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JOINT COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT

Reference: Auditor-General Act 1997

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**JOINT STATUTORY
COMMITTEE OF PUBLIC ACCOUNTS AND AUDIT**

Wednesday, 16 September 2009

Members: Ms Grierson (*Chair*), Mr Georgiou (*Deputy Chair*), Senators Barnett, Mark Bishop, Bushby, Feeney and Lundy and Mr Adams, Mr Bevis, Mrs Bronwyn Bishop, Mr Bradbury, Mr Briggs, Mr Butler, Ms King, Mr Neumann and Mr Robert

Members in attendance: Senator Mark Bishop and Feeney and Mr Adams, Mr Bradbury, Mr Georgiou and Ms Grierson

Terms of reference for the inquiry:

To inquire into and report on:

Whether the provisions of the Auditor-General Act 1997 remain adequate in the modern public sector environment, including but not limited to:

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

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

WITNESSES

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Committee met at 12.06 pm**CAHILL, Mr Matt, Group Executive Director, Australian National Audit Office****CHAPMAN, Mr Steve, Deputy Auditor-General, Australian National Audit Office****COLEMAN, Mr Russell, Principal Auditor, Australian National Audit Office****McPHEE, Mr Ian, Auditor-General, Australian National Audit Office**

CHAIR (Ms Grierson)—I declare open this public meeting. It is the second public inquiry of the Joint Standing Committee of Public Accounts and Audit into the Auditor-General Act 1997. It has been eight years since the committee last reviewed the act and, in that time, the Auditor-General has been assigned a number of additional responsibilities. It is therefore time to review the adequacy of the act not only in light of these new responsibilities but to continue to ensure that the Auditor-General and his officers have sufficient powers to scrutinise the administration of government agencies. Today the committee will hear from the Auditor-General and other representatives of the ANAO. Mr McPhee, do you wish to make a brief opening statement?

Mr McPhee—Thank you, Chair. We have previously made an opening statement, so I think we can dispense with that this time.

CHAIR—And thank you for your briefing to the committee. We have obviously heard from you before on this matter, and we have also received other submissions. The submissions from the Ombudsman and the Institute of Public Administration Australia suggest that any difficulties relating to examining Commonwealth investments in the private sector and Commonwealth grants made to state and local governments could be addressed through cooperative arrangements between the Commonwealth Auditor-General and his state and territory counterparts. Your submission puts forward another option of exploring opportunities to assist state and territory auditors-general to work in a complementary manner. Would you like to elaborate on that opinion and tell us whether you think an approach like that would be adequate, whether your powers are adequate and how that would affect the work you do?

Mr McPhee—Currently, there is a good relationship between the Australian National Audit Office and the state counterparts. The auditors-general meet once or twice a year. Together we do a range of submissions—for instance, to accounting bodies or auditing standards bodies—to be economical in the use of resources. We have a good working relationship with the states. Even on audits where today we are dealing with some state matters, we have had communications with the state A-Gs just to inform them about our audit objectives et cetera. It is a good relationship.

We have tried to work cooperatively with the states on specific audits in the past, and some issues have arisen. Firstly, it is generally the case that each audit act requires the information to be kept confidentially. And so it is very difficult, for instance, for my office to share information that is not in the public arena with my state colleagues. That is one existing constraint.

CHAIR—Is there any reverse constraint with that?

Mr McPhee—Basically, without having checked their legislation closely, I think that would be pretty much the same for them. That is one thing. The other operational issue tends to be different priorities. In the past, we have tried to look at the audit of the Commonwealth aspect of a particular program and the state Auditor-General looks at the state aspect of the program, with the intention of reporting at the same time.

CHAIR—Can you give me an example of that?

Mr McPhee—I recall one—it is going back a while; I do not know whether anyone here can help me—

Mr Coleman—I think it was an audit of the Better Cities Program. It goes back to the 1980s, which is when this arrangement took place.

CHAIR—It was federally funded and the states implemented it.

Mr Coleman—That is correct.

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

CHAIR—So there have not been many attempts to do that.

Mr McPhee—In the light of that experience, we have decided to focus just on our own powers and responsibilities and progress the audits as best we can within that context.

CHAIR—Do you think you have adequate powers to audit Commonwealth investments in state or private sector grants, particularly in terms of state and local governments?

Mr McPhee—If I can just answer the question with a little bit of background: some members here may recall the issue of the Auditor-General's access to other party information. This first came up when outsourcing became very popular. At that time, the Audit Office promoted what we called 'standard access clauses' to allow the two departments to say: 'Why don't you put these standard clauses in your contracts. It provides the Auditor-General with access to records and information held by the contractor?' The department of finance picked that up and put out a standard clause for use in contracts. The important thing to notice is that that is not mandatory but most agencies accept it as good practice. The standard access clause would not be universally applied but it would be commonly applied.

Since that time, we have seen a similar evolution across agreements with the states. For instance, when we did an audit of the AusLink road grants, there was a provision in the legislation that basically said that a funding recipient must allow Australian Public Service employees or persons nominated by the Commonwealth to inspect work on projects et cetera. This gave us a reasonable opening into the AusLink area. When we did our audit of AusLink a year or two back, we had very good cooperation from the state road and traffic authorities. That is one example. Since then, we have had umbrella agreements with the states to recognise that

the Auditor-General must be given access to premises and records. That has been a very positive development and a positive evolution.

I will move to the individual grant issue that you raised, Chair. Individual grant agreements can similarly provide for access to the Auditor-General and, in the agreement that I am looking at here, the Privacy Commissioner. There has been an evolution, which has been a very positive development. The difficulty is that it is not necessarily consistent. The clauses can all be different and cannot be relied on, because they may depend on what departments are proposing to their ministers. I guess what we are putting forward in our submission is that a legislative provision would actually get a more standard and certainly a common approach to this issue. But the good thing is that there does not seem to be any in-principle objection to the developments which have taken place across the years.

CHAIR—You have signalled publicly that you are doing an audit of the BER—Building the Education Revolution.

Mr McPhee—Correct.

CHAIR—Do you anticipate any legislative barriers to your powers in that audit?

Mr McPhee—It is hard to tell but at the moment—

CHAIR—Do your terms of reference have to take any limitations into account, or are they wide reaching?

Mr Cahill—Building the Education Revolution, which is under a national partnership agreement, is underpinned by 22 bilateral agreements. They have included in their bilateral agreements access for the Auditor-General. As indicated, that is not necessarily consistent for all of these types of agreements, but in that instance there is a recognition of our access and we receive cooperation.

CHAIR—As you said, it is not mandatory but they have adopted that practice. That is helpful.

Senator MARK BISHOP—Are the terms of reference for that referral in these documents?

Mr McPhee—We could make available the audit objective, if that is what you are asking about. In fact, Mr Cahill has provided me with the objective of the audit and I am happy to table that.

Senator MARK BISHOP—Is the objective the same as the terms of reference? Has what you are specifically enquiring into been reduced to writing and identified?

Mr McPhee—Yes. It is very succinct and, if you like, I can read it:

... the audit objective is to examine the effectiveness of the department's establishment of the Primary Schools for the 21st Century element of the BER program.

The audit will examine:

- arrangements for administering Primary Schools for the 21st Century (PS21) in accordance with government policy;
- the selection and approval of PS21 projects; and
- monitoring and reporting of PS21 projects' progress and the achievement of broader BER program outcomes.

Senator MARK BISHOP—Did you determine those audit objectives?

Mr McPhee—Yes, I determined those.

Senator MARK BISHOP—Consequent upon what action?

Mr McPhee—There are two things that inform our audit program. Certainly press coverage does, no matter what, and I received a letter from the shadow minister suggesting I do an audit. Generally speaking, we take into account correspondence we receive, but we do set our own objectives, having regard to the press coverage issues and anything else—the parliament's consideration of issues, et cetera.

Senator MARK BISHOP—I will take some guidance from you, Chair. Is it appropriate to go into a discussion of that now or is that for another time?

CHAIR—Only if you are looking at the powers in the Auditor-General Act.

Mr GEORGIU—I go to the question of legal professional privilege. Can you walk me through two issues? The first one is the claim that your legal advice gives you unfettered access, yet you claim in paragraph 12 of your submission that other people got other legal advice that you need to negotiate with them. What is the situation? What is the attitude of departments to your legal claims, and what sort of legal advice do they bring against your claims? How do you normally resolve these things?

Mr McPhee—I can handle this in broad terms, but I might ask Mr Coleman to handle the details. In practice, this does not cause us any issues. Agencies accept our broad access powers and generally we talk it through.

Mr GEORGIU—So broad access is not a problem. Tell me about legal professional privilege.

Mr McPhee—We have never been denied access to information that we felt was significant to the audit work at the end of the day.

Mr GEORGIU—Your submission reads:

Nevertheless, agencies, directly or through their legal advisers, at times claim that certain documents are protected by legal professional privilege and therefore are unable to be accessed by the Auditor-General. Such situations can result in delays in the conduct of an audit as protracted negotiations take place and that at times, require the involvement of legal advisers to resolve the matter.

I am asking you for an explanation of that.

Mr Coleman—You are probably aware that there has been a lot of case history in relation to legal professional privilege. There are a lot of court cases in relation to various aspects of it. Therefore, not surprisingly, there are a variety of interpretations placed on those court cases. It is true to say, as we have said, that there has been conflicting advice received by us and other parties in relation to whether we can access documents over which there is a claim of legal professional privilege. There are also some disagreements at times about whether, by handing over such documents, legal professional privilege is lost, and there are differing views expressed about that. So it is true to say that there are varying legal positions that have been taken from time to time in relation to this matter. There have also been differing views expressed in relation to even whether agencies within the Commonwealth can claim legal professional privilege against another arm of the Commonwealth. Different views on that have been expressed.

Mr GEORGIU—So your response is, ‘Just give us untrammelled access and that will resolve the issue’?

Mr Coleman—We have had advice, and we do have advice, to say that the act does give us access, and that is the advice that we generally act on.

Mr GEORGIU—You say that you want unfettered access, and I quote: ‘access powers should be unfettered’.

Mr McPhee—We understand that our current act gives us the authority; we would just like to avoid the discussion—

Mr GEORGIU—Other people dispute that authority, obviously.

Mr McPhee—There have been different views expressed. That is correct.

CHAIR—In practice, has that ever been brought to bear on refusing access?

Mr GEORGIU—Good question. Who has refused you?

Mr McPhee—I do not recall anyone refusing it.

Mr Coleman—Not at the end of the day, but there is often—

CHAIR—There is a bit of a try-on sometimes.

Mr Coleman—some discussion along the way and eventually the matters get resolved through consultation. But it sometimes takes some time to do that.

Mr McPhee—This is a clause to get efficiency within public administration.

CHAIR—And save a lot of time. Autocracy is a wonderful thing—

Mr GEORGIU—I did not believe that you would suggest anything that was not in the interests of efficiency. Can you explain what the Ombudsman Act actually means with respect to the issue you have attached, as an exemplification of the sorts of things you would like?

CHAIR—It is on page 11 of your submission but it is page 45 for us.

Mr GEORGIU—Can you explain what that means—because I am not a lawyer and I get confused? You used that as an exemplification of a reference to legal professional privilege in the case of the Ombudsman and also in the case of the Human Rights and Equal Opportunity Commission—or whatever they are called now. Can you just explain what the paragraph that you use from the Ombudsman Act means? I am genuinely confused, especially by:

The fact that a person is not excused under subsection (4) from furnishing information, producing a document or other record or answering a question does not otherwise affect a claim of legal professional privilege that anyone may make in relation to that information, document or other record or answer.

What does that mean? That confuses me.

CHAIR—And this goes back to paragraph 15 in your submission to us.

Mr Coleman—My understanding is that the intention of that clause is that, notwithstanding that the documents in question are provided, it does not invalidate or waive a claim of professional privilege that could be made over those documents. That is my understanding of what the provision intended to say.

Mr GEORGIU—Could you spell that out a bit more, because I still have not grasped it?

Mr Coleman—With some difficulty, because I do not profess to be an expert in relation to legal professional privilege.

Mr Chapman—Just to clarify the question: one of the reasons that an agency may not wish to provide a document to us is that, having given it to us, they have then waived their claim of legal professional privilege and any other agency or person may seek equal access. I think this provision is just clarifying that legal professional privilege is not waived because of the Auditor-General's statutory right to obtain the information.

Mr GEORGIU—So you can get it but nobody else can get it if it is an issue of legal professional privilege. Is that what it amounts to?

Mr Coleman—The agency can still claim legal professional privilege over the document, notwithstanding that they have provided it to, in this case, the Auditor-General or the ombudsman.

Mr GEORGIU—Does that mean that if they claim it you cannot publish it or refer to it?

Mr Coleman—No. One of the points we made in our submission is that we believe that any legislative remedy here should recognise the fact that the Auditor-General has the right, subject

to other provisions of the act, to put information in a public report that he or she thinks is important.

CHAIR—Does the act adequately override that legal privilege, do you think?

Mr BRADBURY—There is one issue here, that handing the information over to the Auditor-General does not amount to a waiver. Under the statutory provision that we are looking at, I think that would be addressed. But if the Auditor-General then sought to publish that information, I think that creates a whole new issue, and I am not sure that the statutory provision adequately addresses that aspect.

Senator FEENEY—Surely the waiver is worthless if you publish it.

Mr GEORGIU—So how would this sort of provision help you?

Mr McPhee—The Auditor-General would at least have the benefit of that advice in framing the opinion, and the Auditor-General would need to be very careful in assessing whether to publish any information it bore on that legal advice.

CHAIR—But you are proposing it should not be withheld from you those grounds.

Mr McPhee—It should not be withheld. There are two points which members have quite rightly raised. One is: should it be withheld? We are saying no. The other is: should the Auditor-General nevertheless be able to publish—and I think members are quite properly saying that, if you did publish, clearly the waiver would not apply. So I think an Auditor-General would have to be very mindful of that outcome but, I guess I would argue, nevertheless should properly have that decision to make.

CHAIR—If it was clearly in the public interest—

Mr McPhee—And it could be, for instance, if we went down this road, you could have a public interest test attaching to the issue about reports.

Mr GEORGIU—What is your position now? You claim that you have the right and you claim that they give you the documents. Do you then publish?

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

Senator FEENEY—That would be giving you enormous power on that particular point.

Mr McPhee—And it is what we believe the position is today.

Mr GEORGIU—But equally—of course taking into account your concern for the Commonwealth—you have not, under your powers as you understand it, published anything. Has this ever been a matter of negotiation between any of the departments that you are seeking legal advice from?

Mr McPhee—We have broadly dealt with legal situations by what I would call broad drafting. But the important thing is: we have had access to legal information to inform the report, to understand the significance of the matter in the context of the audit, and then we generally say, ‘We understand the sensitivities around that. We will draft around it.’

Mr GEORGIU—Have the negotiations that you have had with departments, and getting access to information—as you refer to in paragraph 12—raised situations where the department has made the release of their privileged information conditional on non-publication? Is that question obscure?

Mr McPhee—No, it is very clear. Not to my understanding.

Mr GEORGIU—Could you have a look and come back to us?

Mr McPhee—They would say to us, ‘This is extremely sensitive,’—and the other important thing, if I could just complete the picture, is that when we do the draft report, as you know, key constituents get to comment. If they have got particular concerns, that is the opportunity at the end of the day for them to say, ‘Please reconsider on that particular aspect.’ I can certainly check. I can talk to my colleagues and ask them, in their memories, et cetera, and come back to you.

CHAIR—I that notice we are clarifying and possibly widening the powers, or even reinforcing the powers, for the Auditor-General to enter into more private sector realms as well as those of state government, et cetera. Could it be anticipated that that might be more likely to occur?

Mr McPhee—These are the situations it comes up with—in major contracts and disputes on contracts.

Mr BRADBURY—I am sorry, but I do have to leave at this point. I just want to make the point that whilst I would definitely be supportive of enshrining in statute a protection that made it very clear that legal professional privilege was not in any way waived by disclosure of material to the Auditor-General, I would have grave concerns about leaving the decision as to whether or not ultimately that were to be waived into the hands of the Auditor-General. The implications of doing that will depend upon the specifics of the case at hand. But the implications could be very grave in terms of the financial cost to the Commonwealth if there were litigation. I do not believe that a decision of that nature should rest in the hands of the Auditor-General.

CHAIR—What if there were a public interest test, an overriding test? Under what circumstances might there be a need to have an overriding power?

Mr McPhee—Can I perhaps assist the committee—

Mr GEORGIU—Could we an elaboration on—

CHAIR—We should not really be asking, but it is important to clarify that point.

Mr BRADBURY—If there were a suggestion of a public interest test, then presumably still it will be the role of the Auditor-General to assess that public interest test.

Mr McPhee—With some guidance. Can I just help—and I should have perhaps made this clearer earlier. In section 37 of the existing act, dealing with sensitive information not to be included in public reports, it says this:

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

- (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest or for any reason set out ...

And I will go to the reasons:

... it would prejudice the security, defence or international relations of the Commonwealth;

(b) it would involve the disclosure of deliberations or decisions of the Cabinet or of a Committee of the Cabinet;

(c) it would prejudice relations between the Commonwealth and a State;

(d) it would divulge any information or matter that was communicated in confidence by the Commonwealth to a State, or by a State to the Commonwealth;

(e) it would unfairly prejudice the commercial interest of any body or person;

(f) any other reasons that could form the basis for a claim by the Crown in right of the Commonwealth in a judicial proceeding that the information should not be disclosed.

The other thing that the act says is that if:

...the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure would be contrary to the public interest—

for the same reasons. So it requires me to consider those matters, and it still allows the Attorney to trump the decision of the Auditor-General.

Mr GEORGIU—Can you finish reading the bit about the Attorney-General?

Mr McPhee—Yes. Let me go back to the first clause, because the two need to be read together.

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

- (a) the Auditor-General is of the opinion that disclosure of the information would be contrary to the public interest or for any reason set out in sub-section (2)—

those are the reasons I mentioned earlier—or:

(b) the Attorney-General has issued a certificate to the Auditor-General stating that, in the opinion of the Attorney-General, disclosure of the information would be contrary to the public interest for any of the reasons set out in subsection (2);

The reasons being those reasons that I am required to consider—

Mr GEORGIU—And you have to report that.

Mr McPhee—And I would report that the Attorney had acted in that way. So there is a body of protection dealing with this public interest consideration.

Mr BRADBURY—So at a practical level, that would mean that you could not disclose that material. How would the Auditor-General come into the picture here? Let us assume that a department has handed over to you the material, documents in this case. Presumably there is an opportunity for the department to comment as part of the reporting process.

Mr McPhee—Correct.

Mr BRADBURY—You are of a mind to publish information which may potentially waive legal professional privilege.

Mr McPhee—Correct.

Mr BRADBURY—Where does the Auditor-General come in? Is that the point at which there is an opportunity for the department to petition the Auditor-General to intervene to issue a certificate?

Mr McPhee—Correct.

CHAIR—We received evidence from the Australasian Council of Auditors-General that suggested section 36, the secrecy requirements, should be reviewed. It was their view that they might be unduly restrictive and hinder the exchange of information to better inform the Auditor-General. Would you like to comment on these confidentiality and secrecy provisions, section 36?

Mr McPhee—If my memory serves me correctly, this is the issue about sharing information with state colleagues. At the moment, if I am doing an audit using my audit powers, I clearly cannot make the information available to state Auditors-General. They are suggesting that there should be more latitude in my legislation to allow that to happen.

CHAIR—What would be the consequential restriction? What are some examples of the consequences of that?

Mr McPhee—The consequences are that we are passing Commonwealth information that is not yet settled—it is still part of an audit, it is still to go through our processes—and sharing that with the states, working cooperatively as a larger audit constituency.

CHAIR—Do you have a view on section 36 and its adequacy?

Mr McPhee—Our view is that we would prefer the legislation to give the Commonwealth Auditor-General the authority to act in a way to gain access to the information in his or her own right. We accept that working with the states is a viable option but we do not have it at the top of our preferred list—we have it about number four.

Senator MARK BISHOP—I want to pursue the point raised by Mr Bradbury in terms of confidential information that might be provided to a government agency from a major—or minor, for that matter—commercial firm, provided by way of information or to explain a point or to support negotiations. Whatever the reason, often that information is supplied. The provision you seek to change would have a major impact, I would think, on the willingness of commercial organisations to provide information to government agencies if, at some stage in the future, whether or not there be a public interest test, however justified, is to be disclosed without their permission or authority. I would foreshadow to you that, from my experience, a range of organisations would simply choose not to supply information to government departments or agencies if at some stage, without their authority, it could be disclosed in a public manner. I think there needs to be serious thinking done by your agency, if that sort of proposal is seriously advanced.

Mr McPhee—Two things. One is that many of the contracts have clauses that give us access to this information already.

Senator MARK BISHOP—If it is agreed, fine.

Mr McPhee—Two: we have always handled it responsibly. So we are alert to the commercial sensitivities and the legislation does provide that one of those public interest considerations does say that it would unfairly prejudice the commercial interest of any person or body, so that is a consideration we take into account. The reason it is becoming more important is the model of public administration is changing, and has changed over the years, as you know, particularly in the defence area. Now the Commonwealth in many areas works in partnership with industry to deliver particular services, where in the past it may have just been the Commonwealth working. When it was the Commonwealth working, clearly, the Auditor-General had full access, and it was not an issue. But now it is a different world and, quite rightly, the Commonwealth is working with non-government organisations and private sector bodies. And is it reasonable to put the boundary around the Auditor-General's role in that context? You want your audit office to handle this information responsibly, but a lot of Commonwealth funds are now going to other parties for the delivery of Commonwealth services, and it is a serious issue. It is important that there be sufficient safeguards in this area—and I take on board everything the committee has said here this morning—but, equally, the Auditor-General needs to be able to perform the role to ensure the Commonwealth's interests are being looked after as our model of public administration evolves.

Senator MARK BISHOP—That is a serious point you make in response, Mr McPhee, and it requires consideration. Let me ask you the obvious question. As the Commonwealth has shifted and continues to shift to these new models of service delivery in a public administration sense, have those new entities caused you sufficient concern by their refusal to disclose information

that you could say to us that it is seriously impeding the ability of your organisation to carry out its charter?

Mr McPhee—Generally we receive good cooperation but, from time to time, we have to use our formal powers to ask for information. The reason it is important for us is the changing relationship with the states and with the private sector. At the moment, as I was trying to say earlier, we have an inconsistent approach. Even though there has been positive evolution in terms of contractual clauses and arrangements, we think it is important to be able to look at the performance of these other parties in delivering contractual arrangements or arrangements under agreement with the Commonwealth to see whether those services are being performed as expected.

Senator MARK BISHOP—That is your original justification put in a different form of words.

Mr McPhee—Yes.

Senator MARK BISHOP—You have not quite answered my question as to whether these new entities, whether they be state governments, state agencies or hybrids of whatever, are cooperating sufficiently with you to provide the information you seek to carry out your charter.

Mr McPhee—My position is a bit deeper than that. At the moment it relies on executive government decisions in terms of agreement as to what clauses go into agreements et cetera. So that is the first point. I guess what we are saying is that, desirably, these clauses should not be at the whim of the current government of the day or of the department of the day. So if the parliament could—

Mr GEORGIU—Just as you are the general of the day.

Mr McPhee—That is right. Point taken, Mr Georgiou. The reality is that we get good cooperation. It has not constrained us unduly to date.

Senator FEENEY—Can you tell us of a single example where you did not get good cooperation?

CHAIR—And also whether you have tested these powers with a private contractor delivering a contract for the Commonwealth government?

Mr McPhee—I cannot specifically say that, and I want to say to you that we would not be rushing out to crowd the private sector with our audit teams with this. It is as and when required. But sometimes we have been ‘stood up’ by private sector parties saying, ‘What’s your authority? Go away,’ and that sort of thing. Then we can get very formal with them and take evidence et cetera. We have very wide powers at the end of the day, but it is a bit like the legal professional privilege—we like the more cooperative model, where people can see in black and white the access requirements and just get on with it.

CHAIR—If there were a contract that saw one contractor with major market share being advanced through Commonwealth funds—and I am not saying that this has happened—and that

private contractor went under, thereby diminishing the services that are available nationwide, is there not a good case for looking at some of those situations where certain contractors may have a major share of the market because of Commonwealth funding? We do that with the delivery of other services. Obviously the government does not deliver everything, but there is a risk. The ABC Learning childcare centres are not an example of that, but they are an example of something that did go under and then the Commonwealth had to put in funds because it had such a major presence in that market. It was not receiving the funds; it was receiving the benefit of Commonwealth policy, as was the whole market. I am stretching it, but are there cases that would very much justify the Auditor-General auditing a specific contract?

Mr McPhee—I can say in a broad answer that we believe the original legislation was leading edge and set the Audit Office up well. It has lasted extremely well for a decade or so. I am not saying that it is inhibiting us unduly at the moment, but public administration and delivery have moved on. I am seeing in this hearing that we are potentially setting up the act for another 10-year run. We have seen the role of government change in the last 12 or 18 months, where the government has taken a much bigger role in the economy than it ever had to before because of particular circumstances. I am not going to get into the size of the response and all of that sort of stuff, but it is certainly taking a stronger role—giving guarantees to banks et cetera. There is a real question about just what the audit role should be in that context.

CHAIR—Is it fair to say that, if you had further powers and extensions of your powers, the independent auditor and this committee would be a check on those?

Mr McPhee—I do not know whether the independent auditor would hold much sway, but we have got the public interest and the Attorney-General there, which is a protection. This committee would clearly have a role, as it does today, in reviewing the reports. I think the most important thing would be, if there is to be a change in the provisions, to have provisions which the committee itself would be comfortable with and to have the safeguards built in to everyone's satisfaction.

Mr GEORGIU—It is always dangerous reviewing acts. I remember the last time we did this there was some discussion that I have actually forgotten. One of the things the committee legislated for was that:

The Auditor-General must, in the final report, include all written comments received under subsection (4).

Have you done that?

Mr McPhee—Yes, we now do include comments received.

Mr GEORGIU—The gist of this was that all written comments be included—that is, unedited.

Mr McPhee—I recall it. We picked it up as an administrative practice.

Mr GEORGIU—It is a legal requirement.

Mr McPhee—The legislative amendment only came through in the last couple of years and we do follow the legislation. Have you got some doubts?

Mr GEORGIU—Absolutely. I will give you the instances.

Mr McPhee—I appreciate your position, Mr Georgiou, but can I say that, from my point of view, I would be really surprised if that were the case.

Mr GEORGIU—You are about to be surprised.

CHAIR—Obviously the National Broadband Network is an example of public administration changing. It is going to be a major commercial company with the Commonwealth government having a huge stake in it for a certain period of time. I suppose we have reflected on some of the areas that would apply to that. I ask you to think about whether you need to put further information to us, as that information becomes known to you, about how we will take comfort from the Auditor-General's knowledge of that arrangement. It is a very big example of a public administration change, as was the Future Fund, which you have audited.

Mr McPhee—Correct. We did provide the committee with a supplementary submission having regard to the potential NBN arrangements.

CHAIR—So you have had regard to that—excellent.

Mr McPhee—There are two things, as you recall. At the moment, there is minor exclusion from the act in relation to GBEs and we cannot do performance audits of GBEs.

CHAIR—Did we not have legal advice that you could?

Mr McPhee—No, that is the second issue you are thinking about. Then we had in mind that, with the NBN company, the government said in time it may sell down its share to a minority holding and we raised the question in legal advice whether that would be a problem, if you had a partially owned Commonwealth company, whether the Auditor-General should be constrained from doing performance audits. My memory is the legal advice said that that should not be a problem. So our proposition is that it is probably time to review that exclusion in the act to allow the Auditor-General to have a full mandate because at the moment the only minor exclusion is in respect of GBEs and we have a lot fewer GBEs today when we had some time ago when the act and the exclusion were put into place.

Mr GEORGIU—The list of exclusions from your reporting capacity is quite long, it is quite extensive, in the act as it stands. Do you feel comfortable about being precluded from reporting on the deliberations of a cabinet committee? Do you feel uncomfortable being precluded from commenting on communications between federal and state governments? Have these inhibited you in any way?

Mr McPhee—It is a very good question. We are probably being conditioned to that legislative provision but I have to say that we generally draft around sensitivities in this area so it has not caused a problem in the past.

Mr Coleman—The exclusions revolve around the public interest test. The exclusions do not primarily revolve around the six or seven reasons here. The ultimate test is a public interest test, as expressed in 37, for the particular reasons that the Auditor-General outlined before. So ultimately it comes back to whether or not it is in the public interest in the view of the Auditor-General and, as the Auditor-General explained, then the Attorney-General.

Senator FEENEY—From memory, the last of those tests is even more general than the first six.

Mr Coleman—It is a very general—

Senator FEENEY—There are five specifics and then anything else that occurs to you.

Mr Coleman—That is correct.

Mr GEORGIU—So your view is that you can report on matters of national security so long as, in your view, it would not damage—

Mr Coleman—That is correct.

Mr GEORGIU—Can you please tell me where I can find the provision of the Human Rights and Equal Opportunity Commission Act 1986 which you referred to as covering the breaching of legal professional privilege. Take that on notice.

Mr McPhee—We will.

CHAIR—We have dealt with this a lot in our committee, the quality and adequacy of performance indicators. We have seen a lot of change in that area. In paragraph 23 of your submission you outline three options to enhance the audit coverage of performance indicators. For members of the committee that is on page 38 of our papers, the example in paragraph 23. With regard to option (a), which is the conduct of a period review of indicators, as part of the ANAO's audit program, can you expand on how this option would differ from the current process around reviewing performance indicators?

Mr McPhee—It would become a specific focus of an audit. At the moment it tends to be by exception if it is significant, if it is important to the objectives whereas under proposal (a) we would make it a mandatory part of the objective and make sure we did cover it as apart of the performance audit.

CHAIR—Option (c):

a review of an agency's compliance with its responsibilities for a sub-set of indicators which the Parliament and/or the Government considers relate to critical programs or areas of public administration including, for example, environmental sustainability.

That review would be undertaken as an adjunct to the audit of an agency's financial statement. So this is additional overriding ones. If that was adopted, can you expand on what you envisage

the process would be that would allow parliament or government to identify the critical programs.

Mr McPhee—I guess that is for discussion. In my discussions with the state Auditors-General who audit performance indicators, they have said to me that their work has led to an overall increase in the quality and credibility of the indicators. I have taken on board their advice on that and said therefore that the two options we put forward were that, at the same time as you do your financial statement audit you could look at all of the performance indicators and provide an opinion in relation to the completeness, accuracy, et cetera, of indicators. But I am conscious of the resource cost and I am not sure it is entirely necessary. That is the full version. Then the other one is for the parliament, the committee or some other body to say, ‘There are a range of critical government programs at the moment where we would like to get some assurance around the integrity of the performance information and Auditor-General would you mind doing that?’ That is a subset approach and who decides and how it works out is a matter that we have not turned our minds to.

CHAIR—Effective, efficient and ethical, as well as environmentally sustainable: I do not see the FMA Act being revised in that way. There are perhaps imperatives in the future of overriding government requirements that would always be a performance indicator the government would like to see measured.

Mr McPhee—Exactly, or you could take a cyclical approach and say, ‘Why don’t you do a range of portfolio departments over a period of time to make sure there is a degree of integrity in terms of the information being presented?’ We all read the papers and we believe them but the question is: what controls are around those indicators to make sure that they are complete and accurate, et cetera? At the moment there is not real comfort other than relying on departmental systems. The other thing is, as the state Auditors-General would say, it allows departments to improve the quality of their indicators over time—because the Audit Office is reporting on them, et cetera, it provides a stronger focus. At the risk of mentioning resources, it would come with a resource cost and I need to make that clear.

CHAIR—That is right. The Ombudsman’s submission suggests that the Auditor-General Act should include a provision to enable matters such as complaints to be transferred to the Ombudsman, in the same way the Ombudsman Act 1976 provides for the Ombudsman to transfer a complaint to a specified officeholder. Do you have a view on that?

Mr McPhee—I might ask for some advice but I do not have any in principle objections to that.

Mr Coleman—No.

Mr Cahill—I am conscious that during the course of audits we do receive complaints and people write to us. Our usual first course of action is to go to the department through the internal audit liaison saying that we would like it to be looked into and then be briefed back on that. In some ways that is a pragmatic way to ensure the internal complaints processes are being managed accordingly, then whether or not that needs to be supplemented by an automatic referral to the Ombudsman.

CHAIR—That is something we have not given much consideration to, either. Obviously if it is a Commonwealth agency or a department they are complaining of, there is always the option for them to take that complaint to the Ombudsman. I guess the Ombudsman would like that to be a direct action of any complaints.

Mr Coleman—In practice, that is what we would normally do. If we get a complaint and we do not believe we are the appropriate recipient and we cannot act on that, which often we cannot, we will, in a practical sense, suggest that an avenue is to go to the Ombudsman. But that relies on the person to take that action.

CHAIR—We looked at a few areas today. If there are further questions, would you be agreeable to accept those on notice from us?

Mr McPhee—Of course.

CHAIR—And we are hoping to get prompt replies, as we always do from the Auditor-General—although, I think people are expecting even prompter ones sometimes on some issues. On behalf of the committee, I thank the witnesses and everyone for appearing today.

Resolved (on motion by **Senator Bishop**):

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

Committee adjourned at 1.00 pm