submitters. For example, the Hon Dr Bob Such MP, Member for Fisher in the South Australian State Parliament states:
- There should be an amendment to the Act to permit the Auditor-General to have oversight of, and audit, the finances of all Government Business Enterprises, with the intention of greater openness and clarity.¹²
- 3.16 Similarly, from the Chief Executive Officer of the DMO, Dr Stephen Gumley AO:
- ...I suggest expanding section 16 of the Act to include all Government Agencies, including Government Business Enterprises...¹³
- 3.17 ACAG also submit that, like other jurisdictions, the Commonwealth Auditor-General should have the authority to conduct performance audits in GBEs:
- ..the [Auditor-General] should automatically be the auditor of all GBEs and their subsidiaries. All other Australian jurisdictions and New Zealand are the auditors of their GBEs, or equivalent entities, and of their subsidiaries.¹⁴
- 3.18 Having received no evidence to the contrary, the Committee believes it is appropriate that the Auditor-General be provided with the authority to conduct performance audits of Commonwealth wholly-owned GBEs.

11 Australian National Audit Office, sub 3, p 5.

12 The Hon Dr Bob Such, sub 2, p 1.

13 Defence Materiel Organisation, sub 6, p 1.

14 Australasian Council of Auditors-General, sub 8, npn.

Commonwealth controlled GBEs

- 3.19 On 7 April 2009, the Government announced a significant investment in delivering broadband to Australian homes and workplaces and a new company NBN Co Limited was established to build and operate the network.¹⁵
- 3.20 In its primary submission (no 3) and a supplementary submission (no 3.1), the ANAO uses the example of NBN Co Limited to propose that the Auditor-General should be able to conduct performance audits of GBEs in which the Commonwealth holds a majority interest. Although currently a wholly-owned Government Business Enterprise, a partial sale of NBN Co Limited remains a possibility. As the Auditor-General states:
- We are the auditor of NBN Co. Ltd and we have done the financial statement audit for the financial year just ended. We expect, obviously, that company to grow over time. But when we raised it in our submission, you may recall that the government was at least raising the possibility of partly selling down that company at some future stage.¹⁶
- 3.21 The Government investment in the National Broadband Network is considerable. The Committee agrees with the views expressed by the Auditor-General at the hearing on 19 October 2009 that this investment should be subject to performance audits by the Auditor-General:
- It raised for us the issue of knowing the public interest, if you like, in the broadband network, the significant investment of taxpayers' funds, and whether the act should allow the Auditor-General, at their discretion, to undertake a performance audit either of NBN Co. as a wholly owned government business enterprise or as a partially owned GBE.¹⁷
- 3.22 The Committee notes from the ANAO's supplementary submission 3.1 that there is no legal impediment to the Auditor-General's performance audit mandate being extended to Government Business Enterprises in which the Commonwealth holds a majority interest.¹⁸

15 Viewed at Department of Broadband, Communications and the Digital Economy, http://www.dbcde.gov.au/broadband/national_broadband_network on 22 January 2010.

16 Mr Ian McPhee PSM, transcript, 19 October 2009, p 5.

17 Mr Ian McPhee PSM, transcript, 19 October 2009, p 5.

18 Australian National Audit Office, sub 3.1, p 1.

- 3.23 The Committee also notes that any recommendation to extend the Auditor-General's mandate in such a way would not result in the requirement for additional resources as per the following advice contained in supplementary submission 3.4:

A decision to provide the Auditor-General with the authority to conduct performance audits of Government Business Enterprises would, in practice, not have a significant impact on the ANAO's performance audit work program and therefore would not require budget supplementation.¹⁹

Recommendation 2

- 3.24 **That the Act be amended to provide the Auditor-General with the authority to initiate performance audits of Commonwealth controlled Government Business Enterprises.**

Auditing performance indicators

- 3.25 Measuring key aspects of an agency's performance is a critical part of the Government's Outcomes Framework²⁰ and recently, the Department of Finance and Deregulation has increased its focus on agency performance and results. This renewed emphasis is reflected in the revised format of the Portfolio Budget Statements (PBS), which now necessitates increasingly detailed key performance indicators which should clearly identify how they will contribute to achieving outcomes.²¹
- 3.26 According to the ANAO, performance indicators should be a mix of quantitative and qualitative measures, incorporate a range of better practice characteristics, and be cost-effective to collect, analyse and report against.²²

19 Australian National Audit Office, sub 3.4, npn.

20 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25.

21 Senator Andrew Murray, *Review of Operation Sunlight: Overhauling Budgetary Transparency*, pp 88-89.

22 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25.

- 3.27 Currently, the ANAO reviews performance indicators only in the context of individual programs or activities.²³ Mr McPhee described the current coverage of performance indicators as 'by exception...if it is important to the objectives [of the audit]'.²⁴
- 3.28 ANAO performance audits of public sector agencies frequently refer to performance indicators as an 'area that warrants improvement'.²⁵ For example, in its report No 23 2006-07 *Application of the Outcomes and Outputs Framework*, the ANAO states:
- ...over a third of the surveyed agencies with administered items indicated that none of their indicators addressed the effectiveness, quality or cost of their administered items.²⁶
- 3.29 Additionally:
- ...many indicators did not incorporate targets or benchmarks and other better practice characteristics...[in] particular, the majority of surveyed agencies considered that not all their [indicators] were measurable.²⁷
- 3.30 On the basis of its work, the ANAO argues that auditing performance indicators will contribute to an increase in the quality of the information that would become available:
- ...it is evident that the systematic or periodic review of the appropriateness of performance indicators, as well as the accuracy and timeliness of an agency's reporting against them, contributes to an overall increase in the quality and credibility of the indicators themselves and the reliance that can be placed on agencies' reporting against them.²⁸
- 3.31 The Committee notes the view expressed by ACAG below and also believes it is appropriate that the Auditor-General play a role in auditing performance information:
- In the event that Commonwealth entities are required to include in annual reports performance information, then ACAG believes it

23 Australian National Audit Office, sub 3, p 4.

24 Mr Ian McPhee PSM, transcript, 16 September 2009, p 15.

25 Australian National Audit Office, sub 3, p 4.

26 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25.

27 Australian National Audit Office, Report 23 2006-07, *Application of the Outcomes and Outputs Framework*, 2006-07, p 25-26.

28 Australian National Audit Office, sub 3, p 4.

should be a requirement that such information is audited. This would enable users of such annual reports to be assured that the performance information reported is relevant to stated objectives, appropriate for assessing performance and whether or not information reported fairly represents actual performance.²⁹

3.32 Additionally, the Committee notes the following evidence from Mr McPhee that in jurisdictions that provide for the auditing of performance indicators, this has led to positive outcomes more generally:

...in talking to state auditors generally...and the Auditor-General in New Zealand, they do believe that providing an audit focus to performance information does result in an increase in the quality and the integrity of the information presented.³⁰

3.33 The Committee is aware of the utility of being able to develop performance information that would provide benchmarks and comparative information across jurisdictions.

3.34 At the hearing on 8 February 2010, Dr Andrew Pope referred to the difficulties in assessing programs when performance measures are lacking:

One of the issues that is reasonably common across a lot of things is a lack of a baseline set of data. Particularly the further back you go into programs you are not sure what the situation was at the time, and so it is very hard now to look at current performance information and then determine what the impact has been.³¹

3.35 As a result of its own practical experience monitoring accountability across public sector agencies through the work of the ANAO, the Committee is fully supportive of these views expressed by Dr Pope.

3.36 The ANAO put forward three options to enhance audit coverage of performance indicators. These options are as follows:

- (a) the conduct of a periodic review of indicators as part of the ANAO's performance audit program; or
- (b) a review of an agency's compliance with its performance indicator responsibilities as an adjunct to the audit of an agency's financial statements in a similar way to that undertaken by the Western Australian Auditor-General;

29 Australasian Council of Auditors General, sub 8, npn.

30 Mr Ian McPhee PSM, transcript, 8 February 2010, pp 7-8.

31 Dr Andrew Pope, transcript, 8 February 2010, p 7.

(further details are included in paragraph 4 of the Appendix);
or

- (c) a review of an agency's compliance with its responsibilities for a sub-set of indicators which the Parliament and/or the Government considers relate to critical programs or areas of public administration including, for example, environmental sustainability. This review would be undertaken as an adjunct to the audit of an agency's financial statements.³²

3.37 At the public hearing on 16 September 2009, the Committee canvassed these options with the Auditor-General.

3.38 Option (a) is the most similar to current arrangements. If this option was to be adopted, where currently performance indicators are audited by exception they would become a 'specific focus of an audit'.³³ As Mr McPhee states:

...At the moment it tends to [be] by exception if it is significant, if it is important to the objectives whereas under proposal (a) we would make it a mandatory part of the objective and make sure we did cover it as a part of the performance audit.³⁴

3.39 Although there may be some refocussing of some performance audit resources, there would be no need for budget supplementation should option (a) be adopted.³⁵

3.40 If option (b) were to be incorporated into the Act it seems clear that this would provide a high level of assurance to the Parliament as is the case in Western Australia.³⁶ As the Auditor-General explains:

...at the same time as you do your financial statement audit you could look at all of the performance indicators and provide an opinion in relation to the completeness, accuracy, et cetera, of indicators.³⁷

3.41 However, while the Committee agrees that option (b) might provide 'more focused assurance to the Parliament'³⁸ it is resource intensive, particularly in light of the ANAO's indicative budget supplementation in the vicinity

32 Australian National Audit Office, sub 3, p 4.

33 Mr Ian McPhee PSM, transcript, 16 September 2009, p 15.

34 Mr Ian McPhee PSM, transcript, 16 September 2009, p 15.

35 Australian National Audit Office, sub 3.4, npn.

36 Australian National Audit Office, sub 3, p 11-12.

37 Mr Ian McPhee PSM, transcript, 16 September 2009, p 16.

38 Australian National Audit Office, sub 3, p 4.

of \$2.8 and \$4.05 million per annum.³⁹ The Committee also notes the Auditor-General's comment that this option may not be 'entirely necessary'.⁴⁰

- 3.42 In the Committee's view, the third option proposed in the Auditor-General's submission would provide adequate assurance around the integrity of performance information attached to programs or areas the Parliament sees as a priority.
- 3.43 As the Auditor-General states, this option means that should the Parliament and its committees have a particular interest in any particular areas of public administration, programs or portfolios, the ANAO could focus on those interests.⁴¹ For example, examining performance information related to environmental sustainability across all performance audits in any given year.
- 3.44 To that end, the Auditor-General should identify possible agency performance indicators to be audited and consult with the Parliament, through the JCPAA. This process should be conducted in the same way the Auditor-General currently consults with the Parliament about his performance audit priorities.⁴²
- 3.45 The Committee notes that by increasing audit coverage in this way additional budget supplementation would be required. The Committee also notes that while the actual level of resourcing required would be dependent upon the number and nature of the performance indicators involved, the ANAO has provided an indicative figure of up to \$2 million per annum.⁴³

39 Australian National Audit Office, sub 3.4, npn.

40 Mr Ian McPhee PSM, transcript, 16 September 2009, p 16.

41 Mr Ian McPhee PSM, transcript, 8 February 2010, p 32.

42 Each year, the JCPAA advises the Auditor-General on those areas which the Parliament particularly believes need to be audited. The JCPAA performs this function by writing to all other parliamentary committees asking for their advice on any programs or functions within their portfolio area they believe should be audited. Those suggestions are then forwarded to the Auditor-General for his consideration in preparing his work program for the next financial year. By law the Auditor-General is free to reject proposed audit topics. However, he responds to all proposals so that committees can be advised of the status of their suggestions.

43 Australian National Audit Office, sub 3.4, npn.

Recommendation 3

3.46 **That the Act be amended as necessary to enable the Auditor-General to review an agency's compliance with its responsibilities for a sub-set of performance indicators. Proposed performance indicators to be audited should be identified annually by the Auditor-General and forwarded to the Parliament, via the JCPAA for comment, in a manner similar to the annual performance audit work program for the ANAO.**

The Auditor-General should be resourced appropriately to undertake this function.

Legal professional privilege

3.47 Legal professional privilege is a rule of law that preserves the confidentiality of communications between a lawyer and a client. In ordinary circumstances, parties to legal proceedings must disclose to other parties and the court any documents which are relevant to the matter in issue in the proceedings. However, if 'legal professional privilege' is attached to a document, the document need not be produced in connection with legal proceedings, or in other circumstances, such as on receipt of a search warrant from the police or a mandatory notice for production from a regulator.⁴⁴

3.48 Confidential communications between lawyers and their clients which are made for the dominant purpose of giving or obtaining legal advice or in connection with existing or anticipated legal proceedings generally attract legal professional privilege.⁴⁵

3.49 Through section 32 of the Act, the Auditor-General has broad access powers to information and documents. Documents protected by legal professional privilege do not limit that access.⁴⁶

3.50 Despite possessing that authority, the ANAO submits that there are occasions when agencies claim that documents protected by legal professional privilege should not be accessible by the Auditor-General. This can lead to protracted negotiations and subsequent delays in the

44 Viewed at University of Sydney, Office of General Counsel
http://www.usyd.edu.au/generalcounsel/faq/professional_privilege.shtml on 29 July 2009.

45 Viewed at University of Sydney, Office of General Counsel
http://www.usyd.edu.au/generalcounsel/faq/professional_privilege.shtml on 29 July 2009.

46 Australian National Audit Office, sub 3, p 2.

audit process and, at times, can require legal intervention to reach a resolution.⁴⁷

3.51 The ANAO argues that were the Act to be amended or an appropriate reference made in the Explanatory Memorandum to make explicit reference to legal professional privilege in the context of the Auditor-General's information gathering powers (as is the case in other Acts such as the *Ombudsman Act 1996*), this would enhance clarity around the issue.⁴⁸

3.52 It is clear from the evidence that the issue of legal professional privilege is not straightforward. As Mr Russell Coleman, Principal Auditor with the ANAO states:

...there has been a lot of case history in relation to legal professional privilege. There are a lot of court cases in relation to various aspects of it. Therefore, not surprisingly, there are a variety of interpretations placed on those court cases.⁴⁹

3.53 Mr Coleman further describes how the ANAO has received conflicting advice about access to documents protected by legal professional privilege and disagreements about whether legal professional privilege will be waived as a result of providing the Auditor-General with such access. The question of whether Commonwealth agencies can indeed claim legal professional privilege against another arm of the Commonwealth has also resulted in some differing opinions.⁵⁰

3.54 Despite these difficulties, Mr McPhee reported that his office had never been refused access to information.⁵¹

3.55 A number of issues were brought to light during the discussion around amending the Act to contain an explicit reference to the Auditor-General's power to access documents protected by legal professional privilege.

3.56 First, as mentioned above, is the issue of whether such an amendment would result in a waiver of legal professional privilege over those documents. Second, questions were raised about ANAO publication of material protected by legal professional privilege.⁵²

47 Australian National Audit Office, sub 3, p 3; see also sub 3.3, npn.

48 Australian National Audit Office, sub 3, p 3.

49 Mr Russell Coleman, transcript, 16 September 2009, p 5.

50 Mr Russell Coleman, transcript, 16 September 2009, p 5.

51 Mr Ian McPhee PSM, 16 September 2009, pp 4.

52 See transcripts, 22 June 2009, p 16 and transcript 16 September 2009, p 6.

- 3.57 With regard to the first question, the Committee notes that in the context of disclosure within the Commonwealth, disclosure of legal advice to another *Financial Management and Accountability Act* agency, such as the ANAO, does not amount to a waiver of legal professional privilege. However, there appears to be less certainty where disclosure involves a Commonwealth body that is a separate entity.⁵³
- 3.58 The ANAO sought legal advice on this issue, and provided the following information to the Committee:
- We were...asked to consider an amendment of the Auditor-General Act that, while putting beyond doubt that legal professional privilege does not prevent access by the Auditor-General to documents and records, it would ensure the provision of documents or records to the Auditor-General would not result in the waiver of legal professional privilege by persons providing them to the Auditor-General.
- Based on the legal advice we have received, the ANAO suggests that this could be achieved through the inclusion in the Act of a specific power that allows the Auditor-General to access material over which entities claim legal professional privilege but this access does not amount to a waiver of this privilege by the entities concerned.⁵⁴
- 3.59 The ANAO further advised that a provision along the lines of that included in the *Inspector-General of Taxation Act 2003* would satisfy this objective.⁵⁵
- 3.60 As referred to above, questions were also raised about the publication of material protected by legal professional privilege in public reports. The Committee notes that under the current legislation, the Auditor-General has discretion, subject to section 37 of the Act (see paragraph 3.64 below), to include information subject to legal professional privilege in public reports.⁵⁶
- 3.61 On the face of it, this legislative provision appears to warrant some concern. In particular, that decisions which may affect the legal professional privilege attached to certain documents are ultimately the

53 Australian National Audit Office, sub 3.3, npn.

54 Australian National Audit Office, sub 3.2, p 4.

55 See Australian National Audit Office, sub 3.2, pp 4-5.

56 Australian National Audit Office, sub 3.2, p 5.

responsibility of the Auditor-General thereby exposing the Government to risk associated with potential litigation.⁵⁷

3.62 However, the Auditor-General outlined to the Committee not only the high degree of caution that is applied to the publication of sensitive information but additionally, the authority the Attorney-General already has to override such power.

3.63 Specifically, in response to a question about whether he would publish documents that are the subject of legal professional privilege the Auditor-General stated:

The answer is: we have not. The reason is because I am very mindful of the legal advice provided to the Commonwealth. In many cases, as important as it is, it is not central to the individual issue. We would normally try to draft around sensitive legal positions. However, if it happened to be an issue which was front and centre in an audit, we may take a different attitude. But...I am very sensitive to legal advice, the Commonwealth's position, and very careful not to explicitly bring harm to the Commonwealth unless I thought it was significant in terms of the audit that we were doing.⁵⁸

3.64 More significantly, built into the legislation (section 37 of the Act) is a mechanism which overrides that power in certain circumstances. Section 37 of the Act states, in part:

- (1) The Auditor-General must not include particular information in a public report if:
 - (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2); or
 - (b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2).
- (2) The reasons are:
 - (a) it would prejudice the security, defence or international relations of the Commonwealth;

57 See discussion in transcript, 16 September 2009, pp 8-9.

58 Mr Ian McPhee PSM, transcript, 16 September 2009, p 7.

- (b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;
- (c) it would prejudice relations between the Commonwealth and a State;
- (d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the Commonwealth;
- (e) it would unfairly prejudice the commercial interests of any body or persons;
- (f) any other reason that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.⁵⁹

- 3.65 The ANAO submits that claims of legal professional privilege are covered in subsection 37(2)(f) set out above. The ANAO suggests, therefore, that the existing provisions are adequate for addressing the issue of whether information that is subject to a claim of legal professional privilege can be included in a public report.⁶⁰
- 3.66 In practice, section 37 provides 'a body of protection dealing with this public interest consideration'.⁶¹ By way of example, if a Department relinquished documents protected by legal professional privilege to the Auditor-General and the Auditor-General was of a mind to publish that material in his/her report, the Department, having become aware of that report in the statutory process of providing comments on the draft, would then be in a position to petition the Attorney-General to intervene.⁶²
- 3.67 The Committee notes that while there have been three situations recently where agencies have raised concerns about both providing to the ANAO and the ANAO publishing documents protected by legal professional privilege,⁶³ there has been no occasion, under the current legislation, where the Attorney-General has intervened.⁶⁴

59 Subsections 37(1)-(2) of the *Auditor-General Act 1997* (Cth).

60 Australian National Audit Office, supplementary sub 3.9, npn.

61 Mr Ian McPhee PSM, transcript, 16 September 2009, p 10.

62 See transcript 16 September 2009, p 10.

63 Australian National Audit Office, supplementary sub 3.3, npn.

64 Mr Russell Coleman, transcript, 8 February 2010, p 18.

- 3.68 The Committee also notes that Mr Pat Barrett AO, a former Auditor-General, supports the idea that there should not be a detailed prescription of what the Auditor-General can or cannot do and that he/she is guided by 'public interest' considerations.⁶⁵

Committee comment

- 3.69 The Committee believes that as an independent officer of the Parliament the Auditor-General should not be constrained in the conduct of his or her work on behalf of the Parliament.
- 3.70 Additionally, the Committee notes that by including a specific provision in the Act that makes explicit that the Auditor-General has access to material over which legal professional privilege is claimed, and clarifying that such access does not amount to a waiver of such privilege, no additional powers are being conferred on the Auditor-General.
- 3.71 The Committee accepts that efficiency is diminished when the Auditor-General and his officers are engaged in time-consuming invalid negotiations about the provision of privileged documents.

Recommendation 4

- 3.72 **That the Act be amended to make clear that claims of legal professional privilege do not override the Auditor-General's information gathering powers. The Act should also be amended to make clear that access to documents upon which legal professional privilege is claimed does not amount to a waiver of such privilege.**

Fees for financial statement audits

- 3.73 Agencies that fall under the *Financial Management and Accountability Act 1997* do not pay fees for financial statement audits. Agencies are advised of the cost of the audit and it is reported in their financial statements but this is a notional figure which is not actually paid.⁶⁶
- 3.74 On the other hand, under section 14 of the Act, Commonwealth authorities and subsidiaries and Commonwealth companies and subsidiaries are required to pay audit fees for financial statements.

65 Mr Pat Barrett AO, sub 1, p 1.

66 Mr McPhee PSM, transcript, 19 October 2010, p 21.

- 3.75 In 2008-09, a total of \$8.141 million was received in audit fees from bodies that fall under the *Commonwealth Authorities and Companies Act 1997* (CAC Act).⁶⁷ It is important to note that this revenue is returned to the budget and not made available to the ANAO.
- 3.76 The ANAO advises that under the existing Act, the payment of audit fees only applies to Commonwealth authorities and companies that fall under the ambit of the CAC Act. There are a small number of bodies (including the High Court of Australia, the Commonwealth Superannuation Scheme, and the Public Sector Superannuation Scheme) where 'their enabling legislation is silent on the issue of audit fees'⁶⁸ and accordingly they pay none.
- 3.77 The ANAO submits that it would be appropriate to clarify whether the Auditor-General should charge statutory authorities and other bodies that fall outside the ambit of the CAC Act fees for financial statement audits.⁶⁹
- 3.78 The Committee was in receipt of no evidence to suggest that the Act should not be amended to provide some consistency in relation to the collection of audit fees.

Recommendation 5

- 3.79 **That subject to consultation with affected bodies, consideration be given to amending the Act so that all statutory authorities or other bodies that fall outside the ambit of the CAC Act are liable to pay audit fees for financial statements.**

Acting as auditor under the *Corporations Act*

- 3.80 The Auditor-General seeks a technical amendment relating to section 21 of the Act.⁷⁰
- 3.81 Section 21 of the Act provides for the Auditor-General to accept appointment under the *Corporations Act 2001* as the auditor of:
- (a) a subsidiary of a Commonwealth authority;
 - (b) a Commonwealth company; or

67 Australian National Audit Office, *2009-10 Portfolio Budget Statements*, p 99.

68 Australian National Audit Office, sub 3, p 3.

69 Australian National Audit Office, sub 3, p 3.

70 Australian National Audit Office, sub 3, p 3.

(c) any other company in which the Commonwealth has a controlling interest.⁷¹

- 3.82 The intent of this section is to allow the Auditor-General to accept appointment under the *Corporations Act* as auditor of all Commonwealth entities that are subject to the *Corporations Act*.⁷²
- 3.83 The ANAO submits that when the *Auditor-General Act* was drafted, the CAC Act defined a Commonwealth company as 'a Corporations Act company in which the Commonwealth has a controlling interest'. However, as a result of recent amendments to the CAC Act related to the definition of 'control', subsection 21(1)(c) of the Act should be amended to read 'any subsidiary of a Commonwealth company'.⁷³
- 3.84 The purpose of this amendment is simply to make clear that the Auditor-General should audit any Commonwealth controlled companies and their subsidiaries.⁷⁴
- 3.85 The Committee notes that the proposed amendment simply provides legislative certainty to existing arrangements. As such, there are no resourcing implications associated with making this amendment.⁷⁵

Recommendation 6

- 3.86 **That section 21 of the Act be amended to reflect that the Auditor-General is able to audit any Commonwealth-controlled entity including Commonwealth-controlled companies and their subsidiaries.**

71 Australian National Audit Office, sub 3, p 3.

72 Australian National Audit Office, sub 3, p 4.

73 Australian National Audit Office, sub 3, p 4

74 Mr Ian McPhee PSM, transcript, 19 October 2009, p 26.

75 Australian National Audit Office, sub 3.4, npn.

Providing advice and information

3.87 Evidence from the ANAO suggests that section 23 of the Act (set out below) which deals with the provision of advice or information is somewhat 'restrictive':⁷⁶

23 Provision of advice or information

(1) The Auditor-General may provide advice or information to a person or body relating to the Auditor-General's responsibilities if, in the Auditor-General's opinion, it is in the Commonwealth's interests to provide the information or advice.

(2) In this section:

Auditor-General's responsibilities means:

(a) the Auditor-General's functions and powers; and

(b) any matter which the Auditor-General could consider when exercising those functions and powers.⁷⁷

3.88 The Auditor-General's preference would be for the Act to expressly recognise that the functions of the Auditor-General include the promotion of public accountability in the public sector and the authority to do anything incidental or conducive to any of the Auditor-General's audit responsibilities.⁷⁸

3.89 The relevant Australian Capital Territory legislation (i.e., *Auditor-General Act 1996*) is cited as an example which provides greater clarity around these issues.⁷⁹

Committee comment

3.90 The Committee acknowledges and appreciates the wide range of activities (e.g., seminars, better practice guides, capacity building) that are undertaken by the Auditor-General and his office to improve public accountability and administration both nationally and internationally.

3.91 However, it is the Committee's view is that rather than being restrictive, section 23 as it stands is broad in scope. Additionally, it is not clear what practical difference this amendment would make to the Auditor-General's

76 Mr Russell Coleman, transcript, 19 October 2009, p 21.

77 Subsections 23(1)-(2) of the *Auditor-General Act 1997* (Cth).

78 Australian National Audit Office, sub 3, p 2.

79 Australian National Audit Office, sub 3, p 2; Mr Russell Coleman, transcript, 19 October 2009, p 22.

functions.⁸⁰ The Committee does not recommend any amendment to this section of the Act.

Auditing standards

- 3.92 The Australian Auditing and Assurance Standards Board develops standards for both audits and other assurance engagements⁸¹ yet section 24 of the Act requires the Auditor-General to set auditing standards only.⁸²
- 3.93 The Auditor-General submits, and the Committee concurs, that it is proper for the Act to use the same terminology that the profession uses both nationally and globally.⁸³
- 3.94 Additionally, given the Committee's first recommendation outlined in chapter 2 above, (i.e., that the Auditor-General be provided with the express authority to conduct assurance activities) it is appropriate to update the Act.⁸⁴

Recommendation 7

- 3.95 **That the Act be amended to require the Auditor-General to set auditing and assurance standards.**

Parliamentary privilege

- 3.96 Parliamentary privilege refers to the special rights and immunities that belong to both Houses of Parliament, their committees and their Members. These rights are considered essential for the proper operation of the Parliament. These rights and immunities allow the Houses, their committees and Members to carry out their proper roles without obstruction or fear of prosecution.⁸⁵
- 3.97 In its 2001 review of the Act, the JCPAA reported:

The tabling of a performance audit report or financial statements audit report in Parliament becomes part of 'proceedings in

80 See transcript 19 October 2009, p 21.

81 Mr Ian McPhee PSM, transcript, 19 October 2009, p 25-26.

82 Australian National Audit Office, sub 3, p 2.

83 Mr McPhee PSM, transcript, 19 October 2009, p 26; see also transcript, 8 February 2010, p 20.

84 Mr McPhee PSM, transcript, 8 February 2010, p 20.

85 Extracted from *House of Representatives Practice*, 5th edn 2005, p 707.

Parliament' and attracts the protection of Parliamentary privilege. The Auditor-General and ANAO officers cannot be found liable in respect of statement contained in a tabled report.⁸⁶

- 3.98 However, there was a lack of clarity around whether ANAO draft reports, extracts of draft reports and working papers attract parliamentary privilege given these documents are not tabled and hence may not be considered 'proceedings in Parliament'.⁸⁷
- 3.99 The JCPAA recommended, therefore, that the Privileges Committee of both the Senate and the House of Representatives examine this question.⁸⁸
- 3.100 To date, this recommendation has not been taken up by either committee.
- 3.101 This issue was raised at the hearing on 19 October 2009. At that hearing, Mr Russell Coleman indicated that this is an issue that does 'come up...from time to time',⁸⁹ legal advice having been sought in the past by the ANAO:

There are often issues in relation to that as to whether that information subject to a discovery motion could be subject to parliamentary privilege. Some years ago, we did get advice from the then Solicitor-General. He at the time concluded that the relevant provisions of the relevant act...should be read widely. Therefore, not only our reports but also effectively our working papers were subject to parliamentary privilege. I think he also concluded that it was not beyond doubt. The courts generally do not rule on this matter.⁹⁰

- 3.102 The point was also made at that hearing that while it is unclear whether privilege is attached to draft reports and extracts of draft report there are penalties for not adhering to the relevant confidentiality requirements.⁹¹

86 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 11.

87 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 11.

88 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 18.

89 Mr Russell Coleman, transcript, 19 October 2009, p 25.

90 Mr Russell Coleman, transcript, 19 October 2009, p 25.

91 Mr Russell Coleman, transcript, 19 October 2009, p 25.

Committee comment

- 3.103 While there is no urgency attached to addressing this issue, the Committee reiterates the relevant comments its predecessor made in *Report 386*:

The audit process relies on a free flow of information on a continuous basis...the provision of Parliamentary privilege is an essential element in protecting the office of the Auditor-General from legal action so that it may provide a fearless account of the activities of executive government.⁹²

- 3.104 The Committee again recommends that this issue be taken up by the Privileges Committees.

Recommendation 8

- 3.105 **The Committee suggests that the Privileges Committee of both the Senate and the House of Representatives examine in more detail the application of parliamentary privilege to ANAO draft reports, extracts of draft reports and working papers, noting the Auditor-General's status as an 'independent officer of the Parliament'.**

Exemptions from FOI and the Privacy Act

- 3.106 Although not a matter requiring amendment to the *Auditor-General Act*, the issue of the Auditor-General being exempt from the *Freedom of Information Act 1982* (FOI Act) (Schedule 2 exemption) and largely exempt from the *Privacy Act 1998* was raised over the course of the inquiry.⁹³

Exemption from the FOI Act

- 3.107 The FOI Act gives individuals the right to:
- see documents held by federal government Ministers, their departments and most statutory authorities;
 - ask for information concerning them to be changed, if it is incomplete, out of date, incorrect or misleading; and

92 Joint Committee of Public Accounts and Audit, *Report 386: Review of the Auditor-General Act 1997*, p 16.

93 See transcript 22 June 2009, p 12.

- appeal against a decision not to grant access to a document or amend or annotate a personal record.⁹⁴
- 3.108 Federal government agencies are also required to make available detailed information about the way they are organised, their functions and decision-making processes and the documents they hold under the FOI Act.⁹⁵
- 3.109 As referred to above, the ANAO is exempt from all provisions of the FOI Act and in response to a Committee request for the rationale behind this exemption, the Auditor-General provided a summary of the reasons (see supplementary submission 3.2 for more detail):
- The Auditor-General, through the conduct of audits and related activities, is responsible for providing to the Parliament an independent assessment of the operations of public sector entities. The Auditor-General is an independent Officer of the Parliament, performs no executive functions, and makes no decisions or recommendations that directly affect members of the public. The outcome of all audit and related functions are publicly available, thereby achieving the objective of public accountability that is also an objective of the FOI Act.
 - The majority of documents in the possession of the ANAO are obtained from agencies, or are generated by the ANAO for the purposes of producing an audit report or forming an audit opinion that is tabled in the Parliament. Requests to access agency documents are able to be made directly to the agency concerned. Where documents are provided to the ANAO in confidence, it is important that their confidentiality is maintained.
 - The general principle of confidentiality of information obtained during the course of an audit is reinforced by the *Code of Ethics for Professional Accountants*⁹⁶ and by sub-section 36(1) of the *Auditor-General Act 1997*.
 - The FOI exemption for the Auditor-General at the federal level is consistent with the position for Auditors-General in the majority of States and Territories.⁹⁷

94 Viewed at the Department of Prime Minister and Cabinet <http://www.dpmc.gov.au/foi/legislation.cfm> on 7 May 2010.

95 Viewed at the Department of Prime Minister and Cabinet <http://www.dpmc.gov.au/foi/legislation.cfm> on 7 May 2010.

96 This Code is issued by the Accounting Professional and Ethical Standards Board and is applicable to all staff undertaking financial statement and performance audits.

97 For a fuller explanation please see Australian National Audit Office, supplementary sub 3.2, p 2.

- 3.110 The ANAO's exemption from the provisions of the FOI Act raised concerns amongst some Committee members who believed the Auditor-General should be subject to the provisions of the FOI Act in the same way that other agencies, also holding sensitive information, are.⁹⁸
- 3.111 One of the Auditor-General's primary concerns about releasing information is related to the protection of confidentiality (as set out in the second bullet point above). This point was reiterated by the Auditor-General at the public hearing on 22 June 2009 as follows:
- If the protections can go to maintaining the confidences of individuals who have talked to us in a confidential manner for the purposes of furthering the audit then I think the proposal is worthy of looking at. But I would just say to you that it is important not to underestimate the importance of retaining some confidentiality.⁹⁹
- 3.112 The Committee notes the Auditor-General put forward an option for consideration by the Committee that the ANAO, in the context of its administrative functions only, be subject to the provisions of the FOI Act. The Committee can see no real benefit to be gained by adopting such an approach.
- 3.113 The Committee has little evidence on which to suggest that any changes to the ANAO's exemption from the FOI Act are warranted. However, the Committee notes that the current Government conducted a review of Australia's Freedom of Information laws. As a result of that review two bills, the *Australian Information Commissioner Bill 2010* and the *Freedom of Information Amendment (Reform) Bill 2010*, passed through the Parliament on 13 May 2010.¹⁰⁰
- 3.114 These bills provide for the establishment of the Office of the Australian Information Commissioner and two new independent office holders, the Australian Information Commissioner and the FOI Commissioner. The Commissioners are described by the Government as having 'wide ranging FOI functions to promote openness and transparency as intended by the Government reforms'.¹⁰¹

98 See transcript 22 June 2009, p 4.

99 Mr Ian McPhee PSM, transcript, 22 June 2009, p 4.

100 Viewed at Department of Prime Minister and Cabinet, http://www.dpmc.gov.au/consultation/foi_reform/index.cfm on 26 May 2010.

101 Senator the Hon Joe Ludwig, media release, 13 May 2010.

- 3.115 The Committee believes that the appropriateness of the current exemptions from FOI could be examined in the context of that ongoing reform process.

Exemption from the *Privacy Act 1998*

- 3.116 The *Privacy Act 1998* regulates information privacy. More specifically, it regulates how the personal information of individuals (including sensitive information) is collected, used and disclosed, and the accuracy of that information. It also regulates the manner in which the personal information of individuals is kept and their access to that information. The *Privacy Act* also covers the use of tax file numbers and credit worthiness information.¹⁰²
- 3.117 The *Privacy Act* sets out principles about the way in which personal information should be handled rather than being prescriptive. Each agency applies the principles to its own situation.¹⁰³
- 3.118 The Committee was interested in the application of the *Privacy Act 1998* to the ANAO. In response the ANAO informed the Committee that on the basis of advice it had received, the Auditor-General is largely exempt from the provisions of the *Privacy Act 1998*. This is as a consequence of its exemption from the FOI Act. However, the advice also notes:
- ...that the application of the Privacy Act to the Auditor-General and the ANAO is in some respects uncertain, and legislative clarification would be warranted.¹⁰⁴
- 3.119 Based on advice from the Australian Government Solicitor, the ANAO also submitted that in broad terms the access and confidentiality provisions of the *Auditor-General Act* would take precedence over the majority of the provisions of the *Privacy Act* that relate to the activities of agencies that collect or receive personal information.
- 3.120 In summary, the ANAO suggest that while, again, ANAO administrative functions could be subject to the *Privacy Act* there would be little or no public benefit in amending the current arrangements.¹⁰⁵

102 Viewed at the Office of the Privacy Commissioner
<http://www.privacy.gov.au/aboutprivacy/snapshot> on 7 May 2010.

103 Viewed at the Office of the Privacy Commissioner
<http://www.privacy.gov.au/aboutprivacy/snapshot> on 7 May 2010.

104 Australian National Audit Office, supplementary sub 3.2, p 4.

105 Australian National Audit Office, supplementary sub 3.2, p 4.

- 3.121 Like the question of the ANAO exemption from the FOI Act, the Committee has little evidence on which to suggest that any changes to the ANAO's exemption from the *Privacy Act* are warranted.

Definitions of 'persons' giving evidence

- 3.122 In its submission to the inquiry, the Institute of Public Administration Australia raise the definition of the term 'person' in section 32 of the Act which sets out the power of the Auditor-General to obtain information. Section 32 states (in part):
- (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.¹⁰⁶
- 3.123 The IPAA raise this issue because Ministers and their staff could prove to be valuable witnesses in the context of audits yet the operation of section 32 is limited by section 30 of the Act, which states that the power of the Auditor-General to obtain information is limited by the laws of the Commonwealth relating to the powers, privileges and immunities of the Parliament and Parliamentarians.¹⁰⁷
- 3.124 Evidence from the Auditor-General and Mr Russell Coleman taken at the hearing on 19 October 2009 suggests that the IPAA is mistaken in its assumption that Ministers and/or their staff are not subject to section 32 of the Act:
- The Acts Interpretation Act [1901] clarifies the definition of persons. From memory, it is very broad. Generally, again, my understanding is that the Acts Interpretation Act is the relevant act you go to, which expands on things like the wording of persons and bodies and those sorts of things. It is not usually put into specific individual pieces of legislation. The master legislation is

¹⁰⁶ Subsection 32(1) of the *Auditor-General Act 1997* (Cth).

¹⁰⁷ Institute of Public Administration Australia, sub 5, npn.

the Acts Interpretation Act. We believe it is covered sufficiently in that act.¹⁰⁸

...

My understanding is that we are quite clear about the powers already under the act...It applies to everyone.¹⁰⁹

- 3.125 Supplementary submission 3.6 provided to the Committee contains legal advice on the question of the Auditor-General's access powers in section 32 of the Act. On the basis of this legal advice the ANAO submits the following:

The advice does not suggest that any amendments to the existing access powers contained in the *Auditor-General Act 1997* are necessary.¹¹⁰

- 3.126 The Committee agrees that it is not necessary to amend the Act in this respect.

Explicit access to Cabinet documents

- 3.127 The Australasian Council of Auditors-General submit that the Act could be clarified with regard to the Auditor-General's right to access cabinet documents.¹¹¹ However, very straightforward evidence was received from Mr McPhee that there is no requirement for an amendment in this respect:

It is understood. The cabinet issue is understood...[O]n cabinet papers, everyone within the system understands we do have access to them.¹¹²

- 3.128 The Committee believes that there is no need for amendment to clarify this aspect of the Act.

Whistleblowers

- 3.129 In her submission to the inquiry, the Acting Commonwealth Ombudsman, Dr Vivienne Thom, considered there is a case for 'providing the Auditor-General with an express role in relation to any new whistleblowing scheme'.¹¹³

108 Mr Russell Coleman, 19 October 2009, p 27.

109 Mr Ian McPhee PSM, 19 October 2009, p 26.

110 Australian National Audit Office, supplementary sub 3.6, p 1.

111 Australasian Council of Auditors-General, sub 8, npn.

112 Mr Ian McPhee PSM, transcript, 19 October 2009, p 22.

113 Commonwealth Ombudsman, sub 4, npn.

3.130 Currently, the *Public Service Act 1999* and supporting legislation provide a framework for the reporting of breaches or suspected breaches of the Code of Conduct so as to protect the 'whistleblower' from victimisation or discrimination.¹¹⁴

3.131 The Auditor-General, having been invited to provide his views on this matter, provided a sensible rationale for his exclusion from any participation in a whistleblowing scheme as follows:

To preserve the Auditor-General's independence, it is generally accepted that it is not appropriate for the Auditor-General to perform executive functions. In the past, the Auditor-General has been involved from time to time in performing executive functions such as in relation to electoral redistribution committees and tax agents' registration boards. Previous governments, with the strong support of the ANAO, have removed these executive responsibilities from the Auditor-General.¹¹⁵

3.132 Moreover, the ANAO suggests that any specific role in a government scheme might be incompatible with its central auditing responsibilities.¹¹⁶

3.133 The Committee concurs with this view and notes the following comment made by Professor John Wanna when asked for IPAA views on the potential for the Auditor-General to be involved in any whistleblowing scheme:

I think there is a danger in too many people being responsible for whistleblowing. The next generation in the whistleblowing area will be better supported with places to which they can go to receive that support and where they can be protected. Bringing the Auditor-General into that just muddies that water rather than helps clarify.¹¹⁷

3.134 The Committee also notes that no role was identified for the Auditor-General in the House of Representatives Standing Committee on Legal and Constitutional Affairs report entitled *Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*.¹¹⁸

114 Viewed at the Australian Public Service Commission at <http://www.apsc.gov.au/employmentpolicy/whistleblowing.htm> on 7 May 2010.

115 Australian National Audit Office, supplementary sub 3.2, p 5.

116 Australian National Audit Office, supplementary sub 3.2, p 6.

117 Professor John Wanna, transcript, 22 June 2009, p 34.

118 The Government released its response to this report on 17 March 2010.

- 3.135 The Committee does not believe it would be appropriate for the Auditor-General to be involved in any public sector whistleblower scheme.

Comments on reports and extracts of reports

- 3.136 Section 19 of the Act provides that all written comments received from recipients of either a full proposed audit report or an extract of a proposed audit report are required to be included in the final report.¹¹⁹
- 3.137 The requirement to include these comments came about as a result of a recommendation made by the Committee in its 2001 review of the *Auditor-General Act*.¹²⁰
- 3.138 The intention of the JCPAA in 2001 was, in the interests of natural justice, to include comments in full to 'avoid disputes about the representation of agency views'.¹²¹ The ANAO submits that this intention has been realised with the amendments that were made to the legislation as a result of that recommendation.¹²²
- 3.139 However, the ANAO also submits that there are now practical issues around the inclusion of comments received on extracts of reports which could be addressed in the context of this inquiry.¹²³
- 3.140 In particular, the ANAO has expressed concern that on occasion comments received from non-auditees such as contractors, sub-contractors and former Australian Public Service personnel may not be directly relevant to the audit findings or the extract of the report provided to them. This sometimes results in extended consultations with the parties concerned and the need for the ANAO to provide further comment on comments received. Delays become inevitable and additional resources required. Moreover, the ANAO states:

The inclusion of such comments, particularly lengthy comments, can also have the unintended effect of distracting from the central focus of the audit, which is administration by the responsible agency or agencies of the program or activity subject to audit.¹²⁴

119 Section 19 of the *Auditor-General Act 1997* (Cth).

120 Joint Committee of Public Accounts and Audit. *Report 386: Review of the Auditor-General Act 1997*, p 26.

121 Joint Committee of Public Accounts and Audit. *Report 386: Review of the Auditor-General Act 1997*, p 26.

122 Mr Stephen Chapman, transcript, 19 October 2009, p 28.

123 Australian National Audit Office, supplementary sub 3.1, p 1.

124 Australian National Audit Office, supplementary sub 3.1, p 2.

- 3.141 The ANAO argues that while the Act should still require that the Auditor-General include in the final report any comments received from Australian Government entities that are the subject of the audit, other comments should be included at the discretion of the Auditor-General.¹²⁵

We would like discretion so that for non-auditees the Auditor-General has discretion to identify relevance in including the extract in the report. Certainly we would be taking account of the comments.¹²⁶

Committee comment

- 3.142 The Committee is of the view that non-auditees are entitled to natural justice and as such should continue to be provided with extracts of the proposed reports where necessary and permitted to comment on those extracts.
- 3.143 The Committee is sympathetic to the argument made by the Auditor-General in supplementary submission 3.1 and at the hearing on 19 October 2009;¹²⁷ however, in the interests of transparency the Committee believes that all comments received from recipients of extracts of proposed audit reports should continue to be published in full in the audit report.
- 3.144 That said, it is important that recipients of extracts of proposed audit reports be formally made aware of the expectations around, and implications of, their comments.
- 3.145 The ANAO currently provides guidance that asks:
- ...any comments you have on the report extract be directly relevant to the matters referred to in the extract and be reasonably succinct.¹²⁸
- 3.146 The Committee recommends that the Auditor-General should also inform recipients of report extracts of the potential implications and/or complications of naming others in those comments.

125 Australian National Audit Office, supplementary sub 3.1, npn.

126 Mr Stephen Chapman, transcript, 19 October 2009, p 28.

127 See transcript, 19 October 2009, p 28-29.

128 Australian National Audit Office, exhibit 1, npn.

Recommendation 9

- 3.147 **That the Auditor-General continue to provide the recipients of extracts of proposed audit reports with clear guidelines to clarify expectations around the submission of comments (e.g., the importance of brevity and clarity) and also the implications for naming other persons/entities /organisations in those comments which are published in full.**

Tabling embargo during the caretaker period

- 3.148 The timing of the conduct of performance audits is at the discretion of the Auditor-General. However, subsection 18(2) of the Act requires that as soon as practicable after completing the report on an audit the Auditor-General must cause a copy of the report to be tabled in each House of Parliament.¹²⁹
- 3.149 There has been some controversy in the past regarding the tabling of audit reports during the caretaker period.¹³⁰ The question of whether it would be appropriate to incorporate a blackout on tabling during this time was raised both at an Estimates hearing in February 2008¹³¹ and during this inquiry.
- 3.150 At the public hearing on 22 June 2009, the Auditor-General indicated that while he did not see any problem with the imposition of a tabling blackout during the caretaker period should the Committee recommend one, he is comfortable with the current arrangements:

Let us face it, the caretaker period is primarily focused on the current government not really locking in a possible change in government in terms of policy positions or major contracts, so it is a forward-looking consideration. My role and my reporting is very much about accountability for performance of the current government's programs so I am comfortable with making the judgement about whether to table or not in the caretaker period.¹³²

129 Subsection 18(2) of the *Auditor-General Act 1997* (Cth).

130 The ANAO's *Performance Audit of the Regional Partnerships Programme* was tabled on 15 November 2007 during the caretaker period for the 2007 election campaign.

131 Senate Standing Committee on Finance and Public Administration, transcript, 19 February 2008, p 11-15.

132 Mr Ian McPhee PSM, transcript, 22 June 2009, p 21-22.

3.151 Additionally:

...if you have a long caretaker period and you had a blackout, it would mean that the Auditor-General would be required to sit on that report and potentially table it a week after an election. If it were a contentious report, I am not sure that that is in the best interests of the community or the public.¹³³

Committee comment

3.152 The Committee is of the view that the disclosure of information regarding government performance is always in the public interest. It does not, therefore, propose to make any recommendation in this respect.

Provision of information to committees

3.153 Section 49 of the Australian Constitution confers on both Houses of Parliament the powers, privileges and immunities possessed by the United Kingdom House of Commons in 1901. Under Section 50 each House has the right to make rules or orders concerning its powers and conduct of business. This power is delegated to a committee by the Standing Orders, by the Resolution of Appointment, or by the relevant statute.¹³⁴

3.154 One significant power delegated to parliamentary committees is the power to compel the attendance of witnesses, the giving of evidence and the production of documents.¹³⁵ In the case of this Committee, section 13(1) of the *Public Accounts and Audit Committee Act 1951* explicitly provides it with the power to summon a person to appear before it to give evidence and produce documents.¹³⁶

3.155 This authority reflects the significant role committees play in, amongst other things, oversight and scrutiny of the Executive on behalf of the Parliament. The power to access information in order to perform its role is something taken very seriously by this Committee.

3.156 On occasion, claims that information should be withheld from disclosure to a parliamentary committee are made by the Executive on the grounds of public interest (i.e., claims of public interest immunity). Grounds for making a claim of public interest immunity may relate to national

133 Mr Ian McPhee PSM, transcript, 22 June 2009, p 22.

134 Extracted from *House of Representatives Practice, 5th edn 2005*, pp 643–4.

135 Extracted from *Odgers' Australian Senate Practice*, p 59.

136 *Public Accounts and Audit Committee Act 1951*, p 10.

security, or the harm that may result from the disclosure of commercially sensitive information. Such claims are normally made by the responsible Minister in consultation with the Attorney-General and the Prime Minister.¹³⁷ However, it is accepted practice that an alternative means for providing the information in question to the Committee (such as on a confidential basis or *in camera*) should be explored prior to making a claim of public interest immunity.¹³⁸

3.157 Section 36 of the *Auditor-General Act 1997* relates to protection of the confidentiality of information. It provides that information obtained in the course of the performing an Auditor-General function can only be disclosed in particular circumstances. Section 36 states, in part:

(1) If a person has obtained information in the course of performing an Auditor-General function, the person must not disclose the information except in the course of performing an Auditor-General function or for the purpose of any Act that gives functions to the Auditor-General.

...

(2) Subsection (1) does not prevent the Auditor-General from disclosing particular information to the Commissioner of the Australian Federal Police if the Auditor-General is of the opinion that the disclosure is in the public interest.¹³⁹

3.158 At the same time as this inquiry was being conducted, the Committee was also conducting an inquiry into the role of the Auditor-General in scrutinising government advertising campaigns. During that inquiry there was a great deal of discussion about the degree to which the Auditor-General should be required to provide internal documents to the Parliament via the Committee.

3.159 Committee members were interested, first, in the extent to which the confidentiality requirements set out in Section 36 of the Auditor-General Act limit the Auditor-General's ability to disclose material it has in its possession to the Committee¹⁴⁰ and second, whether this potential 'grey area' is an one that might be clarified by amending the Act.¹⁴¹

137 Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989*, p 8.

138 Department of Prime Minister and Cabinet, *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters – November 1989*, p 8.

139 Subsections 36(1)-(2) of the *Auditor-General Act 1997* (Cth).

140 See transcript, 8 February 2010, p 22.

141 See transcript, 8 February 2010, p 24.

- 3.160 With regard to the first question, it is important to note that the ANAO's interaction with the Committee is reasonably considered 'as being part of performing [an Auditor-General function]'.¹⁴² More significantly, it is also important to note that statutory secrecy provisions such as those provided in section 36 of the Act are not considered binding on parliamentary committees. The law of parliamentary privilege provides absolute immunity to the giving of evidence and the disclosure of information to parliamentary committees cannot therefore be prevented unless the legislation expressly states as such.¹⁴³
- 3.161 In a supplementary submission to the inquiry the Auditor-General acknowledged the degree of uncertainty between relevant legislation and parliamentary Standing Orders and advised that, to date, the ANAO's approach to providing information to parliamentary committees has been guided by 'custom and practice'.¹⁴⁴
- 3.162 At the hearing on 8 February 2010, the Auditor-General outlined the matters he takes into consideration when disclosing documents to the Committee as follows:
- I guess broadly it is under the public interest umbrella that drives [considerations about disclosing information to the Committee]... I have always worked to provide the committee with whatever information it wanted, but I do have to keep an eye on the integrity of the audit process itself. We have people who communicate with us openly, directly and in confidence. It is always a judgment as to how...much we provide to committees of the parliament, because I am concerned that if we go too far in that people will not be as open with us about their views on particular aspects, and that will impair the audit process. I believe as Auditor-General that I have an obligation to weigh that consideration as well.¹⁴⁵
- 3.163 In order to provide some clarity around this issue, the Auditor-General proposes that an appropriate amendment to the Act would be one that explicitly requires him/her to consider the public interest in providing information or documents to parliamentary committees. According to the Auditor-General:

142 Mr Russell Coleman, transcript, 8 February 2010, p 25.

143 Extracted from *Odgers' Australian Senate Practice*, p 51.

144 Australian National Audit Office, supplementary sub 3.9, npn.

145 Mr Ian McPhee PSM, transcript, 8 February 2010, p 22.

Such an amendment would not diminish the Auditor-General's accountability for the audit conclusions and opinions that are issued and are publicly available. Further, it is the ANAO's understanding that responding to requests for information and documents, where appropriate, is an integral part of performing an Auditor-General function.¹⁴⁶

Committee comment

- 3.164 The Committee acknowledges that differing claims of public interest by the Parliament and the Executive (or the Auditor-General in this case) may, on occasions, come into conflict. The Committee also acknowledges that there may be occasions when it is in the public interest that certain information not be disclosed. However, it is the Committee's view that any legislative change would inevitably result in the Parliament being seen to diminish in its capacity to scrutinize the performance of the ANAO and other agencies. This is a situation which is not acceptable to the Committee nor indeed in the public interest.
- 3.165 A key question of interest to the Committee is whether the decision not to disclose certain information to committees in the public interest should be one that is left to the Auditor-General.
- 3.166 Upon consideration of this issue, the Committee believes that were the legislation amended so as to constrain the Auditor-General from making decisions about disclosing information in the public interest, or to stipulate that such claims may only be made by a Minister, this would not only result in the potential for interference in the audit process by parliamentary committees but ultimately have a detrimental impact on the independence of the office of the Auditor-General.
- 3.167 It is the Committee's view, therefore, that the most appropriate course of action would be to retain the current arrangements. In this way, individual issues would be resolved on a case by case basis by negotiation or ultimately by the Houses of Parliament, as is currently the case.

¹⁴⁶ Australian National Audit Office, supplementary sub 3.9, npn.

Strengthening the audit independence of the Auditor-General

Background

4.1 The independence of the Auditor-General is fundamental to public accountability in Australia. In 1996, the Joint Committee of Public Accounts in its report *Guarding the independence of the Auditor-General* stated:

If the Parliament cannot ensure the independence of the Auditor-General from the Executive, and if the Executive can effectively inhibit the effective discharge of audit functions by starving the Auditor-General of resources, then the chain of public accountability is broken.¹

4.2 The independence of the Auditor-General is clearly defined in Part 3 of the *Auditor-General Act 1997*, which states in part:

- the Auditor-General is an independent officer of the Parliament;
- subject to this Act and to other laws of the Commonwealth, the Auditor-General has complete discretion in the performance or exercise of his or her functions or powers. In particular, the Auditor-General is not subject to direction from anyone in relation to:
 - ⇒ whether or not a particular audit is to be conducted; or
 - ⇒ the way in which a particular audit is to be conducted; or

¹ Joint Committee of Public Accounts, *Report 346: Guarding the Independence of the Auditor-General*, p 7.

⇒ the priority to be given to any particular matter.²

- 4.3 There were only two issues raised specifically under this term of reference: the appointment of the Auditor-General and the Auditor-General's budget allocation.

Appointment of the Auditor-General

- 4.4 The appointment of the Auditor-General is set out in Schedule 1 of the *Auditor-General Act 1997*. The Auditor-General is appointed by the Governor-General on the recommendation of the Minister.³ The Minister is required to refer the proposed recommendation to the Joint Committee of Public Accounts and Audit for approval. The legislation further states that the Minister must not make a recommendation to the Governor-General unless the JCPAA has approved the proposed recommendation by absolute majority. The Act does not provide any detail on the selection process for a candidate.
- 4.5 The *Public Accounts and Audit Act 1951* outlines the role of the JCPAA in the appointment of the Auditor-General. Specifically, the JCPAA has forty-four days to approve or reject the recommendation and if a decision is not made within the required time period, the Committee is considered to have approved the proposal.
- 4.6 Whilst acknowledging the integrity of all current and former Auditors-General, the Institute of Public Administration Australia submits that when the position of Auditor-General is not advertised it could be seen as a 'grace and favour'⁴ appointment for someone from the central agencies of government. The IPAA is also concerned that the appointment process is not transparent and appears perfunctory.⁵
- 4.7 Additionally, the IPAA submits that the impact of the requirement to consult the JCPAA is not clear, stating:

... the executive (the Finance Minister) routinely informs the JCPAA of the name of the intended candidate possibly only a few days before the announcement is made. There may be some private processes through which the JCPAA indicates views on

2 Subsections 8(1)-(4) of the *Auditor-General Act 1997* (Cth).

3 Schedule 1 of the *Auditor-General Act 1997* makes the following note: The effect of section 19A of the *Acts Interpretation Act 1901* is that "the Minister" refers to the Minister who administers this clause. The administration of Acts or particular provisions of Acts is allocated by Administrative Arrangements Orders made by the Governor General.

4 Institute of Public Administration Australia, sub 5, npn.

5 Institute of Public Administration Australia, sub 5, npn.

potential candidates and its acceptance of the name that is eventually and formally brought forward by the Finance Minister, but that is not at all clear.⁶

- 4.8 In the 2009 paper “Can the Executive influence the ‘independence’ of the Auditor-General”, Dr Charles Lawson elaborates on the role of the JCPAA in the appointment of the Auditor-General. Lawson maintains that selection of the candidate is subject only to a veto by the JCPAA and states:

...the majority of members of the JCPAA are government Members so that a majority decision about appointment ...will merely reflect the Executive’s perspective.⁷

- 4.9 The Auditor-General told the Committee that there was no question that there could be a more open process for the appointment of the Auditor-General. However, he also advised the Committee that at the time of his appointment a recruitment consultant had been employed by government to find a candidate and, although it was not advertised in the press, there was a lot of work done behind the scenes to find a suitable candidate.⁸

- 4.10 Mr Glenn Poole, the convenor of the Australian Council of Auditors-General expressed the view that the appointment of the Auditor-General should be as open and transparent as possible so that there cannot be any suggestions that might impact on the independence of the person who is appointed.⁹

- 4.11 The IPAA outlined to the Committee a possible alternative to the current appointment process. This involved a model similar to that within the Executive arm, where ‘the Public Service Commissioner plays a significant role in relation to a range heads of agencies and statutory authorities’.¹⁰ Under this model, the final decision still rests with government, however, it involves a process of transparent merit protection arrangements, a selection committee and advertisement of the position.¹¹

6 Institute of Public Administration Australia, sub 5, npn.

7 Lawson, C. (2009). Can the Executive influence the independence of the Auditor-General under the Auditor-General Act 1997 (Cth)? *Australian Journal of Administrative Law*, 16, 90.

8 Mr Ian McPhee PSM, transcript, 22 June 2009, p 20.

9 Mr Glenn Poole, transcript, 22 June 2009, p 28.

10 Mr Andrew Podger AO, transcript, 22 June 2009, p 36.

11 Mr Andrew Podger AO, transcript, 22 June 2009, p 36.

- 4.12 Under the *Auditor-General Act 1997* only the current Auditor-General has been appointed to date.¹²

Committee comment

- 4.13 The Committee is satisfied that the current arrangements for the appointment of the Auditor-General are appropriate and it therefore makes no recommendation in this regard. In the interests of enhancing transparency around the appointment process, however, the Committee notes the recent selection process undertaken by the Department of Prime Minister and Cabinet to re-appoint the Independent Auditor of the ANAO, Mr Geoff Wilson on 19 March 2009. In particular, the Committee welcomed the advice it received on the selection process, including advice on the applications received and a briefing on the reasoning behind the recommended appointment.
- 4.14 The Committee expects that a similarly transparent process including full advice on the applications received and a briefing on the rationale behind the recommended appointment would be followed with regard to the appointment of the Auditor-General.

Budget resourcing

- 4.15 In its submission, the IPAA also suggests possible reforms to the budget process for the ANAO. In particular, it suggests that the JCPAA could nominate a preferred budget to the Department of Finance and Deregulation after the Auditor-General has provided advice to the Committee. The IPAA assert that this would require the Government to transparently accept or reject the JCPAA's preferred budget.¹³
- 4.16 The IPAA also made further suggestions that the ANAO be given a three year one line budget with draw-downs and carry-forwards or for the ANAO's budget to be benchmarked against all other OECD Audit Offices on some pro-rata basis.¹⁴
- 4.17 The Committee notes that the IPAA's suggestion about the budget process was based on the following assumption:

The budget of the Audit Office is supposedly separately allocated and voted upon by the JCPAA but we understand that the budget

12 Viewed at Australian National Audit Office, <http://www.anao.gov.au/director/aboutus/history.cfm> on 20 April 2010.

13 Institute of Public Administration Australia, sub 5, npn.

14 Institute of Public Administration Australia, sub 5, npn.

is provided by Finance and the Auditor-General is given no option but to state that the resources are sufficient to perform his/her duties.¹⁵

- 4.18 At the hearing on 22 June 2009, the Auditor-General challenged this assumption and reiterated that each year the JCPAA is provided with the Auditor-General's views about resourcing.¹⁶
- 4.19 For the sake of clarification, the Committee outlines its responsibilities in this regard as follows.
- 4.20 Through the *Public Accounts and Audit Committee Act 1951* (sub-sections 8(j) and (l)) the Committee is empowered to consider and make recommendations to the Parliament on the draft budget estimates of the ANAO. As with other public sector agencies, the ANAO is funded each year through the federal budget process. However, over the second half of the financial year the Auditor-General briefs the Committee on the funds he/she will be seeking in the budget and why, and the ANAO's informal understanding of which of its proposals are likely to be successful or unsuccessful.
- 4.21 In support of this process the *Auditor-General Act 1997* empowers the Auditor-General to disclose to the JCPAA, before the federal budget, the draft estimates for the Audit Office (effectively the ANAO's budget submission). The Committee then has the information it requires to make formal representations to Government on behalf of the ANAO if necessary.
- 4.22 Immediately before the federal budget is delivered to the Parliament, the ANAO briefs the Committee on its funding allocation for that year. The Committee Chair then makes a statement to the Parliament, on budget day, on whether the Committee believes the ANAO has been given sufficient funding to carry out its functions.
- 4.23 This power is intended to discourage governments from trying to influence the Auditor-General by unduly restricting his/her funding, and is reinforced by the Committee having the information needed to make representations to the Executive Government on behalf of the ANAO if necessary.

15 Institute of Public Administration Australia, sub 5, npn.

16 Mr Ian McPhee PSM, transcript, 22 June 2009, p 20.

Committee comment

- 4.24 The Committee has a unique role in scrutinising the proposed budget for the ANAO and it makes representations to Government when necessary in advance of the federal budget.
- 4.25 The Committee takes its role very seriously and discharges this obligation with great diligence. The Committee sees no need for any legislative amendment to the current arrangements.
- 4.26 In the interests of transparency, however, the Committee accepts that it may be prudent for any of its written representations to the Government to be published unless there are compelling reasons for not doing so.
- 4.27 Further, with regard to the IPAA's suggestion that the ANAO be given a three-year one line budget, the Committee has publicly endorsed calls from the Auditor-General for the ANAO's funding to be placed on a more sustainable long-term footing by indexing its budget to the rate of growth in the public sector.¹⁷

17 Ms Sharon Grierson MP, *Report by the Joint Committee of Public Accounts and Audit on the 2008-2009 Draft Estimates for the Audit Office*, p 3.

Jurisdictional issues – ‘following the dollar’

Introduction

- 5.1 Under the final term of reference for this inquiry, the Auditor-General’s authority to ‘follow the money trail’ was examined.
- 5.2 Currently, the *Auditor-General Act 1997* does not provide the Auditor-General with the capacity to directly examine the financial and performance outcomes from Commonwealth investments in the private sector and Commonwealth grants made to State and Local governments. The lack of such capacity imposes limits on the Auditor-General in ensuring that agencies/entities are accountable in relation to the Commonwealth funding they receive.
- 5.3 The Committee received evidence indicating broad support for the enhancement of the Auditor-General’s powers to enable greater scrutiny in this area. However, the extent of those powers and the most effective form of implementation is problematic, potentially raising constitutional issues.
- 5.4 A number of suggestions were put to the Committee that would increase the Auditor-General’s access and enable a cooperative approach between the Commonwealth and States/Territories to audit these funds. These suggestions are considered below.

Cross-jurisdictional arrangements – grants to States/Territories

5.5 The Commonwealth provides three types of payments to the states:

- National Partnership payments to support the delivery of specified projects, facilitate reforms or reward jurisdictions that deliver on nationally significant reforms;
- general revenue assistance which includes GST payments; and
- National Specific Purpose Payments (SPPs) which are related to key service delivery sectors.

5.6 In 2010-11, the Commonwealth will make payments for five National SPPs in the areas of healthcare, schools, skills and workforce development, disability services, and affordable housing.¹

5.7 Most SPPs provided to the States and Territories by the Commonwealth Government are conditional and tied to federal policy objectives.² SPPs are either made 'to' the State/Territory and supplement State funding or 'through' the State/Territory and passed on to other agencies for their use.³

5.8 The Committee was told that historically a lack of accountability has been a problem with Commonwealth grants to States and Territories. The Institute of Public Administration Australia (IPAA) identified the issue in its written submission to the inquiry:

There is a glaring gap in the accountability of Commonwealth grants to states – especially where specified results or performance indicators are agreed. The Commonwealth Auditor-General does not audit these programs against the agreed objectives, nor do state Auditors-General. States may report back on their claimed performance but the Commonwealth has no real check as to their validity and reliability.⁴

5.9 According to the ANAO, the difficulty has been compounded by the implementation of the Intergovernmental Agreement on Federal Financial Relations by the Council of Australian Governments (COAG) which has

1 Viewed at Australian Government, Budget 2010-11 http://www.aph.gov.au/budget/2010-11/content/bp3/html/bp3_spp.htm on 26 May 2010.

2 Finance Circular No. 2005/10, Department of Finance and Administration, p 2.

3 Finance Circular No. 2005/10, Department of Finance and Administration, p 2.

4 Institute of Public Administration Australia, sub 5, npn; Mr Ian McPhee PSM, transcript, 8 February 2010, p 3, p 8.

reduced Commonwealth prescriptions on service delivery by the States thereby increasing flexibility of service delivery.⁵

- 5.10 The Auditor-General told the Committee that under these arrangements assessment of performance would become more significant to ensure accountability and transparency:

It puts even greater emphasis on the performance information that the states themselves generate to show their performance with the Commonwealth funding and some of their own funding. So I think going forward under these new regimes, performance information is going to be even more important than ever.⁶

- 5.11 To enhance accountability arrangements, the ANAO suggested four options. These options are set out as follows:

- a) Provide the authority for the Auditor-General to conduct an audit to assess the performance of bodies that receive Commonwealth funding in circumstances where there is a corresponding or reciprocal responsibility to deliver specified outcomes in accordance with agreed arrangements...
- b) Require, as a matter of government policy, legislation relating to Australian Government Special Purpose Payments (SPP) and agreements that are put in place to govern the provision of payments for specified purposes to include a provision that provides the Auditor-General with the authority to conduct an audit to assess the performance of bodies that receive Commonwealth funding where there is a corresponding or reciprocal responsibility to deliver specified outcomes in accordance with agreed arrangements...
- c) Require, as a matter of government policy, SPP legislation and agreements to provide the Auditor-General with access to information and records relating to the use to which the funds in question have been put by the parties to the legislation or agreement...
- d) Explore opportunities and any necessary legislative changes which would assist in further cooperation between the Auditor-General and State and Territory Auditors-General. Such arrangements would be designed to assist in the Commonwealth and State and Territory Auditors-General working in a complementary manner and may provide for the authority for the Auditor-General to share information obtained

5 Australian National Audit Office, sub 3, p 6.

6 Mr Ian McPhee PSM, transcript, 19 October 2009, p 11.

during the course of audits with State and Territory Auditors-General.⁷

- 5.12 In the case of options a) and b) above, which the Auditor-General submits have the 'greatest potential impact'⁸, any audit undertaken would be in the context of the purposes for which the funds are provided and could be exercised only in circumstances where the performance of relevant bodies is, in the Auditor-General's opinion, significant in the context of an audit of a Commonwealth entity.⁹
- 5.13 Providing the Auditor-General with the authority to conduct audits of the nature and in the manner outlined in options a) and b) above did not elicit a great deal of support from witnesses.
- 5.14 For example, in its written submission to the inquiry, the Australasian Council of Auditors-General (ACAG) cautioned that the Auditor-General's mandate should not be extended into States and Territories as such a move would raise constitutional issues.¹⁰ ACAG did not elaborate on the constitutional issues involved but asserted that such audits should remain the responsibility of State and Territory Auditors-General in the following circumstances:
- where the grant is made to a State or Territory Government and that State or Territory Government is required to acquit the grant in some manner to the Commonwealth, ACAG considers that any audit of that acquittal should remain the responsibility of the relevant State or Territory Auditor-General; and
 - where the grant is made to a State or Territory Government but no acquittal is required, any local audit activity should again remain the responsibility of the relevant State or Territory Auditor-General.¹¹
- 5.15 Instead, ACAG suggested to the Committee that the federal legislation be examined and steps taken to enhance the capacity for cooperation between Auditors-General across Australia and thus facilitate the conduct of joint audits across jurisdictions.¹²
- 5.16 A number of other witnesses also supported the concept of developing a framework for the conduct of joint audits by Commonwealth and State/Territory audit offices (the ANAO refer to this concept in option (d)

7 Australian National Audit Office, sub 3, pp 6-7.

8 Australian National Audit Office, sub 3.10.

9 Australian National Audit Office, sub 3, pp 6-7.

10 Mr Glenn Poole, transcript, 22 June 2009, p 23.

11 Australasian Council of Auditors-General, sub 8, npn.

12 Australasian Council of Auditors-General, sub 8, npn.

above). For example, the Commonwealth Ombudsman suggested that the *Ombudsman Act 1976*, which sets out arrangements to allow cooperation between Commonwealth and State and Territory Ombudsmen, could be used as a model to develop relevant legislation to facilitate cooperation between the Auditors-General.¹³

- 5.17 The potential for constitutional issues were options (a) or (b) to be adopted was also raised by Mr Andrew Podger AO of the IPAA at the hearing on 22 June 2009.¹⁴ In its written submission the IPAA also supported a joint-audit model as follows:

We would support the notion of developing a regime of joint audits – joint teams of Audit staff from the Commonwealth and States/Territories (supplemented by private sector audit experts if necessary). These teams could review program performance, including reports and systems used by the COAG Reform Council, and report to both or all parliaments. It would be hoped that a joint report of findings could be agreed, although provision will have to be made for the event of disagreements or different emphases.¹⁵

- 5.18 The Committee sought clarification on the current impediments to the Commonwealth and States and Territories' audit offices undertaking joint audits. ACAG explained that secrecy provisions in the *Auditor-General Act 1997* are the chief impediment:

At the moment under the legislation – both the Commonwealth legislation and state based legislation – it would require each respective auditor-general to decide to do an audit and then to undertake that audit independently. Certainly our understanding of the Commonwealth legislation provides some restrictions around the sharing of information that might be obtained within a Commonwealth ANAO audit and the limitations on being able to share that information with us at the state level and vice versa.¹⁶

- 5.19 The Auditor-General also referred to the difficulty of information sharing across the offices of Auditors-General as follows:

...it is generally the case that each audit act requires the information to be kept confidentially. And so it is very difficult, for

13 Commonwealth Ombudsman, sub 4, npn.

14 Mr Andrew Podger AO, transcript, 22 June 2009, p 35.

15 Institute of Public Administration Australia, sub 5, npn.

16 Mr Glenn Poole, transcript, 22 June 2009, pp 23-24.

instance, for my office to share information that is not in the public arena with my state colleagues. That is one existing constraint.¹⁷

5.20 Although Mr Poole described the limits on information sharing as the 'nub of the problem',¹⁸ operational difficulties such as differing priorities was also identified as an impediment.¹⁹ ACAG told the Committee that each jurisdiction is responsible for reporting to its own Parliament on that Parliament's priorities. This led to logistical and timing difficulties as each audit office pursued its own agenda and it became difficult to coordinate a reporting deadline.²⁰

5.21 By way of example, the Auditor-General cited an audit into the Building Better Cities Program, a program aimed at improving Australian cities implemented by the Commonwealth and States/Territories between 1991 and 1996.²¹ The Auditor-General told the Committee:

Because the two [offices] were working at different priorities, the timing got out of sync. We were not in control of the states' work and the states were not in control of our work, and so it became rather challenging to deliver.²²

5.22 Rather than providing the Auditor-General with the authority to conduct performance audits (options (a) and (b)) or exploring legislative changes to facilitate cooperation between the Commonwealth and State and Territory Auditors-General (option (d)), the third option (option (c)) outlined by the ANAO above, suggests providing the Auditor-General with access to information and records relating to the use to which the funds in question have been put.

5.23 The Auditor-General advised the Committee that the Department of Finance and Deregulation has encouraged States and Territories to include standard access clauses in contracts, allowing the Auditor-General access to records and information.²³

5.24 According to Mr McPhee, the Auditor-General's access to other party information was initially raised when outsourcing became popular. At that time, the ANAO promoted the idea that Departments should include

17 Mr Ian McPhee PSM, transcript 16 September 2009, p 1.

18 Mr Glenn Poole, transcript, 22 June 2009, p 27.

19 Mr Ian McPhee PSM, transcript, 16 September 2009, p 2.

20 Mr Glenn Poole, transcript, 22 June 2009, p 27.

21 Australian National Audit Office, Audit Report No 9 1996-97 *Building Better Cities*, p 9.

22 Mr Ian McPhee PSM, transcript, 16 September 2009, p 2.

23 Mr Ian McPhee PSM, transcript, 16 September 2009, p 2.

'standard access clauses' in contracts so that the Auditor-General would have access to records and information held by contractors.²⁴

- 5.25 The Auditor-General referred to the audit into the road grants program, AusLink National Network, in 2008-09²⁵ as an example of the way in which legislative provisions that allow Australian Public Service employees or persons nominated by the Commonwealth to inspect work on projects have facilitated cooperation between the Commonwealth and States/Territories.²⁶
- 5.26 The Committee also notes that the Building the Education Revolution (BER) program, part of which has recently been audited by the ANAO, was set up under a National Partnership agreement and has bilateral agreements in place which recognise that reasonable access should be provided to the Auditor-General (for further discussion see paragraph 5.35 below).²⁷
- 5.27 The Auditor-General describes the inclusion of these provisions in agreements that allow the Auditor-General access to premises and records as 'a very positive development and a positive evolution'.²⁸ However, in both oral and written evidence to the inquiry, the ANAO emphasised that even though the inclusion of these clauses is increasingly common it is not mandatory.²⁹
- 5.28 This renders the process unreliable: inclusion is determined on a case by case basis, depends on the government of the day and varies from agreement to agreement.³⁰ As the Auditor-General stated:

The difficulty is that it is not necessarily consistent. The clauses can all be different and cannot be relied on, because they may depend on what departments are proposing to their ministers.³¹

Committee comment

- 5.29 The Committee firmly believes that, in the first instance, there should be no impediment to the Auditor-General's access to information and records relating to how recipients of Commonwealth funding have made use of

24 Mr Ian McPhee PSM, transcript, 16 September 2009, p 2.

25 Audit Report No 29, 2008-09.

26 Mr Ian McPhee PSM, transcript, 16 September 2009, p 2; see

27 Mr Matt Cahill, transcript, 19 October 2009, p 8-9.

28 Mr Ian McPhee PSM, transcript, 16 September 2009, p 3.

29 Australian National Audit Office, sub 3.5.

30 Mr Ian McPhee PSM, transcript, 19 October 2009, p 9.

31 Mr Ian McPhee PSM, transcript, 16 September 2009, p 3.

such funds. Nor should there be any impediment to ANAO officers inspecting project work. The Committee therefore supports the proposal that government policy should require SPP legislation and agreements to provide the Auditor-General with access to information and records related to the funds in question.

Recommendation 10

5.30 **That all funding agreements between the Commonwealth and other levels of Government include standard clauses providing the Auditor-General with access to all information and records, and a capacity to inspect work on all projects, relating to the use of Commonwealth funds under those agreements.**

5.31 That said, the Committee is aware that strengthening the Auditor-General's authority to access information and records does not fully address the limits on the Parliament's potential to investigate whether projects are providing 'value for money' for the Commonwealth and hence the Australian taxpayer.

5.32 The Auditor-General confirmed that under existing legislation he can only assess the Commonwealth's administration of the arrangements and not the use to which the funds have been put:

At the moment, that is beyond what we are able to do under our legislation. If there is an issue, we tend to say, 'How could the Commonwealth have better managed that?' rather than 'This particular jurisdiction hasn't done a good job.'³²

5.33 In providing the Auditor-General access to information related to Commonwealth funding, as set out in Recommendation 10 above, the Committee notes the Auditor-General will consistently have access to performance information, however, significantly, the integrity of that information remains unchecked.³³

5.34 As referred to above, the Building the Education Revolution (BER) program serves as an example where formal access arrangements facilitated a recent audit,³⁴ however, the BER audit also serves as a practical example of the limitations of the Auditor-General's authority.³⁵

32 Mr Ian McPhee PSM, transcript, 19 October 2009, p 10.

33 Mr Ian McPhee PSM, transcript, 19 October 2009, p 12.

34 Mr Matt Cahill, transcript, 19 October 2009, p 8.

35 Australian National Audit Office, sub 3.10.

- 5.35 That is, the objective of the BER audit³⁶ was to examine the effectiveness of the Department of Education, Employment and Workplace Relations' (DEEWR's) establishment of the P21 facet of the program. The ANAO submit that because the Auditor-General's mandate did not allow any assessment of the performance of Education Authorities in their jurisdictions, an examination of the individual BER P21 projects fell outside the scope of the audit. Despite bilateral agreements the ANAO was therefore unable to meet expectations that the audit would have examined the delivery of individual projects.³⁷
- 5.36 The Auditor-General argues that the implementation of options (a) or (b) discussed above (see paragraph 5.11) would have allowed the Auditor-General to more successfully 'follow the dollar':
- ... the ANAO's mandate did not allow an assessment to be made of the performance of Education Authorities in managing the delivery of individual projects, including tender processes, in their respective jurisdictions. An extension of our mandate along the lines outlined in Options (a) and (b) ... would have allowed the scope of audit to include such an assessment.³⁸

Committee comment

- 5.37 The Committee acknowledges the range of views provided to the inquiry. On one hand, it has been suggested that the Auditor-General should have unfettered authority to assess the performance of bodies that receive funding provided by the Commonwealth to States/Territories. On the other, it has been argued that this type of funding can already be adequately tracked and accounted for using the mechanisms provided by the existence of the State/Territory Auditors-General.
- 5.38 The Committee notes that the COAG Intergovernmental Agreement on Federal Financial Relations states that the intent of the parties to the Agreement is to improve the well-being of all Australians through improvements in the 'quality, efficiency and effectiveness of government service delivery' by reducing prescriptions on State and Territory service delivery.³⁹ However, the Committee also notes that the same intent is to be delivered by 'enhancing accountability to the public for the outcomes

36 See ANAO Report No: 33 2009-10, *Building the Education Revolution – Primary Schools for the 21st Century*.

37 Australian National Audit Office, sub 3.10.

38 Australian National Audit Office, sub 3.10.

39 Council of Australian Governments, Intergovernmental Agreement on Federal Financial Relations, p 5.

achieved or outputs delivered under National Agreements or National Partnerships'.⁴⁰

- 5.39 The Committee recognises that increasingly it will become important to establish that Commonwealth funding for programs and projects are achieving the intended results, particularly in circumstances where funding is significant. However, the Committee also believes that while the evidence suggests that there are no constitutional constraints on expanding the Auditor-General's powers in this way⁴¹ these issues have not been well articulated in evidence. Some caution therefore needs to be exercised particularly in light of the following advice provided by the Australian Government Solicitor:

...in general, we see scope from a constitutional perspective for the Auditor-General to be given a greater role in financial statements and performance audit activity of non-Commonwealth bodies...However, we emphasise that our comments are general in nature. Development of a proposal to confer [increased audit authority in relation to financial assistance to States and Territories] on the Auditor-General may give rise to the need to further consider particular constitutional issues.⁴²

- 5.40 Additionally, and perhaps more significantly, the Committee notes and respects the role of State Parliaments and State Auditors-General in scrutinising the activities of State Government agencies.
- 5.41 For these reasons, while the Committee is not prepared to recommend that the Auditor-General be provided with the absolute authority to conduct cross-jurisdictional audits to assess the performance of bodies that receive Commonwealth funding, the Committee does consider that in addition to the access provided for in Recommendation 10 that the Auditor-General should, in certain circumstances, have the power to directly assess the performance of bodies receiving Commonwealth funding.
- 5.42 However, the Committee also acknowledges that constraints need to be in place to moderate this power. In the Committee's view it is appropriate that the responsibility for moderating this power rest with a Minister or the Joint Committee of Public Accounts and Audit on behalf of the Parliament. Recommendation 11 therefore reflects the Committee's position.

40 Council of Australian Governments, Intergovernmental Agreement on Federal Financial Relations, p 6.

41 Mr Ian McPhee PSM, transcript, 19 October 2009, p 15.

42 Australian National Audit Office, sub 3.2.

- 5.43 Consistent with the ANAO's submission, any audit undertaken would be in the context of the purposes for which the funds are provided.⁴³

Recommendation 11

- 5.44 **That the Act be amended as necessary so that the Auditor-General may conduct a performance audit to directly assess the performance of bodies that receive Commonwealth funding in circumstances where there is a corresponding or reciprocal responsibility to deliver specified outcomes in accordance with agreed arrangements if a Minister or the Joint Committee of Public Accounts and Audit requests the audit.**

The Auditor-General may ask a Minister or the Joint Committee of Public Accounts and Audit to make such a request.

- 5.45 The Committee notes the comments of the Auditor-General that inherent in the approach guiding this recommendation is a risk that the level of audit activity may be less than ideal:

I think we were saying looking forward 10 years is it a provision that would be useful, particularly with the way the COAG arrangements are going, to allow the office to audit performance of recipients of grants, the states and other parties. I think...was there a need for a constraint of some sort to say, 'You can only do this if the committee asked you to,' or something like that. I then used the analogy of the GBEs to say that has not really resulted in much activity...⁴⁴

- 5.46 However, the Committee reiterates that the Auditor-General will have the capacity to ask the JCPAA to request such an audit.
- 5.47 With regard to resourcing implications, the Committee expressed concern about expanding the Auditor-General's power to conduct audits of bodies that receive Commonwealth funding. The ANAO is confident that there would be no overall increase in the number of performance audits and that, providing the performance audit program remains adequately resourced, there would be no call for budget supplementation.⁴⁵ Asked to elaborate on this statement, the Auditor-General told the Committee:

43 Australian National Audit Office, sub 3, p 7.

44 Mr Ian McPhee PSM, transcript, 8 February 2010, p 32.

45 Australian National Audit Office, sub 3.4, npn.

We are conscious that resources are finite. I think that, within a program of 50 performance audits a year, if we did decide to look at a particular audit in a state jurisdiction that would substitute for another audit that we would have ordinarily done. So within the basket of 50 performance audits we would program some of these.⁴⁶

Commonwealth jurisdiction – auditing related entities/contractors

5.48 The Committee heard that the growth in outsourcing by governments has increased the use of external parties, including contractors, to deliver government programs and services. Under current legislation, the Auditor-General is unable to directly assess the performance of these external parties and ‘follow the dollar’.⁴⁷

5.49 Oral and written evidence to the inquiry provided a general consensus that the Auditor-General should have the power to examine the expenditure of public funds when government enters into commercial arrangements with private entities for the provision of services. Reiterating the view held by a number of witnesses, the ACAG told the Committee:

This is necessary to sustain the ability of the Auditor-General to carry out audits which examine whether the operations or activities of the whole or any part of the Commonwealth public sector are being performed effectively, economically and efficiently and in compliance with all relevant Acts.⁴⁸

5.50 The Committee expressed some concern that, if the Auditor-General were provided with the power to audit contractors, an agency’s obligation to manage contracts appropriately could diminish. The Auditor-General assured the Committee that this was not the case and that contractual arrangements have been strengthened over time.⁴⁹

5.51 Using the Defence Materiel Organisation (DMO) as an example, the Auditor-General explained that an agency’s success depends on the contractor meeting its performance standards. If the contractor fails in its obligations, the agency’s performance assessment is affected:

46 Mr Ian McPhee PSM, transcript, 8 February 2010, p 33.

47 Australasian Council of Auditors-General, sub 8, npn; Australian National Audit Office, sub 3, p 8.

48 Australasian Council of Auditors-General, sub 8, npn.

49 Mr Ian McPhee PSM, transcript, 19 October 2009, p 17.

We can be critical of DMO and its performance. They in turn would say, 'But we are relying on the contractor to meet their performance standards under the contract as well. If they do not do that, you should be saying a bit more about the contractor's performance.'⁵⁰

- 5.52 Of further concern to the Committee is the possibility that the increasing use of contractors could undermine Ministerial accountability and Parliamentary oversight. As referred to in the AGAG submission, the Administrative Review Council addressed this issue in its Report No. 42, *The Contracting Out of Government Services* (1998). The Council found that contracting out services 'should not result in a loss or diminution of government accountability' provided the Auditor-General had the power to conduct audits on the contractor's performance and had access to all relevant information.⁵¹
- 5.53 Similarly, a report prepared for the United Kingdom Treasury in 2001, *Holding to Account: The Review of Audit and Accountability for Central Government*, recommended that the UK Auditor-General should have statutory access to a range of government grant recipients, including contractors.⁵²
- 5.54 The Committee notes the evidence from the Auditor-General that there have been improvements in contractual arrangements, in particular the making of payments between public sector agencies and contractors.⁵³ However, the Committee notes further comments from the Auditor-General which suggests that while agencies are 'getting better'⁵⁴, contracting arrangements can still be problematic:

The rhetoric is very much around the Public Service and contractors working in partnership to deliver a particular project or a particular outcome. Contractual arrangements support that. When there are circumstances where the contractor does not deliver, it is a serious issue for the department in the first place.⁵⁵

50 Mr Ian McPhee PSM, transcript, 19 October 2009, p 17.

51 Administrative Review Council (1998), *The Contracting Out of Government Services*, Report No 42, pp vii and x.

52 Lord Sharman of Redlynch (2001), *Holding to Account: The Review of Audit and Accountability for Central Government*, pp 36-37.

53 Mr Ian McPhee PSM, transcript 19 October 2009, p 17.

54 Mr Ian McPhee PSM, transcript 19 October 2009, p 17.

55 Mr Ian McPhee PSM, transcript 19 October 2009, p 17.

- 5.55 In its written submission to the inquiry the ANAO indicated that legislation in both Western Australia and Tasmania grants the Auditors-General the authority to conduct audits of certain entities (referred to as 'related entities'). However, the ANAO submits that 'related entities' in this legislation does not include contractors.⁵⁶

Committee comment

- 5.56 The Committee has a long history of reviewing audits of Defence acquisition projects. The Committee is therefore keenly aware of the significance of contractors meeting their performance obligations so that agencies are able to deliver public sector programs and projects on time and on budget.
- 5.57 The Committee also notes Dr Stephen Gumley AO, CEO of the DMO's suggestion (see submission 6) that the Auditor-General be provided with greater authority to 'examine the financial and performance outcomes associated with expenditure of Commonwealth funds, including company audits'.⁵⁷
- 5.58 Given the increasing use of contractors as an integral element of government service delivery, the Committee considers that it is appropriate that the Auditor-General have the power to scrutinise the use of Commonwealth funds by external entities including contractors.
- 5.59 Consistent with the ANAO's primary submission⁵⁸, these types of audits of external entities/contractors should only be undertaken where the entity's/contractor's performance is, in the Auditor-General's opinion, significant in the context of an audit of a Commonwealth entity. Additionally, the scope of these audits would be restricted to the work undertaken under contract to the Commonwealth.⁵⁹
- 5.60 Again, the Committee notes that no resourcing implications arise as a result of the Auditor-General conducting performance audits of entities including contractors involved in the delivery of government programs and projects:
- ...it is anticipated that any additional audit coverage would be accommodated within existing performance audit resources. On this basis, budget supplementation would not be required.⁶⁰

56 Australian National Audit Office, sub 3, p 8.

57 Defence Materiel Organisation, sub 6, p 1.

58 Australian National Audit Office, sub 3, p 8.

59 Australian National Audit Office, sub 3, p 8.

60 Australian National Audit Office, sub 3.4, npn.

Recommendation 12

- 5.61 **That the Act be amended so that the functions performed by entities including private contractors on behalf of the Commonwealth in the delivery of government programs can be subject to direct audit by the Auditor-General.**
- 5.62 The Committee recognises that the expanded power to undertake performance audits of related entities, including contractors, by the Auditor-General requires enhanced accountability arrangements to be put in place. To that end the Committee recommends that the Auditor-General be required to publicly disclose the reasons behind any decision to audit a non-Commonwealth entity.⁶¹

Recommendation 13

- 5.63 **That the Act be amended to ensure that when a decision is made by the Auditor-General to conduct an audit of a non-Commonwealth body, the reasons for that decision should be disclosed in the publication of the report.**

Other Commonwealth activities

- 5.64 In October 2008, in response to worsening global financial conditions, the Australian Government announced a Government guarantee of the deposits and wholesale funding of Australian banks and other deposit-taking institutions.⁶² In their written submissions to the inquiry, both the ACAG and the ANAO suggested that consideration should be given to providing the Auditor-General with the authority to audit a body's performance in meeting the terms and conditions of such investments and support.⁶³
- 5.65 The Committee asked the Auditor-General how the Commonwealth currently monitors compliance with such arrangements. The Auditor-General told the Committee that the Commonwealth relies on its prudential arrangements and the Australian Prudential Regulation

61 Australian National Audit Office, sub 3, p 9.

62 Viewed at Prime Minister of Australia, Media Release 12 October 2008, *Global Financial Crisis*, <http://www.pm.gov.au/node/5533> on 12 April 2010.

63 Australian National Audit Office, sub 3, p 8; Australasian Council of Auditors-General, sub 8, npn.

Authority (APRA) to ensure compliance.⁶⁴ On further questioning, the Auditor-General conceded that, if asked to, the ANAO had some capacity to audit these areas:

If, however, a committee was to say, 'We are concerned about a regulatory regime relating to the giving of guarantees on deposits,' or whatever, then it would be open for us to have a look at that and the effectiveness of the regime.⁶⁵

- 5.66 The Committee is satisfied with these arrangements and on that basis makes no specific recommendation in this regard.

Conclusion

- 5.67 The Committee acknowledges what the IPAA describes as the 'glaring gap in accountability of Commonwealth grants to states [and territories]'.⁶⁶ The Committee is therefore supportive of the need for changes to the *Auditor-General Act 1997* to enable the Auditor-General to access information and records relating to the use of Commonwealth funds under National Partnership payments and SPPs and auditing of that information under certain circumstances.
- 5.68 The Committee also recognises that there is an increasing use of contractors to implement government programs and services. While the Committee acknowledges that this practice has benefits for service delivery, the Committee is concerned it has the potential to undermine Ministerial responsibility and Parliamentary oversight. The Committee wants to see more accountability in this area and accordingly wants the Auditor-General to have the power to audit external entities including contractors delivering government programs and services.

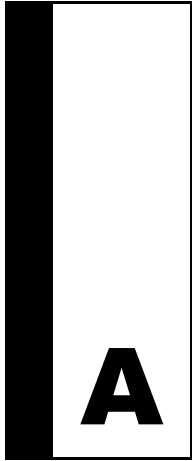
64 Mr Ian McPhee PSM, transcript, 19 October 2009, p 16.

65 Mr Ian McPhee PSM, transcript, 8 February 2010, p 9.

66 Institute of Public Administration Australia, sub 5, npn.

- 5.69 The Committee considers it imperative that the Auditor-General be provided with the statutory authority to address these issues, enabling the Auditor-General to more readily 'follow the dollar' and ensure that Commonwealth funding is fully accounted for and the Commonwealth is receiving value for money.

Rob Oakeshott MP
Committee Chair
December 2010



Appendix A – List of Submissions

- 1 Mr Pat Barrett AO
- 2 Hon Dr Bob Such MP (SA)
- 3 Australian National Audit Office
- 3.1 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.2 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.3 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.4 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.5 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.6 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.7 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.8 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.9 Australian National Audit Office
(Supplementary to Submission No. 3)
- 3.10 Australian National Audit Office
(Supplementary to Submission No. 3)

- 4 Commonwealth Ombudsman
- 5 Institute of Public Administration Australia
- 6 Defence Materiel Organisation
- 7 Department of Infrastructure, Transport, Regional Development
and Local Government
- 8 Australasian Council of Auditors-General



Appendix B – List of Exhibits

- 1 Australian National Audit Office
Letter prepared by the ANAO to accompany draft audit reports distributed to auditees for perusal
(Related to Submission No. 3)



Appendix C – List of Public Hearings

Monday, 22 June 2009 - Canberra

Australian National Audit Office

Mr Ian McPhee PSM, Auditor-General

Mr Steve Chapman, Deputy Auditor-General

Mr Matt Cahill, Group Executive Director

Mr Russell Coleman, Audit Principal

Australasian Council of Auditors-General

Mr Glenn Poole, Convenor

Institute of Public Administration Australia

Mr Andrew Podger AO, National President

Professor John Wanna, National Councillor

Wednesday, 16 September 2009 - Canberra

Australian National Audit Office

Mr Ian McPhee PSM, Auditor-General

Mr Steve Chapman, Deputy Auditor-General

Mr Matt Cahill, Group Executive Director

Mr Russell Coleman, Audit Principal

Monday, 19 October 2009 - Canberra

Australian National Audit Office

Mr Ian McPhee PSM, Auditor-General

Mr Steve Chapman, Deputy Auditor-General

Mr Matt Cahill, Group Executive Director

Mr Russell Coleman, Audit Principal

Monday, 8 February 2010 - Canberra

Australian National Audit Office

Mr Ian McPhee PSM, Auditor-General

Mr Steve Chapman, Deputy Auditor-General

Mr Matt Cahill, Group Executive Director

Mr Russell Coleman, Audit Principal

Dr Andrew Pope, Group Executive Director