COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Reference: Adequacy of the Auditor-General Act 1997

TUESDAY, 15 MAY 2001

MELBOURNE (CITY)

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JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Tuesday, 15 May 2001

Members: Mr Charles *(Chairman)*, Mr Cox *(Vice-Chairman)*, Senators Coonan, Crowley, Gibson, Hogg, Murray and Watson and Mr Andrews, Mr Georgiou, Ms Gillard, Mr Lindsay, Mr St Clair, Mr Somlyay, Mr Tanner and Mr Kelvin Thomson

Senators and members in attendance: Senator Crowley and Mr Charles, Mr Cox and Ms Gillard

Terms of reference for the inquiry:

The adequacy of the Auditor-General Act 1997. The inquiry will focus on the Auditor-General's information gathering powers and related issues.

The Committee will examine:

- the Auditor-General's information gathering powers;
- the confidentiality of information;
- the application of parliamentary privilege to draft reports, extracts of draft reports, and reports;
- access by relevant parties to draft Auditor-General reports;
- procedural fairness;
- a comparison of State Auditor-General provisions to the Commonwealth Auditor-General Act; and
- any other aspects of the Auditor-General Act 1997 that require attention.

WITNESSES

Committee met at 9.47 a.m.

CHAIRMAN—The Joint Committee of Public Accounts and Audit will now take evidence, as provided for by the Public Accounts and Audit Committee Act 1951, for its inquiry into the Auditor-General Act 1997. The Auditor-General Act 1997 came into effect on 1 January 1998. The act sets out the conditions of appointment and main functions of the Auditor-General as an independent officer of the parliament. The act also specifies the Auditor-General's powers and secrecy provisions and establishes the Australian National Audit Office.

The Auditor-General has extensive information gathering power. For example, the Auditor-General may enter and remain on any premises occupied by a Commonwealth agency and is entitled to full and free access to any Commonwealth document. These legislative powers do not extend to assessing the premises of a Commonwealth contractor. However, the Commonwealth Procurement Guidelines advise that, where appropriate, adequate provision should be made for access to records by ANAO.

With the increasing pace of government outsourcing and greater involvement of the private sector in the delivery of public goods and services, the committee seeks to ensure that the Auditor-General Act 1997 has adequate powers to deliver improved public accountability, administration and transparency. The key areas the JCPAA will focus on include the Auditor-General's information gathering powers, confidentiality of information, the application of parliamentary privilege to draft reports and extracts of draft reports, procedural fairness and, where relevant, the comparison of state Auditor-General provisions to the Commonwealth Auditor-General Act.

Today the JCPAA will take evidence from CPA Australia, the Auditor-General of Victoria, the Australian National Audit Office, the Department of Finance and Administration, the Department of Defence, the Department of Education, Training and Youth Affairs, the Department of Foreign Affairs and Trade and the Department of Family and Community Services.

[9.49 a.m.]

AWTY, Mr Adam Trevor, Public Sector Adviser, CPA Australia

LEWIS, Mr Kevin, Director, Public Sector, CPA Australia

CHAIRMAN—I welcome representatives of Certified Practising Accountants Australia to today's hearing. The committee thanks you for your submission. Do you have any extremely brief opening comments you would like to make?

Mr Lewis—I thank the committee for the opportunity to appear before you today and also for the opportunity to put in a submission. Just by way of background, CPA Australia has over 92,000 members. Approximately 20 per cent of those are in the Australian public sector. We also have a significant number of people who either consult with or provide services to the Australian Public Service; thus, our interest in this inquiry. Throughout our appearance this morning, Adam Awty will provide most of the information, being our public sector technical adviser, and I will be here to assist where possible.

CHAIRMAN—In your submission you say:

> CPA Australia believes that the current legislation is sufficiently robust and that it may be premature to have a full inquiry into the adequacy of the Act, as it has been in operation in its current form for only three years. We believe that the Act needs to maintain the Auditor-General as an independent officer of the parliament to ensure the appropriate accountability and transparency to government operations.

So do you think our inquiry is a bit premature? Did you make that decision after reading the reports of our inquiries into the FMA and the CAC Act?

Mr Awty—We did not make that decision based on reading those two inquiries. Our statement on the premature nature of the inquiry is more based around the fact that we have seen in the past that, with legislative changes and implementation of major reform programs, it generally takes around a five-year period to actually have the changes inculcated into the public sector. The first three years or so tend to be a settling period when the agencies concerned and the public sector take a bit of time to get used to the legislative changes and, from that point, actually start to get a handle on what is meant by the legislative changes. We tend to believe that it takes about five years to get a better handle on where, I suppose, the gaps are with any legislative change or implementation of major reform programs.

CHAIRMAN—Just for the public record—and so that you understand and can take this back to your members—the committee has no basic disagreement with what you said. But we determined in the inquiries into the FMA and the CAC Act and this inquiry that, because these acts had been in operation for two years or so, it was time to have a quick look—not a let's change everything look—to see if we are generally satisfied that those acts covered the basic direction that we wanted to head, that we are roughly doing the appropriate things and to determine whether there are minor adjustments that need to be made. That is really why we are holding the inquiry.

Mr COX—The other issue we were particularly concerned about was that there was some suggestion by the Auditor-General that parliamentary privilege did not apply to some of his

activities, particularly the preparation and distribution of draft reports, and that there was an implied threat from people being audited, who did not appreciate adverse comments, that they might take the same sort of action against him as they would take against private sector auditors for defamation. Nothing has ever come of that. Would you like to comment about the extent to which auditors in the private are inhibited by threats of defamation proceedings from people they make adverse findings or comments on?

Mr Lewis—From a private sector point of view, the comments they make would be based on the evidence and facts provided. Also, they would quite clearly be following a line that was made up of a group of the auditors involved in that particular function.

Mr Awty—It would also be undertaken in line with the code of professional conduct. CPA Australia has 92,000 members and a large proportion of our members are auditors within both the public and private sectors. As members of CPA Australia, they have a code of professional conduct that they have to adhere to which would also impact on their auditing, whether it be in the public sector or private sector.

Senator CROWLEY—I think it would be useful for us to have a copy of that code.

Mr Awty—We can certainly provide a copy of that.

Mr COX—How often do you find that people who have been audited or have had adverse comments made about them in private sector audits do either threaten or take legal action against the auditors?

Mr Lewis—Certainly we are made aware of that issue should the situations arise. Once we have conducted an interview and have ensured that the code of professional conduct has been adhered, usually we find that there are no grounds to continue with any further action against those people and that the course of action that they took during their inquiries or audit was in accordance with standards.

Mr COX—So you have a raft of people who, when they do not like what the Auditor tells them about their business conduct, complain to you and suggest that it is malpractice?

Mr Lewis—We have a certain number of complaints put to us as a professional body. They are investigated fully by a peer group of members. Where it is found necessary, disciplinary action would be taken. But in most instances disciplinary action is not necessary.

Mr COX—How often do people go on to take defamation action against auditors?

Mr Lewis—That is outside my purview. I certainly would not be aware of that, other than what I read in the press. If it comes to our attention, we would then be required to undertake an investigation within CPA Australia. I guess that would be a fairly common occurrence against auditors. I imagine that, in most instances, you would find that the standards and the code of professional conduct were adhered to and, accordingly, there would be no grounds to proceed.

Mr COX—Do you see a qualitative difference between the role of the Auditor-General and the role of private sector auditors, in that the Auditor-General is protecting public money and

providing accountability through the parliament and therefore should have fewer constraints on him about what he says than perhaps a private sector auditor?

Mr Awty—The Auditor-General does have a far greater scope. The Auditor-General audits in the interests of the public as well as to report fairly to parliament. The business of the public sector is much broader. It has more social objectives than the private sector. In essence, the Auditor-General probably would have scope to have greater powers in some instances than a private sector auditor because of the public interest nature of his audits.

CHAIRMAN—I would have thought that whoever audited HIH would find themselves under rather intensive scrutiny from a public interest viewpoint.

Mr Awty—One would think so.

CHAIRMAN—They are certainly not a public body.

Mr COX—They are about to be a publicly funded body, Bob.

CHAIRMAN—I am not sure that is correct—some of what they are responsible for, maybe.

Ms GILLARD—Is it common for private sector auditors to insure against defamation risks?

Mr Lewis—All private sector accounting firms and audit firms that operate under the professional bodies would be required to have professional indemnity.

Ms GILLARD—Does the standard professional indemnity clause extend to defamation risks?

Mr Lewis—It covers them for any sort of activity conducted by these firms.

CHAIRMAN—Is it expensive?

Mr Lewis—I think the members would say it was expensive.

Senator CROWLEY—Could you give us an idea? Is it on a firm or an individual assessment?

Mr Lewis—It is fee based.

Senator CROWLEY—Fee based?

Mr Lewis—For the firm.

Senator CROWLEY—So all the individual accountants working in a firm would be covered by the firm's professional indemnity?

Mr Lewis—Yes.

Senator CROWLEY—So, if one accountant behaved very badly, the firm would cover them and then drop them in the river?

Mr Lewis—I am not sure how they would operate in that respect. I am not privy to that sort of information in individual firms.

Senator CROWLEY—I am terribly interested in this to compare it with the medical profession, where the cost of professional indemnity is now pricing a number of practitioners out of an area. So I just wondered whether your professional indemnity was against an individual or against a firm.

Mr Lewis—I think the larger firms would have professional indemnity for the firm. You then go down the scale to the smaller practitioner who has a firm but is an individual.

CHAIRMAN—You are well aware of the fact that we have been recommending for a long time that the Auditor-General be given powers under this act to access contractor premises and records with respect to Commonwealth contracts. Do you support that?

Mr Awty—Yes, we do.

CHAIRMAN—Without reservation?

Mr Awty—We understand that the JCPAA has been supporting this for a long time and has succeeded in getting some stuff into the procurement guidelines.

CHAIRMAN—It is not there yet.

Mr Awty—Or succeeded in getting the government to agree to putting that into the procurement guidelines. We believe that is some way forward. However, we do believe that, when you are talking about audits and the broader scope of getting into private sector premises, you do need some sort of legislative framework around that in order to be more accountable to the parliament and to the community. We support having a legislative framework as well as some guidance through, for example, the procurement guidelines to give it a good balance between legislative and guidance material.

CHAIRMAN—In your submission you say:

... the Auditor-General's authority in relation to performance audits and the right to access of information needs to be worked through more thoroughly over time.

Could you explain what you are talking about?

Mr Awty—Clearly, under the current public sector structure, there has been greater contracting out. Therefore, a lot of the services that were previously undertaken by government have moved into the private sector. The Auditor-General, in his role of providing information to the parliament and acting in the interest of the public, needs to be able to ensure that he or she can access all the information that he or she requires. We believe that, where you have greater contracting out and greater private sector involvement, in some cases that is hindered because

the current legislation does not allow the Auditor-General to gain access to the premises to gain that information. We believe how you actually achieve that needs to be worked through. That comes back to the question of an appropriate mix between legislative amendments within the Audit Act and guidance material through procurement guidelines, ministerial directions or whatever other mechanism you may put in place.

Another thing we thought could be worked through are standard clauses for standard contracts within the Commonwealth public sector. You would work with the contractor so that you had agreement up front that, if it is deemed to be necessary to achieve information for the purposes of providing it to the parliament or to act in the best interest of the public, the Auditor-General would have direct access to the premises of a private sector agency or the private sector agency would provide the information to the Auditor-General on request.

CHAIRMAN—Are you proposing that the Auditor-General be given rights to undertake performance audits of private sector companies?

Mr Lewis—No.

CHAIRMAN—I thought it sounded like that.

Mr Awty—We are talking about ensuring access to the premises where they are conducting a function on behalf of the government where they require information to allow them to conduct a performance audit of a public sector function and allowing them access to a private sector premises to get that information.

Mr COX—When you are doing a private sector audit, you provide advice to the company or its management if it is lacking in any particular areas that come to your attention, do you not?

Mr Lewis—If it is necessary, they would be provided with a qualified report.

Mr COX—If there were particular areas where a company was using money inefficiently, would you provide advice to the company on that?

Mr Awty—I think it is fair to say that, if a company has been using its funds inefficiently in the private sector, generally I think the auditors have the right to go to the shareholders when it is deemed that there are specific concerns in terms of the application of funds of the shareholders.

Mr COX—The Audit Act as it is presently interpreted by the current Auditor-General seems to inhibit him from looking at issues which go to value for money of various types of Commonwealth government expenditure. That can be divided up into a couple of categories. One is the government deciding to spend money on things that are purely wasteful and the other—which I think fits more within the purview of what an auditor should take an interest in and provide advice to whomever they are reporting—is where money is basically wasted because the way that is spent is completely inefficient. If the Auditor-General feels constrained by the present Audit Act from commenting on value for money in the second case, do you think that some amendment might be appropriate to clarify his role and responsibility to advise the parliament and the public when governments are using money particularly inefficiently?

Mr Lewis—Wouldn't the Auditor-General do that anyway through his recommendations in his report?

Mr COX—No, he does not. We have had the odd discussion with him about this.

Mr Awty—I think that is something that is worth considering. If you take a private sector model, equating the shareholders with the parliament in some ways, the auditors of a private sector company do have a responsibility to advise the shareholders when there is clearly mismanagement of funds. If you equate that back to the public sector in terms of value for money, I would think that the act would need to be amended to allow the Auditor-General to flag in a similar fashion with parliament when there is mismanagement of funds.

CHAIRMAN—When the Auditor-General undertakes a performance audit and it involves a contractor, section 19(3) of the act provides for him to be able to circulate an extract of his draft report to the contractor for comment before the whole thing is tabled. Do you have any problems with the operation of that section of the act?

Mr Lewis—No.

CHAIRMAN—Rather than giving the contractor the entire proposed report?

Mr Lewis—If there were an opportunity for the contractor to provide a response or address the issue, I would not see a problem with that.

Mr Awty—It should operate in a similar format to agency audits. If an agency has a performance audit done on it, they have the opportunity to respond to the auditors.

CHAIRMAN—It is on that section rather than the entire report. I assume that part of the reason for doing that was related to security of information. From time to time you see Victorian audits leaked to the press in advance of the audit. I cannot recall a Commonwealth audit being leaked. Can you?

Mr Lewis—I cannot recall.

Senator CROWLEY—Does the Auditor-General audit you? Who audits you?

Mr Lewis—A private firm of auditors audits CPA Australia.

Senator CROWLEY—Do you know whether any of your members have actually been contracted to do work for the Auditor-General?

Mr Lewis—Firms have been contracted to undertake work with the Auditor-General. I would not say that they were definitely our individual members. They could be members of the chartered institute. Certainly the firms work very closely with the Auditor-General.

Senator CROWLEY—Have you ever been involved in an audit?

Mr Lewis—Me personally?

Senator CROWLEY—Yes.

Mr Lewis—No.

Senator CROWLEY—Do you know whether any of your members have been involved or would you say, 'I don't know, but probably some have'?

Mr Awty—Our membership is over 92,000. In that membership, there are be members who are auditors within audit offices around the country, members who are auditors within private sector firms who would therefore be involved in audits which have been contracted out by offices of the Auditor-General around the country, and there would also be members who are involved in the agency that is actually receiving an audit, whether it be a financial audit or a performance audit.

Senator CROWLEY—Have you ever had any feedback from those people about the involvement in the performance audit?

Mr Lewis—No.

Senator CROWLEY—Does your organisation ever seek to get that? Do you collect any data on it?

Mr Lewis—No, there would not be any reason for us to unless we were conducting research into that area.

Senator CROWLEY—So you have never had any feedback? No-one has ever said, 'Oh, I've been asked to do a performance audit,' and rolled their eyes backwards, or said, 'Whacko, I can't wait to get into it'?

Mr Lewis—No.

Mr Awty—As an organisation, we generally receive copies of most of the Auditor-General's performance audits. As to members' views on the audit, we generally do not get any feedback. Our organisation has such a broad spectrum, covering public and private interests, unless there is a specific need, we would not require our members to provide us any feedback on performance audits.

Senator CROWLEY—Have you ever done or ever thought to do any research in that area?

Mr Lewis—It is on the agenda that we would probably look at it down the track, but at this stage it is not a priority or of particular interest at the moment.

CHAIRMAN—Thank you very much for appearing before the committee.

Proceedings suspended from 10.12 a.m. to 10.21 a.m.

CAMERON, Mr Wayne, Auditor-General, Victorian Auditor-General's Office

MANDERS, Mr Joseph Walter, Assistant Auditor-General, Victorian Auditor-General's Office

CHAIRMAN—Welcome. Thank you very much for your comprehensive submission. Would you like to make a brief opening statement before we ask you penetrating questions?

Mr Cameron—No, I would not. I work on the basis that the submission is a starting point for our discussions. I am happy to take questions.

CHAIRMAN—One of the things that I was particularly interested in was that very early in your submission you addressed the issue of cabinet confidentiality and secrecy provisions, saying:

... section 12 now gives, in a direct and clear manner, unfettered discretionary authority to the Auditor-General on the reporting of any material (deemed to be specially confidential or otherwise) to the Parliament ...

You also said:

Because of this change, arguments in favour of confidentiality no longer automatically take precedence over the right of the community to be informed.

But it imposes a responsibility on you. You then compare it with the current section 37 in the Commonwealth Act. You say:

In terms of comparison ... the Victorian approach avoids statutory prescription of the evaluative criteria to be applied by the Auditor-General to disclosure questions. It also does not have provision for the direct involvement of a representative of the Executive Government in decisions impacting on the reporting of audit findings. From my perspective, the approach is a neat and effective way of ensuring the Auditor-General is not unduly impeded in protecting the interests of Parliament and the taxpaying community.

Can you expand on that for us?

Mr Cameron—The review by the state's public accounts and expenditure committee's inquiry into commercial-in-confidence issues, in addition to calls by my predecessor, the Auditor-General, have caused there to be a fresh look at what is essentially the public's right to know. We are now returning to some of the principles that are captured in the freedom of information legislation—and this is reflected in the audit legislation— that, essentially, information should be made available to our democratically established society and that one of the important providers of that information is the Auditor-General. Section 12 of the Audit Act now reflects that strong desire that information be made available to the community on matters relating to financial management and probity in Victoria. There will be occasions, I am sure—we have yet to reach them—when we may have some trouble with the detail that should be disclosed to parliament but, as I said, we have not reached that condition yet.

CHAIRMAN—I am particularly interested in your comments about section 37 of the Commonwealth Act and how you would find that restricting compared with what is currently in operation in Victoria.

Mr Cameron—I will ask Mr Manders to talk about that because I am not as familiar with section 37 of the Commonwealth legislation. As I read that question, it is about whether or not there should be some guiding criteria that assists the Auditor-General in determining and in what circumstances there should be a disclosure.

Mr Manders—Section 37 requires the Attorney-General to have some role in the process. As a result of those changes that occurred in 1999, the Victorian act enabled the Auditor-General to have the sole discretionary power to determine the matters that go into reports, subject to two criteria: the information was relevant to the subject matter of the report, and the information in the report is in the public interest.

The main genesis for that change was an experience of Mr Cameron's predecessor in 1999 with a performance audit of the state's prison system. That audit was substantively completed—the report was printed and ready to go to the parliament—and the then government furnished a legal opinion to the Auditor-General indicating that a range of financial and other performance information in that report was commercially confidential under the secrecy provisions of the Corrections Act and that he had no power to include that information. The Audit Act stated that he could draw conclusions, observations and recommendations from the information, but he could not convey to the parliament the basis of those conclusions and recommendations.

The Auditor-General determined then to blank out all of the information in the relevant tables relating to things like how much private prison operators in Victoria received for services rendered and the amounts deducted from their remuneration for non-compliance with contractual criteria. Those sorts of things were absolutely fundamental to the needs of the parliament, so he decided to leave the tables in there. He blanked out all the information and recommended very strongly to the parliament in his foreword that the legislation be changed. That was the fairly striking reason why the legislation was altered to what it is now.

CHAIRMAN—Let us go back to section 37 again. We are talking about the Attorney-General, not the Auditor-General. Section 37 says:

The Auditor-General must not include particular information in a public report if:

... .

(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).

What you are essentially saying is that you should have the discretionary right. Let me pick one of these. The legislation says:

Reasons are:

... ...

(c) It would prejudice relations between the Commonwealth and a state.

Notwithstanding that your report would prejudice relations between the Commonwealth and the state of Victoria, you could proceed to publish the audit report even though the state Attorney-General thought that it might prejudice those relations. So you think that is the right way to go and that we ought to get rid of section 37? That is what I am trying to come to grips with.

Mr Cameron—I have two observations. One observation is that it is a function of the executive government, notwithstanding the importance of the function of the Attorney-General, to exercise the decision about whether something ought to be in the state's interest or not. This brings me to the second observation.

CHAIRMAN—No, not the state's interest.

Mr Cameron—The public interest, yes.

CHAIRMAN—We are not talking about general confidentiality here or secrecy provisions, we are talking about public interest.

Mr Cameron—I understand what you are saying. I will continue. That is why I made the comment about aligning our considerations more with those that are contained in freedom of information legislation. There are good guidelines on what is in the public interest, which assists the ombudsman to determine what needs to be disclosed. Personally I feel more comfortable with taking into account the guidance that lies in FOI legislation, because that piece of legislation is designed specifically to protect the public interest. That is not to say, of course, that the Attorney-General would not exercise that same discretion, but that position is a little closer to the executive than the statutory role of ombudsman.

CHAIRMAN—On the other hand—and without going from the hypothetical to the extreme—we have had and will continue to have instances where Auditors-General and the executive have had big stoushes, and you wind up with a test of powers. Is it appropriate that you have complete authority, as long as you can demonstrate some public interest, to release cabinet information? I cannot imagine why you would do it unless you are having a real battle with cabinet, which is entirely possible. It happens in the states; it does not seem to happen in the Commonwealth.

Mr Cameron—I am reflecting on my earlier years of experience as to whether that might have ever happened. I cannot think of many instances where you might have disclosed something that was not already known to the community or that somebody could not reasonably infer. A good example is the management of defence contracts, which I have personally been involved in, and where we have been concerned about the management of foreign exchange risk and whether that risk was adequately considered by the cabinet in determining the approval process for the projects. The monetary implications were quite substantial and were sufficiently substantial to merit reporting to parliament why certain defence programs were heading the way they were.

In the course of that audit, one would normally find out the action being taken by the executive to adequately manage that risk. There could well have been instances where the issue

of foreign exchange risk had been considered at the government level, maybe around a cabinet table. I cannot recall ever referring to a cabinet minute or seeing that in an Auditor-General's report. It simply may be taking into account whether there is a contextual picture that relates to the way in which executive government is managing this risk—that you acknowledge this issue has been considered, not by cabinet but by the government. Quoting from cabinet minutes in a public way is not something I have seen happen too often, if at all.

CHAIRMAN—Is that restraint by the Audit Office one of convention, as is, realistically, the restraint by all of the public sector agencies with respect to release of cabinet discussions?

Mr Cameron—The convention I am familiar with—and I have to say it is in my prior position, not my position here—is that cabinet is the vehicle by which government makes decisions but, at the end of the day, it is a government decision. In a way, you could argue that, in a crude sense, cabinet barely has a persona of its own: essentially, the executive government has decided on certain policy action. I tend to look at cabinet material as the government's position on something rather than the cabinet's, or even a subcommittee of cabinet for that matter. At the working level we are all familiar with cabinet committees and subcommittees but, at the end of the day, my experience is that you have to interpret what the government's view is on an issue because that is the only executive view.

Mr COX—How would you feel about a situation where, under section 37, the Auditor-General was able to apply for some kind of administrative or judicial review of the Attorney-General's declaration in the same way that somebody who has been denied access to a document under FOI can seek administrative or judicial review?

Mr Cameron—My sense is that, at the end of the day, the role of the Auditor-General is to draw to the attention of parliament whether or not he has had full access to the information he needs to paint the picture that he is seeking to paint, which is what has happened out there. If information is made available to you, you need to weigh up how germane the disclosure of that information is to the outcome of the audit and the way the audit is reported. If information is not made available to you, I think you are into the blankety-blank mode that Joe referred to. You simply say that you sought an explanation from government on why it chose to do what it did in respect of the privatisation of a particular project and that the information was not made available. That then makes it fairly clear that the Auditor-General has gone as far as his powers enable him to go, which includes looking for other ways to access that information. But, if those roots are not available, it seems to me that the role of the Auditor-General is to report the circumstances to parliament and for parliament to then pick up the issue and have the discussion with the executive in the parliament itself. An Auditor-General that exercises all the powers that are available to him cannot do any more than that. At the end of the day, it is for the Auditor-General to draw the concern to the attention of parliament.

Mr COX—So you do not think that section 37 would be substantially improved by access for the Auditor-General to a review process of the Attorney-General's decision?

Mr Cameron—I have not considered it. At the end of the day, if I was confronted with that circumstance and was simply denied the access, I would draw it to the attention of the House and say that I sought the underlying objectives for the particular initiative and the information was not provided.

Ms GILLARD—With the parliamentary privilege issue that you referred to in your submission, I understand that you assumed that drafts were protected by parliamentary privilege.

Mr Cameron—We work on the basis that we scare everyone into believing that. There is a reasonable amount of audit work that is successful because you have a strong belief in what you are doing, and that would be part of it. When people are provided with official drafts of reports, we remind them that this document will be tabled in the House and will be subject to privilege. The status of the document until it is tabled is very much at large—in fact, I suspect it is not covered by privilege or even earlier versions of it—but we constantly remind people that the outcome of this exercise is a parliamentary document.

Ms GILLARD—Have you ever had a party to whom you have distributed a draft threaten defamation or other proceedings against you or your office if you do not change the draft or have it modified or withheld?

Mr Cameron—I will have to ask Joe because he has more knowledge of the past than I have, but I am not aware of it getting to a point where there is defamation. There is due process in the clearance of reports that provides that all named parties have that instance drawn to their attention so they have every opportunity to correct errors of fact or even of implication. The Ainsworth case requires that; so does good practice, and so does the threat of judicial review, so one always does that.

There have been instances of occasional leaks of reports. We could debate whether they are draft reports or whether they are actually reports at that stage. Last year, we carried out a review of the ambulance call-taking activity, which is now the subject of a royal commission of inquiry. Having completed our investigations into whether the investigation by the appropriate body was done adequately, we produced the report. In the clearance phase, were advised by the Secretary for Justice that the release of our report may be prejudicial to the royal commission's activities. I sought the advice of the Solicitor-General as to the advice I should take: should I be concerned about this concern expressed by the Secretary for Justice or should I table? His advice was pretty clear: our audit legislation says essentially that, if I have a report, I have no choice but to table it. So once a report has been made it must be tabled. In that instance we did table but we spoke to the President and the Speaker—we are talking about the risks here—and the document was accompanied by a note to members of both chambers to be mindful that this issue was the subject of a royal commission of inquiry and that they should be careful about what they debate in the report. That is the only time in my period in office. There was also the children's audit that you referred to earlier.

Mr Manders—Pressure on the office from the legal representatives of contractors did occur with our initial report on the emergency services outsourcing project. We entered into heaps of correspondence with their legal advisers, who subtly suggested to the office that it should not go ahead with presenting its report to the parliament as it stood. Whilst that was time demanding and a bit of a nuisance, we continually pressed the point that the legal advisers should take the opportunity available to their client to come in and look at the draft in terms of procedural fairness and natural justice because we knew that, once that opportunity had been given, based on the Ainsworth case they would not have any legal foundation to stop the report by way of injunction. There would have been seven or eight exchanges of correspondence with a very

major legal firm in Victoria, but we have never had any threats of any actual cases against us from a litigation viewpoint.

Ms GILLARD—This is a hypothetical: would you envisage that your office would have handled that matter, or a like matter, differently if it were absolutely clear that the drafts were protected by parliamentary privilege and that no legal action for defamation could arise on the basis of them?

Mr Cameron—No, I do not think we would. It is all about being fair and accurate. Clearance is a very important step in the whole audit process to make sure that misunderstandings, incorrect contextual comment and plain errors are minimised. When I say 'minimised', they should be avoided; but these things happen when you have tables of data. I do not see that, in the operational sense, it would ever change what you ought to do anyhow. There is always a debate—and I must say that the parliamentary interest is different—about the level of detail of disclosure. Often parliament wants more detail, like the name of the person, versus your making a comment about, say, 16 out of 25 cases. That balance has been the subject of some recent discussions between me and our own public accounts and estimates committee.

CHAIRMAN—I was going to ask about that.

Mr Cameron—It is a judgmental issue. Quite often you could name the transaction or the parties, but the fault was not actually theirs and the administrative error was due to the departmental or agency activity. I am not expressing a view either way here, but you need to ask yourself how appropriate it is for you to disclose something in some instances. Let us say you are talking about case management in a medical setting. The message could easily be as strongly conveyed by the statistical analysis of what you found, without tabulating people.

Take an alternative view at a very simple level. What if there were an assertion that a local mayor, for example, was overpaid? In that instance, you would need to consider the public interest. The public might need the figure clarified for its own consideration because the media has got to a point where it is saying that thousands or millions were paid out to individuals. In those circumstances, we might need to put it on the record by saying, 'No, it's not true. Their honorarium is $50,000, and that is what they got.' So there is a judgment call about the level of disclosure that one needs to make or should make.

Ms GILLARD—I accept that. Just going back to the parliamentary privilege point, I can understand that distributing drafts and giving people an opportunity to comment—what you refer to as the clearance procedures—is good practice, but take the Intergraph example that you raised. I would be concerned that people who were represented and were, perhaps, belligerent would get a better opportunity in that clearance process than other individuals. It would seem to me that there has to be a point where the Auditor says, 'I think the report is right. I stand by it, and too bad. You might be upset, but too bad. That's my best view. I understand that you don't agree with it, but that's it.' If there are five or six exchanges of correspondence, I would be surprised that the legal uncertainty about your position plays no role in your decision making. It would seem to me that, just as a matter of ordinary human conduct, if you know you are on rock solid ground your conduct will tend to be a little different from what it is when you think you are on shaky ground.

Mr Cameron—Not on disclosure issues. Having been in the business for 35 years, I do not think you shake an auditor that easily. He generally will concede errors of fact or even unfairness—there is no question about that—but I do not ever recall a situation where someone's stubbornness made a difference as to whether the issue should be disclosed or not.

Senator CROWLEY—Do you have a view or a clear ruling about the state of those letters—the correspondence—between you and the individual?

Mr Cameron—Yes.

Senator CROWLEY—Do you regard them as private or covered by privilege? Or are they able to be attached to a report?

Mr Cameron—In the first instance they form audit working papers. Audit working papers are subject to protection in terms of non-disclosure or exemption from FOI requests. That is pretty important because the audit process relies on the free flow of information on a continuous basis. If we had people behaving as if certain things could be discovered, we would run the risk of less being made available to us than otherwise would be the case. Any correspondence associated with an audit—even contracted research—forms part of the totality of the audit working papers. At that stage they are simply part of the data that assists in determining what it is you are intending to form a view on and report. Some of it is transactional. There are all sorts of correspondence that goes on between the Auditor and different parties about a number of things. They might be protocols. They might be seeking advice. They might be getting an alternative view about something. They are all part of the general pool of information which builds up a substantive picture of what it is you can then draw the inference about and report on. Some of that find its way into reports to parliament. But it is not common practice for audit reports—

Senator CROWLEY—In what way would they find their way into parliament? For example, if you were getting clarification as to, 'Did we say two? Whoops, we really meant four,' I do not think people would have too much trouble about that kind of correspondence. I think my colleague used the word 'belligerent' and maybe that was just a hypothetical, but what about chest fronting letters that said, 'If you write this, we will get very cranky and upset'? Firstly, do you ever include a comment that says, 'In the exchange of information there was an element of confrontation'? Do you make any comment about what is in the letters? Secondly, what do you mean when you say that they might subsequently find their way into the report?

Mr Cameron—Our clearance processes in Victoria provide an opportunity for those directly affected by the audit—that is, the authority and, in a number of instances, the relevant minister—to make comments on the report and for their comments to be included in the report. That provides parliament with an opportunity to see how those directly affected by the audit feel about the comments and for parliament then to weigh up what they feel about it. I will give you a live example. In the House the week before last I tabled a report on a study into the way local priority policing has been implemented in this state. Included in that report is a comment by the acting commissioner—favourable, I should add—prefaced by comments like, 'We don't believe it was timely to do this audit.' We do not exorcise that; that is his view. Parliament can determine whether or not it is satisfied that we did the work when we did.

As a generalisation, if it is an event-specific audit—let us say abuse of parliamentary privilege or some particular thing—then sometimes it might be appropriate to include letters or correspondence in the report. I will give you a live example. Where there is public outcry about severance payments to a chief executive or a board chairman, it might be helpful to include as an appendix to that report a letter—for instance, the legal advice sought by the agency to justify the payment. If we did not think it added much to the sum body of knowledge that would help one understand why the organisation got to where it did, we probably would not disclose it. But if it allowed parliament to come to a view—which is what it should be able to do, based on interpretive starts by the Auditor-General—we might include that. That is generally easier to do for event specific audits. Across-the-board studies are different again. Going back to the history, Joe, have we had instances—

Mr Manders—Not of disclosure of the correspondence or referring to, say, the frustration of the process. We have taken the position of being as open as possible to the parliament in terms of the contractor's position. In all of our reports on emergency services and a lot of other major reports on outsourcing arrangements, we have allowed the private sector party to actually put in an official response, and we have published that in the document alongside the statutory responses from the government of the day to allow them to air their views. We have never really told the parliament, 'This was a real nuisance and they tried to frustrate the process.'

CHAIRMAN—Do you have authority to enter a contractor's premises to search for records?

Mr Cameron—No.

CHAIRMAN—Have you ever needed that authority?

Mr Cameron—I suppose you could say that in the case of the ambulance services inquiry. There were allegations that there were calls made that did not happen. The question that one asks oneself is whether our current powers would meet our needs. Our current powers are either to call for documents or to examine persons on oath. So we could easily have sought to call for documents from the contractor—this is data lying in a computer system—or we could have examined their staff on oath. The short answer is that our concern about access powers is focused more on the future way governments do business than on the past where there were papers that supported claims for expenditure, reimbursement or whatever. But as the way governments carry out their business gets increasingly sophisticated and involves partnerships or contractual arrangements with the private sector, information held with respect to what is essentially government activity is actually held by the private sector party. At times there even gets to be a debate about whose information it is. Some of those parties believe this is their information and they will just do the job.

My concern with this access issue is: what if the state's or the community's interests have not been protected in a contractual manner by the agency that carried out the contract? For example, let us say they have a five-year contract with somebody to facilitate commerce by electronic means and then they hear, for whatever reason, that there are some concerns about whether or not the claims are valid. They are then in a situation where they say, 'How do we know about this?' This state has moved to ensure that contracts with the private sector include a clause that allows for the department and the departmental auditor to have access to that record—whatever 'departmental auditor' means. That could mean the internal audit, actually. The clause does not

explicitly say the Auditor-General. So I guess our comment more looks to the future than to the past.

In that sense, I was interested to read a report tabled by the Auditor-General of New Zealand just prior to Christmas on this whole business of powers of inquiry. I can leave a copy with the committee. There were concerns about public money going to an NGO, a trust. Concern was expressed, essentially at the parliamentary level, about what had happened to the public money. The Auditor-General had to say, 'I cannot go to the trust. I can ask for papers in support of where that money went, but I cannot go to the trust.' Following that, in the course of the New Zealand public audit bill being considered, the Auditor-General was asked to comment on whether he should have the power to have access to private premises. His conclusion was that he did not think he should and that his powers to call for information or to have people appear before him on oath was sufficient. I understand that, particularly where it is a grant out to a trust—

CHAIRMAN—We don't.

Mr Cameron—No, it is not a problem. But we are not talking about a simple situation; we are talking about sophisticated service delivery in a Public Service of the future, where underlying data are actually held by other parties. They are making assertions every month in the form of an invoice. The agency has not protected the public interest by validating those claims from time to time. The emergency services case—sorry to keep harping on it—is a case in point. There were substantial payments made each month. There was a certain volume of dispatches occurring and certain penalties accruing to the contract of performances below the threshold. Where, seriously, are the incentives to report misdemeanours? It is not likely. People do not generally want to cause themselves to be scrutinised. In that case there was an agency that was tasked with examining whether or not the claims were valid, and we concluded they were not pursuing that as actively as they should.

My view is that there needs to be a reserve protection—underlining 'reserve'. The role of the Auditor-General should be to scrutinise the effectiveness of the administrative actions of the agency that is concerned—there is no question about that. But I can tell you from experience over time that, at times, that protection has not been built into the contractual arrangement. What happens then?

Senator CROWLEY—Mr Chairman, could I just have—

CHAIRMAN—No, because I want to say something first, and then we are going to quit because we have to get Pat in or we are going to run out of time. This committee disagrees with the Auditor-General from New Zealand, very strongly, because we have run into instances—and our Audit Office has—where we do not wield extensive powers to call for documents but we can get whatever we like. The problem is that we do not know what to ask for, and if you do not know what to ask for you might as well be flying in the dark. So, without the authority for the Auditor to enter premises and search documents, you really have not covered the field and you leave yourself open.

Mr Cameron—To say nothing of satisfying yourself in an audit sense about the integrity of the control environment in that organisation that gives rise to the generation of invoices, et cetera.

Senator CROWLEY—Very quickly, I refer to page 2 and your point that if we are looking for where the data is—you might want to look at premises, but you highlight the point that with computers or whatever—often that data is remote from where the services might be provided. Does your act cover that? Are you entitled to go to places remote—even OS?

Mr Cameron—No, we are not entitled to enter private premises at all, and there are important constitutional reasons why that might be the case. I respect those. But I will give you an instance where there were assertions that some works on a senior public servant's house had been undertaken by plumbers, carpenters, et cetera, and when you added them all up the house did not look that big. So one needed to satisfy oneself that there was some authenticity in the stated expenditure levels from the plumber, the carpenter, et cetera. In that instance, we had discussions with the plumber and the carpenter, and they cooperated. I have to say that generally you get quite good cooperation from most people, but it should not be on the basis of cooperative spirit. There ought to be, as the royal commissioner recently stated in the Intergraph case, legislative protection. Even for assertions, for instance, about fleet purchasing or that somebody on the staff is getting a free car, you cannot easily validate that without going to the supplier's records and saying, 'There are 13 vehicles but only 12 on the register. Where is the other one?' You need to go and talk to the supplier. You can, of course, call for them to explain on oath and bring their records, but that presupposes a cardex and, if they are big, they cannot bring their computer all that easily.

CHAIRMAN—Thank you very much. We appreciate your input. We will, in due course as always, send you a copy of our report, and you can see what we think about section 37 and section 12 when we decide what to say.

[11.08 a.m.]

BARRETT, Mr Pat, Auditor-General, Australian National Audit Office

COLEMAN, Mr Russell, Executive Director, Corporate Management Branch, Australian National Audit Office

McPHEE, Mr Ian, Deputy Auditor-General, Australian National Audit Office

CHAIRMAN—Welcome, and we thank you for your submission. Do you have a brief opening statement?

Mr Barrett—Yes. As we indicated in our submission, in reflecting on the operation of the Auditor-General Act over the last three years, we consider that the act is working quite effectively and that, with the exception of a small number of matters which we have outlined in the submission, no substantive amendments are required from our point of view at this time. The other submissions seem to us to generally support this view. The act is principles based and written in simple and easily understood language, and it has stood the test of time, even though it is quite short in the scheme of things. Even though we have found it prudent to obtain legal advice on quite a number of elements of the act, this advice has, by and large, confirmed the original intentions of the act.

In order of priority, we would see benefit in at least considering the following amendments to the act: amend section 19 to allow extracts of proposed reports to be provided to relevant parties; amend section 15 to allow the distribution of single agency reports to any minister with a special interest in the report; and amend section 37 to ensure it is consistent with the explanatory memorandum. Clarification of the extent to which the Auditor-General's mandate covers the actions of ministers would also seem to be desirable, and we can talk about that, particularly in relation to—as the committee would remember—the magnetic resonance imaging inquiry.

In terms of access, we have been advised at officer level that standard audit and access clauses have now been agreed to by the Minister for Finance and Administration and will very shortly be added to the CTC tool kit. It is also understood that the revised procurement guidelines will include reference to these clauses. We now propose to write to all agencies and draw their attention to the standard clauses—and I register our grateful thanks to the committee for the support that they have given us, on at least two occasions or more, to come to that conclusion. We are happy to respond to the questions of the committee.

CHAIRMAN—Thank you, Mr Barrett. The Victorian Auditor-General has said in his submission that, effectively, the recent change to section 12 of the Victorian Audit Act gives him more unfettered right to ignore confidentiality, public interest or anything else. That is, he is relatively unfettered compared with your position as described in section 37 of the Commonwealth Auditor-General Act. I know you said in your report that you think there is some conflict between section 37(4) on final judgments being given to the Auditor-General

versus the Attorney-General, but you think there is some conflict with the explanatory memorandum of the Auditor-General Bill 1996. It states:

... the Attorney-General has issued a certificate to the Auditor-General stating that disclosure would be contrary to the public interest, the Auditor-General must not include that information in a report ...

Do you think that you are constrained, and is it cumbersome? Is the Victorian situation, as described in section 12 of their act, preferable? Do you really think the Attorney-General can tell you not to report?

Mr Barrett—I have discussed this issue with the Victorian Auditor-General. I come back to basic principles, and the basic principle that I come up with is, in terms of government responsibility, the government has access to the widest possible range of information, from the Public Service and elsewhere, on what issues may impact on the question of secrecy and security—particularly the security aspect, which, in many instances, an Auditor-General, no matter what their background and experience, is not necessarily across. Therefore, when I look at the issue in practice, it has not been a problem for audit in the time that I have been Auditor-General.

We certainly have done a number of inquiries where there have been issues of cabinet confidentiality and security issues in the defence arena and the agencies that are responsible for security matters have been subject to audit. We have found that we have been able to get the major issues across to the parliament without having to run the gauntlet of disclosing unnecessarily confidential and/or secure information. In other words, we do not have to go into the details in order to get across the major message of the finding. I cannot recall—unless my two colleagues correct me otherwise—any incident where we have not been able to report positively and openly to the parliament on issues, including, might I add, the rather sensitive one of the security arrangements for the Olympic Games. We did have a lot of discussions about that but, at the end of the day, I think the general judgment of that report was that it was timely, the disclosure was appropriate, and, at the end of the day, the agencies concerned did not have any concerns about the disclosures that did take place in the report itself. So I think that is a test.

I come back to a point we make in the submission, and that is that we believe the explanatory memorandum to the Auditor-General Act 1997 is quite clear as to the Attorney's responsibilities and my role, whereas the two sections that you referred to tend to at least imply some degree of contradiction, because it tends to suggest that I do have an independent role. I think that could be clarified so that everyone knows where they stand. If there were a number of amendments made to the act, it is possibly one that could be desirable, but I am giving the committee assurance that there has not been, to date, a problem. I would envisage that, if the Attorney did have an issue, the Attorney would be quite happy to discuss it with me. I really cannot see a situation in which the parliament would be deprived of information that they would need in order to hold the executive properly accountable in these instances.

CHAIRMAN—Let me give you a hypothetical. You are no longer in the chair. You have retired and someone is taking your place. The current government is no longer there; there is a different government, and I am not describing which flavour or colour—it is just a different government and a different Auditor-General. Your replacement does not have, by the way, a public sector background and does not understand the conventions associated with cabinet

confidentiality as I have had those conventions explained to me by members of the public sector. The hypothetical is that there is a confrontation between the Auditor-General and the executive government. Under those circumstances, do you believe it is possible, under section 37, for the Attorney-General to quash a report or some portion of a report because of political issues?

Mr Barrett—I think the clauses of section 37 really make it quite clear as to the circumstances. You made the point about a political as opposed to a genuine government decision that is made. That is always a difficult problem, if something is being made from a political viewpoint, to distinguish that from a government decision. I would go to the reasonable person rule. So long as there is open and transparent discussion and explanations are provided, what would actually happen is that the Auditor-General of the day would make a comment, in the sections of the report that were objected to, that these sections were excluded on the basis of the Attorney-General's decision. That then would be subject to debate in the parliament as to why the Attorney-General did that. The Attorney-General would be—

CHAIRMAN—We might ask you that too.

Mr Barrett—That is correct. At the end of the day, it is the Attorney-General who has got to respond, not the Auditor-General. The Auditor-General has taken the comments that have been made by the Attorney and has drawn attention to them. Talking hypothetically—which is always dangerous, as you know—the Auditor-General of the day may decide to indicate the broad nature, so the parliament is able to understand the broad issues. Then, on the floor of the House, the Attorney-General would have to say to the parliament that the Attorney is not going to provide, for the reasons suggested, any explanation, and then be subject to the will of parliament—

CHAIRMAN—You are essentially saying that, as far as you are concerned, section 37 is okay except that we ought to clarify whether or not you have the right to reject the Attorney-General's advice.

Mr Barrett—I have sole discretion. The explanatory memorandum does not suggest that.

CHAIRMAN—But outside of that, you are not unhappy with section 37.

Mr Barrett—On the basis of six years experience, we have not come up against any case where I felt that I was not able to, in a full and frank fashion, present to the parliament the issues of the audit in a way that parliament could understand what the issues were and make sensible decisions as a result.

CHAIRMAN—Would I be out of line if I asked your colleagues if they 100 per cent agree with you?

Mr Barrett—Of course not.

Mr McPhee—Certainly, with the governments we have had in recent years and prior to that, I have no reason to take a different view from the Auditor-General. If you had a government which, for a particular reason, decided to be very political, I could conceive of a position where

they may use the cabinet authority and the cabinet confidentiality to try to keep something that was of public interest from the public. But in my experience, and it goes back quite a long time, I have not seen that occur in this country.

Mr Coleman—My comments reflect Mr McPhee's. I am aware of only one report that was, in fact, a restricted report under the previous Auditor-General. That involved some sensitive defence issues. I go back a fair way too, and my recollection is that matters have been able to be satisfactorily resolved by successive Auditors-General.

CHAIRMAN—Thank you. Senator Crowley.

Senator CROWLEY—I have about 10,000 questions, but I will stick to one. I wanted to know whether it would be possible ever for the Auditor-General to come to the JCPAA and raise such a concern prior to a report being finalised—along the hypothetical lines that the chairman has just proposed. Would you ever come to the JCPAA and say, 'We have got a problem here'?

Mr Barrett—I try not to enjoin the JCPAA in any of our audits, because of the JCPAA's independent role—which we value. I can give you only my personal view, and each Auditor-General would have to give you a personal view on this because there is nothing laid down in this respect. I would tend to go with the legal requirements and, in the discussion of that report with the JCPAA, I would bring out any concerns that I had about that report and future reports if this were to continue. In other words, within the discretion that I have to talk about these issues, I would indicate the broad nature of the problem and say that I think that it could or did unduly inhibit a full and frank report.

I come back to my earlier point, and that is that I am concerned about ensuring that the parliament is able to make its assessment on the best possible information from the audit. It is not necessary, as you well know, to know the detail of particular circumstances to know what the implications are of the particular point. If I felt that in the detail in this case, and its exclusion, I was not able to indicate the nature of the problem and the close relationship, then I would say, 'We may have a problem here, not just for this audit but for any future audit in this area,' and I might be seeking the JCPAA's views as to how to deal with that. But in the first instance I would try to deal with that issue directly, with the Attorney and with the government as necessary, and maybe the Prime Minister. That would be my personal viewpoint. I would try to get that issue settled and explain to them my responsibilities as I saw them and the problems that that was going to create, and I would probably also say, if there were an issue of the kind that I have just explained, that I would be taking the matter up with the JCPAA and indicate that I would see some problems in that. That is the way I would act in that situation.

Senator CROWLEY—Section 37(3) does not, from what you have just said, stop you—and I am not talking about the substance; I am talking about a the fact that there was a difficulty.

Mr Barrett—I do not believe so—

Mr Coleman—I guess we would read it as being that information specifically, so, as you described, you could talk about the general issue, I would have thought.

Mr COX—Section 37(2)(e) says:

... it would unfairly prejudice the commercial interests of any body or person;

That could hypothetically be used by a corrupt government to deny disclosure of a corrupt transaction, couldn't it?

Mr Barrett—I think I would be on pretty safe grounds if that were the case. Again, you do not lightly create a situation where you put the government of the day in the witness box, so to speak, but in circumstances where it was blatant—and the kind that you have just described—and was not actually preserving the commercial interest, I would be inclined to say in the report that, in my view, this was not advisable and parliament should have the information. That would create a direct tension with the government of the day. I am taking you literally when you talk about a corrupt government, and you are talking about an extremely serious situation in which the Auditor-General, as an officer of the parliament and with the responsibilities of the parliament, would have to seriously consider his or her position. I would suggest that, if there were no satisfactory resolution about going to parliament, you would have to consider your position—and I mean resign.

Mr COX—Moving back from that extreme position, where there was an arguable case, and you felt that the Attorney-General was being overly zealous in issuing a certificate, do you think that there would be benefit in having a provision under section 37 for you to go through a similar process of administrative or judicial appeal, as applies with the FOI, to determine whether the certificate was reasonable or not?

Mr Barrett—It seems to me to be unduly bureaucratic, if you do not mind my saying. We are talking theoretically here, and we are talking about practical experience—in the case of Mr Coleman it is 30 years—to come up with cases where there has been a problem. I am quite certain that, with this legislation and the relationship of the Audit Office to the JCPAA in particular, it would be a very brave Attorney-General and government if an Auditor-General put a fairly persuasive case in the public interest and we could not get satisfactory resolution. Out of all the governments that I have dealt with, of all political persuasions, I cannot think of any Attorney-General—and I have dealt with quite a number over the years—that I could not have a fairly convincing dialogue with. Also, and again I stress that this is my personal view, if an Auditor-General really felt that he or she was on very strong ground, they would have no alternative but to go to the Prime Minister.

Ms GILLARD—Do we know whether, under this draft, the legislation is capable of litigation—if an Attorney-General issued a certificate for what, in the hypothetical example, is an improper purpose rather than a proper purpose? Is it capable of judicial review now?

Mr Barrett—No, because it would not be known. Someone would have to take an action against the Attorney-General. What the Auditor-General would do would be to simply say in the report that this element had been excised on the basis of a decision made by the Attorney-General. Then the Attorney-General would be subject to questioning in the House. I am not a legal expert, but it seems to me that the answer would be no.

Ms GILLARD—It is an interesting point, because the issuing of certificates by ministers for various things is able to be judicially reviewed. The Treasurer in relation to the Woodside matter, for example, was obviously conscious that that could be litigated—that the determination he had come to could be litigated if there was a suggestion he had made that determination for an improper purpose. It would just be interesting to know whether or not it is capable of being litigated on its current—

Mr Barrett—I would not want to venture a view on that, but Russell—

Mr Coleman—My very imperfect view is that, if it is subject to review, it would need to be spelled out in the legislation.

CHAIRMAN—Before there could be a review.

Mr Coleman—Yes, but I am not a lawyer either.

Ms GILLARD—I am not sure that is right. A statutory office holder—

Mr Barrett—We could get some advice on that.

CHAIRMAN—Would you advise us please?

Ms GILLARD—I have another question of fact about your current powers. In relation to the taking of evidence on oath, you can compel people to come before you but you cannot compel them to give answers—is that right? For example, someone might say that they decline to answer on the advice of their solicitor, because they are worried about future criminal or civil proceedings in relation to their conduct.

Mr Barrett—There would have to be a subject to interpretation—

Mr Coleman—Section 35 suggests that a person is not excused from producing a document, et cetera, on the grounds that it may incriminate the person.

Ms GILLARD—All right.

Mr Coleman—That would suggest that they do not have an excuse on the grounds of self-incrimination. But the protection is that that information is therefore not admissible in any future court hearings.

Ms GILLARD—Have you ever had anybody do that?

Mr Barrett—No. Mostly because I have never had any reason to summons people and take evidence under oath. It is a pre-emptive power, let's face it; who wants to do that in the normal course of events? It is certainly an indication of a significant breakdown and misunderstanding of the role of the Auditor-General and the requirements of the parliament and the legislation. You only have to explain that to people, and they will get their legal advice, as you indicated, but the legal advice is, I suspect, generally that 'these are your obligations and it would be in

your interests to cooperate.' We have never had that happen to that point, but—as I said to the committee on two previous occasions—the greater involvement of the private sector in government activities has created some frictional circumstances in dealings with private sector people, with the provision of information, use of information, and the question of criticisms and possible defamation.

Mr COX—Would it be, in your view, an advantage to your operations if the parliament clarified parliamentary privilege so that it applied to Audit working documents and to draft reports?

Mr Barrett—There would be an advantage to the office. The legal opinion seems to suggest that there might be some difficulties in actually getting that kind of clarification. The legal opinion that we have—and I might ask Mr Coleman to clarify this for you, because he dealt directly with the legal advisers—suggests that there is some protection of parliamentary privilege that goes back through the draft reports to working papers. That is about as far as we can go with our legal advisers, but there is a question of whether we will go one step further to actually try to get advice that makes it somewhat clearer.

We act in a way that suggests that we do not necessarily have full privilege. In other words, we are quite conservative in the way that we treat documentation in our dealings with people into the stage before a report is actually tabled. I do not know of one instance where it has created an administrative or other problem for us; it is just that we need to be somewhat more careful, and we probably get a bit more legal advice than we might otherwise have got. I might ask Mr Coleman if he wants to make any further comment in that respect.

Mr Coleman—Recently we have been having further discussions with the Australian Government Solicitor. We asked whether the Solicitor-General could turn his mind to some of these areas so that we may be able to move the bar a little bit or make the issue a bit clearer than what the Australian Government Solicitor is prepared to chance in this area. We are not experts by any means about what legislative provisions and requirements would be required in this area at all, so it is very difficult for us to categorically say, 'We think it would be a good idea to have this spelled out in the legislation.' It is a bit unclear to us what pitfalls may inadvertently or otherwise flow from that. There may be some, and we have not gone down that path very far.

Mr COX—It is our concern about your advice to us that you might not have full privilege that really precipitated this inquiry. I know that Mr Somlyay, who is chair of a privileges committee, is keen to take it up. So if you were getting formal advice on that aspect and could pass it to us, that would benefit the inquiry enormously.

Mr Barrett—We are quite happy to provide you with the legal advice we have so far.

Mr Coleman—We have already provided that.

Mr Barrett—They can go to the Solicitor-General.

Mr McPhee—As Mr Coleman said, we have asked the Solicitor-General if he would turn his mind to this issue. We understand he is agreeable. Assuming he does find the time to do that, we will provide the advice to the committee.

CHAIRMAN—Should we ask him too?

Mr Barrett—That would be very persuasive, I would have thought—more persuasive than perhaps we would be.

Mr Coleman—There certainly could be a timing issue in terms of priority and so forth.

CHAIRMAN—We would like to table a report before the parliament goes down.

Mr Barrett—That is why I am saying that I think it would be much more persuasive—

CHAIRMAN—I flag with the secretariat that it is the will of the committee that I write to the Solicitor-General and get the advice. I do not detect any objection to that course of action.

Senator CROWLEY—On that point, the Victorian auditors gave evidence a minute ago on the way they treat the documents, the letters—the correspondence, for example—and the things that all become working papers to an inquiry, which I do not think is dissimilar from what you were just talking about. I am not sure I can do justice to what they said, but could I ask you to look at the *Hansard* to see what they said and provide us with any comment? It seems to me that their comments were a little less cautious than your own comments on these matters. Colleagues, I think that is a fair comment. They certainly regarded all documents—for example, even belligerent letters between people being audited and the audit office—as working papers and therefore covered by privilege. But that did not mean that they could not publish some of that correspondence sometimes.

CHAIRMAN—My understanding is that he did not say that it was covered by parliamentary privilege but that, under the code of practice for auditors or accountants, working papers of audits are privileged documents and you are not to disclose them. You could disclose them, but it is against the code of practice to do so. We are talking about a higher level of security here—that is, real authority. The working papers of this committee or the working papers of the audit office are covered by privilege.

Mr Barrett—That is correct.

CHAIRMAN—Which is a higher order of security, I would have thought. Is that right?

Senator CROWLEY—Notwithstanding that—and I am perfectly sure that my grasp of it is not necessarily accurate—I would welcome your comments on that piece. If you had a certificate from the Auditor-General or a restriction from the Auditor-General—however that came—about an inquiry, would you regard that certificate as a part of the working papers?

Mr Barrett—It would be part of the working papers. If you are asking me whether or not we would make mention of it, of course we would. The attorney may include reasons. Then we would have to be very concerned about that in light of the comments. If it was simply, 'I declare under .... of the act that the sensitive material is not to be divulged,' there is nothing wrong with that. That is just a legislative act. It is just a record of it.

CHAIRMAN—Are you satisfied that section 19 provides sufficient natural justice to agencies and relevant parties who are referred to in a performance audit?

Mr Barrett—In essence, section 19 is not about natural justice per se, but the provisions do, in fact, allow opportunities for people to, as you well know, correct any misjudgments or wrong information and the like. Therefore, in that sense, it does offer the opportunity for natural justice to apply. It is not meant to, but it does provide the opportunity for it to apply. Mr Coleman has just reminded me of the terms of the extracts. If there are to be amendments to the act, one of the amendments we would like to see is that section 19 allow us to provide, as necessary, extracts of the report. I will make one particular strong point as to why extracts are important. The main point of section 19 is to ensure that the factual basis of the audit and our recommendations are satisfactory—in other words, they are sustainable and there are no reasons that a person of good faith could not come to valid conclusions as a result. If the whole of the report has to go to every person, no matter if only one sentence is relevant—not even the person mentioned because, as you know, we rarely mention people by name—and can be pointed to that particular person, the problem would be that, if we were wrong in information and that went to a number of people, it may give rise to defamation action and give access to the Commonwealth Treasury unnecessarily, which would not be advisable.

There is an argument in one of your submissions that, in order to put the report in context, the individuals concerned with the corporations, agencies, et cetera, should have the right to see the full report. The point is—and the committee would know this from its own experience—that, except where an agency is very heavily involved in particular aspects, most of the other aspects apply in particular areas and those areas are reasonably self-contained. Therefore, they do not have any necessity—nor should they have any concern—that there are any other aspects in the report.

CHAIRMAN—Have you had any leaks?

Mr Barrett—Not that we are aware of. As you know, Mr Chairman, we do bring to the attention of agencies their responsibilities under section 19. Unfortunately, we are aware, second hand, that perhaps copies of reports have been given to other agencies without clearing with us first—a practice we do not condone at all. Fortunately, while this is an area of risk, we try to manage that risk in a very positive manner. There has been only one breach—which I referred to the committee on a previous occasion—where a comment was made prematurely in relation to an audit report prior to tabling in parliament. We have said that if there is another case of this, then we will have to withdraw the privilege of making reports available two days prior to tabling in parliament. That is how serious it is.

CHAIRMAN—The Department of Foreign Affairs and Trade suggested in their report that the time line for agencies to comment on draft reports be extended from 28 days to 35 days.

Mr Barrett—We do not support that. The number of days in itself is not all that important—whether you are talking about 28, 30 or 35. The parliament in its wisdom decided on 28 days. As you have already heard, Victoria, for instance, has a much shorter period than we provide, as does Queensland. The Queensland Auditor-General, who is giving you a submission, also has less time than us. My point about this is a very simple one: whenever an agency, agencies or some individuals make a good case for the extension of the 28 days, inevitably we grant it. The

only problem that I have seen in that is the possible criticism by the parliament that, for example, 'We have said 28 days and that is what we meant.' With parliament's tolerance, if it makes the difference between getting an audit report that we are satisfied with and one that we are not, I think parliament would prefer to have us put in a report that we are satisfied with. We see the 28 days as important and we specify that. We try to keep to it and we put that heavily upon the agencies concerned.

There are circumstances in which we have asked, because of the time taken or the urgency of the audit, for agencies to try to respond earlier than the 28 days. In some cases they have cooperated in so doing. But where agencies or individuals have insisted on the full 28 days, we have had no alternative but to do that. I would be very loath to go beyond the 28 days, because it does add an unnecessary cost to the audit. It also creates more problems in terms of finalising the audit with the specific agencies involved. Time and experience have shown that 28 days is more than satisfactory.

The committee is well aware of our process, but I think it deserves to be enunciated here today. We have issues papers. Those issues papers and variations to those papers as a result of departmental input are discussed with the agencies sometimes months before a draft report. We then have the draft report process. It seems to me that another 28 days is not exactly a great burden for agencies to respond when they have had so many opportunities to be intimately involved in the audit process and in many cases have known for months where the audit really is coming out.

Mr COX—The other issue that the Department of Foreign Affairs and Trade raised was the lack of any protection in the act for personal information. I think they were concerned about issues that might arise from your performance audit of consular activities. Do you think there is a need for any amendment to protect personal information?

Mr Barrett—Frankly, we would have no problem in adding privacy. As you would know, we are subject to the Privacy Act, the same as all Commonwealth bodies. This is one area in which we are very circumspect.

Mr COX—The other issue we are going to hear about this afternoon from the Department of Family and Community Services is the situation where one agency contracts with another agency to provide the services and then does not necessarily receive findings that are adverse to the function of the activity that has been done on its behalf and are therefore not in a position to act in a proper line of accountability. Do you have any comment on that?

Mr Barrett—Yes, I do have a number of comments on that particular issue. The committee is aware that, by far, the majority of our audits are multiagency reports. There would be very few times that we would do audits, particularly performance audits, when we do not do a purchaser and provider—the left and right hand so to speak. In that case they would have a direct interest and they would get access to that information. Our professional responsibilities, which are set down quite clearly, are to the chief executives of the particular agencies concerned. In this particular case we have suggested, and it is actually working quite well, that there be a memorandum of understanding between the two in terms of this sort of information. As we are aware, the chairman of the board of Centrelink makes all this information available as a matter of course to the two secretaries on that board. So they do have that information.

The question really is—and I have no doubt Dr Rosalky will make the point himself—about the issues papers that we do. We say that our responsibility is to the chief executive. Obviously, if it is a multiagency report, the issues papers will be discussed with the agencies concerned. If it is a single agency reference they will not—they will be discussed only with the agency concerned. Then, of course, the relationship—the purchaser/provider ones—should then be subject to a memorandum of understanding between the two agencies. That is where you get the confidence and the interchange of information. It should not be up to the auditor to go along and provide information on the agency that they are auditing to someone who has got a financial interest. You can take an analogy from that into the private sector, and you could see how ridiculous that would look. At the moment we have a working relationship and it is working quite well. The information is available. I would be very loath to cut across our relationship with the chief executive officers of the individual agencies we are responsible for auditing.

CHAIRMAN—In your opening statement you made a brief reference to how you have agreed with the DOFA to implement access to contractor records. I was daydreaming; would you mind repeating it?

Mr Barrett—We have agreed, and the minister has agreed, and my understanding is that it will be now up on the CTC tool kit.

CHAIRMAN—The what?

Mr Barrett—The competitive tendering contracting tool kit.

CHAIRMAN—Is it a requirement that agencies put that clause in their contracts?

Mr Coleman—I do not know that it will be as strong as being a requirement, but those multiple or standard clauses will be up on the tool kit. We are still waiting for the final procurement guidelines which will make reference to those clauses. I do not think it is a question of a requirement as such.

CHAIRMAN—My understanding of the communication from the minister to this committee was that it was going to be a requirement. Do you have a copy of that letter?

Mr Barrett—Yes, we do. Witnesses from the Department of Finance and Administration will be appearing. I am sure they will be able to provide clarification.

CHAIRMAN—Could you give me your recollection of what that letter to me from the minister said?

Mr Barrett—If we have a copy that would be even better. My understanding is that the minister said that he accepted the committee's recommendation.

CHAIRMAN—We asked him to make a change to the act.

Mr Barrett—The government's response was:

Once the *Guidelines* have been revised the Minister for Finance and Administration will write to all Ministers to draw attention to the changes and also to recommend that their portfolio agencies liaise with the ANAO on the most sensible approach to access, depending on the contract.

Mr COX—Once those administrative arrangements are in place, don't you think it would be advantageous if it was also contained in the act?

CHAIRMAN—That is what we recommended.

Mr Barrett—Up to this point the government has not agreed. I would think that, if the minister has now put the standard clauses as part of the purchasing requirements, you can be assured that we will come back and tell you from time to time where we have not seen that.

Mr COX—We have been thwarted.

Mr Barrett—I hope this does not sound second rate, but it is about the best we could have expected to get.

Ms GILLARD—You make a reference in your submission to the nature of your mandate in relation to ministers and their staff perhaps warranting some consideration. Can you explain to us what you think needs to be done there, if anything?

Mr Barrett—It is really clarification. As we said in the submission, this has not presented a problem because the ministers involved have actually subjected themselves, but there is no clear requirement to do so and it is very unwieldy.

Mr Coleman—The explanatory memorandum makes some reference to the mandate encompassing matters of administration that are undertaken by ministers and not their constitutional powers. I understand there is a potential issue about the force of that explanatory memorandum versus what is in the act itself.

Ms GILLARD—Which section of the act is that referring to?

Mr Barrett—The explanatory memorandum talks about some effective limits of performance audit. So it would be the performance audit sections of the act. My recollection is that at the time it was felt that it might have been more appropriate to deal with it in the explanatory memorandum. I think it would possibly be cleaner if it was dealt with in the act itself.

Mr McPhee—Section 15 says that the Auditor-General may at any time conduct a performance audit of an agency. The question becomes: where a minister is taking decisions in the context of a predefined government program, is the Auditor-General entitled to review the actions of the minister in that case? We clearly understand that we do not have a role in commenting on government policy but, where the government has decided, either through legislation or administratively, to set up a program and intends it to operate in a particular way, should it be made clearer that the Auditor-General's mandate does take into account the basis on which ministers act to take decisions? As Mr Coleman said, this act can be read quite narrowly and the explanatory memorandum is not exactly all that helpful in any event. We have been

fortunate to date that ministers have readily agreed to cooperate. All we are saying is that we have got by to date with that, and that is a good thing, but if ever there were a situation where ministers declined to be of assistance, that would become an issue for us and we would just have to report in the report that we were not able to progress this any further. The question was: does the parliament wish to clarify what is the expectation in terms of the Auditor-General's mandate and the relationship with ministers?

Ms GILLARD—Do any of the state audit acts deal with that question? For example, with the Intergraph matter, there were issues about conduct in the minister's office. I must admit I do not recall whether or not the then minister cooperated—presumably she did. Do you know whether that has been tested at any of the state levels or whether they have broader powers?

Mr McPhee—No, I am not aware of the situation. If you like, we could review the Victorian and New South Wales legislation to see whether that is of any assistance to the committee.

Mr Coleman—I think they deal with the issue in various ways, but we could have a specific look at that.

Ms GILLARD—I would be persuaded of the argument that it would be a good thing if it was clarified, but I suspect that it would be a real drafting trick to draw the line. So if anybody has done that, that would be of assistance.

Mr Coleman—We must agree with that. I think one of the reasons it was maybe not dealt with in the original legislation was the potential drafting issues.

Mr COX—We have had a couple of discussions before about the extent to which you feel able to comment in your reports on issues relating to value for money. We had a discussion with the CPA this morning in which I divided those issues into two things: one, where a government mounts a program that somebody of reasonable mind might think was a waste of money—and that is a separate issue—; and two, where the government administers a program or provides a service to itself in a manner that is very inefficient in terms of the use of funds. The CPA told us this morning that, in terms of private sector practice, where money was being very inefficiently used, an auditor could either qualify accounts or might feel they had an obligation to report to shareholders that funds were being very inefficiently used. Do you think there is a potential for some clarification of your responsibilities to provide for you to report analogously to the parliament?

Mr Barrett—I would have thought that all the powers and all the arrangements under the FMA Act and the CAC Act sort of reinforce. I would have thought it was easier for me than it is for the private sector, particularly in the performance audit area. But, even in the financial statement audit area, all our management letters would bring attention to anything that we saw that was something that management ought to take its attention to. As you know, we have three classifications of matters: A, B and C. Matters classified A are most urgent matter and need to be done quickly. If a matter is classified B it needs to be done in at least the next 12 months. A matter rated C is something that is good practice that management ought to consider but is not essential to an audit opinion. It is probably in the last category that a lot of these instances that you are talking about arise. If it was material to the financial statements, then it could either be an A or a B matter. This would be reported as a matter of course.

Mr COX—The best example of the sort of thing that I am thinking of is the sale of Commonwealth property—sale and lease back. We had some evidence from the head of the Defence Estate Organisation only a couple of weeks ago saying that Defence felt that some of the transactions that had been insisted upon by the government were not in Defence's interests. They had been compensated for the additional cost of them by presumably some supplementation of their budget. In my mind, that leaves open the likelihood that those transactions were not actually in the best interests of the Commonwealth.

Mr Barrett—In those cases, what you can be assured of is that, if there is a performance audit, we would refer in the audit report to the policy decisions they are making without comment. We would not comment on the policy decision; we would simply indicate that there was a policy decision that was taken which had these implications. You could draw your conclusions about that and no doubt you would.

Mr McPhee—We are entitled to look at the advice provided to government and the quality of that advice, but not comment on the particular government decisions.

Mr Barrett—We could talk about the implications and the performance of it. It would be fairly evident, I would have thought. We would not walk away from that—you can be sure about that. We would just simply say what the outcome is. We are not going to be saying that the government's policy is wrong. The government may have other reasons for doing it. We are simply saying that these are the results of the policy and parliament can then make up its mind about it.

CHAIRMAN—I would have thought they would have had full authority to do that now.

Mr COX—I did, with some of your staff, go over the issues that were going to be covered in a review of a performance audit of property management, and that was one of the issues that was not covered.

Mr Barrett—Are you talking about Defence or property management?

Mr COX—I think it was property management generally.

Mr Barrett—We would not be discussing the policy decision. But, in terms of whether the results that were achieved under property management were effective or not, we would do that as a matter of course.

CHAIRMAN—We might do a report on why Mr Barrett is saddled with such high occupancy expense at Centenary House.

Mr COX—There has already been a royal commission about that. It is as a result of a decision by his predecessor. But there is an ongoing issue, where there have been sales of $10 billion of non-financial assets.

CHAIRMAN—You are off on something else again now. Thank you very much gentlemen.

[12.14 p.m.]

BACK, Mr Gavin, Branch Manager, Department of Finance and Administration

HARDY, Mrs Robyn, Department of Finance and Administration

HUTSON, Mr Jonathan, Group Manager, Financial Framework Group, Department of Finance and Administration

CHAIRMAN—I welcome representatives of the Department of Finance and Administration. I do not have a copy of the letter with me that I received from John Fahey saying that the purchasing guidelines were going to be amended and the Auditor would discuss with individual ministers how that was to be implemented. Where, exactly, do you understand we are now?

Mr Hutson—I understand that we now have, approved and agreed with the Auditor-General, a set of standard access clauses. The Commonwealth procurement guidelines already provide that agencies need to consider whether or not they should include—

CHAIRMAN—I understand that. We know all that.

Mr Hutson—I think you will find on our web site a Commonwealth procurement tool kit which includes detail of those standard access clauses. That should be up within the next week or so.

CHAIRMAN—Are the agencies required to take account of those guidelines or not?

Mr Hutson—Yes, they are. They are required to take account of those guidelines.

CHAIRMAN—So every Commonwealth contract, after that is up, will include the standard clauses requiring Attorney-General access?

Mr Hutson—They are not mandatory. They are required to take them into account, but they are not actually mandatory.

CHAIRMAN—We will need to consider asking to be advised on every occasion on which those guidelines are not used. We will consider that at the next meeting of the committee. That would give us a bit more control. Were any of you involved in the drafting of the current Audit Act?

Mr Hutson—No.

Mr COX—It was an audit job, wasn't it?

Mr Hutson—Yes. It was a Maurie Kennedy job. He has retired.

CHAIRMAN—So you do not know why section 37 wound up the way section 37 did?

Mr Hutson—No, we do not know why it ended up the way it did. If you want the anecdotal history of why the act is written exactly the way it is, the answer is: no, we cannot help you with that.

CHAIRMAN—Do you have any view about section 37 and the restrictions it places or otherwise on the Auditor-General in performances of his or her functions?

Mr Hutson—Is this about sensitive public information not to be included in reports? Is this concerning the Attorney-General's certificate?

CHAIRMAN—Yes.

Mr Hutson—I am familiar with that. I do not think we have too much that we really want to add about that, to be honest. I do not think there is much that we can usefully add to the committee's discussions about section 37, about the certificate. The Auditor-General has expressed a particular view and I think that is probably where we would like to leave it—unless you had some specific issues.

CHAIRMAN—There seems to be some contention here about whether the Auditor can ignore advice from the Attorney-General or not. We have to deal with that separately; there is no sense in our asking you. If the explanatory memorandum is right and the Attorney-General's advice must be followed by the Auditor-General, would that not support the argument that executive government, in a confrontation situation with an Auditor-General, might be able to exercise power which would prevent parliament from receiving information to which parliament otherwise might be entitled?

Mr Hutson—I think the answer that you probably would have got from the Auditor-General—I was not present when his evidence was being given—would have been something along the lines that the Auditor-General still has the right to advise parliament that in fact parts of his report or parts of the information have actually been deleted for reasons that the Attorney-General has. The Attorney-General is then accountable to parliament directly for that decision making process.

CHAIRMAN—You are very intuitive, aren't you?

Mr Hutson—I think that is probably the way in which the act was intended. It seems to me that is probably appropriate in a number of situations. As you suggested, you may have a confrontational situation with an Auditor-General but also you may have a situation where an Auditor-General might feel obliged to advise on something, for example relating to national security. The Attorney-General would then issue a certificate saying that he should not advise about that issue but that in fact something may have a security implication that the Auditor-General may not even be aware of. It may not be in a confrontational situation.

Senator CROWLEY—What is the process by which the Attorney-General gets to know? Does the Auditor ring up the Attorney-General and say, 'I've been asked to do an inquiry here?'

Does the department contact the Attorney-General? What is the process by which the Attorney-General comes into the loop?

Mr Hutson—I do not think there is a formal process, because it happens so rarely. It has not happened under this act at all, as far as I am aware.

Senator CROWLEY—Nor is it anticipated it would occur.

Mr Hutson—If it ever came up, I would think that at the section 19 stage when a copy of the draft report is made available to the department, if there was something in there that the department and/or the minister felt was absolutely outside the bounds then it would be open for the department to seek an Attorney-General's certificate. That is probably the point at which it would come up.

Mr COX—If, say, it was a security issue you would expect the Secretary to the Department of Defence to contact the Secretary to the Attorney-General's Department.

Mr Hutson—Exactly.

Ms GILLARD—That begs the question: if it is a high-level matter of national security and there is a draft report running around the Commonwealth public sector about it, is the protection satisfactory anyway? I think that is a matter for work.

CHAIRMAN—On section 19, the Auditor suggests that it would perhaps achieve natural justice better if they could issue for comment sections of reports to minor players rather than the entire report, and indeed preserve confidentiality so we do not wind up with leaks and all that sort of stuff, which none of us want. Are you unhappy with his proposals?

Mr Hutson—No. I think you have to leave it up to the Auditor-General's discretion regarding whether or not the extract is sufficiently broad to enable someone to provide a comment in context. I think that the issue primarily relates to parties who may be affected who are outside the Commonwealth rather than Commonwealth departments. It would be more common for us to see the whole report under section 19 and to be governed by the provisions of the act. I suppose we also do not have the issue that the Auditor-General is concerned about—that is, that he may be exposed or the Commonwealth may be exposed to defamation if they actually publish a section 19 report widely because they have to consult with a lot of people. I do not think we have a problem with the concept, at least, of providing an extract of the report.

Mr COX—Do you have a view as to whether it would be advantageous for the parliament, if it were possible, to extent privilege to cover audit working papers and draft reports to avoid the risk of defamation proceedings?

Mr Back—I do not think we would have any objections to that sort of extension if there were legitimate concerns or if experience was that it was causing difficulties. Otherwise we would not have a view.

Mr Hutson—I do not think it actually in practice is a particular issue. The Auditor-General conducts his performance audits in a pretty careful way.

Mr COX—The evidence that we have had today is that he conducts them in a very careful way because he is not sure of his ground in that regard. Other Auditor-Generals that we have spoken to today assert and bluff that they are protected by privilege, but they carry the same level of uncertainty.

Mr Hutson—Sure. A series of parliaments have decided that is where it should lie and they have really only extended to the final report as published. To some extent there is actually an advantage to the way it is currently written, apart from anything else, in that it certainly does provide for those audit reports to be dealt with very carefully, and the Auditor-General does do that. By creating the risk, it almost imposes upon the Auditor-General a duty of care.

Mr COX—You would hope that the Auditor-General would exercise their duty of care, anyway.

Mr Hutson—You would certainly hope that anyway. I suppose I am just putting a potential alternative argument as to why those working papers should not be extended parliamentary privilege. Parliamentary privilege is a pretty tough test. There are not too many—

CHAIRMAN—That are tougher.

Mr Hutson—That is right. There are not too many areas of activity that get the sort of benefits that parliamentary privilege has obtained—and obtained after a lot of soul searching over a couple of centuries, really.

CHAIRMAN—The CPA this morning, while not objecting to our inquiry, gave us the submission that it is probably a bit early. Considering the way that the Audit Act has worked, and indeed our act and the changes to our act along with the Audit Act, do you have any significant problems with its operation so far?

Mr Hutson—No. The main reason we did not make a submission is that we felt the Auditor-General Act was in general running pretty well. It seemed to be providing for a pretty high quality of assurance by parliament about the financial statements that the Commonwealth puts out, and I think it provides performance audits that the parliament has found useful.

CHAIRMAN—You will recall that we reviewed the CAC Act and the FMA Act early, too. Those reviews have proved quite useful, I would have thought.

Mr Hutson—I am not suggesting that the review is not useful. I am just saying that I think the act as it currently stands is probably working pretty well. I think that is reflected in many of the submissions you have received which talk about essentially technical issues of really a fairly minor nature. There are not really any fundamental problems with the way the act is.

Senator CROWLEY—We have had an interest raised in terms of purchaser-provider relationship, particularly, for example, from FaCS, which has indicated that there is no formal framework to manage the sharing of ANAO audit information between the purchaser and provider agencies. I would like to ask you two questions. Firstly, would you support an amendment to the act to ensure that the purchaser agency received a copy of the proposed audit

reports and other information, for example? Secondly, how does DOFA satisfy itself in this area?

Mr Hutson—Would we support an amendment? It is probably not an appropriate role for us to support an amendment or otherwise. Sooner or later you will produce a report and there will have to be a government response to that, so it is probably not appropriate for us to support amendments or proposed amendments to legislation. Perhaps you could expand a little bit on your question concerning the purchaser-provider and what the issue is that you are looking to address?

Senator CROWLEY—The department, for instance FACS, is a purchaser of services from Centrelink. How do the Auditor, the government or whoever satisfy themselves that what FACS is buying it is getting in the most efficient and the most socially responsible way? One way it does this is that the Auditor goes out and does a report and we have a look. The question that has been proposed is that FACS does not necessarily get involved in what the Auditor is doing when it audits Centrelink, for example. I was just interested in whether you have an interest in this area. You do, don't you?

Mr Hutson—We certainly do.

Senator CROWLEY—How do you satisfy yourself that what is being purchased is being provided? Do you just depend on the Auditor?

Mr Hutson—Whether or not the Commonwealth resources are being properly used in that particular example you talk about is primarily the responsibility of the chief executive of the agency concerned. That is not in the Auditor-General Act. That is in the FMA Act, section 44, which provides very clearly that the accountability for the proper use of Commonwealth resources, which is described as efficient, effective and ethical use of those resources, is the accountability of the chief executive.

To the question about whether we have an interest in that, the answer is: yes, the Department of Finance and Administration does have an interest in that. We probably go about in a couple of ways. One of the things is that we also have this process in the budget process now of pricing reviews. Essentially, we go through a process in which we work out whether the price that the government is paying for the outputs that are being produced by the agencies is correct. Is it the correct price? Is it too high? Is it too low? Those pricing reviews are done in conjunction with departments and they are considered by the government.

CHAIRMAN—Are you happy with the way the independent auditor scrutinises the Audit Office?

Mr Hutson—I do not know that that is something that we really have anything to comment on. He does not report to us. We are not the agency responsible for the Auditor-General's office. We have not looked at any of his reports as to whether or not they are up to scratch or not, so there is not much that we can add about that.

Mr COX—We had a discussion earlier with an auditor about what he is empowered to look at and comment upon. One of the things that is of principal interest to me is value for money.

He feels constrained about not commenting on government decisions. I would divide 'value for money' into two broad areas. One is decision by governments to have programs that any reasonable person would think was a total waste of money, which it may not be the province of the Auditor to comment upon. The other is where governments make decisions about how money is to be spent to provide services to the Commonwealth or to people who are receiving services from the Commonwealth, such as the provision of office buildings for government departments and things like that. We spoke to the CPA this morning. They said in a private situation where a company was spending money particularly inefficiently an auditor would have an obligation to either qualify the accounts or to bring the matter directly to the attention of shareholders. Do you think there might be a case for amending the Audit Act to allow the Auditor-General to make findings that the way particular programs were being administered were not value for money?

Mr Hutson—The first point is that if you go into the realm of performance audits that the Auditor-General undertakes he very clearly identifies areas for improvement in Commonwealth administration and in the use of Commonwealth resources. In fact it is almost the purpose of the performance audit to do that. That is probably the first point. The answer is that there is an avenue open for the Auditor-General to make decisions about what performance audits he will undertake. He makes those independently. I think he also makes them in conjunction with discussion with this committee and a variety of other sources as well. He can certainly inquire into those things. There is actually an avenue which is written into the statute to enable him to provide that sort of advice to the parliament.

You talked about a dichotomy of programs, in terms of where there was a program which someone might argue is not value for money and a way in which the program is being delivered which is value for money. The obligation on chief executives under the FMA Act is to efficiently, effectively and ethically use Commonwealth resources. That is only 'counterbalanced' by other laws and regulations. In particular, the regulation which is relevant is regulation 9 of the FMA Act, which provides that, effectively, when making a spending decision you have to have regard to government policy. I suppose what I am suggesting is that the black-letter difference between the two that you are talking about is actually a bit greyer than that.

Mr COX—Regulation 9 of the FMA Act says that a CEO must have regard to government policy. We heard from the head of the Defence Estate Organisation a couple of weeks ago that some decisions had been forced upon the Defence Estate Organisation by government policy, that were not in Defence's interests, to sell certain office buildings and lease them back and that Defence had then been supplemented from the budget. You would therefore argue that those decisions to sell those office buildings and lease them back were not in the taxpayers' interest. Do you think it would be reasonable for the Auditor-General to be able to comment on those sorts of things?

Mr Hutson—I do not know the circumstances of the case sufficiently to be able to give you any sort of informed advice at all.

Mr COX—I think there is about $10 billion worth of cases.

Mr Hutson—I do not know about that case. I do not think I really want to get into that debate.

CHAIRMAN—Thank you very much.

Proceedings suspended from 12.37 p.m. to 1.39 p.m.

NEUMANN, Mr Claude, Inspector-General, Department of Defence

ROCHE, Mr Michael John, Under Secretary, Defence Materiel Organisation, Department of Defence

CHAIRMAN—Welcome. We did not receive a submission from Defence.

Mr Neumann—We thought we should spare you.

CHAIRMAN—Thank you very much. Do you have a brief opening statement which we could include in our proceedings?

Mr Roche—No.

CHAIRMAN—We understand today that DOFA and the Audit Office have signed off on a set of words which will now go into the procurement guidelines, and that departments are required to take note of the procurement guidelines but are not required to implement them one hundred per cent. Based on our previous conversations, can you tell me what your approach will be towards implementing that guideline once it is up and running on the web site, which I believe is almost as we speak?

Mr Roche—I do not know that I have actually seen the guideline that has been agreed between Finance and the Auditor-General. Obviously we do follow the acquisition guidelines.

CHAIRMAN—Do you? Religiously?

Mr Roche—They are guidelines, and we do our best to follow them.

CHAIRMAN—Very good.

Ms GILLARD—It is apparently going to be posted to the tool kit on your internal web—they said in approximately a week's time—so there might be some reason you have not seen it.

Mr Roche—I am not conscious that I have seen it. I have seen some words floating around but I do not believe I have seen anything that represents a settled position—although I did see a press release or a press article the other day that said there had been a government position taken on this. If I could make a comment in passing, there probably needs to be a closer working relationship between us and the Department of Finance and Administration in relation to purchasing policy, given the scale of our purchasing and the way in which it is concentrated in a single place. I am not convinced that we have the best possible detailed working relationship between those two organisations.

CHAIRMAN—We will leave it up to you to implement your own advice, Mr Roche.

Mr Roche—Yes.

CHAIRMAN—Could you do us a favour, though: when that final set of words does go up on the tool bar on the web site, or however you access it, would you get back to us and tell us?

Mr Roche—Do you have a set of words here?

CHAIRMAN—No, we do not.

Mr Roche—I presume it will be about providing in contracts for access by the Auditor-General.

CHAIRMAN—That is correct.

Mr Roche—I guess I would want to see in what terms it was expressed and how absolutely required it was. At the end of the day, when you put things into contracts most things are negotiable—that is the essential nature of a contract. If there is absolute rejection of that access, the issue is what you then do about it. There are also, for Defence contracts, security issues. There is information in companies we deal with that even we do not have access to in some cases. For example, take the source code that drives radars on the F18s: we simply do not have access to that. There is no way in which the company concerned would accept an unrestricted right of access by an Australian government authority, even the Auditor-General, to the records of that company, if it implied that they could go into secure areas where even we do not have access. So, if that access is to be provided, my instinct is that companies, if they are prepared to contemplate it, will probably want to seek a range of caveats that, firstly, limit the access to relevant financial areas and probably, secondly, have something in it to do with the use to which that information can be put—whether it might be published or not.

CHAIRMAN—In any case, would you get back to us with your view on those words and what you intend to do with them?

Mr Roche—We are happy to get back to you.

CHAIRMAN—Sections 32 and 33 of the act set out the information gathering powers of the Auditor-General. In your experience, are you satisfied that the Auditor-General has used those powers in a cooperative and appropriate way?

Mr Neumann—The exercise of the powers really depends on the individual auditor's approach. Most are very cooperative, and a few are more demanding—that is the way I would phrase it. Some people ask diplomatically, if you like, and some people tend to go straight to the powers as a way of enforcing it, before asking politely. But that is an individual approach.

Senator CROWLEY—Is the department likely to respond in a different way?

Mr Neumann—No. At the end of the day, I think we have now made it quite clear to people that the Auditor-General does have access. If you ask me about individuals' responses: yes, the response will be different. People whose attention is drawn immediately to that sort of thing tend to feel a little threatened and are perhaps a little less inclined to point people in the direction of other relevant information, and so they let the auditors find out for themselves. It is the same with my internal auditors: we do not have the same powers, but it is the approach that

matters. If we go and check with management first and ask for things, we usually get them—and we do not have the powers that the Auditor-General has.

CHAIRMAN—No, we do not expect you to. But, relatively speaking, you are a large establishment.

Mr Neumann—Yes.

CHAIRMAN—You are responsible for the expenditure of one hell of a lot of the Commonwealth's purse.

Mr Neumann—Yes.

CHAIRMAN—And the Audit Office seems to have frequent looks at what Defence does.

Mr Neumann—As it should do.

CHAIRMAN—As a result, so do we, which is why we talk relatively frequently—you would know that, being with Defence. Would you describe that relationship as cooperative, generally speaking—not going back and relying on your earlier answer?

Mr Neumann—No. I would say that we have very good relationships with the Audit Office. I think we have discussed before that the Auditor-General's representatives regularly participate in the Defence audit committee. I would say that the relationship with the financial auditors is perhaps rather stronger than with the performance auditors. The reasons for that, in my view, are that the financial auditors take a more professional, cooperative approach, they are keener to discuss issues informally, they seem to be keener to assist management with solutions and they have a more strategic focus, and so they will come to us with actual solutions. I think that I or the head of internal audit would get at least one phone call a week at the group manager level from the financial auditor side of ANAO.

CHAIRMAN—Section 37 of the A-G Act—

Mr Roche—Are you about to move on to section 37? That probably goes to the point I was going to make.

CHAIRMAN—Go ahead and make your point.

Mr Roche—There could be merit in thinking separately about the powers of the Auditor-General in relation to officers of the Commonwealth, Commonwealth instrumentalities, external bodies and members of the public. You could link the powers—which are very wide powers that he has under 32 and 33—to section 37 and the prohibition on including information in a public report if it unfairly prejudices the commercial interests of any body or person. There is no method that I am aware of by which that can be judged or appealed or whatever. The process by which the person outside the Commonwealth can make his point to the Auditor-General that information might prejudice him unfairly is not really clear in the legislation. If your intention is that the Auditor-General have wider access to people outside the

Commonwealth—people with whom the Commonwealth is in a contractual relationship—then my instinct is that the safeguards should be better expressed.

CHAIRMAN—Does not the Privacy Act cover some of your concerns?

Mr Roche—I do not know that it does. In any event, there is a very strong argument that, if you are using one act to empower access, it makes a fair bit of sense to have that act also provide the safeguards. There are elements of the safeguards in section 37, but it is not comprehensive and it is not drawn out, and the process is not there.

CHAIRMAN—Dealing with section 37, in fact the Victorian Auditor-General this morning told us that, in effect, new regulations in his act under his section 12 give him an almost unfettered right to inquire into anything without having to observe cabinet paper confidentiality et cetera; whereas our section 37 theoretically puts some brakes on the Auditor-General, in giving a member of the executive—that is, the Attorney-General—under certain circumstances the right to proscribe his actions. So the Victorian Auditor-General is saying that he has—

Mr Roche—That is in relation to publishing the information; it is not in relation to access.

CHAIRMAN—No, we are not talking about access. I am not talking about publishing; I am talking about section 37.

Mr Roche—I thought you said that the Victorian Auditor-General made the point that he had access without regard to cabinet confidentiality.

CHAIRMAN—No. What I meant to say was not that he has access—since everybody has access to cabinet papers and confidential information—

Mr Roche—But he can publish.

CHAIRMAN—But he can publish without any restraint whatsoever other than that it must be in the public interest. If it is not in the public interest, he cannot. The Commonwealth Auditor-General has more constraints. You were saying that, on the one hand, perhaps his access is not proscribed enough—

Mr Roche—I simply make the comment that his is very wide access. There is no limit, really, on his access.

CHAIRMAN—I think that is true. Do you think that is a bad thing?

Mr Roche—If it is the intention of the parliament that he have that access, there are in my experience some safeguards that are worth while building into that. Three come to mind. Firstly, the material should be relevant to his inquiry—and there is no actual limit on this at the moment. Secondly, the people who actually have the access should, I believe, probably be officers of the Auditor-General's office rather than consultants. As you would recall, in the Australian Submarine Corporation case there was, in my view, some not unreasonable sensitivity on the part of the Australian Submarine Corporation because the people that the

Auditor-General wished to use to gain access to those records were former employees of the corporation. There have been, in my experience, a number of occasions on which the Auditor-General has used as consultants people who have had previous intimate involvement in the dealings. I understand why he does that, but it raises some very significant problems of conflict of interest for the people concerned. The third safeguard that I would see is in publishing information. The Auditor-General will, of necessity, have come across a range of what people consider to be sensitive commercial information—trade secrets and so on. There needs to be a process that at least enables the people who have been subject to that access the opportunity to raise their concerns in a procedural and documented way.

CHAIRMAN—I thought section 19 took care of that.

Mr Roche—I have to say that I do not believe it does. Section 19 covers performance audits only, not financial audits. I thought that the access that we are proposing here for the Auditor-General would be under either financial or performance audit conditions or arrangements. Secondly, section 19 requires the Auditor-General to give a copy to the chief executive of the agency audited, but it only says that he 'may' give a copy of the proposed report to any person who 'has a special interest in the report'—and that presumably would be the company that was the subject of the access. So he is not required to do it; he is only required to do it under the performance audit arrangements.

Mr Neumann—And the subsection for this says that if you reply within 28 days he must consider these comments. It does not say that he has to do anything with them other than consider them.

CHAIRMAN—There is something wrong with that.

Mr Roche—When I looked, I could not find any requirement for him to give—

CHAIRMAN—He is arguing that he should be able to give sections of it—

Mr Roche—Mr Chairman, to cut to the chase, I believe that in any case where the Auditor-General has had access under 33 or 34 by virtue of a contractual provision or not the equivalent of section 19(1) should apply to the chief executive officer of any external organisation that has audit access.

CHAIRMAN—I think we are under the impression that it happens.

Mr Roche—No, it does not. It is not required.

Ms GILLARD—It does happen; but it is a question of whether it is required. As I understand it—and maybe I have it wrong—the Auditor-General and his staff as a matter of practice distribute copies of reports to affected parties, including contractors, for comment and may include those comments if there is a dispute as to the facts or may even modify the report in the light of those comments. But they do that as a matter of professional practice rather than because of being required to by legislation.

Mr Roche—And I do not believe, given the significance and the sweeping powers under this act, that it should be a grace and favour action on the part of the Auditor-General's office that they do that. I believe they should give the person who has been audited a copy of the relevant sections of the report together with a copy of the sections of the legislation which point out their rights.

Mr COX—They argue that they go through that meticulously, at least for performance audits, because they are afraid of being sued.

Mr Neumann—With regard to contract management, your report No. 379 talks about Defence and then says:

> The ANAO responded that while section 19(3) was discretionary, natural justice, operating under common law, provides a legal requirement to provide a person with access if a report might adversely affect the reputation or interests of a person identifiable in the report.

Ms GILLARD—So, in your experience, there has been an example where access to contractors' records has been done other than by ANAO staff, and you think that is inappropriate—is that right? Is that one of your three conditions?

Mr Roche—I believe that it was inappropriate in the case of ASC, understanding the sensitivity of the company, to use ex-employees of the company to seek to conduct a search of their records.

Ms GILLARD—And would that sensitivity have been allayed, had it actually been an ANAO officer?

Mr Roche—I think the Auditor-General would have been in a better position if he had been able to point to them as his officers.

CHAIRMAN—We had a number of difficulties with that audit, but the biggest difficulty that we had in terms of access was with the insurance issue—right?

Mr Roche—Yes, I understand that.

CHAIRMAN—Because you said no and ASC said no, the Auditor could not get access to try to chase documents. You can say that he has full power to call for documents, but he did not know which documents to call for—and neither did we. We have as much power as he does, and we would have called for them and demanded them had we known what it was that we wanted. But we did not know what we wanted and we had no way of figuring out what we wanted unless we had full right of access to have a look.

Mr Neumann—Correct me if I am wrong, but at the end of the day the internal auditors, my auditors, actually did get access; and I remember having a session with you and providing Mr Georgiou, I think, with a big bundle of papers that were a detailed record. I actually think it was an issue of the way the approach was made, not an issue of access; but it then became an issue of access because of the way the approach was made. A different approach would have given

the result that you sought, Mr Chairman, I believe, even under the current legislation. I cannot prove it now, but that is what I feel.

Mr COX—I do not think that if the Auditor had asked nicely the company would have acceded to the request.

Mr Neumann—I think it was the approach, and I agree with Mr Roche's point that you do not use ex-employees or people with known positions as officials for the purpose of that occasion as members of the Audit Office. So you have to be fairly careful in selecting the people you are going to contract the work to. With big companies, if they have overseas headquarters, irrespective of what was said I am not sure that you will get access at the end of the day, either, if they judge it in their commercial interest for you not to have access.

Ms GILLARD—Looking at your three proposed safeguards: I can understand that there is merit in it actually being an Auditor-General's officer. I would be interested to see what the ANAO says, but I can understand why you would put that.

Mr Roche—There can be no argument about conflict of interest.

Ms GILLARD—No. On the issue of relevance, the problem with that is, of course, that someone who is getting access to a contractor's records should not be doing that for an improper or irrelevant purpose; and that is accepted. But the problem of defining that in a legislative sense would seem to be that often in looking at documents, in the same way as discovering works in a court case, you do not know what is relevant until you have seen the lot. It is not possible to define relevance at the threshold point.

Mr Roche—I accept that. I do not have a great problem with him seeing some documents that might not be relevant. But, in the same way as the court approach would work, if it is not relevant—even though it may have been turned up in the discovery process—it is not appropriate to introduce it into evidence.

Ms GILLARD—But that is not a legislative safeguard—is it?—so much as a matter of professional practice by the Auditor, that he or she would look at but then discard, not destroy but no longer further inquire into, documents that were not relevant.

Mr Roche—Take as an example some sensitive source software in relation to a classified piece of equipment. If the Auditor-General went beyond asking for commercial documents in relation to it and said that he wanted access to the source data, if we were to do it under contract I would assume that companies would immediately say that they wanted a prohibition on him having it, or they certainly would not agree to his access to that source data. If they will not give it to people from Defence, they are not going to give it to another Australian government employee.

CHAIRMAN—What do you mean by 'if they will not give it' to you?

Mr Roche—There are certain items of classified equipment for which we do not have access to the source code. Some of the equipment we get comes with antitamper devices and so on.

CHAIRMAN—You will have access to it if you specify it in your contract.

Mr Roche—If we specify it in the contract. But equally it is often specified in the contract that we will not have access to it.

CHAIRMAN—Why? Because the contractor tells you he does not want you to have it?

Mr Roche—In some cases, it is not permitted by the US government export licences.

Ms GILLARD—But has there ever been a live example where the Auditor sought things of that nature—source codes and antitamper stuff—or is that a bit fanciful? I cannot imagine what they would want it for.

Mr Roche—I think it is unlikely. But, if we are talking about granting very wide access, I cannot see why we are not prepared to put the appropriate safeguards in to avoid any suggestion that this will be the case.

Senator CROWLEY—But even that may at some stage be debatable, may it not? Even the examples you are giving may in some places be debatable. And what is the Auditor going to do with it? Why shouldn't they have access? How can they possibly judge, sometimes, whether there is value for money and appropriate costings and so on if they do not? I would not want to suggest that the comment made earlier about how hard it is to make definitions is not very important. Indeed, it may be that the Auditor may sometimes need to have a look.

Mr Roche—In some cases, this is the most sensitive data. I can assure you that if the company or the foreign government concerned does not give the Australian defence department access they are unlikely to give the Australian Auditor-General access. At the end of the day, they will not do the business if that is the condition of doing the business.

Senator CROWLEY—I have got about six comments to that, but I will say nought.

Mr Roche—I think there should be some way of coming up with a form of words that deals with what is in the net and what is out of the net.

Mr COX—That is why we wanted a very detailed submission from you, because last time around we were discussing this.

Ms GILLARD—I think we have talked about the relevant stuff—for example, using ANAO officers. But it seems to me that the third thing you say—the confidentiality stuff—is what is constantly litigated in freedom of information. From an earlier life when I was with the state opposition here, I could tell you any number of stories about huge matters of public policy where the first response by the government in a freedom of information setting was, 'That's commercial-in-confidence.' That is how the Intergraph matter started off: commercial-in-confidence. It is not very confidential now. For us to say, 'Let's stuff into this act free access to contractor records but then the Auditor can't disclose anything that is commercial-in-confidence,' actually begs more questions than it answers, because the equivalent Defence entity to Intergraph is going to say to the first inquiry, 'No, that's commercial-in-confidence. The number of emergency calls we put through our dispatch system is commercial-in-

confidence.' The people who run the private prisons are going to tell you, 'The suicide rates are confidential,' and, 'The events of defaults in terms of riots are confidential.' That is what they did in relation to those inquiries in Victoria. So it does not get you anywhere.

Mr Roche—I think to be fair, to my knowledge—and certainly not in the last year and a half or so—Defence have not tried to claim commercial-in-confidence in a way that prevented this committee, the Auditor-General or anybody inquiring into any areas.

CHAIRMAN—I cannot comment on the Auditor-General, but I am unaware of any time when that was claimed in front of this committee.

Mr Roche—We have been very open on that.

Ms GILLARD—I accept that. But when you are talking about the balance in the act, it is not you sitting in that chair in this committee; it is what someone is doing 50 years from now.

Mr Roche—I do not have a really clever answer to it. I guess I just draw the committee's attention to the fact that there will be some acute sensitivity in some areas to this. I go down to the third leg of the suggestions I made—that is, I believe that there does need to be a statutory right for an external body that has been audited to see the relevant parts of the report and to have a statutory right of comment and for there to be a process by which—

CHAIRMAN—You do understand, as we understand it, that under section 19 the Auditor considers that, as part of natural justice, he believes he must give everyone who is mentioned in the report and subject to the audit a full copy of the report. He is asking us for relief from that. He would like us to consider asking the government to modify the act so that, instead of having to give them a full copy of the report, he need only give them relevant sections of the report which are appropriate to them. He considers that section 19 requires him to give any contractor or any other body that he has investigated as part of that report a full report and allow them to comment and make sure that that comment is contained in the final audit report.

Mr Roche—I do not have any problem with it being the relevant parts of the report, and I guess I would agree with the Auditor-General on that.

CHAIRMAN—That is what I was trying to get to about 20 minutes ago.

Mr Roche—I am sorry, we obviously missed each other. I would change the word 'may' to 'must' in 19(3). So it would read, 'He must give a copy of the relevant sections of the proposed report,' and I agree with what the Auditor-General wants to do there. The other problem with section 19 is that it only goes to performance audits; it does not go to financial audits. The Auditor-General can access, as I understand it, anyone in Australia under sections 32 and 33 for the purposes of both performance audits and financial audits.

CHAIRMAN—I did not understand that section 19 is only—

Mr Roche—Section 19 is related just to the performance auditing powers. The requirement for the Auditor-General to provide copies of reports and so on to chief executives of agencies

and departments is all tied back to performance auditing. They do not have similar rights in relation to powers exercised under his financial auditing powers.

CHAIRMAN—Fascinating.

Mr Roche—If sections 32 and 33 were expressed as being subject to the performance auditing powers which come back to division 2, section 15 and following, then yes I would have no problems, but they are not.

Ms GILLARD—Has there ever been a time when Defence has considered briefing the Attorney-General about seeking a certificate under section 37, or has that never been an issue?

Mr Roche—Not in my experience.

Senator CROWLEY—Why would that not be a sufficient protection for you against the concerns you raised earlier?

Mr Roche—My point is that it is the company itself that has the concern, not necessarily the Department of Defence. Through the Attorney-General, you are asking the Department of Defence to speak for the company concerned. I believe that if the company is the one to which the Auditor-General has access, the company should have some direct rights under the legislation.

CHAIRMAN—Have you experience of companies that have come to you and said, 'Sections of what we are contracted to the Commonwealth for are going to wind up in an audit report. We want you to guarantee that we have right of reply'? I mean, what has generated this? Is this internal Department of Defence judgment, or is it based on actual contractors coming to you and stating a concern?

Mr Roche—There has been one case where a contractor has expressed concern to us about access by the Auditor-General.

Senator CROWLEY—When?

Mr Roche—Last year. I think they were just nervous and uncertain of what was involved by access; they did not know what was following, they did not understand what the process was or anything like that. I also have to say that, contrary to I think views that have been expressed in this committee, all of the industry contacts I have had are opposed to the idea of broadening the Auditor-General's access.

CHAIRMAN—But you would know that we have not got the same information that you do.

Mr Roche—Precisely, and I have said to people who have expressed those views to me that they should tell the committee if that is their view.

CHAIRMAN—They should.

Mr COX—And you have encouraged them to tell the committee?

Mr Roche—I have done that.

CHAIRMAN—And these companies also do business with the United States government?

Mr Roche—Yes.

CHAIRMAN—And they have a big problem with access there?

Mr Roche—I think the difference that we raised before was that the—

CHAIRMAN—They're yanks and we're Aussies.

Mr Roche—My understanding is that there is a view that the American process might change but that most of the contracts concerned are cost plus contracts. As I mentioned to you in a previous hearing, I believe that some companies will not deal with the American government if it does involve that level of access.

CHAIRMAN—Even though most of them are cost plus, you would have to admit that the ones that are not cost plus exceed in dollar value the contracts that the Australian Department of Defence lets by a factor of probably a thousand to one.

Mr Roche—I certainly agree that they are very big contracts. I have been thinking about this since I appeared before you last. I would not want my position characterised as saying that I am against all access; I am not. I believe that, where there is a fiduciary relationship between the Commonwealth and the contractor, access should be provided as a right through legislation, and I have no difficulty with that. If it cannot be provided through legislation, it should be provided through the contract. Where the relationship is a purely commercial one, I do not believe that it is appropriate, because the pressure is on the Commonwealth to become increasingly commercial in the way that it deals in acquisitions and so on and deals with companies. To have a special access like this in a purely commercial approach is not appropriate.

Senator CROWLEY—Where does that pressure come from? Who is putting on the pressure to make the Commonwealth more commercial?

Mr Roche—Certainly my understanding is that successive ministers have taken the view that we should learn from the way that the private sector does business, that we should have simpler acquisition procedures, and that we should learn from what the private sector is doing in contracting and so on.

Senator CROWLEY—And the price of this might well be that we would give away access to information to check whether or not the efficiencies claimed are actually real?

Mr Neumann—There are a couple of ways of approaching this. One is to go down the legislation route, and the other is to see what you have there and make it work. With the submarine one, in my view it did work in the end once the question was actually formulated.

The access was there, but it was not done through the Auditor-General. One of the ways it may have been able to be done would have been if the approach had been different.

CHAIRMAN—I thought if the contractor had been less stubborn or obstructionist. The contractor is the contractor.

Mr Neumann—There are ways and means of dealing with stubborn contractors.

CHAIRMAN—It also could be said that, if you are encouraged to become more commercial, frequently in the purely commercial world that relationship between a contractor and an owner, or a contractor and a contractee, is a cooperative approach and less adversarial than dealing with a Commonwealth agency. That, Mr Roche, has been my private sector experience and my experience from dealing with the public sector as well.

Mr Roche—And I would have to agree with you. I think there is that view.

CHAIRMAN—Then couldn't the Department of Defence learn that it is easier to get on with their suppliers and work with them than it is to have this adversarial approach in the beginning that the contractor is there just to rip the government off?

Mr Roche—Yes. I do believe that is what we have got to be doing. That then goes to issues such as greater use of partnerships, alliance contracting, more performance oriented and functionally oriented tenders, faster processes.

CHAIRMAN—We agree on that, particularly in the IT sector.

Ms GILLARD—When you say 'fiduciary' versus 'commercial', are you talking about the difference between an ongoing contract for the provision of services, like a Job Network provider versus an acquisition? Is that what you are saying?

Mr Roche—Certainly where you are expecting a private sector organisation to carry out a function that would normally be carried out by government that might involve making judgments on access to some sort of government benefit or entitlement. I would take it further than that. Just going to the discussion we have just had about commercial relationships, there are commercial relationships where there is a fiduciary relationship or a very close partnership involved between companies in which access by each other or an individual auditor is given where there is a profit sharing arrangement or cost sharing arrangement or where you are expected to accept the other party's cost structures. I would say that in those cases the Commonwealth's auditors should have that access. The point where I stop is if I go just to a straight commercial transaction and buy at a certain price a piece of equipment from a company. If I buy Mack trucks at a certain price, then I am involved in a purely commercial transaction, and I cannot see the purpose of the Commonwealth Auditor-General having access to that company's records.

CHAIRMAN—You do understand that what we are asking for is a reserve power?

Mr Roche—I understand that.

CHAIRMAN—We are not asking for—nor could the Auditor afford—daily access to your contractors' records, nor would the Auditor want that. He could not afford to do it and we would not approve the budget for him to be able to do it.

Mr COX—Do you believe it is possible to codify an adequate set of safeguards and put them into legislation?

Mr Roche—I think it would represent a challenge. If at the end of the day it erred slightly in terms of trespassing on a commercial transaction, then I would accept that.

Mr COX—Would you like to prepare a submission for this committee setting that out?

CHAIRMAN—I knew that was coming. You walked right into it.

Mr Roche—I am prepared to go away and think about it and see whether I believe I can do it. I am not a draftsperson, but I will think about it and if I believe I can do it I will put a submission to the committee very quickly. If I believe that it is beyond my skills, I will inform you accordingly.

CHAIRMAN—We will be delighted to see that.

Mr COX—If you were able to just put down the principles that you believe need to be addressed—

Mr Roche—I can tackle the drafting instructions.

Mr COX—Yes. Whatever we do with it, we would make recommendations and, no doubt, if the government felt of a mind, other minds would be put to turning it into something that went into legislation anyway.

Mr Roche—I would be happy to have a crack at it. It would certainly crystallise my views, I am sure. It would be better than having these debates at three monthly intervals.

Senator CROWLEY—What would be the status of this document? Would it be a personal letter from you, or would you be covered by the department?

Mr Roche—It would certainly be reflective of a departmental view. I cannot imagine putting something to this committee that was not supported by Alan Hawke or that the Prime Minister had a problem with.

Senator CROWLEY—I appreciate that. I think for the points of this discussion that should be clear. You say it would be from the Defence department. Do you think the proposals or the restrictions you put would be only from a Defence department point of view, or do you think they would have broader applications?

Mr Roche—I think they would have broader applications. That would be my intent.

CHAIRMAN—I do have to tell you that we have whittled most of the departments down. You are about the last hopeless case left. Just about everybody else has given up and capitulated.

Mr Roche—I apologise for my recalcitrance. I would be happy to do that very quickly for you.

Ms GILLARD—On which side of the fiduciary commercial divide is a complex acquisitions matter?

Mr Roche—It depends for starters on whether it is a fixed price or not. When we get to a fixed price for a certain product, my view is that it is inappropriate at that level.

Ms GILLARD—So if you were going to buy a ship and you knew what the price was, that would be a commercial matter?

Mr Roche—That would be.

Mr COX—We were told that the submarines were a fixed price contract.

Mr Roche—I guess we have been over that particular transaction and the territory—

Ms GILLARD—Would something like the submarines—which is not buying a known piece of kit for a fixed price but developing it—be in the fiduciary basket or the commercial basket?

Mr Roche—Developing would be getting close to the fiduciary end, if it was not for a certain product and if the price was not certain. I think, for the record, the major problem with the transaction that the committee was inquiring into at the ASC was that a commercial settlement was made and it was not documented properly. There was clearly a process of thought that somebody went through in the department, and it just simply was not tracked.

Mr COX—I have always believed that, but the chairman does not.

CHAIRMAN—We do not necessarily disagree with you, but by the same token, when $2.4 million goes walkabout without any audit trail, the Auditor wants to know why, and you can be damned sure that this committee wants to know why and the committee takes it seriously. I know it was only $2.4 million out of billions, but that is not the point.

Mr Roche—I think it is a lot of money.

CHAIRMAN—It is the issue. You cannot trade off $2.4 million. There has to be proper paying for things and receiving of money, and there has to be something received for the benefit. Thank you very much. It is nice talking to you again and we will look forward to your two pieces of advice. You were also going to let us know your reaction when you receive the set of words.

Mr Roche—I have to say that I am not sure putting a direction like that on a web site is necessarily the way in which I would do it. I think I would send a draft copy to such a large purchaser as us and ask for views on the draft, and then I would contemplate promulgating it.

CHAIRMAN—Mr Roche, this committee recommended that it be put in legislation. The minister has decided differently, but we got our second option, which is that it is in the guidelines and the guidelines are to be observed unless you have good cause. I suspect this committee will want to know every time anybody does not follow the guidelines and why. That might be a pain in the ass, but I suspect that is what the committee might want.

Mr Roche—I accept the authority of the minister for finance and the relationship of the FMA. I guess all I am talking about is the implementation of his decision, in which I believe it is appropriate to discuss those drafts with very large centres of purchasing power.

CHAIRMAN—May I suggest you take that up with him?

Mr Roche—I will.

Mr COX—Do you find the department of finance a wee bit frustrating to deal with at the moment?

Mr Roche—Do I have to answer that?

CHAIRMAN—No. You are excused.

[2.34 p.m.]

GRANT, Mr Peter Julian, Deputy Secretary, Department of Education, Training and Youth Affairs

CHAIRMAN—Welcome, Mr Grant. In your brief submission, you said that you have recognised the issue of access, which we were discussing at some length, and you were here when we were discussing it with Defence. You have said that you have recognised the issue and catered for it by incorporating specific provisions into the terms of contracts. Have you had any contractor resistance?

Mr Grant—No, none whatsoever. In fact our contractors appear to have accepted those provisions as a fair and reasonable part of our requirements as a purchaser of their services. So there has been no resistance from our contractors. I should perhaps add that those particular clauses have not needed to be invoked, in so far as access to the premises or records of our contractors by the Auditor-General or his office is concerned, though we do have complementary provisions in our contracts in relation to our own officers' access and we have invoked those clauses on a number of occasions.

CHAIRMAN—So your internal audit committee has gone to look at contractor premises on a number of occasions?

Mr Grant—Yes, internal auditors or our investigators in relation to cases of suspected fraud or the like.

CHAIRMAN—Have you found any?

Mr Grant—There are one or two cases still under investigation, in fact.

CHAIRMAN—How do you define fraud? I am not being facetious, and I will explain the question. The Taxation Office, for instance, defines fraud as the following: if an individual within the tax office or a contractor to the tax office accessed my tax file number on their screen and had a look at my tax record out of curiosity or for whatever reason, that would be fraud.

Mr Grant—I think it has a very wide definition and it takes very many forms. In the case of our own department's relationships with our contractors, it would most commonly involve various forms of abuse of public funds—that is, illegal or improper use of public funds—and there have been a number of such cases over the years.

Ms GILLARD—When you have had occasion to exercise those powers, have you had to have arguments with the contractor about what is commercial-in-confidence and what you should be able to access and not access?

Mr Grant—No. By and large, because we have built a provision into our contracts and that provision is understood at the outset, there has been no debate or argument about our need to

invoke that clause. I think when the most sensitive case arises, we do provide in our contracts for a fair and reasonable notice arrangement, except in certain limited cases—for example, where there is suspicion of fraud or abuse and where the giving of fair and reasonable notice might actually alert a provider of services to our suspicions and thereby allow them to arrange their affairs. In some limited cases, as I recall, we have judged that there has been a need to take advantage of invoking that part of the contract which allows us to inspect premises or records without advanced notice. That is in the sorts of cases I mentioned before, where we do have reason to suspect some form of fraud or abuse and we see the need not to give notice so there is no forewarning. I stress that these are the exceptions rather than the rule. But, as I would judge it, these arrangements have worked effectively to be honest.

Senator CROWLEY—As I understand it, in your submission you talk about procedural fairness. You state:

While on occasion there has been robust discussion of particular issues identified in ANAO audits, that dialogue has always been constructive ... and any differences ... have been professionally articulated and addressed.

I think 'robust discussion' is a euphemism for something. Who is that discussion between?

Mr Grant—Between ourselves and the officers of the Australian National Audit Office.

Senator CROWLEY—So this is actually after the ANAO has made a report or sent you a draft?

Mr Grant—No. Typically it is in the course of an audit or it may be after receipt of the draft report and in the exchange that follows the receipt of that draft report. Once again, I would want to keep that comment in perspective. I think the main point of our short submission in this respect was to highlight that our relationships with the ANAO are and have been over recent years effective, cooperative and professional with mutual respect for the roles and responsibilities of the two organisations. But it is true that, in the case of some particular audit inquiries, views have differed on particular matters and in those cases we do, as need be, have robust discussions; and the ANAO does the same with us when it has a different view. What has been productive about the relationship is that it has been possible to express those views clearly and robustly as occasion has required, and generally I think there has been some reasonable measure of mutual understanding and accommodation of differences.

Senator CROWLEY—So they are more about an interpretation of the data provided or something of that sort rather than, for instance, the powers of the ANAO?

Mr Grant—Yes. It is more about the issues in question. You may recall one case that comes to mind, though it was some few years ago now but I think you took an interest in it at the time, Senator Crowley. I am talking about the ANAO performance audit of the Austudy program when that program was our department's responsibility. In that case, there was some vigorous dialogue—debate, if you like—about particular matters which had been the subject of the audit inquiry. I do not think the facts, as I distantly recall it now, were so much in contention as the interpretation placed upon the facts and the assessment of the significance of the facts. Our feeling was that maybe some conclusions were overstated or the language used to describe them was perhaps excessive. But all of those matters were worked through professionally between

competent officers of good will on both sides of the table. I think in the end there was a fair and reasonable audit report which reflected the benefit of those discussions.

Senator CROWLEY—Given that you have robust discussions on your own behalf, have you ever had robust discussions on behalf of any of those people who provide services for you?

Mr Grant—Speaking personally, I cannot recall in my many discussions with officers of the ANAO ever having had to represent the interests, if you like, of the providers of our services. I have not seen that as my role, and I do not think there has been occasion to do so. Normally when we meet directly with the ANAO on these sorts of matters, we are talking about our own direct discharge of our own responsibilities, our own direct delivery of services or, in the case of services which are provided on a contracted basis, our management of the contractual relationship to ensure that services are provided in accordance with the contract and on a value for money basis. So I think in all of those cases the primary focus is our management of our own responsibilities rather than in any sense, if you like, standing up for the providers of services. I am not saying it would be impossible.

CHAIRMAN—If you look at the cruise ship audit as a case in point, you did not stand up for the contractor?

Mr Grant—This was quite some time ago, and happily I was not all that directly involved. Moreover, employment matters are now the responsibility of another portfolio. But the answer is no, not that I recall. I think the major issue then once again was our then department's management of its own responsibilities, including its responsibilities in relation to the management of the contract with the providers in question.

CHAIRMAN—I recall. But since you were not directly involved, you cannot tell me whether the Auditor gave the contractor the right of response.

Mr Grant—To be honest, I well recall the case but not at that level of detail.

Senator CROWLEY—That is interesting. Would it be useful if Mr Grant were able to provide us with any information along that line: about whether in that portfolio—

CHAIRMAN—You would have to find somebody who remembered.

Senator CROWLEY—That is a very good point, and you should put it on the record, Mr Chairman. We would have to find somebody who could remember, indeed. I hope we are not outing a private comment here.

CHAIRMAN—You would have to find somebody who was involved in the cruise ship fiasco—excuse me, but it was a fiasco. I think the company by that time was bankrupt, so I am not sure that even procedure wise it was proper, but you might just check.

One of the issues we have been discussing all day is that the Auditor, under section 19 of his act, believes that it is his responsibility when he does a performance audit to give a full copy of the proposed draft audit report to everyone who is connected with the thing, not just the agency CEO, and that includes the minister. It does not say that in those words, so we are having a

debate now and we had a debate with Defence about what all this really means. But the Auditor is convinced that natural justice requires him and would have required him on that audit report to go to the cruise line, whatever the name of the thing was—

Mr Grant—South Pacific.

CHAIRMAN—Yes, South Pacific Cruise Lines Ltd. It would have required him to send a full copy of the report to them, and they would have had to get back to him within 28 days. Could you comment on that?

Mr Grant—Just on that general issue, I doubt whether we would take a very firm view one way or the other. We understand the natural justice considerations involved, and you mention that the Auditor-General has highlighted the importance of those. There are some contrary considerations I expect, and they might apply particularly where the provision of a draft report to a contractor on the same basis as to the CEO of a Commonwealth agency might serve wittingly or unwittingly to disclose possible fraud or malpractice in regard to contractor performance and thereby in some fashion jeopardise the Commonwealth's powers to follow up on those matters.

I think whichever way that issue comes out and whatever decision is finally taken on the matter, we would feel that, if it were decided as a matter of either law or practice to make available copies of draft reports to contracted providers of services on the same basis as to the CEOs of Commonwealth agencies, the provision of such reports to contractors—or indeed extracts of reports to contractors—should be on the same terms and conditions, including the same confidentiality restrictions that apply to the CEOs of Commonwealth agencies. So section 37, or whatever the relevant section is, should apply equally to contractors. That would seem to us to provide some reasonable measure of protection against improper use of those reports.

CHAIRMAN—The Victorian Auditor-General told us this morning that he believed that section 37 was restricting on the Auditor-General because an officer of the Commonwealth—that is, the Attorney-General—under certain circumstances appeared to have the right to tell the Auditor-General not to disclose. There is some debate about the absoluteness of that power, but anyway. Does it bother you that a representative of the executive—that is, the Attorney-General—should have such overarching powers over an independent officer of the parliament?

Mr Grant—I must say that it is not a matter which we as a department have focused specifically on, nor to the best of my knowledge or recollection has that particular power ever been invoked in relation to an audit inquiry being undertaken within our own portfolio domain. I suppose my general view, without having thought about it deeply, is that, as long as that provision remains, it should be used sparingly, it should be used obviously in accordance with the various circumstances that I think are set out later in that section of the act and it should always have regard to the need for balance with the independence of the Auditor-General as an officer of the parliament and to the importance of public interest and public disclosure. So I think it is very much a matter of balance, but I would not pretend to put a firm view on the department's behalf on that issue. It is not something that we have had to encounter directly.

CHAIRMAN—DFAT, who will be talking to us when you have concluded, has recommended that the time for commenting on draft reports should be extended from 28 days to 35 days. Do you have a view on that?

Mr Grant—I must say that we have not found any problem with the 28-day time limit as it has operated for some time. We have found that to be a reasonable period within which to prepare comments and responses to draft reports. I think the proviso I would put on that is that it is subject to there being an effective and professional relationship between the line department and the Audit Office in the actual conduct of the audit, because if that is the case then the line department, such as our own, is aware of the issues and what questions or criticisms may be in the draft report, and therefore there are few or no surprises. It is a relatively straightforward matter, having received the formal draft report, of identifying those within the department who need to see it in action and putting together the comments. It would be a different situation if such a relationship did not exist and there were significant surprises in draft audit reports. But happily that has not been our experience in recent days, and again I think that reflects on the professional relationship that exists between our officers and the officers of the Auditor-General.

CHAIRMAN—I must admit that it always amazes me when an audit appears to be a surprise to a Commonwealth agency, a minister or whatever.

Mr Grant—I can recall an earlier era when audit reports were all too often a surprise, at least in terms of their detail and the tone of their commentary.

CHAIRMAN—How long ago was that?

Mr Grant—The early 1990s. This was common practice in my experience.

Mr COX—When Mr Taylor was Auditor-General.

Mr Grant—It happened to be at that time, yes.

CHAIRMAN—I thought that was self-evident because he was the only one.

Mr Grant—Happily, things have changed since that time and these days, at least so far as DETYA is concerned, the draft reports that we receive typically go to issues which we are familiar with and which we are well prepared to deal with within the 28-day period.

CHAIRMAN—As a general comment which I had not thought of before, is the issue of lack of surprise and the more cooperative environment simply a nature of the individual who occupies the Auditor-General's chair? Is it partially due or more due to the change in relationship between the Auditor and the audited due to the fact that we now have an Audit Act, the Auditor is an independent officer and the JCPAA's act has been amended to have parliamentary oversight of audit functions, appointments and everything else? Or is it just the nature of the man?

Mr Grant—To be honest, I think it is probably some of each of those. I would not contribute causality to any single factor. I think, undoubtedly, the quality of leadership of any organisation,

including the Audit Office, does have a bearing on the conduct of that organisation's activities. Certainly, we have been impressed by the professionalism of the Audit Office in recent years. Equally, I would like to think that the way that we have conducted our affairs has been suitably professional. I think there is a balance to be struck in all of this.

I have spoken about the cooperative relationship, but cooperation can get too close in some of these matters. I think there does need to be clearly a measure of distance; there needs to be obviously a suitable measure of objectivity on the part of the Auditor-General and his officers. I think professionalism, mutual understanding and respect for roles and responsibilities rather than cooperation and closeness as such should be the hallmark of an effective relationship between the Auditor-General's office and a line department such as our own. My honest view is that those sorts of qualities do characterise the sort of relationship we have and have had over the last few years with the Auditor-General's office. But it is a fine line. If it all gets too close and cosy, I do not think it is necessarily a good thing. I am not suggesting that we are in that situation. I think independence and objectivity are also important in this sort of relationship.

Mr COX—Do you think there would be any value in having an opportunity for the Auditor-General to seek a judicial review of any certificate that was issued by the Attorney-General under section 37 to stop publication of a particular part of a report?

Mr Grant—I have not contemplated that or considered that as an option in any depth at all, so I would refrain from any top-of-the-head judgment. In general, if that were seen as one of the necessary means to achieve balance between the sorts of considerations listed in section 37 of the act, on the one hand, and the wider considerations of the independence of the Auditor-General and wider public interest issues, then I suppose I would see it as one of the possible means of seeking to achieve that balance. I think it is important to seek to achieve that balance. It is a matter of judgment, I suspect, as to whether that balance is well served by the existing legislative framework and whether there are refinements or improvements to that framework which could better ensure that that balance is struck. That may be one of the mechanisms that could be contemplated, but I would not pretend to be able to put a considered view on it without reflection, at least.

CHAIRMAN—Thank you very much.

[3.01 p.m.]

ANDERSON, Ms Annabel, State Director, Victoria, Department of Foreign Affairs and Trade

GRANT, Ms Michele Patricia, Acting Director, Evaluation and Audit Section, Department of Foreign Affairs and Trade

CHAIRMAN—Welcome. We have received your submission. Would you like to make a brief opening statement?

Ms Anderson—No. Our main points are in the submission.

CHAIRMAN—I have to tell you we have not been able to find anybody to support your request for an extension from 28 to 35 days.

Ms Anderson—In essence, the rationale for that request is that the final audit report does not always contain the comments that are made by the audited agencies. So, while the report itself as a whole is not a surprise there can be elements, particularly difficult elements of the report, where departmental or agency views are not reflected. In the case of the Department of Foreign Affairs and Trade, we have a rather complicated bureaucratic structure. We have our headquarters in Canberra, of course, but we are also a global operation with over 80 embassies and posts overseas, and there is a complex internal negotiation and consultation process that goes with finalising our responses to audit reports.

I should get on the record that Department of Foreign Affairs and Trade has, to my knowledge, always met that 28-day deadline. But in times of crisis in various areas of the department's work it does impose a heavy resource burden, whereas that extra seven days, which is not significant—I would think—from an outside point of view, would ensure a better quality response and a more considered response in cases where there are differences of opinion in the final reports.

CHAIRMAN—I am a little bit unclear about what winds up in the final report that you are not aware of.

Ms Anderson—When the reports are done and they are sent to agency heads for a look at, there is nothing in the legislation and there is no procedure that would ensure that the department's views or differences with the Auditor-General are reflected. They may or may not be taken on board. They may or may not be adequately or accurately reflected in the final report.

CHAIRMAN—You are given the opportunity to comment.

Ms Anderson—Yes.

CHAIRMAN—Absolutely—on the entire report.

Ms Anderson—But the Auditor-General is to consider those comments.

CHAIRMAN—And the final report does not always reflect those comments?

Ms Anderson—Reflect or accurately reflect. We have had that situation arising.

CHAIRMAN—Significantly?

Ms Anderson—The overall report is familiar and not an issue of contention, but there may be particularly sensitive or important aspects of the report that are of concern where there has not been what we think is a true, a full or an accurate representation of departmental views.

Senator CROWLEY—Can you give an example?

Ms Grant—Two examples would be fairly recent reports. One is the *Commonwealth foreign exchange risk management practices*, where there was some difference of opinion between the departments. Very complex issues were being handled in the report.

CHAIRMAN—I would have thought 'some' was a very modest word!

Ms Grant—The relevant area did have some concerns with the report.

CHAIRMAN—What about your secure communications system? What is that called?

Ms Grant—ADCNET. Yes, ADCNET was another, earlier, report.

CHAIRMAN—Did you have difficulties with that one? I recognise that it is still sub judice, in any sense.

Ms Anderson—We would have to take that on notice. Neither of us have the background on that particular one. In the case of the agency banking audit, that is currently in draft form and, in order to try and ensure a more accurate representation of the department's views on those handful of issues where there is significant disagreement, we have taken the step this time of putting our views again in writing to the Auditor-General, making it very explicit. We had not done that in the case of a previous audit.

CHAIRMAN—Really? You mean you just verbally tell the audit representative?

Ms Grant—No, there was a formal response to the recommendations in both cases. With the agency banking there was a subsequent letter after the final draft report has come across, to reiterate some of the earlier points.

Ms GILLARD—Are you really asking for an extension of time, or are you asking for a second-round opportunity to comment?

Ms Anderson—An extension of time.

Ms GILLARD—I am not sure how that fixes your problem, because if you take 35 days and put your response back and you still think the Auditor does not fairly capture it—

Ms Anderson—It may not, but the problem is that sometimes a final report is not completely expected in some of those areas, and it allows a little bit more time for the consultation within the department.

Ms GILLARD—When you are talking about the final, are you talking about the last draft given to you for your comment?

Ms Anderson—The report, yes.

Ms GILLARD—Then the 28-day period—or, on your version, the 35-day period—would ensue and in that time you would put back a view saying, 'We think you got this right. You got this wrong. Page 10 makes reference to $1 million. That should really read $100,000,' or whatever the errors might be. You seem to me to have another problem which is that even after you have made those comments the Auditor, in your view, does not catch those comments adequately. Nothing about the 35 days is fixing that, is it?

Ms Anderson—No; but it gives time for a more considered response if the issue is still there. At bottom it really is a resources question, reflecting the way the department is structured and the amount and degree of consultation that we as a bureaucracy work by. It may involve consultation with ministers and with senior departmental officers who are travelling widely. It is a big organisation and it does take time.

Ms GILLARD—Not many of the audit reports would require you to consult with your offshore posts, though, would they? With the foreign transactions one, for example, everybody who deals with that would be Australian based, wouldn't they?

Ms Anderson—We have had a report into our consular function. There are all sorts of aspects of our operations that we would consult on as a matter of course.

Mr COX—A lot of your foreign transactions would be done either out of the finance office in London or Washington.

Ms Anderson—That is right.

CHAIRMAN—In the beginning of your brief submission, you suggest that it is too early to assess properly the operation of the Audit Act—and, by inference, the amendments to our act which happened at the same time. I would remind you that we have already inquired into and reported back on the FMA Act and the CAC Act which took place at the same time. We did those early to get the 'early warning signals'. I thought that most agencies found both those reports very useful because they essentially said, 'We think it is pretty right; there are a couple of things that we might adjust to get it a bit more right.' But we thought we should test this act as well fairly early, rather than wait too long and have a build up of pressures and find that things were going wrong.

Ms Anderson—Part of the reason for that was that with the legislation as it is currently framed we see the scope for problems. We have not yet experienced some of those problems but we do not discount it. It is a comment made from that perspective. One of the most important elements there is the issue relating to confidentiality of information. For example, in a lot of the department's consular work, as more and more Australians travel overseas and as a more litigious culture develops in Australia, we expect that there would be the potential for those sorts of issues to arise and become a little more sensitive. But it has not happened yet. There is a fairly good relationship with the Audit Office and the way that the procedures are operating at the moment.

CHAIRMAN—Over the last 2½ years—not day by day but almost month by month or bimonthly—we have come across new issues where there were words on a document that say, 'That is the act,' but that do not tell us how it might work, and we have had to implement procedures in order to make it work. Sometimes at the first try we have not done well. We have had to backtrack and start again because we or I or somebody has made a strategic error and headed down the wrong bunny hole and run into a dead end. We backtracked and started back on track again. I think that is inevitable with new acts that are not prescriptive in nature.

With respect to your privacy issues, our understanding is that the Auditor-General is subject to the Privacy Act, too, so I do not understand the problem.

Ms Anderson—I am not a lawyer, so I would have to sit down and consider that. We have not had a problem, I should say—and we were very concerned in the context of the inquiry into the audit of consular services.

CHAIRMAN—You could have this auditor or you could have any auditor. Section 19 of the act prescribes public interest. Section 37 requires that the Auditor give each department a copy of his report before the report is tabled and allow them to comment. As a matter of natural justice it allows you to comment. He considers it a matter of procedural fairness, I understand, that he also give any individual or any contractor or any other group that is caught up in that audit an opportunity to comment as well. He has a problem sometimes with giving them a copy of the entire draft audit report, because of confidentiality reasons, when it is in draft and because he is not certain that he is covered by privilege. So he has asked us if we will consider requesting the Commonwealth to amend the act to allow him to send out sections of the report applying to some other agency or some individual. Do you have a problem with that?

Ms Anderson—No.

CHAIRMAN—How would you propose that we deal with your issue concerning privacy, notwithstanding the fact that you were unaware that he is caught up in the Privacy Act too?

Ms Anderson—Some explicit reference in the relevant section, section 37, subsection 2, could make explicit reference to that.

CHAIRMAN—But subsection 2 is largely associated with giving the Attorney-General powers to direct the Auditor not to report.

Mr COX—On public interest grounds. Probably privacy would take in public interest grounds.

CHAIRMAN—Is privacy a public interest? I would not have thought so. I think you are stretching it a bit.

Senator CROWLEY—It is an interesting question. I am not quite sure what your concerns are. Maybe you could help us by giving us an example. I would have thought that there have been a few examples of recent times when people have been under threat—captured or God knows what—and the department has had to deal with very difficult situations which they think have been not helped by publicity about the people concerned. Is that the sort of thing you are talking about or are you talking about something different? What sort of privacy rights are you asking for?

Ms Anderson—It is really in a very broad sense. The department gathers a considerable amount of detail about individuals and their families in implementing their consular responsibilities. Many of those cases become controversial. Many of those cases are very easily recognised even when the broad parameters of the case are described and individuals' names are not referred to. What I am referring to is the very deep and detailed personal information that the department gathers in implementing that responsibility.

Senator CROWLEY—How would that differ from other departments that collect extremely extensive personal information on people and that is not jeopardised by Auditor's reports? Why do you think that your information would be under threat by an Auditor's report?

Ms Anderson—As a matter of practice, the way the procedures have been conducted to date it has not been. It has been worked out very well in practice between the department and the ANAO. It is the potential that concerns us. As a matter of practice it has been managed well by both agencies to date.

Senator CROWLEY—Is that a precedent-setting practice, or are you not confident that you have established a precedent?

Ms Anderson—Hopefully, but I guess we are not comfortable that we live in a thoroughly certain world. We would like explicit recognition of that right to privacy. It just looked to us to be an odd exception from the wording of that particular subsection.

Senator CROWLEY—We have heard from the previous department that they have had 'robust discussions'. Would that describe what you have done with the ANAO? Have your arm wrestled about what should be in the report?

Ms Anderson—Certainly, in some cases. Overall, the relationship is very good and it is very close. The ANAO participates in formal quarterly meetings that the Department of Foreign Affairs and Trade holds in its departmental audit committee. It works at a more informal level, too, with the internal audit section we have in the department that Michele Grant is from, and we work very closely together during individual audits. So there is plenty of scope within all of that for plenty of robust discussion. Most issues are resolved and the relationship is very good.

Performance of audits can vary, individual by individual. Some can be more confrontational than others.

Senator CROWLEY—But my question really is: has any of that robust discussion gone to the protection of privacy of people—and, if not, why worry?

Ms Anderson—For those issues that were resolved during the consular audit, no. The more robust discussions have been on the audits concerning finance issues. There were different perspectives.

Ms GILLARD—It just seems to me that the problem with your suggestion about putting privacy in 37(2) is that that section is directed to a fairly extraordinary failsafe, and that is where the Attorney-General issues a certificate to prevent the Auditor-General publishing certain aspects of a report. To our knowledge that has never happened. I would suggest it would be a fairly big thing if it did happen and certainly the comment of a lot of press speculation as to why the Attorney-General would be suppressing an Auditor-General report or part thereof. I would not have thought an Attorney-General was going to do that all that lightly. So, in terms of the concerns you seem to be expressing, it seems to be taking a sledgehammer to crack a nut.

Ms Anderson—As I read section 37—and I am coming to this as a departmental officer—the Attorney-General may issue certificates but also the Auditor-General cannot disclose information if it is contrary to the public interest or if it is for any of the other reasons set out in subsection (2). It is not solely the Attorney-General issuing a certificate, as I read that.

Ms GILLARD—You are contending that—

Ms Anderson—The Auditor-General has the discretion for all the reasons under subsection (2), in addition to the Attorney-General.

Ms GILLARD—I accept that. But, as it currently stands, what the Auditor says to us—and I think this is right—is that they very rarely identify individuals in their reports. Obviously, they do summary data all the time on records which individually are confidential. You cannot look at the performance of the Job Network, for example, without doing summaries of how many people are long-term unemployed and what those long-term unemployed did or did not do. You cannot do audits of Centrelink without saying how many people are on various benefit categories. But they do not ever go to the stage of saying, 'Suzie Smith is receiving X from Centrelink.' I do not see why there would be a particular concern in Foreign Affairs. It would seem to me the same summary data—so many million people applied for visas, and X got them and Y did not—

Ms Anderson—That is not a problem for us.

Ms GILLARD—Has there ever been a suggestion by the Auditor that they take it to a level of detail other than that sort of summary data which they do to get an agency-wide view of what is going on?

Ms Anderson—Not that I am aware of.

Senator CROWLEY—To the extent that DFAT have standard clauses in their contracts, when you have a contract with a contractor, have the contractors ever objected to the clause that allows the Auditor-General access to their records?

Ms Anderson—We do have standard clauses and we have never had any problems with our contractors in permitting access to the Auditor-General.

Senator CROWLEY—Does that also allow the Auditor-General to go to those places, or just to get hold of the data?

Ms Anderson—I would have to take that on notice and check and get back to you on that.

Senator CROWLEY—Are you happy with the relationship with the Auditor-General or do you think that, good and all as it is and robust and all as the discussions are, it can be improved? If so, in what way?

Ms Anderson—One way the procedures could be improved would be for there to be more clarity in the procedures if there is a difference of view. If a department does have a different view, the Auditor-General is required to consider the departments views, but it is never been made clear what that means in terms of inclusion or otherwise in the final report. We certainly see room for improvement there.

CHAIRMAN—Remember that the Executive, after urging by the parliament, has excised the Auditor from the bureaucracy. He has been excised completely. He is independent.

Ms Anderson—Yes.

CHAIRMAN—I would have thought it was improper, by definition, in a framework, skeleton act to require the Auditor to include any comments that anybody else has. They may be scurrilous comments; they could be lies; they could be defamation; they could be anything. You are saying that, by definition, we should tell the Auditor, 'If that is what they say, you have to put it down.' We want him to be fearless, without favour, and say what he bloody well thinks.

Ms Anderson—We are not suggesting that his views should be moderated, but if there is a significant difference two views can be reflected—and often are—in public documents.

CHAIRMAN—I hear you.

Mr COX—It is hard enough giving any semblance of accountability without starting a process of bureaucratic obfuscation at the point of publishing a report.

Ms Anderson—There are some other ways where we think the relationship can be improved. When the reports are issued, often a short summary or brochure is issued with the report. While we would not to be prescriptive that this is a bad idea, it has caused the Department of Foreign Affairs and Trade some concern. A brochure is necessarily selective. It is usually what the media use for their interpretation of the report. We think it would be a much better option in most circumstances if the full report were issued rather than a summary.

Mr COX—The full report is issued, with the brochure inside it. The other benefit of the brochure is that it has the phone number of, probably, the officer who did the report. I am reliably informed by journalists that if the press want to find out what the Audit Office really thinks they can ring that number and get a very good account of it.

Ms Anderson—We have no objection to the number of the particular officer being circulated. But we have felt, for example, in the audit of our consular services, that the brochure issue reflected a different assessment than the actual report did.

I will just mention one or two other things. Just as a suggestion, we would like to see more formal consultation with the Auditor-General's office in addition to the meetings that the Australian Public Sector Audit Network Group operates. The ANAO has a lot of material on its web site, which is very useful and which officers in my department draw from and use. But a more formal consultation process, I think, would be an improvement. Also, perhaps some ANAO sponsored training in issues and trends in auditing would be very good in making sure that capacity in departments was kept right at that top level.

There is a third small initiative. In the past audits were often done jointly, where a departmental officer would work with the ANAO. We think it would be useful for that joint approach, which did work very well in the past, to be brought back.

Senator CROWLEY—Do you see any of those three recommendations in any way possibly intruding on the independence of the Auditor-General?

Ms Anderson—No. I think it has worked very well in the past. I think the close cooperation has a lot of benefits. We see an audit not necessarily solely as an examination of a particular area of responsibility by the department but just as an opportunity to review and keep up with the latest benchmarks of how to do things. So the consultation is very useful, from a departmental perspective, in that sense. That is, an audit is an opportunity to improve and not just an examination.

CHAIRMAN—Thank you very much.

[3.33 p.m.]

ROSALKY, Dr David Marcus, Secretary, Department of Family and Community Services

STAFFORD, Mr Geoffrey George, Chief Internal Auditor, Department of Family and Community Services

CHAIRMAN—Welcome. We have read your submission. Before we ask you questions, do you wish to say anything?

Dr Rosalky—I have some words by way of explanation. But, I think in the interests of time, it might be worth my while getting those out in relation to questions that ask you. If I find they are not being addressed, I will grab the opportunity—

CHAIRMAN—Yes, to refer to them.

Dr Rosalky—I also give the committee full permission not to address us as gentlemen if you do not wish to.

Ms GILLARD—You were present during our discussion with Foreign Affairs about privacy issues in relation to the Audit Office. I would have thought that of any department in the Commonwealth you probably would be the one that worries about privacy issues almost more than any other—maybe the ATO might equal you. Do you share those concerns? Do you think there is a real issue there about the performance of ANAO and privacy matters?

Dr Rosalky—I do not believe there is, in practice. I have tried to think of the circumstances. From what I was hearing of the discussion, I think I agree that the general requirement of adhering to privacy principles is sufficient of a safeguard. That is a statement really about practice. I can imagine practice shifting over time, which might introduce a worry. I do not have that concern at the moment from any experience that I have had. I do believe though that this whole public accountability process, by its very nature, often has conflicting objectives. I would, I think, just remain alert possibly to certain pressures sometimes overruling privacy, and then I would be concerned. I believe that at the moment the principles work well, and I have not had such a problem.

Ms GILLARD—You also would have heard the discussion about departmental responses to audit reports. There is an issue, it seems, about the 28 or 35 days. Foreign affairs would say 35 days. There also seems to be an issue about whether the Auditor ultimately reflects the comments that have been made by the department. What would you say about those two matters?

Dr Rosalky—The 28 days has not been a constraining parameter for us, except from our own fault: with any deadline one will leave these things because of other priorities. Complexities can be relevant to anything that has a finite time limit. I think the appropriate response would be to have the flexibility for the Auditor, if there is a very good case established—and they would have to be exceptional cases, in my view—to grant an extension of time. I listen to the cases; a

lot of departments have complexities. It is more the nature of the audit than the nature of the department, I would have thought, that would raise a complexity. The question about whether there have been difficulties, in reflection: there certainly are differences of opinion, not surprisingly, that will develop.

CHAIRMAN—Sorry?

Dr Rosalky—Ms Gillard asked the question about whether we had had any experience with—I am sure you did not use this word—'misrepresentation' of the facts and therefore a dispute arising. I was answering that I believe we have had situations where there have been differences of opinion between us and the Auditor—that is, there have been occasions where the Auditor's opinion expressed in an audit has been in disagreement with ours. I cannot think of a case where that has extended to the facts of the matter; it has been more an issue of opinion. That is his prerogative, and then it is up to us to be able to explain that in a public forum.

Ms GILLARD—Would you say you get an adequate opportunity to comment on those matters?

Dr Rosalky—Yes. If I might pick up that point, I was thinking about that while the previous witnesses were speaking. Again it goes on practice. My view though of practice in recent years—I think certainly in the period that I have been a secretary of a Commonwealth department—is that I find the Audit Office's processes quite elaborate and they give us many opportunities to involve ourselves right from the time of planning a schedule of audits and planning individual audits. Especially if they are complex in some way or might be getting at programs in a novel way, they will sometimes ask us about the best way to approach it, and we have been able to have, I think, influential input into that. During the conduct of an audit, there is a lot of contact. Then, of course, there is the draft report. Again, I think I would venture that, where we have got ourselves sometimes into a position that we have regretted, it is probably because we did not pay enough attention to all of those preliminary steps and that we waited until the draft report was there and, in a sense, it was getting too late to try to influence it. I think we do get ample opportunity. I do not know whether Mr Stafford, who is possibly closer to the generality of our audits, has a view on that.

Mr Stafford—I think I would agree with what the secretary says. There are elaborate processes that the ANAO puts in place to make sure that people do get adequate opportunity to comment on audits of their agency.

Senator CROWLEY—I apologise, because I must leave shortly, but I do want to raise questions that have come to my mind from your point 11, 'Duties of directors of FMA Act Agencies'. I am particularly interested in the sentence:

> The FMA Act is silent on the issue of the primary allegiance of an officer who is a director of an FMA Agency and it is not clear to what extent a director can use that position to ensure that information provided by the Auditor-General to the provider Agency can be used to manage the responsibilities of the purchaser Agency.

Please elaborate.

Dr Rosalky—The circumstance that I am in—not by dint of law but by a decision of a relevant authority, such as the minister—is that I am the chief executive of the Department of

Family and Community Services for the purposes of the FMA Act, and I have certain accountabilities attached to that. I am also a member of the board of Centrelink, from which I purchase. A lot of people have questioned that as an interesting model in a commercial sense. I think in a way that is irrelevant—we are not in a commercial situation. I think what this point is referring to is that, because I hold those separate accountabilities, firstly, the act is silent; it does not specify what my rights are in respect of these points of access to audit reports or to internal management processes of Centrelink because I am a director. The way I conduct those roles is that I keep them apart to a significant extent; it is impossible to do it totally. But, as a director of Centrelink, I do not believe I have the right to assume that anything I have access to as a director would be freely available to my department as a purchaser.

Senator CROWLEY—Why not?

Dr Rosalky—Because Centrelink has its own governance and accountability responsibilities. It has a management structure and a chief executive who is responsible to a board, and there is a line of accountability and authority that works through that chain. As a purchaser, I have other impositions on Centrelink, such as trying to ensure that we have good price and good product for what we are trying to purchase. Those roles can come into absolute conflict. Some departments, including some departments who purchase from Centrelink, separate those roles with a Chinese wall in their own department. So that is, say, a secretary and a deputy secretary will conduct those two roles quite independently, and they will deliberately not pass on certain information. Certainly I find it not improper but an inappropriate use of my access. If I want access to certain audit information as a purchaser, I will still seek it formally through the board and ask them whether they think that is appropriate.

Senator CROWLEY—Have you ever been in the curious position of noting that the board is not providing you with full information?

Dr Rosalky—Yes.

Senator CROWLEY—What do you do then?

Dr Rosalky—I make it very clear. I try to resolve it at management level first. I always try to resolve any differences between the purchaser and the provider at management level, and we have a very good process for addressing points of conflict.

Senator CROWLEY—Are you telling us that you sit on a board as a director—

Dr Rosalky—Yes.

Senator CROWLEY—where that board has deliberately obfuscated—

Dr Rosalky—No, inadvertently.

Senator CROWLEY—or inadvertently obfuscated the data provided to you, a CEO of a department that is purchasing from them?

Dr Rosalky—Never deliberately, because it has not arisen.

Senator CROWLEY—I take out the word 'deliberately'.

Dr Rosalky—There have been situations where—

Senator CROWLEY—Incompetently?

Dr Rosalky—No, I am not going to use that word either.

Senator CROWLEY—Unintentionally?

Dr Rosalky—Firstly, I do not want all the information they have; I would be drowned. So there is a process by which we expect certain information to come to us, or information to come to us in a certain timely manner. Again, if it has not happened, I have raised it at management level. If I have not been able to resolve it and there is a point of principle in conflict between us, I have said to the management of Centrelink, 'I'll be raising this with the board,' and we have raised it with the board; we have had a discussion and resolved it with the board.

Senator CROWLEY—Resolved it how?

Dr Rosalky—By having a debate about the pros and cons, usually finding an appropriate compromise, or the board just making a decision under its authority to say, 'This is the way we will conduct it in future. The relationship with our purchaser is important; therefore we will pass that information in a different way than we have been.'

Senator CROWLEY—'Therefore we will pass that information in a different way from what we have been'?

Dr Rosalky—Say, faster or at an earlier stage, or something like that. I am talking very generally here.

Senator CROWLEY—Yes, indeed you are. I think this is a matter of the gravest importance. I think you have hinted at that a little yourself, because the words used here are that the act 'is silent on the issue of the primary allegiance of an officer'. I think they suggest or indicate that there may be a tension between these two positions. As we are here looking at whether the Audit Act has sufficient teeth to find all it needs to find on behalf of the taxpayers of this country, I think you are indicating that you know, through your own personal experience of being the one person in two places, that it does not always work to the best advantage.

Dr Rosalky—Yes, but, with respect, Senator, you are putting a sort of negative connotation on all of this. I was trying to explain a moment ago that there is a vast amount of processing of information that goes on inside an organisation of the size of Centrelink. We quite deliberately, as a purchaser, seek certain information and certain timeliness on that information. It can never be a complete story. Sometimes information that is outside that agreement comes to attention, and we say, 'Look, we'd like to have access to that information perhaps at the same time management has it,' or something like that. There is an obligation on the management of

Centrelink to respond to knowledge that they have and to optimise management processes. I am a separate organisation with separate accountability. Both Centrelink and we, FaCS, have equal responsibilities under the FMA Act and all the other acts to report to this committee, to report to the parliament. There is no question of information not becoming public. It is a question of whether it comes to me in the form and the timeliness that allows me, as purchaser, to make a decision saying perhaps I want a different outcome from Centrelink.

Senator CROWLEY—Please excuse me. I hope my colleagues will continue my questions in my absence.

Dr Rosalky—I hope I have given the right impression to you, Senator; it is very important. I would like to know your response to what I have said.

Mr COX—We raised what we thought was the substance of your concerns with the Auditor this morning. He said two things. One was that he believed you should have an MOU with the provider organisation to provide you with such information as you need.

Dr Rosalky—Yes.

Mr COX—The second was that he did not want to upset his direct relationship with the CEO of the organisation that he was primarily responsible for auditing. Where they were purchaser-provider arrangements, he was happy to provide the information to both when the function went across both functions. But, in terms of some audits, he believed that he should have a relationship with the CEO of the provider and not necessarily with the customer, and he drew some parallels with how strange that would look in a private sector environment. Would you care to comment?

Dr Rosalky—We have had that discussion. I am familiar with the Auditor-General's position. My view on the points generally is as follows. We do have a memorandum of understanding as part of our business partnership agreement, which establishes protocols and processes to attain certain information—and that works. It is sometimes less timely than I would like, and I will explain that in a moment. But that is not deliberate tardiness or anything else—and this was why I was a bit concerned about Senator Crowley's implications. But it works, and it works because there is very great goodwill and we have worked very hard on a conflict-resolving relationship. The board is very proactive in ensuring that there is an extremely good relationship between purchaser and provider. I do not want though, as a matter of principle, to rely on goodwill and memoranda of understanding. They have absolutely no force in law. Basically they have the force of a public accountability, of the fact that we have a joint accountability to government in the delivery of programs.

But the natural processes that we are talking about here are that an audit is a lengthy process, it progressively uncovers certain information and issues might be raised. The instinct of management in any organisation is to say, 'I would like to know and understand this more. I would like, firstly, to believe it.' Any audit report is subject to a credibility check by the auditee always—'Why did you come to that conclusion? That's a bit of a surprise to me.' If it was not a surprise, then it was not an issue. Also, 'Let me understand how you have come to that.' One then responds to it by putting in place a process internally. So by the time, say, a public report is prepared and available, it could be quite a long time from when the first information began to

expose a potential issue. Therefore, the question arises if such issues that are being discovered should be brought to the attention of a person not as a purchaser but as a person who shares the accountability for that program. That is the critical difference I am talking about here. I do think we fall dangerously into the language of commercial analogies and sometimes stretch the analogy beyond sometimes its helpful boundaries.

Mr COX—That is because you have a responsibility under the FMA Act for the delivery of that program, but that responsibility is not reflected by the Auditor-General's Act.

Dr Rosalky—Correct. The Auditor-General in, say, auditing Centrelink, may uncover issues which are absolutely and solely under the responsibility of the Chief Executive Officer of Centrelink, but he will also at times find information that bears on the process that affects the integrity of the program that they are delivering, for which I am accountable under the Financial Management and Accountability Act.

Mr COX—I will give you a possible example of that that I am getting when I get some of the detail to write to the Auditor-General about, and that is lack of data matching between clients of Centrelink. For example, people are being caught with overpayments when one partner in the relationship has advised Centrelink of a change of income but that information has not been matched with their partner's records and, therefore, an overpayment continues—things like that.

Dr Rosalky—Perhaps I might just comment on that for a moment. If the Auditor were to find that out, it might be that what he is really discovering is a matter of policy, a matter of rules that have emanated from me as the purchaser. In that case, he is almost certainly auditing me. In fact, that has happened where there has been a parallel audit of the purchaser to see whether the purchase actually specified rules, et cetera, appropriately. If, however, what he is finding is that this is a matter of practice within Centrelink and not the law or the rules that have been set up by the purchaser, but that they are not doing it in an appropriate way or whatever that is exposing the program, then yes, it is an audit of Centrelink and their own training or decision making processes. But the impact bears directly on the accountability of the purchaser, and that is the circumstance I am addressing.

Under that circumstance I am saying that, when the audit process uncovers that and reveals it to the management of Centrelink, if in the opinion of the Auditor that is an issue that bears on the integrity of the program and, therefore, the accountability of the purchaser, he ought to be obliged at that time to bring it to the purchaser's attention as well. That is the crux of the submission that we have made. The simple fact is that we cannot resolve that with a contract—not only because of the legalities in that we are both the Commonwealth of Australia as a legal entity, but because the focus of a contract would be to say that, if one party is materially affected by the action and there is a monetary value or a legal right affected, that can be recovered in law. It is not that situation whatsoever. It is not, in fact, the shareholders' value of my department that is at stake here; it is the programs of the Australian government and the clients of the Australian government, for which Centrelink and we are jointly responsible and accountable.

CHAIRMAN—Do you have a problem with the Auditor having access to your contractor records?

Dr Rosalky—Generally?

CHAIRMAN—Yes.

Dr Rosalky—No.

CHAIRMAN—The Auditor-General has conceded that currently, under section 19 of the act, he is required to give a draft copy of the entire audit report to anyone who is caught up in the audit, whereas more appropriately it might be that only a small section of the report should go to a company or an agency where there might be some question of parliamentary privilege and that sort of thing. Do you have any problem with only sections of the report going to such agencies or entities?

Dr Rosalky—No. I understand that his power is that if he chooses under his power to—

CHAIRMAN—That is correct, absolutely, but he does—

Dr Rosalky—Then it says 'the report' and not 'parts of'. I have absolutely no difficulty with the concept of it being—

CHAIRMAN—My understanding is that he always—perhaps not always, but anyhow—sends copies of the draft report to anyone caught up in the audit.

Dr Rosalky—The specific point of your question is that I do not have a difficulty with that. In fact, I think it makes it easer for my proposal to be put into effect. There is a subsidiary issue there if what I am proposing were to become difficult because of it easily being extended to the words that you have just used, Chairman—that anybody who might be affected or have an interest is sent it. I would not want to see that thwart what I am trying to do. The words I am using are that, if in the Auditor's opinion—and that gives him the discretion and, therefore, retains his role in this—the matter bears materially on the public accountability of that officer or that institution, that is not just a general interest. Also, if an audit mentions another organisation, there is a point of judicial fairness or—what is the word we are looking for?

Mr Stafford—Natural justice.

Dr Rosalky—Natural justice, procedural fairness or whatever that that organisation be informed. But very often the circumstance I am talking about does not explicitly mention the other organisation if it bears on a matter to do with the management of the auditee that, by implication, bears on. Therefore, still I think we need recognition that there has to be that judgment that there is such impact on the accountability and that, therefore, that material should go to that person.

CHAIRMAN—Your submission did not comment on this, so I will ask you: are you generally happy with the operation of the Audit Act—other than the issues that you raise?

Dr Rosalky—The Auditor-General's Act?

CHAIRMAN—Yes, that is what we are inquiring into.

Dr Rosalky—Yes, I thought the Audit Act was a defunct act, but anyway that is just a technical point.

CHAIRMAN—I said the Auditor-General's Act.

Dr Rosalky—I beg your pardon.

CHAIRMAN—The Audit Act is gone. It was 1901.

Dr Rosalky—Yes, that is very true. The answer is: I do not believe I have. Of course, I do not get into the technicalities thereof. As for the issues, I have already commented that I think all the practices of the Auditor-General in compliance with that act I find quite acceptable in providing the ability to engage the Auditor-General on these issues. Perhaps I could ask Mr Stafford whether he has some views on that.

Mr Stafford—I agree with what the secretary said. We do not have any problems in general with the Auditor-General's Act, apart from what we have already covered.

CHAIRMAN—There is a constraint under section 37 that under certain circumstances would imply—although there seems to be some legal interpretive difficulty—that the Attorney-General in some circumstances, as a member of the executive government, might require the Auditor not to report on an issue. Do you have any problem with that?

Mr Stafford—No. The one thing I was thinking of was that someone said today: how does the Attorney-General get to find out about it if the Auditor-General has only provided a section 19 report to the department that is responsible and they can only give that report to the Attorney-General if they get the Auditor-General's approval in the first place? Otherwise, no, we do not have a problem. As the Auditor-General said, they have never exercised that particular section. We see it as being unlikely to affect us, and we expect that the Auditor-General would discuss it with us if it did affect the department.

CHAIRMAN—In terms of exercise, an awful lot of this is reserve powers, as we all know. Our constant request for the Auditor basically to be given unlimited access to contractor records in premises is put in the nature of it being a reserve power only, not for it to be contemplated as an operational tool to be used every day in every audit; it may be used once a decade perhaps, more if necessary—although one would hope it was not. But the power being there, I thought, would tend to encourage a contractor to cooperate in the first instance rather than to be obstreperous.

Mr Stafford—Yes.

CHAIRMAN—As there are no further questions, I thank you both very much, Dr Rosalky and Mr Stafford. I also thank Hansard, the staff, the secretariat and all those contributing to the hearing, including the authors of the submissions, and I thank my colleagues.

Resolved (on motion by **Mr Cox**):

That this committee authorises publication, including publication on the parliamentary database of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 4.00 p.m.